Jury Trials in Bankruptcy Court: Are There Any Constitutional, Statutory or Practical Limitations?

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JURY TRIALS IN BANKRUPTCY COURT: ARE THERE ANY CONSTITUTIONAL, STATUTORY OR PRACTICAL LIMITATIONS?

The seventh amendment to the United States Constitution commands that in suits at common law, the right to a trial by jury must be preserved.1 However, the authority of a bankruptcy court

1 U.S. CONST. amend. VII. The seventh amendment provides:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

The Supreme Court has construed “Suits at common law” to mean that the seventh amendment preserves an individual’s right to a trial by jury in legal causes of action, as distinguished from equitable or admiralty jurisdiction. See Ross v. Bernhard, 396 U.S. 551, 553 (1970) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830), overruled by NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)). The Court has recognized an inherent difficulty in adequately distinguishing between legal and equitable actions. Ross, 396 U.S. at 553 (citing Whitehead v. Shattuck, 138 U.S. 146, 151 (1891)). “Characterization of an issue as legal or equitable is often a difficult federal law issue.” 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.8, at 257 n.12 (3d ed. 1986) [hereinafter R. ROTUNDA, J. NOWAK & J. YOUNG]. Such characterization may often be achieved by analyzing the character of the issue to be adjudicated, rather than the unique form of the complaint or the pleadings. Id. See also infra notes 10-15 (discussing three-part test used by Court to decide whether seventh amendment preserves right to trial by jury).

The jury is an integral part of American jurisprudence, signifying our quest for the impartial resolution of litigants’ disputes: “[A jury is a body of twelve persons,] described as upright, well-qualified, and lawful [persons], disinterested and impartial, not of kin nor personal dependents of either of the parties, . . . sworn to render a true verdict according to the law and the evidence given to them. . . .” BLACK’S LAW DICTIONARY 1349 (5th ed. 1979). See generally R. ROTUNDA, J. NOWAK & J. YOUNG, supra, § 17.8, at 256-59 n.12-13 (3d ed. 1986) (discussing seventh amendment right to jury trial in new causes of action); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2301-02 (1971 & Supp. 1990) (reviewing historical basis for, and principles applicable to, right to jury trial); Wolfram, The Constitutional History of the Seventh Amendment, 57 MINN. L. REV. 659 (1973) (historical foundations of seventh amendment rights); Rendleman, Chapters of the Civil Jury, 65 KY. L.J. 769, 769-72 (1976-77) (discussing role of jury in modern litigation and potential jury prejudices).

The Supreme Court reiterated a three-part test to determine whether the seventh amendment preserves a trial by jury to a defendant, where the plaintiff brought an action pursuant to statute in the bankruptcy code. Granfinanciera v. Nordberg, 109 S. Ct. 2782,
to conduct a jury trial is not derived from the seventh amendment; rather, it is statutory in nature. One frequently debated constitutional issue regarding such statutes concerns the scope of authority that may be permissibly granted to article I bankruptcy courts. While the absence of a constitutional grant of authority

2790 (1989). *Granfinanciera* is relevant to the discussion herein, given the Court’s finding that a jury trial was guaranteed in petitioners’ legal cause of action. *Granfinanciera*, 109 S. Ct. at 2802 ("the Seventh Amendment entitles petitioners to the jury trial they requested."). The three-part test employed by the *Granfinanciera* Court entails: (1) the comparison of relevant legislation to 18th-century English actions tried before the law and equity courts merged; (2) the ascertainment of whether the action is legal or equitable in nature; (3) the determination - provided that parts one and two indicate that a party has a jury trial right under the seventh amendment - of whether Congress was empowered to assign resolution of a claim to a non-article III adjudicative tribunal that does not utilize a jury as factfinder. *Granfinanciera*, 109 S. Ct. at 2790.

* See, e.g., Ben Cooper, Inc. v. Insurance Co. of Pa. (*In re Ben Cooper, Inc.*), 896 F.2d 1394, 1402 (2d Cir.), cert. granted, 110 S. Ct. 3269 (1990). After determining that the bankruptcy court had jurisdiction, and that the appellees had a right to a jury trial in their cause of action, the Court of Appeals for the Second Circuit stated: “this brings us to the issue of whether the bankruptcy court has statutory and constitutional authority to conduct such trials.” *Id.* at 1402. The *Cooper* court went on to find statutory authority based on a combination of two statutes in Title 28 of the United States Code., “[d]espite the lack of a specific statutory provision . . .” *Id.* See also *Hughes-Bechtol, Inc. v. Air Enters., Inc. (*In re Hughes-Bechtol, Inc.*), 107 Bankr. 552, 571 (Bankr. S.D. Ohio 1989). In holding that bankruptcy courts cannot conduct jury trials under the present code, the *Hughes-Bechtol* court stated in dicta that the courts could, with consent of the parties, conduct trials by jury if Congress enacted specific provisions authorizing them to do so. *Id.* at 573.


Jurisdiction is "the legal right by which judges exercise their authority." *Black's Law Dictionary* 766 (5th ed. 1979) (citing Max Ams, Inc. v. Barker, 293 Ky. 678, 701, 170 S.W.2d 45, 48 (1943)). *See, e.g., Pennoyer v. Neff, 95 U.S. 714, (1877) (detailing traditional bases for personal jurisdiction); Shaffer v. Heitner, 433 U.S. 186 (1977) (delineating "minimum contacts" standard for personal jurisdiction). "The exercise of jurisdiction can... be substantively controlled by [Congress'] channeling of certain issues through non-article III tribunals." *L. Tribe, American Constitutional Law* § 3-5, at 51 (2d ed. 1988) [hereinafter *Tribe*]. Congress' power to channel issues through non-article III courts (by creating non-article III courts) is derived from article 1, section 8 of the United States Constitution. *Id.* This provision suggests that Congress shall have the power "To constitute Tribunals inferior to the Supreme Court". *U.S. Const. art. I, § 8, cl. 9. However, "[t]he Supreme Court has never definitively resolved how far Congress... may [go to] create tribunals to resolve questions falling within the subject-matter jurisdiction of article III courts encumbered by the tenure limitations and justiciability requirements of article III." *Tribe, supra*, at 51. The issue, most often, is whether certain grants of jurisdiction by Congress upon non-article III tribunals are unconstitutional because certain disputes may only be
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cannot deprive litigants of their seventh amendment right to a jury trial, it may nevertheless prevent them from exercising this right in a bankruptcy court. Recently, in Granfinanciera, S.A. v. Nordberg, a divided United States Supreme Court held that an individual who has not submitted a claim against a bankrupt estate is guaranteed a trial by jury when defending a fraudulent conveyance action. The specific issue of whether bankruptcy courts are empowered to conduct such jury trials was not, however, conclusively determined by the Court.

This Note will first address the Granfinanciera decision, focusing on the Supreme Court’s refusal to decide whether bankruptcy courts are empowered to conduct jury trials. The authors will adjudicated by article III tribunals. See Northern Pipeline, 458 U.S. at 60; Palmore, 411 U.S. at 390-400; Tribe, supra, at § 3-5.

* See Wilkey v. Inter-Trade, Inc. (In re Owensboro Distilling Co.), 108 Bankr. 572, 576 (Bankr. W.D. Ky. 1989). The court stated that:

[The] presence of a Constitutional right to jury trial does not then equate the ability of the bankruptcy court to conduct that trial - it simply means that the bankruptcy court will need to determine if such a right exists. The litigants would then resort to another appropriate court - either state court or federal - for the jury trial.

Id.

Citing an absence of authority, bankruptcy courts have often evinced an aversion to conducting jury trials. See, e.g., Friedman v. Gold Advice, Inc. (In re Fort Lauderdale Hotel Partners, Ltd.), 103 Bankr. 335, 337 (Bankr. S.D. Fla. 1989) (granting defendant’s motion for jury trial but abstaining from hearing matter and remanding to state court, reasoning that bankruptcy court did not have authority to conduct such trials); Weeks v. Kramer (In re Weeks Sec., Inc.), 89 Bankr. 697, 715 (Bankr. W.D. Tenn. 1988) (“This Court has concluded that there is no statutory procedural authority for the Bankruptcy Court to conduct jury trials.”); Braun v. Zarling (In re Zarling), 85 Bankr. 802, 804 (Bankr. E.D. Wis. 1988) (transference of proceeding to state court eliminated necessity of determining jury trial issue).

The Wilkey court emphasized that a litigant with a constitutional right to trial by jury, guaranteed under the seventh amendment, retains that right regardless of whether the bankruptcy court has statutory authority to conduct the jury trial. Wilkey, 108 Bankr. at 576 (citing Taubman W. Assoc. v. Beugen (In re Beugen), 81 Bankr. 994, 997 (Bankr. N.D. Cal. 1988)).


* Granfinanciera, 109 S. Ct. at 2799. Since the action here did not rely on the statutory process or the restructuring of debtor-creditor relations the Court concluded that “Congress . . . cannot divest petitioners of their Seventh Amendment right to a trial by jury.” Id.

* Granfinanciera, 109 S. Ct. at 2802.

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then analyze the present Bankruptcy Code as it applies to bankruptcy courts and conclude that these courts are not expressly authorized by statute to conduct jury trials. Furthermore, the constitutionality of such a grant of authority under article III of the Constitution will be addressed. This Note will then propose that Congress grant bankruptcy courts the express authority to conduct jury trials in the interest of efficiency or, in the alternative, make bankruptcy courts article III tribunals. Finally, acknowledging the ramifications of granting bankruptcy courts authority to conduct jury trials, it will be suggested that bankruptcy judges be given discretion in deciding whether their courts can equitably and efficiently conduct a jury trial, or whether withdrawal to the district court is more appropriate or necessary under the circumstances.

I. GRANFINANCIERA, S.A. v. NORDBERG

In Granfinanciera, S.A. v. Nordberg, the Supreme Court held that an individual has a right to a jury trial when defending a fraudulent conveyance action initiated by the trustee in a bankruptcy proceeding. Justice Brennan, writing for the majority, utilized a three part analysis to determine whether the petitioner had a sev-

* Id. In Granfinanciera, the Chase and Sanborn Corporation filed a petition for reorganization under Chapter 11. Id. at 2787. The United States Bankruptcy Court for the Southern District of Florida approved a reorganization plan which vested in Nordberg, the trustee of the bankrupt estate, causes of action for fraudulent conveyances. Id. Respondent filed suit in federal district court against Granfinanciera and Medex for allegedly receiving fraudulent transfers of $1.7 million from Chase and Sanborn's corporate predecessor within one year of the filing of the bankruptcy petition without receiving sufficient consideration. Id.

The District Court referred the fraudulent conveyance action to the bankruptcy court, which subsequently denied petitioners' request for a jury trial, deeming the action equitable in nature. Id. The Bankruptcy court entered judgment for Nordberg, the trustee, on the constructive fraud claim, which judgment was affirmed by the district court. Id. at 2802. The Court of Appeals for the Eleventh Circuit affirmed the decision, declaring that Granfinanciera and Medex had no statutory right to a jury trial, and that no seventh amendment right to a jury trial existed under these facts. See Nordberg v. Granfinanciera, S.A. (In re Chase and Sanborn Corp.), 835 F. 2d 1341, 1348-50 (11th Cir. 1988), rev'd, 109 S. Ct. 2782, 2787-88 (1989). The Supreme Court granted certiorari on the issue of petitioners' right to a jury trial. Granfinanciera, S.A. v. Nordberg, 486 U.S. 1054 (1988). The Supreme Court subsequently reversed the circuit court's decision and held that Granfinanciera and Medex had a seventh amendment right to a jury trial. Granfinanciera, 109 S. Ct. at 2782, 2787.

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enth amendment right to a trial by jury. First, the Court compared petitioner's statutory action to eighteenth century actions brought in England before the merger of the law and equity courts. Second, the Court determined whether the remedy which petitioners sought was legal or equitable. Finally, once these two factors indicated that petitioners had a seventh amendment right to a trial by jury, the Court examined the issue of whether Congress had assigned resolution of the claim to a non-article III adjudicative body that did not use juries as factfinders.18

10 Granfinanciera, 109 S. Ct. at 2790. This analysis was employed by the Court in Tull v. United States, 481 U.S. 412, 417-25 (1987).

11 Granfinanciera, 109 S. Ct. at 2790. Part one of the test was also employed by the Court in Tull. Tull, 481 U.S. at 417-21. The Tull Court noted that "characterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." Tull, 481 U.S. at 421 (citing Curtis v. Loether, 415 U.S. 189, 196 (1974)). Pursuant to part one of the test, the Granfinanciera Court cited an array of cases brought in England in the late 1700's in the examination of petitioner's assertion that the present actions for monetary relief would not have sounded in equity two hundred years ago in England. See Granfinanciera, 109 S. Ct. at 2791. Part one of the test, however, is of less import in the overall inquiry. For example, the Tull Court acknowledged that this part of the test "has been called an 'abstruse historical' search for the nearest 18th-century analog." Tull, 481 U.S. at 421 (citing Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970)). The Granfinanciera Court also recognized that part one of the test is less significant than part two. See Granfinanciera, 109 S. Ct. at 2790.

12 Granfinanciera, 109 S. Ct. at 2793-94. In reviewing the second part of the test proposed by the Court, whether a case is one lying in equity or at law, it was emphasized that "[i]f the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial." Id. at 2797. Pursuant to this second prong, Granfinanciera stressed the doctrine that "suits in equity will not be sustained where a complete remedy exists at law." Id. at 2793. See also Atlas Roofing Co. v. Occupational Safety Comm'n, 450 U.S. 442, 458-59 & n.14 (1977) ("as a general rule, the decision turn[s] on whether courts of law suppl[y] a cause of action and an adequate remedy to the litigant.") (citing The Judiciary Act of 1789, 1 Stat. 82, which provided: "Sec. 16. And be it further enacted, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain adequate and complete remedy may be had at law.") (emphasis in original).

In addition, the Court maintained that the seventh amendment also applies to actions where the plaintiff seeks to invoke "statutory rights [which] are analogous to common law causes of action ordinarily decided in English law courts in the late eighteenth century, as opposed to those customarily heard by courts of equity or admiralty." Granfinanciera, 109 S. Ct. at 2790 (citing Curtis v. Loether, 415 U.S. 189, 193 (1974)). In Curtis, the Court stated, "we have often found the Seventh Amendment applicable to causes of action based on statutes." Curtis, 415 U.S. at 195 (citing Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962) (trademark laws); Hepner v. United States, 215 U.S. 103, 115 (1909) (immigration laws)).

13 Granfinanciera, 109 S. Ct. at 2797-2802. This stem of the analysis was first emphasized in Atlas Roofing, wherein the Court dictated, "[W]hen Congress creates new statutory 'public rights', it may assign their adjudication to an administrative agency with which a jury would be incompatible, without violating the Seventh Amendment's injunction that jury
After a historical analysis of fraudulent conveyance claims, and upon a determination that monetary relief was sought, the Court concluded that petitioners had a legal claim rather than an equitable one. Consequently, petitioners were deemed to have been guaranteed a trial by jury, provided that Congress had not permissibly granted bankruptcy courts, sitting without juries, the right to try such actions. Relying on *Atlas Roofing Co. v. Occupational trial is to be 'preserved' in 'suits at common law.'" *Atlas Roofing*, 430 U.S. at 455. For a discussion of the "public rights" doctrine, see infra notes 19-20 and accompanying text.

14 *Granfinanciera*, 109 S. Ct. at 2791. The Court first noted that "[t]here was no dispute that actions to recover preferential or fraudulent transfers were often brought at law in late 18th-century England." *Id.* at 2790-91. The Court focused on the cases brought in England and compared the present case to "common law actions of trover and money had and received", which were traditionally brought before juries. *Id.* at 2791 (quoting *Schoenthal v. Irving Trust Co.* 287 U.S. 92, 94 (1932)). The Court cited many cases to support this view, including: *Smith v. Payne*, 101 Eng. Rep. 484 (1795) (trover); *Barnes v. Freeland*, 101 Eng. Rep. 447 (1794) (trover); *Vernon v. Hanson*, 101 Eng. Rep. 156 (1788) (assumpsit; money had and received). *Granfinanciera*, 109 S. Ct. at 2791. The Court dismissed the respondent's claim that three recent courts of appeals' cases supported respondent's view that fraudulent money transfers were traditionally recognized as equity claims. *Id.* at 2792 n.5. The Court concluded that, in 18th-century England, respondent would have had to have brought his action to recover for a fraudulent transfer of money at law, and not in equity. *Id.* at 2792-93.

16 *Granfinanciera*, 109 S. Ct. at 2793-94. The Court noted that "[t]he nature of the relief respondent seeks strongly supports our preliminary finding that the right he invokes should be denominated legal rather than equitable." *Id.* at 2793. The Court cited previous Supreme Court decisions that set forth the proposition that a bill in equity would not be sustained if the damages sought could be recovered adequately at law. *Id.* (citing, e.g., *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974) ("[W]here an action is simply for the recovery . . . of a money judgment, the action is one at law.") (quoting *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891)). The *Granfinanciera* Court then compared the respondents' claim to its decision in *Schoenthal v. Irving Trust Co.*, wherein the Court "removed all doubt that respondent's cause of action should be characterized as legal rather than as equitable." *Granfinanciera*, 109 S. Ct. at 2793. The *Granfinanciera* Court pointed out that the recipients of the alleged preferential transfers in *Schoenthal* apparently had not filed any claims against the bankrupt estate. *Id.* see also *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932). In *Schoenthal*, the respondent brought a suit in equity seeking to void alleged preferential transfers to defendants. *Id.* at 93. The defendants moved for a transfer to a court at law and for a trial by jury. *Id.* at 93-94. The defendants' motion was denied, the case was tried in equity, and a decision was rendered in favor of the respondent. *Id.* at 94. The Court of Appeals for the Second Circuit affirmed. *Id.* In reversing, the Supreme Court stated that the alleged facts gave "no support to the plaintiff's assertion that it has[d] no adequate remedy at law. The preferences sued for were money payments of ascertained and definite amounts." *Id.* at 95. As a result, the Court determined that the defendants were entitled to have the suit tried at law instead of in equity. *Id.* at 96.

17 *Granfinanciera*, 109 S. Ct. at 2793-94.

18 *Granfinanciera*, 109 S. Ct. at 2794. The Court stated "unless Congress may and has permissibly withdrawn jurisdiction over that action by courts of law and assigned it exclusively to non-Article III tribunals sitting without juries, the Seventh Amendment guarantees petitioners a jury trial upon request." *Id.* The Court cited section 157(b)(2)(H) [1982 ed., Supp. IV] of Title 28 of
where it was held that Congress may only deny jury trials in actions at law in cases where public rights are litigated, the Court defined the essential limits of "public rights," and reasoned that fraudulent conveyance actions are matters of private rights rather than public rights.

As such, the Court concluded that a fraudulent conveyance action against a transferee who has not filed a claim against the bankrupt estate is a legal claim, to which the seventh amendment's jury trial guarantee attaches.

In dissent, Justice White asserted that the majority's decision

the United States Code, which designated fraudulent conveyance actions as "core proceedings;" therefore, bankruptcy judges may adjudicate if a district court has referred the matter to them. Id. However, the Court declined to address the issues of: (1) whether bankruptcy courts could conduct jury trials in fraudulent conveyance actions brought against a party who had not entered a claim against a bankrupt estate; (2) whether bankruptcy courts were authorized to hold jury trials in such actions; and (3) whether, if jury trials can be held in bankruptcy court, the seventh amendment's assurance that no fact tried by a jury shall be reviewed would be violated by the present procedure allowing for de novo review of a bankruptcy courts ruling by the district court. Id. at 2794-95.


19 Granfinanciera, 109 S. Ct. at 2795 (citing Atlas Roofing, 430 U.S. at 458). The Court in Atlas Roofing emphasized that "[o]n the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution." Atlas Roofing, 430 U.S. at 450, n.7. (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

The Atlas Roofing Court further considered whether Congress could create new actions and assign their enforceability to an administrative agency, where no jury trial could be held. Id. at 444. The Court held that "when Congress create[d] new statutory 'public rights,' it could assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the seventh amendment's injunction that jury trial[s] [were] to be 'preserved' in 'suits at common law.'" Id. at 455. However, the Granfinanciera Court pointed out that Congress could not divest a party of his right to a jury trial in contesting matters of "private rights." Granfinanciera, 109 S. Ct. at 2795.

40 Granfinanciera, 109 S. Ct. at 2795. The Granfinanciera Court stated, "Our prior cases support administrative factfinding in only those situations involving 'public rights,' e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights." Id. (quoting Atlas Roofing, 430 U.S. at 458). The Supreme Court further clarified the meaning of "public rights" in Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 586 (1985). The Thomas Court held that the federal government need not be a party for a case to involve "public rights." Id. The Granfinanciera Court stipulated that if a statutory right was not closely related to a federal regulatory program that Congress has the power to enact, and the federal government is not concerned with such a right, then the right must be adjudicated by an article III court. Granfinanciera, 109 S. Ct. at 2797.

41 Granfinanciera, 109 S. Ct. at 2797. The Court noted that in certain situations, "Congress may fashion causes of action that are closely analogous to common law claims and place them beyond the ambit of the seventh amendment . . . ." Id. at 2796. The Court cautioned, however, that this power is very limited and not applicable to the case at bar. Id. As such, the Court found this fraudulent conveyance action to be private. Id. at 2799.

42 Id.
can be read as overruling several Supreme Court decisions and striking down at least one federal statute. He argued that, with the historical evidence in equipoise and the nature of relief not dispositive, the Court should defer to Congress’ exercise of its power under article I, section 8, clause 4 of the United States Constitution.

Although the question of whether bankruptcy courts have the power to conduct jury trials is not novel, it is suggested that the Granfinanciera Court created more problems than it solved by holding that at least one “core proceeding” — a fraudulent con-

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veyance action against a transferee who has not filed a claim against the bankrupt estate — is a legal claim requiring a jury trial without delineating the tribunal in which such trial should take place. It is further submitted that jury trial demands made pursuant to the Granfinanciera holding will lead to inconsistent decision-making by bankruptcy, district and appellate courts as a result of the Court's failure to prescribe the appropriate tribunal.

Although the Granfinanciera Court expressly decided not to answer this difficult question, Justice Brennan suggested that the issue requires consideration of three factors: (1) whether Congress has expressly authorized article I bankruptcy courts to conduct jury trials, (2) whether this grant of power would comport with article III, and finally, (3) whether the seventh amendment's standard of review for jury trials would be violated by this grant of power.

II. STATUTORY ANALYSIS

Since Congress has not expressly authorized bankruptcy courts to conduct jury trials, most bankruptcy judges, when faced with

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27 Granfinanciera, 109 S. Ct. at 2792-93 ("We therefore conclude that respondent would have had to bring his action to recover an alleged fraudulent conveyance of a determinate sum of money at law in 18th-century England, and that a court of equity would not have adjudicated it.").

28 See Granfinanciera, 109 S. Ct. at 2802. The Court stated:

We do not decide today whether the current jury trial provision - 28 U.S.C. § 1411 - permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts . . . . We leave those issues for future decisions.

Id.

29 See id. at 2796-2800.

30 See Ben Cooper, Inc. v. Insurance Co. of Pa. (In re Ben Cooper, Inc.), 896 F.2d 1394 (2d Cir.), cert. granted, 110 S. Ct. 3269 (1990). In Cooper, the Second Circuit stated, "[d]espite the lack of a specific statutory provision, we nevertheless hold that the bankruptcy courts may conduct jury trials in core proceedings." Id. at 1402 (emphasis added). See also Hughes-Bechtol v. Air Enter., Inc. (In re Hughes-Bechtol), 107 Bankr. 552, 571 (S.D. Ohio 1989) ("Congress has clearly not enacted any legislation specifically authorizing bankruptcy court(s) to conduct jury trials"); I.A. Durbin v. Jefferson Nat'l Bank (In re Durbin), 62 Bankr. 135, 146 (S.D. Fla. 1986) (discussing limited right to jury trials - i.e., available only in district courts - under present code).

But see Haden v. Edwards (In re Edwards), 104 Bankr. 890, 893-900 (Bankr. E.D. Tenn. 1989). The bankruptcy court in Edwards used the lack of express authority in the bankruptcy code as support for finding itself incompetent to conduct a jury trial. Id. at 897
motions demanding trial by jury, look to the Bankruptcy Code for guidance. Courts have differed as to whether the Code contains the implicit authority to conduct jury trials.


Arguably, Congress could have clearly specified that the bankruptcy courts are not authorized to conduct jury trials. It is a more compelling argument... that Congress could easily have expressed its intention that the bankruptcy courts were authorized to conduct such trials. The absence of that positive expression and the presence of statutory language to the contrary, coupled with Marathon limits placed on this Court's authority makes it clear... that Congress did not authorize jury trials in the bankruptcy courts.

Edwards, 104 Bankr. at 898 (quoting Weeks, 89 Bankr. at 714 (emphasis in original)). See generally Cowans, supra note 6, § 1.6 at 77 (1989) ("There is no statute about jury trial any longer other than the provision of section 1411(b) [which provides that the court may order that the issues in an involuntary petition be tried without a jury]"); Cowans, supra § 1.6 at 78 ("Yet nothing in Section 303, or elsewhere in Title 11, grants any statutory right to a jury trial."); Sabino, Jury Trials in the Bankruptcy Court: The Controversy Ends, 95 Com. L.J. 238 (1987) [hereinafter Sabino] (arguing that present bankruptcy code contains no authority for bankruptcy courts to conduct jury trials); King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand. L. Rev. 675, 704 (1985) [hereinafter King] ("Moreover, there is no authorization in Title 11 or Title 28 for bankruptcy judges to conduct jury trials.").

81 See, e.g., Data Compass Corp. v. Datafast, Inc. (In re Data Compass Corp.), 92 Bankr. 575, 582 (Bankr. E.D.N.Y. 1988) ("We further believe that the authority to conduct a jury trial is implicit in 28 U.S.C. § 157(b) with respect to core proceedings."); Hughes-Bechtol, 107 Bankr. at 569 ("[T]his court begins its examination of the presently existing authority for a bankruptcy court to conduct a jury trial."); Edwards, 104 Bankr. at 893-900 (detailed analysis of authority to conduct jury trial); Weeks, 89 Bankr. at 708-16 (same). See also Gibson, Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment, 72 Minn. L. Rev. 967 (1988) [hereinafter Gibson]. Professor Gibson noted that the majority of bankruptcy courts have found the implied authority to conduct jury trials in the present Bankruptcy Code. Id. at 1029. Gibson further noted that "these courts infer such authority from a variety of sources: section 1411; Bankruptcy Rule 9015, which prior to its abrogation prescribed the procedure for jury trials; or 28 U.S.C. § 157(a), which authorize[d] district courts to refer bankruptcy matters to bankruptcy judges." Id. at 1029-30 (footnotes omitted) (emphasis added). These statutes are discussed further, infra, notes 35-36 and accompanying text (discussion of 28 U.S.C. § 1411(a)); notes 65-73 and accompanying text (discussion of former Bankruptcy Rule 9015).

Lastly, former bankruptcy Judge Cowans stated that "a strong inference arises from Section 1411(b) that there is some right to a jury trial. It may be considered an implied statutory right." Cowans, supra note 6, § 1.6 at 78 (emphasis added).

82 Compare Ben Cooper, Inc. v. Insurance Co. of Pa., 896 F.2d 1394, 1404 (2d Cir.), cert. granted, 110 S. Ct. 3269 (1990) (no statutory or constitutional bar to holding jury trials in present case); Kroh Bros. Dev. Co. v. United Bank of Kan. City (In re Kroh Bros. Dev. Co.), 108 Bankr. 710, 714 (Bankr. W.D. Mo. 1989) ("It is clear from the language of 28 U.S.C. §§ 151 and 157(b) that Congress has enacted a statutory grant of authority which is suffi-
A. Present Statutory Authority

With respect to jury trials in the bankruptcy court, the present statutory scheme contains only 28 U.S.C. § 1411, entitled "Jury Trials." No other provision expressly pertains to jury trials in the bankruptcy court.

Section 1411(a) provides that chapter 87 (28 U.S.C. §§ 1408-1412, which furnish the venue for the district courts), and title 11 (the Bankruptcy Code), "do not affect any right to trial by jury that an individual has under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim." Section 1411(a) provides:

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

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

The Official Comment to section 1411(a) informs:

Subsection (a) is a limitation of what was formerly contained in 28 U.S.C. § 1480.

The former provision, added in 1978, retained the right to jury trial as it existed.
tion 1411(a) is clarified somewhat by an Advisory Committee Note in the 1987 Amendments. This Note apprises: "Section 1411 added by the 1984 amendments affords a jury trial only for personal injury or wrongful death claims, which 28 U.S.C. § 157(b)(5) requires be tried in the district court." Thus, section 1411(a) acknowledges that chapter 87 and title 11 have removed jury rights from bankruptcy courts, its purpose being to insure that litigants would not lose their seventh amendment jury right in personal injury and wrongful death tort claims. Some courts have read

under any statute in effect on September 30, 1979; accordingly, the type of cause of action was not a material consideration. Pursuant to 28 U.S.C. § 1411, however, the only right to a jury trial that is retained is that of

(i) an individual;
(ii) existing under applicable nonbankruptcy law;
(iii) concerning a personal injury or wrongful death tort claim.

Id.  

Bankr. R. 9015 [abrogated] (Advisory Committee Note reprinted in COLLIER, BANKRUPTCY RULES 1990). The Advisory Committee Note to the 1987 Amendments, which abrogated Bankruptcy Rule 9015, provides:

Former section 1480 of title 28 preserved a right to trial by jury in any case or proceeding under title 11 in which jury trial was provided by statute. Rule 9015 provided the procedure for jury trials in bankruptcy courts. Section 1480 was repealed. Section 1411 added by the 1984 amendments affords a jury trial only for personal injury or wrongful death claims, which 28 U.S.C. § 157(b)(5) requires be tried in the district court. Nevertheless, Rule 9015 has been cited as conferring a right to jury trial in other matters before bankruptcy judges. In light of the clear mandate of 28 U.S.C. § 2075 that the "rules shall not abridge, enlarge, or modify any substantive right," Rule 9015 is abrogated. In the event the courts of appeals or the Supreme Court define a right to a jury trial in any bankruptcy matters, a local rule in substantially the form of Rule 9015 can be adopted pending amendment of these rules.

Id.  

The Court stated that section 1411(a) "might suggest that jury trials are available only in personal injury and wrongful death actions, [but] that conclusion is debatable." Id. While the Court stated that the submitted interpretation is "debatable," it provided little support for this assertion. Id. The Court further suggested that section 1411(b) provides authority for the district court to order that the issues in an involuntary petition be tried by the judge alone. See id. It interpreted this as "suggesting that the court lacks similar discretion to deny jury trials on at least some issues presented in connection with voluntary petitions." Id. But the United States Supreme Court neither offers sufficient guidance on this possible interpretation of section 1411, nor does it substantiate the claim. Id. The Court does support its assertion that the legislative history on the section has confused commentators, but merely by naming two law review articles that express dismay on the legislative history. See id. (citing Gibson, Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment, 72 MINN. L. REV. 967, 989-996 (1988); Note, The Bankruptcy Amendments and Federal Judgeship Act of 1984: The Impact on the Right of Jury by Trial in Bankruptcy Court, 16 TEX. TECH. L. REV. 535, 543-46 (1985)). The Court discusses its alternative interpretation
section 1411(a) as conferring the negative implication that the Bankruptcy Code removed the power of the bankruptcy courts to conduct jury trials, and that therefore, with respect to the torts named in the section, litigants must obtain trial by jury in the district courts. Other courts have read this section as requiring only that the named tort actions be tried in the district court, but as otherwise not affecting the bankruptcy courts’ power to try other causes of action by jury.

Notwithstanding the two conflicting interpretations, it is suggested that section 1411(a) does not confer express statutory authority upon the bankruptcy courts to employ juries as their factfinders, given its apparent acknowledgement that title 11 does not further. See id. See also T. CRANDALL, R. HAGEDORN, F. SMITH JR., DEBTOR-CREDITOR LAW MANUAL ¶ 11.05 at 11-51, 11-52 (1985).

The apparent intent of subsection (a) of Section 1411 is to preserve for personal injury tort or wrongful death claims any right of trial by jury that might exist under non-bankruptcy law. Arguably such claims must be determined by the district court. It is not clear that the bankruptcy judge may conduct jury trials. Id. (footnotes omitted).

See, e.g., Huffman v. Perkinson (In re Harbour), 840 F.2d 1165, 1165 (4th Cir. 1988). The Huffman decision asserts that section 1411(a) simply limits litigants’ jury rights to wrongful death and personal injury tort claims, and that there is no other statutory right to jury trials. Id. at 1179. In Berryman v. Smith (In re Smith), 84 Bankr. 175 (Bankr. D. Ariz. 1988), Judge Mooreman stated: “[T]he view adopted by this court, is that § 1411 is declaratory of the right to a jury trial on a ‘limited class of contingent tort claims.’” Id. at 177-78 (citing In re Kaufman, P.A., 78 Bankr. 309, 311 (Bankr. N.D. Fla. 1987) (quoting Morse Elec. Co. v. Logicom, Inc. (In re Morse Elec. Co.), 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985)). Judge Mooreman also quoted the Advisory Committee Note to abrogated Bankruptcy Rule 9015, which appears in the 1987 amendments. See 114 F.R.D. 392 (1987). He wrote, “§ 1480 [was] repealed . . . Section 1411 [added by the 1984 amendments] affords a jury only for personal injury or wrongful death claims, which 28 U.S.C. § 157(b)(5) requires to be tried in the district court.” Smith, 84 Bankr. at 177-78. Judge Mooreman then concluded from the language in section 1411(a), which states that the section does not affect any jury trial rights except with respect to the torts named therein, that “presumably it does affect (and eliminate by exclusion) such rights regarding other claims.” Id. at 178 (quoting Jacobs v. O’Bannon (In re O’Bannon), 49 Bankr. 763, 769 (Bankr. M.D. La. 1985) (emphasis added by quoting court)). He held, therefore, that the bankruptcy court had no authority to grant a jury trial in the plaintiff’s causes of action, since they were neither for personal injury nor for wrongful death. Id. See also supra note 12 (discussing concept of public rights).

See, e.g., Ben Cooper, Inc. v. Insurance Co. of Pa., 896 F.2d 1394, 1402 (2d Cir.), cert granted, 110 S. Ct. 3269 (1990). In Cooper, the Second Circuit held that the bankruptcy courts are inferentially empowered to conduct jury trials by two statutes in title 28 of the United States Code. Id. at 1402-03. Thus, Cooper, controlling authority for all Second Circuit bankruptcy courts, holds that jury trials may authoritatively be conducted, “despite the lack of a specific statutory provision,” and, ostensibly, despite section 1411. Id. at 1402. See also infra notes 75-84 and accompanying text (discussion of Cooper opinion).
not provide bankruptcy courts with authority to conduct jury trials. As previously set forth, the section provides that title 11 "does not affect any right to a trial by jury" with respect to the named tort causes of action. It would be unnecessary to preserve a jury trial in these causes of action if the Bankruptcy Code so provided. Indeed, one commentator has suggested that section 1411(a) would be redundant if the right to a jury trial still existed under other causes of action, which is logical since the Bankruptcy Code itself provides no authority to conduct jury trials. As such, section 1411(a) requires certain tort causes of action that must be tried by jury, be so tried in the district court, addressing the Code's failure to furnish bankruptcy courts with the authority to conduct the jury trial.

B. Prior Statutory Authority

The original Bankruptcy Act of 1898 authorized bankruptcy courts to conduct jury trials only when an involuntary bankruptcy petition was filed which involved issues of insolvency and the commission of an "Act of Bankruptcy." Under this Act, bankruptcy

41 See supra note 35 (full text of section 1411); supra note 36 (text of Advisory Committee Note which states that section 1411 provides for jury trials only in two tort causes of action, which trials are unambiguously relegated to district courts); supra notes 38-40 (array of courts' views on section 1411).
43 See, e.g., Gibson, supra note 31, at 991. Professor Gibson states: "By preserving jury trial rights for this limited class of cases, Congress may have meant that all other bankruptcy matters should be tried without a jury." Id. (footnote omitted). But Gibson further notes that subsection (b) of 1411 would be unnecessary if that were the correct interpretation. Id. Section 1411(b) allows the district court to order that the issues in an involuntary petition be tried without a jury. 28 U.S.C. § 1411(b) (Supp. V 1987). The author's submission in this Note is simply that Congress intended 1411(a) to provide for jury trials in the specific causes of action named, and purported to authorize district court judges to order that the issues arising from an involuntary petition be tried without a jury, while affording these judges the ability to conduct the jury trial if they do not so order (pursuant to section 1411(b)). See Gibson, supra note 31, at 991 & n.105 ("[S]ection 1411(a) would be totally redundant if the right to jury trial continued to exist in other types of disputes.") (quoting King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand. L. Rev. 675, 706-07 (1985)).
44 See King, supra note 30, at 706-07.
45 Bankruptcy Act of 1898, § 19(a), 30 Stat. 551. Section 19(a) provided:
Sec. 19. JURY TRIALS.—(a) A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor
courts were limited to exercising "summary jurisdiction," wherein the judge could only adjudicate matters over which the bankrupt estate had possession, or matters consented to by the non-bankrupt party. The Bankruptcy Reform Act of 1978, however, expanded the jurisdiction of bankruptcy courts and amended Title 28 of the United States Code by adding section 1480. Under section 1480(b), bankruptcy courts were authorized to adjudicate issues arising from an involuntary petition without a jury. Similar to section 1411(a) of the present bankruptcy code, former section 1480(a) provided that bankruptcy jurisdiction would not affect any right to a trial by jury, but unlike section 1411(a), only if "provided by any statute in effect on September 30, 1979." This provision was construed by some bankruptcy courts as authorizing them to conduct jury trials. Other bank-

at or before the tim [sic] within which an answer may be filed. If such application is not file [sic] within such time, a trial by jury shall be deemed to have been waived. Id. An act of bankruptcy was defined under the Act of 1898 as (1) an act that "hinder[s], delay[s], or defraud[s] his creditors;" (2) a transfer of assets by the insolvent, while solvent, to creditors "with intent to prefer such creditors over his other creditors;" (3) permitting a creditor to obtain a preference, while insolvent, through legal proceedings; (4) the making of "a general assignment for the benefit of his creditors; or" (5) admitting in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." Id. at § 3, 30 Stat., at 546.

See COWANS, supra note 6, § 1.2, at 14 n.17 ("Under the poorly named concepts of summary and plenary jurisdiction, the bankruptcy judge only had jurisdiction if there was consent or possession . . . summary referred not to procedure but possession of assets."); JORDAN & WARNER, BANKRUPTCY 900 (2d ed. 1989) [hereinafter JORDAN] ("[Summary bankruptcy jurisdiction] extended to matters of administration (claims, distribution, discharge, etc.), to property in the actual or constructive possession of the debtor at the time of the petition, and to controversies with respect to which the nonbankrupt litigant had consented, actually or constructively, to the jurisdiction of the bankruptcy court.") (citation omitted).


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

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

Id. See supra note 48 (text of 28 U.S.C. § 1480(b)).

See supra note 35 (text of 28 U.S.C. § 1411 (1988)).

Id. See WEINTRAUB, supra note 6, ¶ 6.06 at 6-30 & n.5 (1986). The authors cite, for exam-
ruptcy courts, acknowledging their status as courts of equity, deemed themselves powerless to conduct jury trials.\textsuperscript{3} Section

\textit{In re Frank Meador Buick, Inc.} (Brown v. Frank Meador Buick, Inc.), 8 Bankr. 450, 454-55 (Bankr. W.D. Va. 1981) (plaintiff has right to jury trial in bankruptcy court since he would have had right to jury trial had issue been raised in State or Federal court); Pereira \textit{v. Checkmate Comm. Co.} (In re Checkmate Stereo & Elec., Ltd.), 21 Bankr. 402, 408 (Bankr. E.D.N.Y 1982) ("[W]here a right to a jury trial existed prior to enactment of the new code, section 1480 makes clear that it will not otherwise be diminished.").

\textit{See}, e.g., Merrill v. Heller & Co. (In re Merrill), 594 F.2d 1064, 1067 (5th Cir. 1979) ("Because of the equitable nature of bankruptcy proceedings there is generally no constitutional right to a jury trial.").

Moreover, bankruptcy courts have considered their tribunals inherently equitable, and therefore powerless to conduct jury trials, both before and after the 1984 amendments which repealed section 1480. See, e.g., Nordberg v. Granfinanciera, S.A. (In re Chase & Sanborn Corp.), 835 F.2d 1341 (11th Cir. 1988), affg 58 Bankr. 721 (Bankr. S.D. Fla. 1986), rev'd, 109 S. Ct. 2782 (1990). The Eleventh Circuit noted that "bankruptcy itself is equitable in nature and thus bankruptcy proceedings are inherently equitable." Nordberg, 835 F.2d at 1349. Relying on its three-part test, the Supreme Court reversed the decision of the Eleventh Circuit and concluded that fraudulent conveyance actions are based upon legal claims rather than equitable claims. Granfinanciera, 109 S. Ct. at 2790-94. The Court's conclusion, however, does not necessarily imply that bankruptcy courts are no longer "essentially courts of equity." \textit{Id.} at 2798. In part three of its analysis, the Court stated: "[w]e must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a factfinder." \textit{Id.} at 2790 (footnote omitted) (emphasis added). Such a statement suggests that the Court still recognizes the equitable nature of bankruptcy courts. \textit{See also supra} note 4 (discussing Court's inquiry into whether Congress has permissibly entrusted resolution of certain disputes to administrative agency or specialized court of equity). The Granfinanciera Court acknowledged that Congress did not have the authority to take away parties' seventh amendment right to trial by jury. Granfinanciera, 109 S. Ct. at 2797. The Court stated: "The Constitution nowhere grants Congress such puissant authority. '[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity . . . .'" \textit{Id.} at 2795 (citation omitted) (emphasis added).

In part three of its analysis, the Court examined the issue of whether Congress may place causes of action that are analogous to common law claims "beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable." \textit{Id.} at 2796 (emphasis added in part) (citations omitted). The Court concluded that a legal cause of action may be tried without a jury if it is public in nature. \textit{Id.} The public-private distinction of causes of action originally arose in the case of Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 458 (1977). The Granfinanciera opinion notes that the Atlas case failed to define "public rights." \textit{Id.} at 2795 n.4. The term, however, was previously defined in Crowell v. Benson, 285 U.S. 22 (1932), as "the liability of one individual to another under the law . . . ." Crowell 285 U.S. at 51. "In addition, the Crowell Court defined 'public rights' as arising between the Government and persons subject to authority in connection with the performance of the constitutional functions of the executive or legislative departments." Granfinanciera, 109 S. Ct. at 2795 n.4.

Although the public-private distinction is beyond the scope of this Note, the discussion of this distinction in Granfinanciera is noteworthy since it suggests that the Court has already determined that bankruptcy courts lack the authority to conduct jury trials. This conclusion is supported by the Court's contention that, since the "respondent's right to recover a fraudulent conveyance under 11 U.S.C. § 548 (a)(2), is not a "public right" for article III purposes, then Congress may not assign its adjudication to a specialized non-
1480(a), however, was soon abrogated in response to the 1982 Supreme Court decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*

In *Northern Pipeline*, a plurality of the Court found that the 1978 Reform Act’s expansive grant of jurisdiction to bankruptcy courts was unconstitutional in part because bankruptcy judges were not life-tenured, nor given protection against salary reduction, which are expressly required under article III of the United States Constitution. In this regard, the Court directed Congress

article III court lacking ‘the essential attributes of the judicial power.’” *Id.* at 2796 (quoting *Crowell*, 285 U.S. at 51) (emphasis added). Moreover, in finding that the cause of action in dispute was private in nature, the *Granfinanciera* Court concluded that “Congress cannot eliminate a party’s Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.” *Id.* at 2800 (citation omitted) (emphasis added).

By referring to bankruptcy courts as tribunals that do not use juries as factfinders, or as specialized courts of equity, the *Granfinanciera* opinion suggests that the Supreme Court regards bankruptcy courts as inherently courts of equity. *See id.* at 2787-90. *See also* *Kroh Bros. Dev. Co. v. Bazan* (*In re Kroh Bros. Dev. Co.*), 91 Bankr. 889, 892 (Bankr. W.D. Mo. 1988). The *Kroh* opinion states:

The courts adopting this view [that jury trials are not permitted nor mandated in core proceedings] believe that Congress intended for the distinction between core and non-core proceedings under the current bankruptcy code to parallel summary and plenary jurisdiction of the old bankruptcy act. [Summary jurisdiction is discussed briefly, *supra*, at note 44.] And, since jury trials were not allowed under the old act, and the new act was not intended to change the parties’ right to a jury trial in bankruptcy matters, jury trials are not allowed in core proceedings. *Id.* (citations omitted). While the *Granfinanciera* decision casts doubt on the theory that all core proceedings are equitable, it does not appear to dispute the theory that bankruptcy courts are specialized courts of equity. *Granfinanciera*, 109 S. Ct. at 2782, *passim.* The Court rejected the notion that Congress perceived all core proceedings as equitable because respondent therein did not provide the Court with “evidence that Congress considered the constitutional implications of its designation of all fraudulent conveyance actions as core proceedings.” *Id.* at 2800.


45 *Id.* at 87. Justice Brennan wrote the opinion, in which Justices Marshall, Blackmun, and Stevens joined. *Id.* at 50. The Court quoted article III of the Constitution and asserted that the “good behaviour” clause assures that article III judges will receive life tenure and
to revise the Reform Act before a certain date, but Congress failed to meet that deadline, as well as its subsequent extension. In response to Congress' inaction, the Judicial Conference of the United States proposed a Model Emergency Rule which was adopted by all judicial circuits. The relevant jury trial provision in the Emergency Rule unambiguously prohibited bankruptcy judges from conducting jury trials. Congress finally responded to Northern Pipeline when it drafted Title I of the Bankruptcy may be removed only upon impeachment. Id. at 59. Also, the Court stated that the Compensation Clause guarantees that article III judges receive "fixed and irreducible compensation for their services." Id. at 59 (quoting U.S. v. Will, 449 U.S. 200, 217-18 (1980)). Bankruptcy judges, however, were not given such article III protections under the 1978 Act. Id. at 60. Consequently, the Court concluded that such a grant of jurisdiction, which granted "essential attributes" of article III judicial power to a non-article III adjunct, is unconstitutional. Id. at 87.

*See Weintraub, supra note 6, ¶ 6.03, at 6-8 ("When Congress failed to remedy the situation, the stay was extended to December 24, 1982. Nonetheless, Congress failed to act by the December 24 deadline and the Court denied another request to further extend the stay."); JORDAN, supra note 47 at 925 ("Congress did not act by the October 4, 1982 deadline set in Northern Pipeline, but the Court extended its stay.").

*JUD. CONF. OF THE U.S., REP. OF PROC. (Sept. 1982). See generally WINTRAUB, supra note 6, ¶ 6.03, at 6-8 & n.3 (brief discussion of model emergency rule) (citing Countryman, Scrambling to Define Bankruptcy Jurisdiction: The Chief, The Judicial Conference, and the Legislative Process, 22 HARV. J. LEGIS. 1, 19-28 (1985) [hereinafter COUNTRYMAN]). Professor Countryman informs: [T]he Judicial Conference adopt[ed] a resolution requiring the Director or the Administrative Office of United States Courts to 'provide each circuit with a proposed rule, which was to take effect in the absence of congressional action. The resolution was intended to permit the bankruptcy system to continue without disruption in reliance on jurisdictional grants remaining in the law as limited by the Northern Pipeline decision.'

Id. at 19 (quoting JUD. CONF. at 91).


"(d) Powers of Bankruptcy Judges.

(1) The bankruptcy judges may perform... all acts and duties necessary... except that the bankruptcy judges may not conduct:... (D) jury trials." Id. at 5-16.

It should also be noted that the Emergency Rule provided that bankruptcy judges would have jurisdiction over "related proceedings to set aside preferences and fraudulent conveyances." Id. at 5(A), COLLIER, supra, ¶ 3.01, at 3-17. The Collier treatise correctly notes that "this provision of the Emergency Rule was unconstitutional because it deprived defendants in these kinds of actions of their seventh amendment right to a jury trial." Id. at n.21(a) (citing Granfinanciera S.A. v. Nordberg, 109 S. Ct. 2782, 2802 (1990)).
Jury Trials

Amendments and Federal Judgeship Act of 1984. The 1984 Amendments enacted section 1411 under title 28, as discussed earlier, and repealed section 1480. However, some bankruptcy courts have failed to acknowledge the repeal of section 1480, and have persisted in their belief in the existence of statutory authority to allow bankruptcy courts to conduct jury trials.

The next provision relevant to jury trials in bankruptcy court is Bankruptcy Rule 9015, promulgated under the 1984 Amend-

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6 See, e.g., Granfinanciera, 109 S. Ct. at 2789 n.3. In a footnote, the Court discussed the current statutory scheme governing the bankruptcy courts and jury trials therein. Id. Section 1480 would not apply to petitioners' claim, however, because their cause of action arose after September 30, 1979. Id. The Court then stated, "As [petitioners] recognize, section 1480 was apparently repealed by the 1984 Amendments." Id. (emphasis added). It is submitted that the Supreme Court should know in more certain terms whether this provision was or was not, in fact, repealed. The Court cited two law review articles, briefly discussed infra this note, to support its assertion that the section was ambiguously repealed. Id. These commentators concluded, however, that the section was repealed. See Gibson, supra note 31, at 989; King, supra note 30, at 703 n.79. See also Comment, The Bankruptcy Amendments and Federal Judgeship Act of 1984: The Impact on the Right of Jury Trial in Bankruptcy Court, 16 Tex. Tech. L. Rev. 535, 543 (1985) ("section 1480 was repealed in full.").

In Gibson, supra note 31, at 989, a footnote recognized that the 1984 amendments were ambiguous because different provisions were apparently contradictory. Id. at 989 n.96. Professor Gibson asserted that "[most] courts and commentators sensibly conclude, however, that section 1480 was repealed outright or by implication by the 1984 Amendments." Id. (citing American Univ. Ins. Co. v. Pugh (In re Pugh), 72 Bankr. 174, 177 (Bankr. D. Or. 1986), aff'd 821 F.2d 1352 (9th Cir. 1987)) ("I note that 28 U.S.C. § 1480 was repealed, albeit clumsily, by the Bankruptcy Amendments and Federal Judgeship Act of 1984. . . . Section 1480 was replaced by 28 U.S.C. § 1411."). See King, supra note 31, at 703 n.79 (noting inconsistency between sections of the 1984 amendments, but concluding that "§ 1411 rather than § 1480 controls the right to jury trial in proceedings arising in or related to cases under the Bankruptcy Code."). See also Sabino, supra note 31, at 242. Sabino states: "the 1984 Amendments repealed Section 1480, admittedly by a most circuitous route." Id. He notes an opinion by Bankruptcy Judge Steen who concluded from a "pains-taking analysis" that section 1480 was, in fact, repealed. Id. at 243 & 255-57; Jacobs v. O'Bannon (In re O'Bannon), 49 Bankr. 763, 767 (Bankr. M.D. La. 1985) (holding that section 1480 has been "effectively repealed").

64 See Fed. Bankr. R. 9015, 11 U.S.C.A. § 9015 (West 1984). This rule provided, for example: time for a jury demand, R. 9015(b)(1); the procedure by which a party may specify which issues that party desires tried by jury, R. 9015(b)(2); authority for the court to "determine whether there is a right to trial by jury" or whether a jury demand with respect to issues arising in an involuntary petition shall be granted, on motion by the parties or on its own initiative, R. 9015(b)(3); that failure to timely demand a trial by jury consti-
Rule 9015 outlines the procedure to be followed when litigants make a demand for a trial by jury. Although some bankruptcy courts disagree, this Rule has been relied upon by certain courts as express authority for conducting jury trials. The former courts argue that this procedural rule could not create the substantive right to a trial by jury in a bankruptcy court, relying on 28 U.S.C. § 2075, which prohibits the Rules from "enlarging, abridging, or modifying any substantive rights." Thus, these courts insist that Rule 9015 could never have provided bankruptcy courts with the explicit or implicit authority to hold jury trials. Moreover, it should be noted that Congress repealed Rule 9015 under the 1987 amendments to the Bankruptcy...
In the Advisory Committee Note which replaced the Rule, it was stated that because Rule 9015 "has been cited as conferring a right to jury trial," - an interpretation that is clearly contrary to the mandate of 28 U.S.C. § 2075 - the Rule is abrogated. Consequently, bankruptcy courts are left only with section 1411 to rely upon as authority to conduct jury trials, which, as argued herein, cannot seriously be interpreted as conferring express statutory authority.

C. Implicit Authority

On February 7, 1990, the Court of Appeals for the Second Circuit decided Ben Cooper, Inc. v. Insurance Co. of Pennsylvania. In Cooper, it was recognized that there is no express statutory authority for bankruptcy courts to conduct jury trials. Nevertheless, the Cooper court concluded that bankruptcy courts have implied authority to conduct jury trials in core proceedings.

The Cooper court found implicit statutory authority through a combination of sections 151 and 157(b) of title 28, coupled with the Supreme Court's Granfinanciera decision. The opinion quoted section 151's authorization that bankruptcy judges be permitted to exercise the authority conferred under chapter six (sections 151 through 158) of title 28. The court then cited section 157(b), which authorizes bankruptcy judges to "hear and determine" core proceedings. The court noted that Granfinanciera mandated that when the core proceedings are legal, the seventh
amendment requires trial by jury, and therefore held that bankruptcy courts are empowered to hear the core proceedings with the authority to enter judgments.

It is suggested that the Cooper court's analysis of the statutory scheme supports the contention that bankruptcy courts are impliedly permitted to conduct jury trials. It should be observed, however, that such an interpretation is unlikely to be uniformly accepted throughout the circuits. Given the unfairness to litigants who must rely on a particular court's subjective interpretation of the present Bankruptcy Code, it is further suggested that the Code should provide expressly for the right to a jury trial, or should mandate that all issues triable by jury be referred to the district court.

III. CONSTITUTIONALITY

In Granfinanciera, part one of Justice Brennan's three part analysis inquired: If Congress has authorized article I bankruptcy courts to conduct jury trials, does such grant of authority comport with article III? It is submitted that Congress may and should constitutionally empower article I bankruptcy courts with the authority to conduct jury trials in core proceedings under section 157. An analysis of two Supreme Court decisions, and various lower court interpretations thereof, supports this conclusion.

In the seminal case of Northern Pipeline Construction Co. v. Marathon Pipe Line Co, the central issue addressed was "whether the Bankruptcy Reform Act of 1978 violates the command of Arti-
cle III\textsuperscript{67} that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article.\textsuperscript{68} Since the 1978 Bankruptcy Reform Act conferred broad, article III-like power to the bankruptcy courts, while these courts retained their non-article III status, the \textit{Northern Pipeline} Court declared this Act unconstitutional.\textsuperscript{69}

\textsuperscript{67} U.S. Const. art. III, § 1. Article III, section 1 of the United States Constitution provides:

\begin{quote}
The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.
\end{quote}

\textsuperscript{68} See \textit{Northern Pipeline}, 458 U.S. at 62.

\textsuperscript{69} See \textit{id.} at 87. Specifically, the Court believed that the lack of life tenure and protection against salary reduction was indicative of the intent of Congress not to make the Bankruptcy Courts into article III tribunals. \textit{Id.} at 60-61. Justice Brennan, writing for the Court, argued that the Framers of the Constitution expressly decided that those courts that have broad judicial authority must have article III status in order to ensure separation of powers. \textit{Id.} at 83-87. The Court first dealt with the issue of whether Congress could give bankruptcy courts "legislative court" status and decided that there were three limited situations where this is allowed: (a) limited geographic areas, (b) court martials, and (c) cases involving "public rights." \textit{Id.} at 64-70. The Court held that bankruptcy courts do not fit into any of
The Court in *Northern Pipeline*, while abrogating the Bankruptcy Reform Act of 1978, failed to address the specific issue of whether bankruptcy courts are authorized to conduct jury trials. Bankruptcy courts anticipated an answer to this question when the Supreme Court granted certiorari to the petitioners in *Granfinanciera, S.A. v. Nordberg*. However, in *Granfinanciera*, the Court found such a determination unnecessary, thus depriving bankruptcy courts of the guidance for which they had eagerly awaited.

Some authorities have used this language to support their view that *Northern Pipeline* dictated that jury trials in bankruptcy courts would be unconstitutional. See, e.g., *Terry v. Proehl* (In re *Proehl*), 36 Bankr. 86, 87 (Bankr. W.D. Va. 1984) (asserting that it would be unconstitutional to conduct jury trial); *Eisenberg v. Guardian Group, Inc.* (In re *Adams, Browning, and Bates, Ltd.*), 70 Bankr. 490, 496 (Bankr. E.D.N.Y. 1987) (dictating that *Northern Pipeline* held that it would be unconstitutional to conduct jury trial). See also infra note 94 and accompanying text (discussing rationale of those courts deeming jury trials an Article III function). *But cf. Northern Pipeline*, 458 U.S. at 85 (Court's analogy did not discuss jury trials alone, but listed jury trials among four factors that distinguish constitutional from unconstitutional grants of jurisdiction).

In *Granfinanciera*, the Supreme Court will review the Ninth Circuit's conclusions that an action to avoid a fraudulent transfer is, as a core proceeding, inherently equitable in nature, and that a request solely for monetary relief does not transform the action into a legal matter entitled parties to a jury trial. *Id.* See also *Jackson v. Wessel* (In re *Jackson*), 90 Bankr. 126, 135 (Bankr. E.D. Pa. 1988).

The *Jackson* court suggested:

> We do have some reservations as to our conclusion that, even in this matter, involving a core proceeding which presents an action at law, we, as a bankruptcy court, may conduct a jury trial. It is hoped that the Supreme Court, having granted certiorari in the *Chase and Sanborn*, will provide guidance to us in this area, at least in its next term.

*Id.*

*Granfinanciera*, S.A. v. *Nordberg*, 109 S. Ct. 2782, 2802 (1989). The Court stated: We do not decide today whether the current jury trial provision -28 U.S.C. § 1411 ([Supp. IV 1982]) - permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the District Courts pursuant to the 1984 Amendments.

*Id.* at 2802.

*See supra* note 91 (cases expressing anticipation of *Granfinanciera* ruling). The Supreme Court has, once again, granted certiorari in a case which gives the Court the oppor-
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Although some courts construe *Northern Pipeline* as implicitly holding that bankruptcy courts are not constitutionally permitted to conduct jury trials, it is submitted that such a construction is incorrect. Upon examination of the *Northern Pipeline* decision, it is apparent that the Court there was primarily concerned with the general grant of jurisdiction contained in 28 U.S.C. section 1471(c), which authorizes bankruptcy courts to adjudicate "essentially state-based claims". Subsequent case law has suggested that the power to conduct jury trials was merely one of several factors considered by the Supreme Court in holding the 1978 legislation unconstitutional.

...
Moreover, not all non-article III tribunals have been constitutionally prohibited from conducting jury trials. As such, a major-
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ity of courts have concluded that there is nothing inherently unconstitutional in allowing a non-article III court to conduct jury trials.98

The greatest impediment, therefore, to bankruptcy courts conducting jury trials lies not with the Northern Pipeline decision alone, but with the Northern Pipeline limits coupled with a lack of express statutory authority.99

Although the Supreme Court in Granfinanciera declined to address this issue, it did recognize constitutional restraints under Northern Pipeline.100 In doing so, the Court revealed its intention to revitalize the article III concerns conveyed by the Northern Pipeline Court.101 Several lower courts have correctly perceived

See supra notes 30-31 and accompanying text (setting forth caselaw permitting bankruptcy courts to grant jury trials).

99 See Weeks, 89 Bankr. at 714 ("The absence of that positive expression and the presence of statutory language to the contrary, coupled with the [Northern Pipeline] limits placed on this Court's authority makes it clear ... that Congress did not authorize jury trials in the bankruptcy courts."); Hughes-Bechtol, Inc. v. Air Enters. Inc. (In re Hughes-Bechtol, Inc.), 107 Bankr. 552, 569 (Bankr. S.D. Ohio 1989). Based on repeated statements by the Supreme Court in Northern Pipeline and Granfinanciera conveying article III concerns, Bankruptcy Judge Waldron concluded that for bankruptcy courts to conduct jury trials, there must be express statutory authority. Id. After an examination of the statutory scheme, the court determined that the 1984 amendments contained no such authorization. Id. at 569-70.

100 Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782, 2796-2801 (1989). "[W]e therefore rely ... on our decisions exploring the restrictions Article III places on Congress' choice of adjudicative bodies to resolve disputes over statutory rights to determine whether petitioners are entitled to a jury trial." Id. at 2796. "Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments." Id. at 2802.

101 See Hughes-Bechtol, 107 Bankr. at 567. In recognizing the constitutional significance of this issue, Judge Waldron reasoned:

This court believes that a fair reading of Granfinanciera reflects a consistent concern by the Supreme Court that the separation of powers doctrine reflected in the independence of the Federal Judiciary pursuant to Article III of the Constitution re-

line illustrated the difference between the statutory authority given bankruptcy judges and that given federal magistrates. Id. For example, Magistrates can enter final judgments only where there is consent of the parties, whereas bankruptcy judges can enter final judgments in core proceedings under section 157(b) without consent of the parties. Id. at 1040 n.342. Therefore, Gibson contended that the article III issue as it relates to bankruptcy must be addressed without reference to analogous grants of power. Id. at 1040. See also Sabino, Bankruptcy, Continuing Controversy, supra note 95, at 934. Sabino discredited the analogies not only to magistrates, but to District of Columbia courts and special masters as well. Id. As for District of Columbia courts, Sabino claims this analogy ignores Northern Pipeline's finding that District Courts are uniquely empowered due to their status. Id. Sabino also refutes the analogy to special masters, noting that Federal Rule of Civil Procedure 53(b) dictates that "a reference to a master shall be the exception and not the rule." Id.

See supra notes 30-31 and accompanying text (setting forth caselaw permitting bankruptcy courts to grant jury trials).
this progression as necessitating that express statutory authority exist in order to conduct jury trials.\(^{102}\)

IV. PROPOSALS

It is contended that Congress has the authority to grant bankruptcy courts the power to conduct jury trials, and that the intent of the 1978 legislation was to do just that. The 1978 Act was not declared unconstitutional solely because of its jury trial provision.\(^{103}\) In fact, it is asserted that a statute conferring such power to bankruptcy courts would withstand constitutional attack. The authors propose that such a statute is necessary to solve the jurisdictional dilemma with which bankruptcy courts are presently faced.

There is, however, an alternative: Congress has the power to

quires the Supreme Court to exercise continual vigilance to prevent encroachment by other branches of the government. It is also clear that the Supreme Court has determined that Congress has limited power to provide authority for non-Article III courts to adjudicate issues requiring a jury trial.

Id. Bankruptcy Judge Waldron then analyzed the statutory scheme, keeping in mind the limits placed by the Supreme Court language in *Northern Pipeline* and *Granfinanciera*. Id. Cf. *Ben Cooper, Inc.* v. *Insurance Co. of Pa.* (*In re Ben Cooper, Inc.*), 896 F. 2d 1394 (2d Cir.), *cert. granted*, 109 S. Ct. 3269 (1990). Circuit Judge Timbers argued "that *Granfinanciera* does not foreclose the possibility of jury trials in the bankruptcy court." Id. Judge Timbers quoted *Granfinanciera* Court language to support this view:

> [O]ne cannot easily say that 'the jury would be incompatible' with bankruptcy proceedings, in view of Congress' express provision for jury trials in certain actions arising out of bankruptcy litigation. And Justice White's claim that juries may serve usefully as checks only on the decisions of judges who enjoy life tenure overlooks the extent to which judges who are appointed for fixed terms may be beholden to Congress or executive officials, and thus ignores the potential for juries to exercise beneficial restraint on their decisions.

*Id.* (quoting *Granfinanciera*, 109 S. Ct. at 2801). Judge Timbers concluded that, despite the lack of a specific statutory provision, bankruptcy courts may conduct jury trials in core proceedings. *Id.* at 1403-04.

\(^{102}\) See, e.g., *Hughes-Bechtol*, 107 Bankr. at 571-572. In *Hughes-Bechtol*, Bankruptcy Judge Waldron analyzed the statutory scheme only after he established Supreme Court concerns surrounding article III. *Id.* In this examination, Bankruptcy Judge Waldron discerned that in the 1984 Amendments to the Bankruptcy Code (following *Northern Pipeline*), Congress did not expressly state whether bankruptcy courts are authorized to conduct jury trials. *Id.* at 569-70. See also *Haden v. Edwards* (*In re Edwards*), 104 Bankr. 890, 899 (Bankr. E.D. Tenn. 1989) (no statute on point, therefore bankruptcy court not empowered to conduct jury trials in either core or non-core proceedings). But see *Cooper*, 896 F.2d at 1402 ("Despite the lack of a specific statutory provision, we nevertheless hold that the bankruptcy courts may conduct jury trials in core proceedings.").

\(^{103}\) See supra note 91 and accompanying text (discussion of *Northern Pipeline* and its aftermath).
make bankruptcy courts article III tribunals.\textsuperscript{104} At least one authority has suggested that this approach was not taken in 1984 because of the contempt conveyed by the judiciary toward granting life tenure to bankruptcy judges.\textsuperscript{108} By granting article III status to bankruptcy courts, Congress would achieve what appears to have been its objective under the 1978 Bankruptcy Reform Act: permitting all bankruptcy proceedings to take place at one time in one tribunal.

Due to the present confusion stemming from this recurring and difficult issue, any path chosen by Congress will be beneficial to litigants, who are presently afforded no explicit guidance. The decision in \textit{Granfinanciera} has opened the door to an influx of jury demands in bankruptcy proceedings. It is incumbent upon Congress to decide whether to authorize bankruptcy courts to open their doors to these demands.

\section*{V. Practical Implications}

The foregoing discussion argues that Congress should provide bankruptcy courts with the statutory authority to conduct jury tri-
als. Pursuant to *Granfinanciera*, the jury trial demand will be granted in the limited circumstance where: (1) the proceeding is core, (2) the cause of action is legal, and (3) the party demanding trial by jury has not submitted a proof of claim against the bankrupt estate.\(^{106}\) This Note contends that bankruptcy courts should be uniformly empowered (or, in a less-desired alternative, uniformly denied the power) to conduct jury trials in such circumstances.\(^{107}\)

It is conceded that practical limitations may prohibit bankruptcy courts from properly conducting jury trials.\(^{108}\) Indeed, some bankruptcy courts which have acknowledged both a litigant’s right to trial by jury and the bankruptcy court’s power to conduct it have nevertheless been forced to request withdrawal.\(^{108}\) For this reason,
while it is submitted that Congress should expressly authorize bankruptcy courts to conduct jury trials, those courts should also retain their present ability to request withdrawal where circumstances so require. Such circumstances would permit bankruptcy judges to consider whether their court’s are adequately staffed, whether the proceeding is truly related to bankruptcy law, and whether it would otherwise be unfair to the party moving for a trial by jury to have it conducted by the bankruptcy court.\textsuperscript{110} By granting bankruptcy judges the power to seek withdrawal when necessary, a speedy, just and equitable method of adjudicating bankruptcy proceedings shall be preserved.

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\textsuperscript{110} See supra notes 107-08 (discussing various practical limitations faced by bankruptcy courts concerning their conducting jury trials).