UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

IN RE:

JOHNSON COUNTY GAS COMPANY, INC.
A KENTUCKY CORPORATION NO. 83-00002

DEBTOR

MEMORANDUM OPINION

This case is before the court on an involuntary petition for relief under chapter 7 of the Bankruptcy Code filed against the debtor by three of its creditors. The major petitioning creditor, Columbia Gas of Kentucky, Inc., alleges it is owed an unsecured debt in the amount of $222,587.62, which amount is increasing because it is continuing to supply gas to the debtor. The other two petitioning creditors, Health Consultants, Inc. and Reams Control, Inc., are owed $826.95 and $2,855.20 respectively. The petition alleges the debtor is not generally paying its debts as such debts become due.

The debtor operates a natural gas distribution business at Van Lear in Johnson County, Kentucky that supplies natural gas through underground lines to approximately 800 customers. The company was acquired by its present stockholders, Danny Preston and his wife, Betty R. Preston, in 1980. The company is subject to regulation by the Public Service Commission of Kentucky.

NO. 83-5601

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Pike C.A. 83-209

IN RE: JOHNSON COUNTY GAS CO., INC., DEBTOR

COLUMBIA GAS OF KY. HEALTH CONSULTANTS, INC., REAMS CONTROLS, INC.,

Plaintiffs-Appellees

vs.

JOHNSON COUNTY GAS CO., INC.,

Defendant-Appellant

ORDER

It appearing that an order has heretofore been entered in this cause directing the appellant to show cause on or before December 29, 1983 why this appeal should not be dismissed for want of prosecution;

It further appearing that the appellant has failed to show cause or respond in any manner to such order;

IT IS ORDERED that this appeal be and it hereby is dismissed for want of prosecution.

ENTERED PURSUANT TO RULE 4(f),
SIXTH CIRCUIT RULES

John P. Hehman /s
Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By Audrey Crockett
Deputy Clerk

The petitioning creditors also seek the appointment of an interim trustee to take possession of the property of the estate and to operate the business of the debtor. They allege irregularities in the operation of the business as documented in investigative reports of the Public Service Commission of Kentucky and the Kentucky Attorney General's office.

The debtor has asserted a number of defenses to the petition including the allegation that this court is without constitutional power and authority to liquidate the debtor under the United States Supreme Court's holding in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). The debtor has also filed a counterclaim against Columbia Gas Company, Inc. for damages in the amount of $500,000 and punitive damages in the amount of $5,000,000, alleging that the petition is filed in bad faith by Columbia in an attempt to gain control of the debtor at the expense of the debtor's customers or other creditors or to impose a surcharge on customers of the debtor without the approval of the Kentucky Public Service Commission.

Following the taking of depositions on discovery of Danny Preston, the president and managing officer of the debtor, and the debtor's accountant, the petitioning creditors have moved for summary judgment on the allegation that the debtor is generally not paying its debts as such debts become due. The petitioning creditors assert that Preston's testimony reveals that the debtor owes its certified public accountants, its attorneys,

the Small Business Administration, the Department of Local Government (a debt in excess of 1.3 million dollars), Kentucky West Virginia Gas Company and Columbia Gas Company, and is in arrears in payments to all of its creditors except the Small Business Administration.

For the reasons hereinafter stated, the court is of the opinion the involuntary petition under chapter 7 of the Bankruptcy Code for an order of relief against the debtor, and the debtor's counterclaim against Columbia Gas of Kentucky, Inc., should be dismissed for lack of jurisdiction.

CONCLUSIONS OF LAW:

Part I

Section 201 of the Bankruptcy Reform Act of 1978 adds to title 28, United States Code, a new Chapter 6, entitled "Bankruptcy Courts." Section 151 of title 28, appearing in new Chapter 6, provides as follows with respect to the creation and composition of bankruptcy courts.

> §151. Creation and composition of bankruptcy courts
>
> (a) There shall be in each judicial district, as an adjunct of the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.
>
> (b) Each bankruptcy court shall consist of the bankruptcy judge or judges for the district in regular active service. Justices or judges designated and assigned shall be competent to sit as judges of the bankruptcy court. (emphasis added).

Pursuant to the first sentence of subsection (b) of section 151 above quoted, a bankruptcy court is composed only

of the bankruptcy judge or judges in active service in the district. The second sentence of subsection (b) tracks with amendments to sections 291, 292 and 294 of title 28, United States Code, made by sections 202, 203 and 206 of the Bankruptcy Reform Act of 1978. The latter amendments, which do not take effect until April 1, 1984, will permit Article III judges to sit by designation and assignment as judges of the bankruptcy court.

It is obvious from the foregoing amendments to title 28 of the United States Code that the term "bankruptcy court" or "court" as used in Titles I and II of the Bankruptcy Reform Act of 1978 does not include a judge of the district court, except after 1984, when such judge has been designated and assigned to sit as a judge of the bankruptcy court.

The question arises as to whether the "courts of bankruptcy," which have been continued in existence during the transition period for the purposes of the Bankruptcy Reform Act of 1978 and the amendments made thereby, likewise consist only of the bankruptcy judge or judges in active service in the district.

The court has concluded that the transition courts of bankruptcy consist of both the Article III judges of the courts of bankruptcy and the non-Article III bankruptcy judges in active service in the district, but it is only the bankruptcy judges who are authorized to exercise the judicial powers of the courts of bankruptcy. The Article III judges of the courts of bankruptcy

have been retained as titular judges only for the purpose of vesting in them the power to appoint, remove or temporarily assign bankruptcy judges during the transition period, powers which pass to the President, the Judicial Council, or to the chief judge of the circuit at the end of the transition period. Article III judges of the courts of bankruptcy are not authorized to exercise any of the judicial powers of the transition courts of bankruptcy, as will be hereinafter demonstrated.

Section 404(a) of the Bankruptcy Reform Act of 1978 continues in existence during the transition period (commencing on October 1, 1979, and ending on March 31, 1984) the courts of bankruptcy existing on September 30, 1979, as defined under section 1(10) of the Bankruptcy Act and created under section 2a of the Bankruptcy Act. Such courts are continued as the courts of bankruptcy for the purposes of the Bankruptcy Reform Act of 1978 and the amendments made by that Act. Each of the courts of bankruptcy so continued is constituted as a separate department of the district court.

According to legislative history, the purpose of section 404 of the Bankruptcy Reform Act of 1978 is to continue the present bankruptcy court system during the transition period, with changes that are necessary to make the transition system enough like the proposed new court system so that the measurement process of caseload and judicial time requirements will be accurate.[1/]

One change that was necessary to make the transition bankruptcy court like the proposed new court was repeal or recision of statutory provisions that authorized the Article III judge of the court of bankruptcy to function generally as a judge of the court of bankruptcy. Therefore, Congress did not continue in existence during the transition period the provisions of sections 1(9) and 1(20) of the Bankruptcy Act defining the courts of bankruptcy to include the judge of the court of bankruptcy. These provisions, which were as follows, were repealed October 1, 1979.

> (9) "Court" shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending;
>
> (20) "Judge" shall mean a judge of a court of bankruptcy, not including the referee.

The courts of bankruptcy as continued in existence by Congress during the transition period are no longer defined to include generally the judge of the court of bankruptcy. Consequently, the terms "bankruptcy court" or "court" as used in the Bankruptcy Code do not include the Article III judge of the court of bankruptcy during or after the transition period.

Section 404(b) of the Bankruptcy Reform Act of 1978 continues referees in bankruptcy in office during the transition period, confers upon them the title United States bankruptcy judge, and provides that they shall serve in the courts of bankruptcy in the manner prescribed by Title IV of the Bankruptcy

Act of 1978, in other words, as the judges of the transition bankruptcy courts.

Significantly, section 1(10) of the Bankruptcy Act, 11 U.S.C. § 1(10), which defines courts of bankruptcy, does not say that courts of bankruptcy are included within the United States district courts. Rather, it says just the opposite. We quote:

> (10) "courts of bankruptcy" shall include the United States district courts . . . .

As a matter of statutory construction the word "include" is an encompassing rather than a limiting term.[2/] Consequently, the courts of bankruptcy exist outside rather than within the district courts. This explains why specific enabling legislation was necessary to extend the reach of authority of district judges in order for them to function as judges of the courts of bankruptcy.

Section 132 of title 28 of the United States Code, providing for the creation and composition of the district courts, does not define such courts to include the courts of bankruptcy or the judge or judges of the court of bankruptcy for the district. Subsection (c) of section 132, which authorizes a district judge to exercise the judicial power of a district court, does not authorize such judge to exercise the judicial power of a court

of bankruptcy or bankruptcy court. If such power exists, it does not flow from any provision of title 28 of the United States Code. The authority of a judge of the court of bankruptcy to exercise the judicial power of a court of bankruptcy has heretofore been contained in enabling legislation incorporated in the Bankruptcy Act. As hereinabove indicated, this enabling legislation has been repealed.

Each court of bankruptcy in each judicial district, existing as it does outside the district court, has been continued in existence during the transition period as a separate department of the district court. According to Webster's dictionary the word separate means "set or kept apart," "detached," "existing by itself," "autonomous."[3/] Consequently, the courts of bankruptcy have been continued in existence not as departments within, but rather as separate autonomous departments outside the district courts. The courts of bankruptcy are in fact constituted as courts of record separate from the district courts during the transition period, in the same manner as the bankruptcy courts are established as separate courts of record after the transition period.[4/]

The first sentence of section 151(b) of title 28, United States Code, defining the bankruptcy court to include only the bankruptcy judge or judges in active service in the district,

is made applicable during the transition period by section 404(e) of the Bankruptcy Reform Act of 1978. Section 404(e) confers upon transition bankruptcy judges "the same rights and powers as a United States bankruptcy court established under section 201" of the Bankruptcy Reform Act of 1978 with respect to the appointment of a clerk of the bankruptcy court and necessary other employees as authorized by section 233 of such Act. During the transition period, the clerk of the court of bankruptcy has the same powers, functions and duties as a clerk of the United States bankruptcy court established under section 201 of the Bankruptcy Reform Act of 1978.[5/] It is clear from the foregoing provisions that the court of bankruptcy is authorized to function as a court of record separate from the district court during the transition period.

The conclusion that only bankruptcy judges may exercise the judicial powers of the courts of bankruptcy during the transition period is reinforced by the language of section 405(a) of the Bankruptcy Reform Act of 1978 mandating that all cases commenced during the transition period shall be referred to the United States bankruptcy judges rather than to judges of the courts of bankruptcy and providing that all proceedings in such cases, except a proceeding to enjoin a court or to punish a criminal contempt, shall be before the United States bankruptcy judges.

Under sections 301-303 of the Bankruptcy Code, 11 U.S.C. §§ 301-303, a bankruptcy case is commenced by filing the petition with the clerk of the court of bankruptcy/bankruptcy court rather than the clerk of the district court as under former law. Under section 1473 of title 28, United States Code, a proceeding arising in or related to a case under title 11 is commenced by filing a complaint with the court of bankruptcy/ bankruptcy court. The clerk of the court of bankruptcy is precluded by section 405(a) from referring a case to the judge of the court of bankruptcy. The judge of the court of bankruptcy is precluded from sitting as a trial judge.

In the aftermath of the decision of the Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., supra, the search for some vestige of authority in Article III judges of the courts of bankruptcy over bankruptcy cases and proceedings has caused attention to be focused on section 405(a)(2) of the Bankruptcy Reform Act of 1978, which provides as follows:

> (2) Except as provided in subsection (c) of this section [which permits appeals to be routed to a panel of three bankruptcy judges or directly to the court of appeals for the circuit, as well as to the district court], any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district in which such case is pending.

Obviously, this provision was not drafted with the prescient notion that the jurisdictional underpinings for the powers exercisable by United States bankruptcy judges under paragraph (1) of section 405(a) might be declared unconstitutional. Rather, it was so drafted to accommodate the fact that in paragraph (1) of such section Congress withholds from non-Article III transition bankruptcy judges the power to enjoin another court or to punish a criminal contempt. Consequently, the straightforward meaning of section 405(a)(2) is that a proceeding to enjoin another court or to punish a criminal contempt shall be before the judge of the court of bankruptcy.

The original version of paragraph (2) as it appeared in H.R. 6 was as follows:

> (2) Any proceeding in a court of bankruptcy in a case under title 11 that is not before the bankruptcy judge shall be before the United States district court for the district in which such case is pending.6/

Under this language it might have made sense to keep 28 U.S.C. § 1334 in effect during the transition period, in order that the district court might entertain jurisdiction of the two types of proceedings that could not be heard by non-Article III transition bankruptcy judges, i.e., proceedings to enjoin another court or to punish a criminal contempt. It appears that it may have been the intention of the draftsmen to keep 28 U.S.C. § 1334 in effect during the transition period for

this very limited purpose in order that the district court might assist the court of bankruptcy by entertaining these two types of proceedings, in the event such proceedings were necessary to enforce the orders of the court of bankruptcy.

The change in the language of section 405(a)(2) to its present form to specify that proceedings to enjoin another court or to punish a criminal contempt "shall be before the judge of the court of bankruptcy" rather than the district court is unfortunate because 28 U.S.C. § 1481, as ultimately modified to accommodate the fact that the bankruptcy court is created as a non-Article III court, withholds from the bankruptcy court the power to enjoin another court or to punish a criminal contempt. Section 405(b) of the Bankruptcy Reform Act of 1978 makes 28 U.S.C. § 1481 applicable during transition. Consequently, during the transition period, courts of bankruptcy do not have power to enjoin another court or to punish a criminal contempt. An Article III "judge of the court of bankruptcy" cannot exercise powers withheld from the court of bankruptcy by Congress.7/ Therefore it would be an exercise in futility to commence a proceeding to enjoin another court or to punish a criminal contempt in the court of bankruptcy. It necessarily follows that such proceedings should be commenced in some court other than the court of bankruptcy/bankruptcy court. The jurisdictional authority of the district court to entertain such proceedings either during or after the transition period is by

no means clear.[8/] In any event, the language of paragraph (2) of subsection (a) of section 405 of the Bankruptcy Reform Act of 1978 to the effect that "any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before a United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district" was intended to permit the Article III judge of the court of bankruptcy to preside only for the purpose of hearing either of the two types of proceedings which a non-Article III United States bankruptcy judge is precluded from hearing by paragraph (1) of such subsection. A construction that the above-quoted language permits an Article III judge of the court of bankruptcy to preside generally as the judge of the court of bankruptcy cannot be reconciled with paragraph (1), which specifies that with two exceptions all proceedings in a case shall be before the United States bankruptcy judges. Nor can such a broad construction of the foregoing language be reconciled with the purposeful omission of definitional provisions in former law which permitted the Article III judge of the court of bankruptcy to function generally as the judge of such court.

The congressional intent embodied in section 405(a) is indicated by the Report accompanying the final version of the Senate bill. The concept of passing jurisdiction over bankruptcy proceedings and matters through the Article III district courts to non-Article III adjunct bankruptcy courts originated in the

Senate bill. This was to be accomplished by amendment of 28 U.S.C. § 1334 to include a proposed subsection (d) as follows:

> (d)(1) Except as provided in paragraph (2) of this subsection, a bankruptcy judge may exercise all powers and jurisdiction conferred on the district court in cases under title 11 and in civil proceedings arising under title 11 or arising under or related to cases under title 11.
>
> (2) A bankruptcy judge may not -
>
> (A) enjoin a State or Federal court; or
>
> (B) punish any person for any acts constituting a contempt of such court by imprisonment or by a fine of more than $1,000.[9/]

This section was to be read in conjunction with section 201 of the Senate bill, which like the House bill inserted in title 28 a new Chapter 6 providing for the creation and composition of the bankruptcy courts. Proposed 28 U.S.C. § 164 appearing in such Chapter 6 allowed bankruptcy judges to conduct all proceedings and trials except in municipal debt adjustment and railroad reorganization cases. According to the Senate Report:

> Subsection (d), when read in conjunction with section 164 of chapter 6 of title 28, as enacted by section 201 of this bill, restricts the power of the bankruptcy judge in only two areas which have traditionally been reserved to district judges, (1) the enjoining of another court, and (2) the imposition of punishment for contempt of court. District judges are to conduct cases under chapter 9 and railroad reorganization cases under chapter 11. Otherwise, bankruptcy judges shall have full and complete responsibility for cases under title 11 and all litigation arising out of such cases. The use of the term "may" in this section is not intended to imply that the district court has any discretion whatsoever in withholding bankruptcy cases or civil proceedings arising under title 11 or arising under or related to a case under title 11 from the bankruptcy court.

> The powers of the bankruptcy judge enumerated in section 164 include the power to conduct all proceedings under title 11 except in municipal adjustment and railroad reorganization cases, and in actions under section 1334(b) of this title. It is the intent of these provisions that the bankruptcy court will receive and the bankruptcy judge will handle cases and proceedings under title 11, and that all actions filed under section 1334(b) except those arising in connection with municipal adjustment and railroad reorganization cases will be automatically referred to the bankruptcy judge. It is contemplated that rules of Bankruptcy Procedure will be adopted to carry out this intent in order that the bankruptcy judge shall exercise the full range of jurisdiction in bankruptcy cases and proceedings. Except for municipal adjustment and railroad reorganization cases, the district judge will be expected to act in title 11 cases only in limited instances (1) where it is necessary to enjoin a State or Federal court or (2) to punish a person for contempt by imprisonment or by a fine of more than $1,000. Otherwise, the district judge will function only as an appellate judge in bankruptcy matters, as provided in subsection (e) of this section.
>
> Subsection (e)(1) confers upon the district court for each judicial district jurisdiction of appeals from (A) final decisions and interlocutory orders of the bankruptcy court in bankruptcy cases, and (B) final judgments, orders, and decrees of the bankruptcy court for such district in proceedings arising under title 11 or arising under or related to cases under title 11. Subsection (e)(2) provides that the decisions of the bankruptcy court shall be final unless a notice of appeal to a district judge is timely filed. It is contemplated that the manner and time for filing a notice of appeal will be set forth in Rules of Bankruptcy Procedure.10/

The command in section 405(a) of the Bankruptcy Reform Act of 1978 that bankruptcy cases and proceedings shall be handled by bankruptcy judges is even more forceful and positive than the foregoing language of the Senate bill and should be interpreted accordingly.

As previously indicated, because of last minute changes to 28 U.S.C. § 1481, the language in present section 405(a) purporting to permit an Article III judge of the court of bankruptcy to hear proceedings filed in the court of bankruptcy to restrain a court or to punish a criminal contempt has been rendered meaningless because the court of bankruptcy has been deprived of power to entertain such proceedings.

It follows from the foregoing analysis that the terms "court of bankruptcy" and "judge of the court of bankruptcy" as used in Title IV of the Bankruptcy Reform Act of 1978 should not be construed to authorize Article III judges of the court of bankruptcy to exercise any of the judicial powers of the court of bankruptcy.

It is also quite apparent that the courts of bankruptcy and the district courts are not identical. It was the intention of Congress that each court of bankruptcy should function as a separate court of record with its own clerk and supporting personnel, presided over only by a United States bankruptcy judge, during the transition period, in the same manner that the bankruptcy court was to function as a separate court of record at the end of the transition period. Otherwise, for example, conceptually, how was it to be possible to remove a civil action from the district court to the court of bankruptcy as provided for by 28 U.S.C. § 1478, made applicable during the

transition period by section 241(a) of the Bankruptcy Reform Act of 1978, or how could there be an appeal from the court of bankruptcy to the district court as provided by section 238 of the Bankruptcy Reform Act of 1978, as made applicable during the transition period by section 405(c)(2) of such Act. Moreover, the elevated status of the district courts as the intermediate courts of appeals from judgments, orders, and decrees of the courts of bankruptcy is inconsistent with the notion that the judges of the district courts may also function generally as trial judges of the courts of bankruptcy.

Because the courts of bankruptcy during the transition period, like the bankruptcy courts that are to come into existence at the end of the transition period, consist only of the United States bankruptcy judge or judges in active service in the district, insofar as the exercise of the judicial powers of such courts are concerned, section 105 of the Bankruptcy Code, which authorizes the court of bankruptcy/bankruptcy court to issue any order, process, or judgment that is necessary and appropriate to carry out the provisions of title 11, does not, in the view of this court, authorize Article III judges of a court of bankruptcy to adopt the so-called Model Rule adopted in this district on December 24, 1982 in conformity with an order of the Judicial Council of the Circuit.

In ordering the "district courts" to adopt such rule, the Council has by judicial fiat attempted to obliterate

the distinction that has existed since 1898 between the court of bankruptcy and the district court in each judicial district, a distinction which Congress recognized and seized upon as the medium for testing the new bankruptcy court system in order to determine the number of judges that would be needed for operation of the new court system commencing April 1, 1984.

Part II

A. Jurisdiction under 28 U.S.C. § 1471(a) and (b).

In White Motor Corporation v. Citibank, _____ F.2d _____, April 1, 1983, a panel of three judges of the Court of Appeals for the Sixth Circuit concluded (1) that the decision of the Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., supra, invalidates as unconstitutional only the jurisdictional grant to bankruptcy courts in 28 U.S.C. § 1471(c) so that § 1471(a) and (b) which invest the district courts with jurisdiction of all cases under title 11 and all civil proceedings arising in or related to such cases remain operative, or (2) in the alternative, if 28 U.S.C. § 1471(a) and (b) are also invalidated, the district courts nevertheless have jurisdiction under old 28 U.S.C. § 1334, which remains extant during the transition period or, in any event, is revived as a result of the invalidation of § 1471.

With respect to the first conclusion above another panel of three judges of the court of appeals for this circuit in Rhodes v. Stewart, _____ F.2d _____, decided April 11, 1983 (ten days after the decision in the White Motor Corporation case), were of the view that a plurality of six justices in the Northern Pipeline case agreed that the jurisdictional grant of § 1471 was unconstitutional in toto and could not be redeemed through division or severance of the offending exercises of jurisdiction.

The latter decision is obviously correct. The Supreme Court declared section 241(a) of the Bankruptcy Reform Act of 1978 unconstitutional. Section 241(a) enacts a new Chapter 90 of title 28 of the United States Code containing sections 1471 through 1482. A suggestion that only § 1471(c) of title 28 was declared unconstitutional in Northern produces anomalous consequences. It means that the venue provisions of Chapter 90, §§ 1472-1473 specifying that bankruptcy cases and proceedings arising in or related to such cases shall be filed in the bankruptcy court, remain operative even though the bankruptcy court has no jurisdiction over such matters. It means that civil actions related to a bankruptcy case can still be removed from state courts or district courts to the bankruptcy courts pursuant to § 1478 even though the bankruptcy courts no longer have jurisdiction over such civil proceedings. It means that a panel of non-Article

III bankruptcy judges can exercise the judicial power of the United States at the appellate level under § 1482 even though they can no longer exercise the judicial power of the United States at the trial court level. Surely the plurality of six justices meant to hold and did hold that all of Chapter 90 is unconstitutional because the conclusion that non-Article III judges may not exercise the judicial power of the United States renders the whole chapter dysfunctional.

It may be argued that the observations of the panel of three judges in Rhodes concerning the holding of the Supreme Court in Northern is dicta. If so, the assertions of the panel of three judges in the White Motor Corporation case concerning Northern is likewise dicta.

In each case the order of the bankruptcy court was entered in 1981 and therefore was not directly affected by the decision in Northern.

The issue in the White Motor Corporation case was whether the court of bankruptcy/bankruptcy court could appoint a special master to hear and make a recommendation to the court concerning the disposition of certain product liability cases. In view of the holding of the Supreme Court in Northern that a non-Article III bankruptcy tribunal cannot be invested, long term, with all the powers of a court of equity, law, and admiralty, a simple negative answer to this question is all that was required, whether the non-Article III tribunal derived its jurisdictional powers from a statute by reason of the delay

of the mandate in the Northern case or from the district court by reason of the Model Rule. The court apparently overlooked Rule 9031 of the Proposed Rules of Bankruptcy Procedure approved by the Judicial Conference on September 22-23, 1982. This rule, which as a matter of policy will preclude appointment of a special master by a bankruptcy court, was recommended by the Advisory Committee on Bankruptcy Rules apparently in direct response to the question presented by the appeal to the district court and to the court of appeals in the White Motor Corporation case. Because the operative facts in the White Motor Corporation case occurred long before adoption of the Model Rule and in view of the guidance offered by the decision of the Supreme Court in the Northern case and by the Judicial Conference in approving Rule 9031 of the Proposed Rules of Bankruptcy Procedure, there was no necessity for the court to grapple with the issue of the validity of the Model Rule in order to answer the question presented by the appeal in the White Motor Corporation case. In this sense, most of the opinion in that case appropriately may be characterized as dicta.

In any event, the holding in the White Motor Corporation case that 28 U.S.C. § 1471(a) and (b) invest the district courts with jurisdiction of bankruptcy cases and proceedings has been overruled by the later pronouncement in the Rhodes case.

The remaining alleged source of derivative jurisdiction pursuant to which bankruptcy cases and proceedings may be delegated to the transition courts of bankruptcy is 28 U.S.C. § 1334.

B. Jurisdiction under 28 U.S.C. § 1334.

There are a multiplicity of reasons for rejecting the argument that Congress continued 28 U.S.C. § 1334 in effect during the transition period as a failsafe measure to provide a jurisdictional basis for the courts of bankruptcy to continue to administer bankruptcy cases and proceedings in the event the non-Article III adjunct bankruptcy court system were declared unconstitutional.

1. None of the courts which have held that the district courts have jurisdiction over bankruptcy matters and proceedings under 28 U.S.C. § 1334, which jurisdiction may in turn be delegated to the transition courts of bankruptcy pursuant to the so-called Model Rule, have paused to examine the scope of the arcane jurisdictional grant in § 1334. No person knowledgeable in the history and development of our bankruptcy laws would suggest that a functional bankruptcy system can operate under the jurisdictional grant of § 1334 with its troublesome exclusivity provision and virtually unintelligible "matters and proceedings" jargon.[11/] If the vague "matters and proceedings" terminology appearing in § 1334 is sufficiently comprehensive in scope to

include all civil actions arising in or related to a bankruptcy case, and if such jurisdiction is triggered by the filing of a case under title 11 in the court of bankruptcy, it would seem to follow that thereafter, because of the exclusivity provision in § 1334, all proceedings in relation to such a case must be pursued in the court of bankruptcy. Yet in the White Motor Corporation case the appellate court suggested that the district court may want to consider whether to permit the products liability cases against the debtor "to go forward in the courts where they were pending initially." By what authority might the district court do that if its jurisdiction over such litigation under § 1334 is exclusive?

Clearly, 28 U.S.C. § 1471(b) was intended to override the anachronistic exclusivity provision in 28 U.S.C. § 1334.

What venue provisions govern bankruptcy cases and proceedings therein grounded on the jurisdictional grant in § 1334? As hereinabove pointed out the venue provisiors in 28 U.S.C. §§ 1471 and 1473 have been invalidated. The venue provisions of 28 U.S.C. § 1391 do not offer guidance as to where a bankruptcy case may be filed and certainly do not authorize a civil proceeding to be commenced in a court where a bankruptcy case is pending unless all the defendants reside in the district.

There is no provision in § 1334 giving the court jurisdiction over property of the debtor "wherever located." With 28 U.S.C. § 1471(e) stricken, the jurisdictional grant in § 1334 is completely deficient in cases involving property located in several states.

The purpose here is not to provide answers to these difficult questions but simply to call attention to the superficial manner in which the courts have dealt with this issue, and to rebut the suggestion that Congress retained § 1334 in effect as a fallback jurisdictional measure.

The drafters of the Bankruptcy Code recognized the deficiencies in § 1334 and simply scrapped the measure as no longer necessary.

2. Section 1334 of title 28 has never been viewed as providing jurisdiction for the courts of bankruptcy, as distinguished from the district courts, to administer bankruptcy cases and proceedings. Instead, section 2a of the old Act, 11 U.S.C. § 11a, invested the courts of bankruptcy with original, but not exclusive, jurisdiction to determine controversies in relation thereto. If section 1334 providing the district courts with exclusive jurisdiction over bankruptcy matters and proceedings operates to confer similar jurisdiction on the separate courts of bankruptcy, then the now repealed section 2a of the Bankruptcy Act existed for eighty years as both conflicting and superfluous legislation. Obviously, section 2a of the Bankruptcy Act was necessary precisely because 28 U.S.C. § 1334 never operated to invest the separate courts of bankruptcy with jurisdiction over bankruptcy matters and proceedings.

3. If old § 1334 has not been repealed by implication or stands revived, are both versions of the statute extant during the transition period? In her opinion in Citibank v. White Motor Corporation, 9 BCD 882 (1982), Judge Aldrich recited that the district court had jurisdiction of the appeal from the court of bankruptcy by reason of "future 28 U.S.C. § 1334" which is made applicable during the transition period by section 405(c)(2) of the Bankruptcy Reform Act of 1978. The Court of Appeals for the Eleventh Circuit has held that the new version of § 1334 is now in effect. See In Re International Horizons, Inc., 689 F.2d 996, 1000 n. 5 (1982). If old § 1334 is revived as suggested by the panel of judges in the White Motor Corporation case, and new § 1334 has been "bumped" from the statute books by such revival, it may follow that the district court did not have jurisdiction of the appeal in the White Motor Corporation case, with the result that the appeal was improperly before the court of appeals as well. In fact it would seem to mean that all the decisions of the district courts sitting as intermediate appellate courts and of the circuit courts of appeals, including decisions concerning the validity of the Model Rule, are void, except in those cases where the appeal has gone directly to the court of appeals by consent of the parties, as for example in Rhodes.

The presumption that old § 1334 has been repealed is at least as compelling as the presumption that both versions of § 1334 are in effect simultaneously.

The argument that § 1334 is revived by the invalidation of § 1471 is not particularly persuasive because § 1471 replaced sections 2a, 23 and the "property wherever located" phraseology of section 70a of the Bankruptcy Act, rather than § 1334.

4. The insistence that Congress carefully kept the jurisdiction of the district courts under 28 U.S.C. § 1334 in effect during the transition period because Congress was concerned about the constitutionality of the broad jurisdictional grant under section 1471 to non-Article III bankruptcy courts is an argument that defeats itself. If Congress had been so concerned it would have kept section 1334 permanently in place because surely there was no way to predict when a challenge to such jurisdiction might occur.

It is interesting to note that a leading proponent of this argument was a member of an Ad Hoc Committee of the Judicial Conference that on November 28, 1977, through a spokesman, advised sponsors of the Senate bill as follows:

> [F]rom the standpoint of the constitutionality of the bankruptcy judge assuming increased powers, there was a unanimity in this committee and there was unanimity in the Judicial Conference of the United States that Article III status was not necessary to assume that expanded jurisdiction. Circuit conferees, consisting of every district and every circuit judge within a circuit, have concluded that an Article III judge is not necessary.

See Hearings on S. 2266 and H.R. 8200 Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 95th Cong., 1st Sess. 411, 413-414 (Nov. 28, 29 and Dec. 1, 1977).

The legislative history cited by the court in the White Motor Corporation case reveals the concern of members of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee about establishing the bankruptcy court as a non-Article III court on a permanent basis. The House Judiciary Committee was so concerned about this matter that after passage of the Danielson-Railsback Amendment, which provided for a non-Article III bankruptcy court, it withdrew H.R. 8200 from further consideration on the floor and held additional hearings on the issue.12/

There is no legislative history to document a concern on the part of members of the House Judiciary Committee about the exercise of the judicial power of the United States by non-Article III bankruptcy judges during the relatively short transition period from the old court system to the new system. The Supreme Court has recognized that where necessary and justified by an exigency a non-Article III judge may exercise the judicial power of the United States for a transitory period. Netlakatta Indian Comm. v. Egan, 363 U.S. 555 (1960); Glidden v. Zdanok, 370 U.S. 530 (1962).

The members of the House Judiciary Committee were concerned about the exercise of such jurisdiction by non-Article III judges long-term, a concern ultimately shared by six justices in Northern.

5. As pointed out in Part I of this opinion the idea of laundering the jurisdiction of the bankruptcy court through the district court to impermeate it with an Article III aroma in the belief that such jurisdiction might then be exercised by non-Article III judges of an adjunct bankruptcy court originated in the Senate bill. The bill passed by the Senate on September 7, 1978 utilized a completely redrafted section 1334 both as the vehicle to pass jurisdiction through the district courts to the adjunct bankruptcy courts and to confer on the district courts jurisdiction of appeals from the bankruptcy courts. Under the Senate proposal the judges of the adjunct bankruptcy courts were to be appointed for twelve-year terms by the circuit courts.

The bill which had been passed by the House on February 7, 1978 provided for creation of an Article III bankruptcy court, the judges of which were to be appointed by the President to hold office during good behavior. The jurisdictional provisions in the House bill were contained in proposed 28 U.S.C. § 1471.

Following discussions between House and Senate sponsors of these bills, it was agreed that bankruptcy judges would be appointed by the President to hold office for a term of fourteen years rather than during good behavior. In view of the fact that the bankruptcy court was to be established as a non-Article III court, in order to enhance the status of the court, it was

agreed that the court would be created as an adjunct of the courts of appeals, with the jurisdiction of the court to be Article III scented by filtration through the courts of appeals rather than the district courts. This was to be accomplished by amendments to title 28, as follows:

> § 151. Creation and composition of bankruptcy courts
>
> (a) There shall be established in each judicial district, as an adjunct of the circuit court for the circuit in which such district is located, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.
>
> § 1471. Jurisdiction
>
> (a) Except as provided in subsection (b) of this section, the courts of appeals shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the courts of appeals, the courts of appeals shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case is commenced under title 11 shall exercise all of the jurisdiction conferred by this section on the courts of appeals.
>
> (d) Subsection (b) or (c) of this section does not prevent a court of appeals or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.
>
> (e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all the property, wherever located, of the debtor, as of the commencement of such case.

A compromise bill in this form was passed by the House by unanimous consent on September 28, 1978 and was scheduled for passage by the Senate later on the same date.[13/] For reasons which were generally well publicized[14/] but which are not documented in legislative history, the Senate reneged on the compromise agreement and delayed action on the legislation. As a result of further negotiation and compromise the bankruptcy court was unhinged from the court of appeals and "readjuncted" to the district court as originally proposed in the Senate bill, and the provisions of 28 U.S.C. §§ 151 and 1471 were redrafted accordingly as they appear in their present form.

It should be noted however that in both the initial and final versions of the compromise bill, 28 U.S.C. § 1334 (the Senate bill jurisdictional proposal) was jettisoned in favor of 28 U.S.C. § 1471 as the vehicle for passage of jurisdiction through the district courts to the bankruptcy courts.[15/]

In both versions of the compromise legislation 28 U.S.C. § 1334 was used only to confer on the district court jurisdiction of appeals from judgments, orders and decrees of the bankruptcy court, indicating that other proposed amendments that would have been made to section 1334 by the Senate bill were discarded as unnecessary.

One purpose of this short recitation of legislative history is to illustrate that the House and Senate sponsors of bankruptcy

reform legislation in the Ninety-Fifth Congress did not entertain any notion of keeping section 1334 in effect as a backup jurisdictional measure in the event the adjunct non-Article III bankruptcy court system should be declared unconstitutional. If the bankruptcy courts had been created as adjuncts of the courts of appeals as initially agreed upon by such sponsors, the system nevertheless would have been unconstitutional under the Northern analysis. How then could section 1334 jurisdiction have been transmitted to a court of appeals and radiated by that court to its adjunct courts of bankruptcy? One can envision the necessity to construct a large antenna atop the Federal building in Cincinnati to pick up section 1334 jurisdictional vibrations from the district courts to be beamed back to the adjunct bankruptcy courts. All of this is fanciful stuff, but perhaps no more fanciful than the attempted delegation of nonexistent section 1334 jurisdiction from the district courts to the bankruptcy courts by means of the Model Rule.

6. Assuming for purposes of discussion that the district courts do indeed have jurisdiction over bankruptcy cases and proceedings arising in or related to such cases under either 28 U.S.C. § 1471 or 28 U.S.C. § 1334, none of the decisions so holding have explained how this jurisdiction is invoked by the filing of a bankruptcy case or an adversary proceeding

arising therein or related thereto with the clerk of an entirely separate court, the court of bankruptcy.16/

Apparently, those who believe such jurisdiction exists in the district courts and that it may be delegated to the courts of bankruptcy pursuant to the Model Rule continue to entertain the notion that the courts of bankruptcy are adjuncts of the district courts even though six justices in Northern invalidated section 241(a) of the Bankruptcy Reform Act of 1978 because the bankruptcy courts are created as "adjuncts" of the district court in name only and not in fact.

The bankruptcy court flunked all of the tests applied by Justice Brennan in Part IV of his opinion for the purpose of determining whether the court was an adjunct as opposed to an independent tribunal. He emphasized the failure of the bankruptcy court to qualify as an "adjunct" of the district court by consistently placing the word "adjunct" in quotation marks.

Justice Rehnquist was even more emphatic in his concurring opinion.

> All matters of fact and law in whatever domains of law to which the parties' dispute may lead are to be resolved by the Bankruptcy Court in the first instance, with only traditional appellate review apparently contemplated by Art. III courts. Acting in this manner the Bankruptcy Court is not an "adjunct" of either the District Court or the Court of Appeals. (emphasis supplied).

If the bankruptcy courts created by Congress are not adjuncts of the district courts, and under Article III of the Constitution only Congress is authorized to create and assign functions to inferior courts, by what authority may the Judicial Branch authorize the district courts to recapture and reformulate the courts of bankruptcy/bankruptcy courts and assign to such courts a former role from which they have been systematically, specifically and purposefully liberated by Congress. The national rule-making authority of the Judicial Branch is subject to scrutiny by Congress and national rules cannot take effect until they have been approved by Congress. 28 U.S.C. § 2075. By any test the so-called Model Rule is a national rule. It was formulated at the behest of and was disseminated by the Judicial Conference of the United States. The district courts did not adopt the rule of their own volition; they were ordered to do so by the Judicial Councils of the eleven circuits. The evasion of the requirements of 28 U.S.C. § 2075 by classification of the Model Rule as a local rule, however well intentioned in the interest of avoiding chaos, is nevertheless a resort to judicial anarchy. In other words the rule creates that which it attempts to avoid.

We are certain that after reviewing the history of the Model Rule recited in the White Motor Corporation case and noting the requirements of 28 U.S.C. § 2075, the Court of Appeals for this circuit will revise its views concerning this matter.

For the same reason that the bankruptcy courts are not "adjuncts" of the district court merely because the statute says they are, the Model Rule is not a local rule merely because it has been so categorized.

In any event, the rule-making authority of the Judicial Branch does not extend to the restructuring of the Federal court system or to the splicing of jurisdictional fibers severed by the Supreme Court. These are matters within the exclusive province of Congress.

Part III

We assume that in sanctioning the Model Rule the panel of judges in the White Motor Corporation case did not intend to preclude the lower courts from pointing out specific defects in the rule. Under the facts of this case, subsections (D)(2) and (3) of the rule operate to deny the debtor a trial before an Article III judge on its counterclaim against Columbia Gas of Kentucky, Inc. for alleged use of the bankruptcy laws to take over the debtor's business. For this reason the rule is unconstitutional under the rationale of the recent holding of the United States Court of Appeals for the Fourth Circuit in 1616 Reminc Limited Partnership v. Atchinson & Keller Co., _____ F.2d _____, April 14, 1983.

Dated: June 13, 1983

By the court -

Judge

Copies to:

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Attorney for the Petitioning Creditors

Thomas E. Morgan
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FOOTNOTES:

1/ H.R. Rep. No. 595, 95th Cong., 1st Sess., 459 (1977).

2/ 11 U.S.C. § 102(3).

3/ Webster's Seventh New Collegiate Dictionary 790 (1963).

4/ Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ____ U.S. ____, 102 S.Ct. 2858, 2863-64, 73 L.Ed.2d 598, 605-06 (1982).

5/ Bankruptcy Reform Act of 1978, Sec. 404(e), 92 Stat. 2684.

6/ H.R. 6, 95th Cong., 1st Sess., 267-268.

7/ The words "may not" as used in title 11 are prohibitive, 11 U.S.C. § 102(4), and probably should be so construed as used in title 28 as well.

8/ No exception was made in 28 U.S.C. § 1471 for these types of proceedings, and as previously indicated it is the view of this court that 28 U.S.C. § 1334 has been repealed. Certainly, § 1334 is repealed as of April 1, 1984. See also 28 U.S.C. § 2283 which permits a court of the United States to stay a State court only where necessary in aid of its own jurisdiction.

9/ S. 2266, 95th Cong., 2d Sess., § 216, July 14, 1978.

10/ S. Rep. No. 989, 95th Cong., 2d Sess., 154-155 (1978).

11/ The "matters and proceedings" phraseology appears in the Bankruptcy Act of 1867 where it is embellished by specific jurisdictional grants. See Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st and 2d Sess., Supp. Appendix Part 1 at 29 (1976).

12/ Hearings on H.R. 8200 before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 95th Cong., 1st Sess., Dec. 12, 13, and 14, 1977; H.Rep. No. 13, 95th Cong., 2d Sess., Jan. 1978.

13/ 124 Cong. Rec., H 11047, H 11082, H 11088 (daily ed. Sept. 28, 1978).

14/ Ross, Chief Justice Seeks Delay on Bankruptcy Legislation, The Washington Post, Oct. 3, 1978, at C 11, col. 5; Mintz, Chief Justice Hit Ceiling, Sen. DeConcini Charges, The Washington Post, Oct. 7, 1978, at C 1, col. 1.

15/ 124 Cong. Rec., S 17403-17434 (daily ed. Oct. 6, 1978).

16/ For example, the district courts have federal question jurisdiction under 28 U.S.C. § 1331, but no one would argue that such jurisdiction is invoked by raising a federal question in pleadings filed in a State court.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

IN RE:

JOHNSON COUNTY GAS COMPANY, INC.
A KENTUCKY CORPORATION NO. 83-00002

DEBTOR

ORDER OF DISMISSAL

For the reasons stated in the Memorandum Opinion of the court this day entered, the involuntary petition for an order for relief under chapter 7 of the Bankruptcy Code against the debtor, and the debtor's counterclaim against Columbia Gas of Kentucky, Inc., are dismissed for lack of jurisdiction.

Dated: June 13, 1983

By the court -

Joe Lee
Judge

Copies to:

W. Thomas Bunch
Attorney for the Petitioning Creditors

Thomas E. Morgan
J. L. Fullin
Attorneys for Columbia Gas of Kentucky, Inc.

S. H. Johnson
Attorney for the debtor

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

IN RE: INVOLUNTARY CHAPTER 7

JOHNSON COUNTY GAS COMPANY, INC.

DEBTOR BANKRUPTCY NO. 83-00002

COLUMBIA GAS OF KENTUCKY;
HEATH CONSULTANTS; INC.;
AND REAMS CONTROLS, INC. APPELLANTS

VS. DISTRICT COURT NO. 83-209

JOHNSON COUNTY GAS COMPANY, INC. APPELLEE

BRIEF FOR APPELLANTS

On Appeal from United States Bankruptcy Court,
Eastern District of Kentucky, Pikeville Division,
Honorable Joe Lee, Bankruptcy Judge

This is to certify that a copy of the foregoing Brief for Appellants has been served, by mail, first class, to S. H. Johnson, Box 470, Paintsville, KY 41240, Attorney for Johnson County Gas Co.; Honorable Joe Lee, United States Bankruptcy Judge, Merrill Lynch Plaza, Lexington, KY 40507, this the 8 day of July, 1983.

W. Thomas Bunch

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ISSUES PRESENTED TO THIS COURT ON APPEAL

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2. DOES THE CONCEPT OF STARE DECISIS PRECLUDE THE BANKRUPTCY COURT FROM RENDERING AN OPINION DIFFERENT FROM A HOLDING DIRECTLY IN POINT BY A SUPERIOR COURT?

TABLE OF AUTHORITIES CITED

Supreme Court Cases

Circuit Court Cases

District Court Cases

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

IN RE:	INVOLUNTARY CHAPTER 7
JOHNSON COUNTY GAS COMPANY, INC.	
DEBTOR	BANKRUPTCY NO. 83-00002
COLUMBIA GAS OF KENTUCKY; HEATH CONSULTANTS, INC.; AND REAMS CONTROLS, INC.	APPELLANTS
VS.	DISTRICT COURT CIVIL NO. 83-209
JOHNSON COUNTY GAS COMPANY, INC.	APPELLEE

BRIEF FOR APPELLANTS

Come the Appellants, Columbia Gas of Kentucky, Heath Consultants, Inc. and Reams Controls, Inc., by and through counsel, and for their Brief in the above-styled matter state as follows:

STATEMENT OF FACTS

The Appellants herein were petitioning creditors seeking an involuntary adjudication of the Appellee, Johnson County Gas Company, Inc., in the United States Bankruptcy Court, Eastern District of Kentucky, Pikeville Division ("Bankruptcy Court"), pursuant to an Involuntary Petition filed on January 18, 1983. After discovery, the Appellants

moved for a summary judgment, contending that there was no question of fact that the Appellee was insolvent and bankrupt under Title 11, §§303 of the United States Bankruptcy Code ("Code"). The motion was argued before the Bankruptcy Court on March 30, 1983, and a Supplemental Motion for Summary Judgment was filed on April 15, 1983, to which the debtor responded, and thereafter submitted to the court for decision.

On June 13, 1983, the Bankruptcy Court issued a Memorandum Opinion and an order dismissing the case for lack of jurisdiction, relying up on its interpretation of Northern Pipeline Construction Co. v. Marathon Pipe Line, 102 S. Ct. 2858, 73 L. Ed.2d 598 (1982), and upon the Bankruptcy Court's own determination of the unconstitutionality of the Emergency Resolution promulgated by the United States Court of Appeals for the Sixth Circuit, and adopted by both the United States District Court for the Eastern District of Kentucky and by the Bankruptcy Court effective December 24, 1982, ("Emergency Resolution"). This appeal followed.

ISSUES PRESENTED TO THIS COURT ON APPEAL

1. Did the United States Bankruptcy Court subvert the opinion and holding of the United States Court of Appeals for the Sixth Circuit in the White Motor Corporation v. Citibank, ___ F.2d ___ No. 82-3638 (6th Cir. 4-1-83) by holding that, contrary to White, the Bankruptcy Code and the Emergency Resolution are unconstitutional?

2. Does the concept of stare decisis preclude the Bankruptcy Court from rendering an opinion different from a holding directly in point by a superior court?

ARGUMENT

In July, 1982, the United States Supreme Court in Marathon Pipe Line, supra, ruled that either a portion or all of §1471 of the Code was unconstitutional due to an excessive grant of jurisdiction to an Article I judge which could only have been granted to an Article III judge. After one extension, Marathon became effective on December 24, 1982, and, Congress having failed to correct the constitutional defect, the Emergency Resolution, previously adopted by all eleven United States Judicial Circuits, went into effect to continue the jurisdiction of bankruptcy matters in the United States District Courts under 28 U.S.C. §1334 to avoid chaos in the judicial system.

The Emergency Resolution, a copy of which is attached hereto as Exhibit 1, continued the jurisdiction of the Bankruptcy Court under the supervision and direction of the United States District Court, and went into effect in this Circuit on December 24, 1982 by order of the Sixth Circuit Court of Appeals. Since then, bankruptcy in this District has been operating under authority of the Emergency Resolution.

Numerous opinions by circuit district courts and bankruptcy courts have upheld the jurisdictional basis and

the continuation of bankruptcy matters under §1334, a narrow interpretation of §1471, or the Emergency Resolution since December 24, 1982. See 1616 Reminc Ltd. Partnership v. Atchison & Keller Co., ___ F.2d ___ No. 82-1284 (4th Cir. 4-14-83); Hansen v. First Nat. Bank of Tekamah, Nebraska, 702 F.2d 729 (8th Cir. 3-23-83), In Re International Harvester Co., 103 S.Ct. 1804 (4-18-83) cert. den. on 7th Circuit upholding validity of Emergency Resolution; Moody v. Martin, 27 B.R. 991 (D.C. Wisc. 3-7-83) issuing mandamus to Bankruptcy Judge to comply with Emergency Resolution; In Re Braniff Air Lines, 27 B.R. 231 (D.C. TEX. 1-20-83), affirmed 5th Circuit No. 83-1048; In Re Color Craft Press, Ltd., 27 B.R. 962 (D.C. Utah 2-22-83); Matter of Northland Point Partners, 26 B.R. 1019 (D.C. Mich. 2-8-83); In Re Ql Corp., 28 B.R. 647 (D.C. N.Y. 3-22-83); Otero Mills, Inc. v. Security Bank and Trust, 28 B.R. 386 (D.C. N.M. 2-28-83); In Re Mego International, Inc., 28 B.R. 324 (B.C. N.Y. 3/18/83); In Re Jorges Carpet Mills, Inc., 28 B.R. 616 (B.C. TN 4-6-83); Egeria Societa per Azioni di Navigazione, 26 B.R. 494 U.S.B.C. VA 1-14-83), and White Motor Corporation v. Citibank, ___ F.2d ___, No. 83-3638 (6th Cir., 4-1-83), copies of which are attached hereto for the court's convenience and marked as Appellants' Exhibit 2.

On April 1, 1983, the United States Court of Appeals for the Sixth Circuit, in White Motor Corporation v. Citibank, ___ F.2d ___ (6th Cir. 4-1-83), faced squarely the issue of the jurisdiction of the bankruptcy courts, and held

that "we find that, in spite of Northern Pipe Line, there remain at least two valid statutory grants of original jurisdiction over bankruptcy cases to the district court. First, the Northern Pipe Line decision simply does not question the jurisdiction of the district courts.... Thus, we hold that §§1471(a) and (b) giving the district courts original jurisdiction on all cases under Title 11 were not affected by the Supreme Court's decision in Northern Pipe Line. Even assuming, arguendo, that the Supreme Court invalidated all of §1471, the district courts retain original jurisdiction over bankruptcy matters under 28 U.S.C. §1334, which provides as follows: 'the district courts shall have original jurisdiction, exclusive of the states, of all matters and proceedings in bankruptcy'." White, supra pp. 11-13.

The court then went directly to the issue as to whether the Emergency Resolution was unconstitutional, and held specifically that the Court of Appeals and the District Courts "have the authority to adopt rules for the administration of bankruptcy cases which are within their jurisdiction," although "these rules must not violate the Constitution as construed in Northern Pipe Line." The court also held specifically "We find that the interim rule (the Emergency Resolution) does not conflict with the holding in Northern Pipe Line and is not prohibited by Article III of the Constitution. White, supra, p. 18. (Parenthetical note added).

Therefore, the Sixth Circuit Court of Appeals has ruled definitively that the Emergency Resolution and its interpretation of Northern Pipe Line continues the jurisdiction of the bankruptcy court as derivitive from that of the United States District Court and as an Article I adjunct thereto.

In the June 13, 1983 Memorandum Opinion, however, the Bankruptcy Court interpreted Northern Pipe Line differently from the interpretation given it by the Sixth Circuit in White, and then held the Emergency Resolution unconstitutional, directly in conflict with the Sixth Circuit's ruling in White. The Bankruptcy Court opined that the White decision contained defects and that upon the Sixth Circuit's review of the noted defects that the Sixth Circuit would correct its opinion accordingly.

The Memorandum Opinion also noted that there was a conflict in the Circuit in that Rhodes v. Stewart, decided on April 11, 1983, contained the proper interpretation of bankruptcy jurisdiction. A review of Rhodes shows that, in a historical preamble leading up to an interpretation of the Tennessee opt-out provision for exemptions applicable in bankruptcy proceedings, jurisdiction was casually mentioned. A copy of Rhodes is attached hereto as Exhibit 3 and that sentence is underlined. From the reading of the Rhodes opinion, that one sentence supporting the Bankruptcy Court's views was mere dicta and not to be considered as a definitive ruling or policy and construction of the Emergency Resolution

and the constitutionality of the Code in this judicial district.

In the instant case, the doctrine of stare decisis clearly applies. Stare decisis is defined in Black's Law Dictionary as the "policy of course to stand by precedent and not to disturb a settled point, citing Neff v. George, 4 NE2d 388 (IL 1936). Under this doctrine "...a deliberate or solemn decision of a court made after argument on the question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point again is in controversy." (emphasis added, citing State v. Mellenberger, 95 P.2d 709 (OR 1939), and St. Louis Southwestern Railway Company v. City of Tyler, Texas, 375 F.2d 938 (5th Circuit 1967), wherein even a circuit court of appeals held that they were constrained by the doctrine of stare decisis to follow the decisions already decided in their circuit.

In In Re Bill Ridgeway, Inc.. 4 B.R. 351 (B.C. N.J. 1980), a bankruptcy court ruled that under the doctrine of stare decisis it must follow the decision of a federal judge in the same district; see also, 20 Am.Jur.2d Courts §201 (1965). The general rule is that the stare decisis effect is accorded to a decision of a court higher in rank, or of the same rank, but not to a decision of a court lower in rank than the court in which the decision is cited as a precedent. Since the stare decisis effect is given to courts of superior

rank in the judicial hierarchy, such effect serves to remove a lower court's discretion as to the same issues when the lower court encounters those issues in subsequent cases. Ibid.

Indeed, once a judicial decision is made by a higher court, the lower court cannot disregard the precedent set, even if the lower court perceives error therein, disagrees with the rule of law, or believes a change should be made in the ruling. Davis v. Estelle, 529 F.2d 437 (5th Cir. 1976); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). Even a decision by one circuit court panel cannot be altered by another later panel in the same court without an en banc court sitting. Washington, supra at footnote 10, p. 1354.

In the instant case the United States Court of Appeals for the Sixth Circuit in the White case definitively, clearly, unequivocally, and without any limitations, faced the question of the unconstitutionality of the Code and the Emergency Resolution and ruled specifically that both were constitutional, i.e., the Code still retains jurisdiction applicable to the district courts and therefore the bankruptcy courts can continue as adjuncts in the nature of referees under the supervision of the district court, and that the Emergency Resolution does not violate Marathon, Article III of the Constitution or any other constitutional principle. To that extent, then, the Bankruptcy Court, was constrained and compelled to follow the precedent and stare

decisis effect of the White case without deviation therefrom. It did, of course, have the right to criticize the White case or point out defects therein, but it is required to implement the legal effect of White, otherwise our system of justice and the hierarchy of judicial rank is severely impaired and will eventually be destroyed.

Regardless of the Bankruptcy Court's beliefs as to the constitutionality of the Code or the Emergency Resolution, the doctrine of stare decisis makes it plain that it is compelled to follow precedent. This doctrine has already been applied in this district. Judge Kelley in Tennessee, although noting the defects in the White opinion, applied the law of this circuit in In Re Jorges Carpet Mills, supra, properly interpreting that he had no discretion to disregard the White opinion, but must follow the Sixth Circuit principles in our judicial hierarchy system. In the instant case, Judge Lee also was compelled to do the same thing, and was precluded by White from ruling that he had no jurisdiction by virtue of his interpretation of Marathon and the Emergency Resolution.

It is essential that bankruptcy judges follow the law that has been established within their judicial circuits. To do otherwise will amount to judicial anarchy, usurpation of superior judicial authority and rulings by bankruptcy judges that are counter to a superior court's ruling on the same issue, thereby causing conflict and division within the judicial district. In In Re V-M Corp., 23 B.R. 952 (B.C.

Mich. 1982), Judge Nims wrote, "although, the bankruptcy judges are no longer officers of the United States District Courts, the new bankruptcy courts are 'an adjunct of the district court for such district'and with limited exceptions, in this circuit, appeals are taken to the district court. I would therefore feel I am bound by the decisions of the district court for this judicial district." See also In Re Martin Edsell, Inc., 228 F.Supp. 143 (D.C. N.H. 1963), where a district court reversed a bankruptcy referee's allowance of a late filing because the bankruptcy judge did not follow precedent in that judicial district.

Judge Nims, in V-M Corp., also pointed out that bankruptcy judges are adjuncts of district courts, and as Article I adjuncts, they can be likened to other Article I governmental agencies which are bound by Article III judicial rulings. In Allegheny General Hospital v. NLRB, 608 F.2d 965 at 970 (3rd Cir. 1979), that circuit court wrote that

> "A decision by this court, not overruled by the United States Supreme Court, is a decision of he court of last resort in this federal judicial district. Thus our judgments . . . are binding on all inferior courts and litigants in the Third Judicial District, and also on administrative agencies when they deal with matters pertaining thereto. . . . [T]he Board is not a court nor is it equal to this court in matters of statutory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect. . . . For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law. (Emphasis added)

In Accord: Ithaca College v. NLRB, 623 F.2d 224 (2d Cir. 1980)

As was most succinctly stated by Bankruptcy Judge Britton in In re Zaleta, 29 B.R. 489 (B.C. Fla. 3-17-83): "A rule directed by the Judicial Council of this circuit is, I am convinced, no less binding on me than a rule of decision announced by a panel of that court".

CONCLUSION

To that extent, although the Appellants herein appreciate the great effort that the Bankruptcy Court went to in writing a 38-page opinion, the effect of that opinion is such that it overrules the Sixth Circuit Court of Appeals' interpretation of Marathon and the Emergency Resolution in this judicial circuit, and neither the bankruptcy court or this court should have the right to alter decisions made squarely in point by a court of higher rank in the same judicial hierarchy. Judge Lee's ruling forecloses the practice of bankruptcy and the enforcement of the rights of debtors and creditors in bankruptcy in the eastern district of Kentucky. With a jurisdictionally impotent court, there can be only judicial chaos, or, alternatively, the district court's acquisition, management and supervision directly of the thousands of pending bankruptcy matters. For the reasons set forth herein, the Memorandum Opinion of Bankruptcy Court should be set aside and the Order of Dismissal, effectively dismissing all of the within proceedings, should be reversed,

and a mandate should issue from this Court ordering the United States Bankruptcy Court to hear the involuntary petition on the merits, rather than dismissing same for lack of jurisdiction.

Respectfully submitted,

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This is to certify that a copy of the foregoing Brief was mailed, first class, to S. H. Johnson, Box 470, Paintsville, KY 41240, Attorney for Johnson County Gas Co.; Honorable Joe Lee, United States Bankruptcy Judge, Merrill Lynch Plaza, Lexington, KY 40507, this the 8th day of July, 1983.

_____
W. THOMAS BUNCH

APPENDIX OF EXHIBITS

INDEX OF CASES ATTACHED AS EXHIBITS

Exhibit 1 - * Emergency Resolution of Sixth Circuit

Exhibit 2 - Cases Upholding Emergency Resolution on Jurisdiction of Bankruptcy Courts

1616 Reminc Ltd. Partnership v. Atchison & Keller Co., ___ F.2d ___ No. 82-1284 (4th Cir. 4-14-83);

Hansen v. First Nat. Bank of Tekamah, Nebraska, 702 F.2d 729 (8th Cir. 3-23-83);

In Re International Harvester Co., 103 S.Ct. 1804 (4-18-83);

Moody v. Martin, 27 B.R. 991 (D.C. Wisc. 3-7-83);

In Re Braniff Air Lines, 27 B.R. 231 (D.C. Tex. 1-20-83);

In Re Color Craft Press, Ltd., 27 B.R. 962 (D.C. Utah 2-22-83);

Matter of Northland Point Partners, 26 B.R. 1019 (D.C. Mich. 2-8-83);

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Otero Mills, Inc. v. Security Bank and Trust, 28 B.R. 386 (D.C. N.M. 2-28-83);

In Re Mego International, Inc., 28 B.R. 324 (B.C. N.Y. 3/18/83);

In Re Jorges Carpet Mills, Inc., 28 B.R. 616 (B.C. TN 4-6-83);

Egeria Societa per Azioni di Navigazione, 26 B.R. 494 U.S.B.C. VA 1-14-83);

White Motor Corporation v. Citibank, ___ F.2d ___, No. 83-3638 (6th Cir., 4-1-83)

Exhibit 3 - Rhodes v. Stewart. ___ F.2d ___ (6th Cir. 4-11-83)

Exhibit 4 - Other Bankruptcy Reporter Cases Cited in Brief

In Re Bill Ridgeway, Inc., 4 B.R. 351 (B.C. NJ 1980);

In Re V-M Corporation, 23 B.R. 952 (B.C. Mich. W.D. 10-5-82);

In Re Zaleta, 29 B.R. 489 (B.C. Fla. 3-17-83)

R U L E

(a) Emergency Resolution

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The bankruptcy court constituted by §404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely

Exhibit 1.

motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt --

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3) (A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate;

allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (e) 2A and B of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (A) A district judge shall review:

(i) an order or judgment entered under paragraph (d)(2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d)(2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (d)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order of judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. §2075 and limited by SEC. 405(d) of the Act, to the extent

that such Title and Rules are not inconsistent with the holding of Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S. Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1284

1616 Reminc Limited Partnership,

Appellant,

v.

Atchison & Keller Company;
Atchison & Keller, Inc.;
Roland E. Kinser;
Tony Yaksh;
Peerless Insurance Company;

Appellees.

In Re:

1616 Reminc Limited Partnership,

Debtor.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued January 10, 1983 Decided April 14, 1983

Before WINTER, Chief Judge, CHAPMAN, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

Mark C. Ellenberg (Stephen N. Shulman, Cadwalader, Wickersham & Taft; James A. Newell, Holywell Corporation on brief) for Appellant; Mark P. Friedlander (Friedlander & Brooks P.C.; Robert C. Coleburn, Simmonds, Coleburn & Towner; Alexander M. Heron, Holland & Knight on brief) for Appellees.

Exhibit 2

WINTER, Chief Judge

The issue presented by this case is whether Rule 810, Rules of Bankruptcy Procedure, unconstitutionally transfers the exercise of "the judicial power" of the United States from an Article III court to a non-Article III bankruptcy referee[1] sitting under the 1898 Bankruptcy Act, by limiting the district court to the "clearly erroneous" standard when reviewing a compulsory breach of contract counterclaim adjudicated in the bankruptcy court. We hold that it does, and therefore remand to permit independent fact-finding by the district court. Because the other issues raised on appeal, with one exception noted below, infra note 10, are intertwined with the district court's reconsideration on remand, we do not reach them. We also conclude that our holding must apply only prospectively.

I.

1616 Reminc Limited Partnership (Reminc) is a debtor-in-possession in a Chapter XII proceeding begun in 1975. Its principal asset is a Rosslyn, Virginia, office building which it commissioned to be built in 1973 by CITCON Corporation. CITCON in turn executed a standard form subcontract with Atchison & Keller Company (A & K) for installation of a heating, ventilation

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1. Although "judge" is the more precise designation since promulgation of Bankruptcy Rule 901, 415 U.S. 1003 (1974), we will use the term "referee" to distinguish these proceedings under the 1898 Bankruptcy Act. See infra note 6.

and air conditioning (HVAC) system in the building. A & K's duties included construction of a chamber in which circulating air is heated over electrical elements known as reheat coils before being pumped throughout the building. Reset switches designed to detect overheating of the reheat coils were incorporated into the assembly to prevent irreparable damage to the coils. The subcontract and plans called for A & K to install two reset switches, one automatic and the other manual, and designated four possible approved suppliers of parts for the overall system.

When operating properly, the automatic reset switch would shut off the reheat coils if they began to overheat, allow cooling, then reactivate the coils, so as to provide uninterrupted heating to the building. The manual reset was planned as a back-up safety feature. The system originally installed in Reminc's building, however, failed to work as planned. The major problem was that the manual reset switch consistently activated before the automatic, leaving tenants without heat until maintenance personnel could reset the manual switches in each of the numerous air outlets throughout the system. Reminc lost tenants and eventually sought bankruptcy protection, filing its initial petition in August 1975.

A & K subsequently filed a proof of claim based upon a purported mechanic's lien against the office building. Reminc objected to the claim and, on July 22, 1976, filed a compulsory

counterclaim alleging breach of contract against A & K, its principals, and its surety Peerless Insurance Company.

After dismissal of A & K's claim, Reminc's contract action proceeded to trial before the bankruptcy referee, who found against Reminc on motion for directed verdict. On appeal, the district court reversed and remanded for additional fact-finding. Further proceedings were conducted on January 27, 1981. The referee again denied Reminc relief, relying primarily on a factual finding that the cause of the reset switches' malfunctioning was another subcontractor's faulty construction of the airshaft leading to the heating chamber, and not A & K's workmanship nor material selection.[3] The district court affirmed on February 17, 1982, deferring to the bankruptcy court's election "not to give full credence to Reminc's evidence" which the district court understood to be the referee's "prerogative in view of the conflict in the evidence."

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2. Reminc asserted liability on the theories of express and implied warranty under Virginia common law, as well as §§ 8.2-314 and 8.2-315, 2A Code of Virginia (1965 added vol.), the warranty provisions of the Virginia Commercial Code.

3. The bankruptcy court also found that Reminc had failed to satisfy two conditions precedent to suit against the surety Peerless on the bond: by giving untimely notice of intent to sue, and by filing the suit beyond the time specified. These rulings, also affirmed by the district court, involve factual determinations equally as complex as those of the breach of contract claim. For the reasons that follow in the text, we also leave their redetermination to the district court on remand. We note, however, that both courts below were correct as a matter of law that A & K is liable directly on its contract through the assignment to Reminc by CITCON, the general contractor, making the satisfaction of the bond conditions irrelevant to A & K's liability.

II.

Before us Reminc ascribes many errors to the proceedings below, among them the district court's adherence to the "clearly erroneous" standard of review found in Rule 810 of the Rules of Bankruptcy Procedure. Essentially, Reminc argues that application of Rule 810 here resulted in its compulsory[4] breach of contract counterclaim being fully adjudicated in the first instance by a concededly non-Article III official[5] without the possibility of independent fact-finding by the district court. It contends that adjudication of its claim by an Article I judge under these circumstances violates principles of Article III jurisprudence. Reminc does not attack the power of bankruptcy referees under the 1898 Bankruptcy Act[6] generally, but only adjudications in cases such as this involving common law contract claims and turning on

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4. The test for whether a counterclaim by the bankrupt or its trustee is compulsory is the same as that of Rule 13(a), Fed. R. Civ. P. 1 Collier on Bankruptcy ¶ 2.40[1.1] (14th ed. 1974).

5. There is no question but that the bankruptcy referee lacked both the life tenure "good Behaviour" and the irreducible salary "Compensation Clause" attributes of an Article III federal judge. See generally Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 582-87 (1980).

6. As an action pre-existing the October 1, 1979, effective date of the Bankruptcy Reform Act of 1978, P.L. 95-598, 92 Stat. 2549, the prior Bankruptcy Act of 1898 and applicable rules govern the proceedings. § 403(a), Bankruptcy Reform Act of 1978, 11 U.S.C. prec. § 101 (1979); Central Trust Co. v. Officials Creditors' Committee of Geiger Enterprises, Inc., _____ U.S. _____, 50 U.S.L.W. 3537 (1982).

questions of fact. Because of our disposition of this constitutional challenge to Rule 810, we do not reach the merits of Reminc's other claims.[7]

A.

We begin by considering the effect of Rule 810 in this case. Rule 810 states:

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

13 Collier on Bankruptcy 8-77 (14th ed. 1977). The rule requires "'the same effect to be given the referee's findings as Rule 52(a) of the Federal Rules of Civil Procedure accords to the findings of the trial court.'" Id. at ¶ 810.01, quoting Advisory Committee's Note to Rule 810. This limitation on review of referee fact-finding perpetuates the "clearly erroneous" standard of former Gen. Order in Bankruptcy No. 47, 305 U.S. 679 (1935); indeed, when General Order 47 was revised into Rule 810, the provision allowing the district judge to "receive further evidence" was abandoned, strengthening the degree of deference. 2A Collier on Bankruptcy ¶ 39.28 (14th ed. 1978).

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7. Except, as already noted, with regard to dismissal of its statutory warranty claims. See infra note 10.

We have long given effect to this standard, and we have not hesitated to reverse where a district court too readily substituted its view of the facts for the bankruptcy court's, particularly where witness credibility played a role in the referee's decision. See, e.g., Melichar v. Ost, 661 F.2d 300 (4 Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1974 (1982); Mountain Trust Bank v. Shifflett, 255 F.2d 718, 720 (4 Cir. 1958); Mutual Savings & Loan Association v. McCants, 183 F.2d 423, 426-27 (4 Cir. 1950).[8] Reminc's constitutional challenge to Rule 810 manifestly is an unanticipated one raising issues of first impression.

B.

We consider next if we should address the issue. Reminc suggests that Rule 810's unconstitutionality follows inexorably from the holding and the principles articulated in Northern Pipeline Construction Co. v. Marathon Pipeline Co., ____ U.S. ____, 102 S.Ct. 2858, 50 U.S.L.W. 4892 (1982). But A & K, in arguing that we should not decide the issue, correctly points out that the Marathon Pipeline Court expressly stayed the effect of its decision first until October 4, 1982, 50 U.S.L.W. at 4902, and

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8. The "clearly erroneous" standard has been carried over into the 1978 Bankruptcy Act in practice, although not expressly adopted in that statute. Northern Pipeline Construction Co. v. Marathon Pipeline Co., ____ U.S. ____, 102 S.Ct. 2858, 50 U.S.L.W. 4892, 4894 n.5 (1982); see also 1 Collier on Bankruptcy ¶ 3.03[8][b] (15th ed. 1982).

subsequently until and including December [illegible] 1982, 51 U.S.L.W. 3259, at which point the decision began to apply only prospectively. 50 U.S.L.W. at 4902. The Court foresaw that general retroactive application of its holding "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." Id.. A & K therefore argues that we should not address this issue.

We do not think that we should decline decision now. First, this case does not present the same issue decided in Marathon. Even though the principles invoked and applied in Marathon are the same which govern decision here, Marathon dealt with only the powers of bankruptcy judges under the 1978 Bankruptcy Act. We are concerned with the validity of a rule promulgated under the 1898 Bankruptcy Act. Second, Reminc's challenge to the validity of the rule was initiated and argued prior to the decision in Marathon.[9] Reminc therefore is not now before us claiming a windfall from any change in the law wrought by Marathon. Cf. Ramey v. Harber, 589 F.2d 753 (4 Cir. 1978), cert. denied, 442 U.S. 910 (1979). Whatever Marathon may teach with respect to retroactive and prospective application of what we decide, we think that it would be inequitable to deprive Reminc of its prescience in discerning the constitutional infirmity in Rule 810 when the rule is applied in the context of this case.

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9. The district court opinion and order here were issued February 17, 1982, while Marathon Pipeline was not announced until June 28, 1982.

C.

Turning to the merits, we note first that the degree to which plenary power to adjudicate traditional common law contract claims may be vested in a federal tribunal without full Article III trappings has never been fully defined. In Katchen v. Landy, 382 U.S. 323 (1966), decided before Rule 810 abrogated General Order 47 and thereby jettisoned district court de novo fact-finding, the Article III issue was not addressed. Instead, the Court at most held that a bankruptcy court could adjudicate in summary fashion the claims of a creditor and counterclaims against the creditor generally without violating the Seventh Amendment's guarantee to a trial by jury. Significantly, the Court characterized the creditor's affirmative assertion of a preference as but "an equitable claim to a pro rata share of the res", 382 U.S. at 336, a claim shaped by Congressional enactment. By contrast, Reminc's litigation here involves "breach of contract . . . and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." Marathon Pipeline, supra, 50 U.S.L.W. at 4903 (Rehnquist, J., concurring).[10]

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10. Reminc has combined claims under Virginia's Commercial Code warranty provisions, 2A Code of Virginia §§ 8.2-314 and 8.2-315, with its common law claims. We have no need to consider whether these code claims, as modern statutory ones, would also implicate a "clearly erroneous" limitation on review, as the (Continued)

In addition, in conducting a full trial covering all aspects of Reminc's contract claim while shielded by Rule 810, the bankruptcy referee was more than an "adjunct" of the district court.[11] Thus, neither Crowell v. Benson, 285 U.S. 22 (1932), nor United States v. Raddatz, 447 U.S. 667 (1980), endorsed the extent of control over Reminc's contract action effectively vested in the bankruptcy court by Rule 810. The "judicial power" required by Article III to be exercised by courts possessing certain attributes of political independence from the other branches of government has long been considered to include unprescribed consideration of facts as well as decision of questions of law. Crowell v. Benson, 285 U.S. at 57; see generally Note, Article III Limits on Article I Courts; The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 591-92 (1980). And Reminc's contract claim is not included

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Commercial Code does not encompass Reminc's allegations. The HVAC system was hardly "movable", 2A Code of Virginia § 8.2-105, and we see no merit in separating the contract into severable ones for each movable part that went into producing the whole contracted for by Reminc. Cf. Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 580 (7 Cir. 1976). Those counts therefore were properly dismissed.

11. Justice White in his Marathon Pipeline dissent elaborated at length on the broad powers of the referee even under the 1898 Act, and noted especially the continuity of the "clearly erroneous" standard from the old to the new Bankruptcy Act. 50 U.S.L.W. at 4906. This observation does not imply that the vesting of adjudicatory powers in a non-Article III judge becomes inherently violative of separation of powers notions whenever a rule such as Rule 810 governs appellate review. On the contrary, it only points up that where the claim adjudicated is one that by its nature can only be heard by an Article III judge in the federal system, the differing features of the various Bankruptcy Acts do not provide a sound basis for distinction upon which to uphold limited review.

among the many matters over which Congress possesses well-established power to commit to the authority of administrative agencies or legislative courts. See, e.g., Atlas Roofing Company v. Occupational Safety Commission, 430 U.S. 442 (1977); Palmore v. United States, 411 U.S. 389 (1973); American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828); Crowell v. Benson, supra; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

We therefore decide in part a question frequently reserved, "the extent to which Congress may commit the execution of even 'inherently' judicial business to tribunals other than Article III courts." Glidden v. Zdanok, 370 U.S. 530, 549, (1962) (opinion of Harlan, J.) The issue is not diminished because Rule 810 came into being as an Order of the Supreme Court rather than as an Act of Congress. As the Court has been careful to point out, "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946) (ultimately upholding validity of Rule 4(f), Fed. R. Civ. P.). To be sure, Congress generally enjoys the flexibility to "make a particular allocation to a non-Article III tribunal if functional considerations subserving a valid legislative purpose justify it (and if there is adequate provision for judicial review)." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 396 (2d ed. 1973) (emphasis original).[12] But although Congress may in many

instances pursue a valid legislative purpose by establishing a deferential statutory standard of judicial review,[13] here a court-adopted rule insulates a non-Article III official without the imperative of a Congressional directive to do so. This lack of Congressionally crafted purpose weakens the rule's stature in the present context.

Under the circumstances of this case, then, we conclude that the application of Rule 810 unconstitutionally vested the non-Article III bankruptcy referee with too great a measure of the judicial power of the United States. Reminc pursued its cause of

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12. Justice White's dissent in Marathon Pipeline warned against adoption of a principle that would "overrule a large number of our precedents upholding a variety of Article I courts--not to speak of those Article I courts that go by the contemporary name of 'administrative agencies'". 50 U.S.L.W. at 4909. Concluding that there is no "abstract principle" dividing the types of issues that may be adjudicated by Article III as opposed to Article I courts, Justice White in the end advocated reading Article III "as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck." Id. To this extent all Justices writing in Marathon agreed that there is an abiding limit on "the work that Congress may assign to an Article I court." Id. Cf. Tribe, American Constitutional Law, § 3-5 at 43-44 (1978).

13. See, e.g., § 706 of the Administrative Procedure Act, 5 U.S.C. § 706; § 205(h) of the Social Security Act, 42 U.S.C. § 405(h). This deferential review generally accompanies those matters classified as involving "public rights" in the categorization scheme set out in Marathon Pipeline, supra, 50 U.S.L.W. at 4897. It does not necessarily follow that as "public rights" permissibly adjudicated in the first instance by non-Article III bodies, such matters may be placed by Congress altogether outside the purview of Article III courts. See The Supreme Court, 1981 Term, 96 Harv. L. Rev. 62, 262-65; Atlas Roofing, supra, 430 U.S. at 455 n.13; Marathon Pipeline, supra, 50 U.S.L.W. at 4897 n.23.

action in the bankruptcy court not by choice, but by virtue of its position as debtor-in-possession responding by compulsory counterclaim to A & K's prior filing of a claim against it.[14] The bankruptcy judge exercised full adjudicative powers in disposing of the breach of contract matter in the first instance. Although the district court properly reviewed on appeal the adequacy of the bankruptcy judge's disposition, remanded once for further proceedings, and again on a second appeal gave careful and searching scrutiny to the record and issues raised prior to affirming, indisputably Rule 810's "clearly erroneous" standard was applied throughout. The challenged Rule thus insured transgression of the narrow but distinct principle that "a 'traditional' state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Article III court' if it is to be heard by any court or agency of the United States." Marathon Pipeline, 50 U.S.L.W. at 4903 (dissenting opinion of Burger, C.J.).[15]

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14. We do not construe the seeking of protection in a bankruptcy proceeding as an implied consent to trial by an otherwise unconstitutional tribunal, lest we move towards condonation of unconstitutional conditions on access to a federal forum.

15. Although we have concluded that Marathon Pipeline cannot by its terms be directly controlling of this case, we nonetheless take guidance from its authoritative elaboration of the issues involved. In distilling the specific holding of Marathon Pipeline to the kernel principle quoted in the text, we believe Chief Justice Burger enunciated a statement of Article III jurisprudence that resolves many of the competing constitutional inter-
(Continued)

II.

We turn now to the effect of our ruling. Although by no means as sweeping a disturbance of the bankruptcy adjudication scheme as that effected in Marathon Pipeline, our decision here nonetheless meets all three parts of the test of prospectivity stated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). We decide an issue of first impression, retroactive application of which will do little to further its operation, while instead adding still greater uncertainty to an already unsettled situation. This court has stated previously:

> Nothing in the Constitution prevents use of the technique of prospective limitation or prospective overruling. It is a developing technique of great usefulness in lending protection to those who had placed their reliance upon the earlier rule against the harsh impact of ex post facto change. It has been employed by many courts. The Supreme Court has made the technique widely familiar as a limitation upon the retroactivity of even constitutional doctrine.

Lester v. McFaddon, 415 F.2d 1101, 1107 (4 Cir. 1969) (footnotes omitted).

In holding that our decision regarding Rule 810 applies only prospectively, we do not deprive Reminc of the benefit of its foresight. As we have noted in prior cases, "In the Supreme Court, the prospective rule has usually been applied in the case

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ests drawn into Reminc's challenge to Rule 810. In finding this principle ultimately primary in this case, we do not intimate any view as to the resolution of an abstractly similar challenge in a different context.

in which it is first announced." United States v. Allen, 542 F.2d 630, 634 (4 Cir. 1976), cert. denied, 430 U.S. 908 (1977). Although "not an inevitable requirement", id., application to the instant case is the better practice so as to avoid rendering a merely advisory opinion.[16] To require a remand in this case, we expect, will work only a minimum disruption; we are aware of no other cases involving a like challenge to "clearly erroneous" review actually raised in a bankruptcy proceeding prior to the decision in Marathon Pipeline. In any case reviewed by a district court after December 24, 1982, the standard of review is no longer the "clearly erroneous" standard.[17]

Accordingly, we remand this case to the district court for reconsideration of its disposition of the appeal from the bankruptcy court. On remand the district court will be free to hear such evidence as it believes necessary for resolution of the

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16. Exceptional circumstances may occasionally warrant non-application to the case at hand, such as in McFaddon, where the court raised the novel jurisdictional issue sua sponte. 415 F.2d at 1102.

17. Effective with the Supreme Court's refusal to stay its decision in Marathon beyond December 24, 1982, the Circuit Council promulgated an order requiring the district courts of this circuit to adopt a local rule in the form prescribed in the order. See Circuit Council Order No. 3 (December 20, 1982). § (e)(2)(B) of that order provides:

> In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify in whole or in part the order or judgment of the bankruptcy judge and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

issues involved. In its review of the bankruptcy proceedings, the district court will be guided by the provisions of the district court's local rule adopted in compliance with § (e)(2)(B) of Order No. 3 of the Circuit Council of this circuit, at least until such time as Congress may prescribe a different scope of review.

VACATED AND REMANDED.