IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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UNPUBLISHED OPINION

In re	)	
	)	
GORDON M. McCLEAN, JR.,	)	Bankruptcy Case No. 84C-01279
GORDON M. McCLEAN, SR.,	)	Bankruptcy Case No. 84C-01280
	)	
Debtors.	)	
	)	
TRACY COLLINS BANK & TRUST COMPANY, a Utah corporation,	)	Civil Proceeding No. 85PC-0145
	)	Civil Proceeding No. 85PC-0144
Plaintiff.	)	
	)	
vs.	)	
	)	
GORDON M. McCLEAN, JR.,	)	DETERMINATION OF DEFENDANTS'
GORDON M. McCLEAN, SR.,	)	RIGHT TO TRIAL BY JURY ON
	)	ISSUES FOR WHICH JURY TRIAL
Defendants.	)	IS DEMANDED

This matter is before the Court, on its own motion,[1] to determine whether there is a right to trial by jury on the issues

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1 Bankruptcy Rule 9016(b)(3) states:

> Determination by Court. On motion or on its own initiative the court may determine whether there is a right to trial by jury of the issues for which a jury trial is demanded or whether a demand for trial by jury in a proceeding on a contested petition shall be granted.

Cf. Rule 39(a), Fed.R.Civ.P. See also Medtronic, Inc. v. Benda, 689 F.2d 645, 660, (7th Cir. 1982) cert. denied, 459 U.S. 1106, 103 S.Ct. 731, 74 L.Ed.2d 955 (1983); Covert, et al. v. The Washington Hilton Hotel, 33 Fair Empl. Prac. Cas. 657 (BNA) (D.D.C. 1983); In re Schmid, slip op., no. 84-04128G (Bkrtcy. E.D. Pa. Oct. 31, 1985).

for which a jury trial has been demanded by defendants in these consolidated adversary proceedings. For the reasons hereinafter set forth, the Court sua sponte strikes defendants' demand for a jury trial.

FACTUAL AND PROCEDURAL BACKGROUND

The debtors, Gordon M. McClean, Sr., and Gordon M. McClean, Jr., filed petitions for relief under Chapter 7 of the Bankruptcy Code on May 10, 1984. On February 27, 1985, Tracy Collins Bank and Trust Company commenced this adversary proceeding objecting to the dischargeability of certain debts pursuant to Section 523(a)(2)(B) of the Bankruptcy Code. On June 7, 1985, the Court entered an order authorizing plaintiff to amend its complaint to add claims for relief based upon averments of actual fraud and a false corporate financial statement. Essentially, the amended complaint alleges that the defendants were officers, directors, and shareholders of National Servaccount, Inc., a Utah Corporation, and that they induced plaintiff to extend credit to National Servaccount, Inc. in an amount in excess of $236,000 by means of false representations and a materially false financial statement, upon which plaintiff reasonably relied. On May 8, 1985, the debtors filed demands for a jury trial, and on June 5,

1985, in their answers to plaintiff's amended complaint, also endorsed demands for a jury trial.[2]

By stipulation among the parties, these proceedings were consolidated for trial. The matter is presently scheduled for a two-day jury trial on January 9 and 10, 1986.

ISSUE

The sole question the Court addresses on its own motion is whether a debtor is entitled to a jury trial on a creditor's complaint to determine the dischargeability of a debt.

DISCUSSION

I.

The Right to Trial by Jury on the Issue of Dischargeability Under the Seventh Amendment

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States,

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2 In their demands, defendants did not specify the issues they wished to have tried by a jury. Specification of issues is not required by the Bankruptcy Rules. Pursuant to Rule 9015(b)(2), a party may specify the issues to be tried by a jury; "otherwise he shall be deemed to have demanded trial by jury of all the issues so triable."

> than according to the rules of the common law.

Although the thrust of the Seventh Amendment is to preserve the right to jury trial as it existed in 1791, the phrase "common law," embraces all suits in which legal rights are to be determined, as distinct from suits in equity or admiralty. Curtis v. Loether, 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). At one time courts analyzed the right in historical terms, and if at the time of the adoption of the Seventh Amendment the common law courts had jurisdiction to decide the case and to provide adequate relief, the parties had a right to trial by jury. Whitlock v. Hause, 694 F.2d 861, 863, 10 B.C.D. 249, 7 C.B.C.2d 801 (1st Cir. 1982).[3] The Supreme Court now recognizes that the Seventh Amendment extends beyond common law forms of action existing in 1791 and includes actions unknown at the common law. Curtis v. Loether, supra 415 U.S. at 193. Under the present Seventh Amendment analysis there is less emphasis on whether a

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The English law of bankruptcy, as it existed at the time of the adoption of the Constitution, was designed for the protection of creditors and the only persons permitted to fall within the term "bankrupt" were traders. Voluntary bankruptcy was unknown at that time. Continental Bank v. Rock Island and Pacific Railway Co., 294 U.S. 648, 668, 55 S.Ct. 595, 79 L.Ed. 1110 (1935). Further, the laws were administered by the Lord Chancellor and no jury was used in bankruptcy practice. In re G.S.F. Corp., 7 B.R. 807, 809, 3 C.B.C.2d 466 (Bkrtcy. D. Mass. 1980). See In re Universal Research Laboratories, Inc., 203 U.S.P.Q. (BNA) 984 (Bkrtcy. N.D. Ill. 1978). See generally, Countryman, "A History of American Bankruptcy Law," 81 Comm.L.J. 226-32 (1976).

close equivalent to the subject proceeding existed in 1791. Instead, in determining whether an action based on a federal statute entails a constitutional right to a jury trial, courts should consider whether the action involves rights and remedies "of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." Pernell v. Southall Realty, 416 U.S. 363, 374-75, 94 S.Ct. 1723, 40 L.Ed.2d 198 (1974).

The "legal" character of an issue is determined by considering (1) the manner in which the question was treated prior to the merger of law and equity in 1938; (2) the remedies sought; and (3) the practical abilities and limitations of juries. Ross v. Bernhard, 396 U.S. 531, 538 n. 10, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970).[4] In the present case, it appears that the practical abilities and limitations of the jury is not a significant factor. The questions involved here are well within the abilities of a jury to handle. With respect to the premerger

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The practical and conceptual difficulties in applying this test were recognized by the dissenting justices in Ross:

> The fact is, of course, that there are, for the most part, no such things as inherently "legal issues" or inherently "equitable issues." There are only factual issues, and, "like chameleons [they] take their color from surrounding circumstances."

396 U.S. at 550.

custom, it appears that jury trials were seldom used in state court proceedings in which a creditor would bring an action on its debt and the debtor would assert his discharge as a defense. H.R. Rep. No. 91-1502, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4159. See Hearings Before a Special Subcomm. of the Senate Judiciary Comm. on S. 578, S. 1316, H.R. 2517, H.R. 2518 and H.R. 2519, 90th Cong., 1st Sess. 74-75 (Apr. 3, 1967) (statement of Referee Cowans). This Court has been unable to find any reported decision by a state court discussing the right to jury trial on the issue of discharge-ability. The determinative factor, then, is the nature of the relief sought. Although a money judgment is often considered a form of "legal" relief, not all forms of monetary damages can be characterized as "legal" in nature under a Seventh Amendment analysis. See Curtis v. Loether, supra, 415 U.S. at 196; Grayson v. Wickes Corp., 607 F.2d 1194, 1196 (7th Cir. 1979); Securities & Exchange Commission v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 95 (2d Cir. 1978); Securities & Exchange Commission v. Asset Management Corp., 456 F.Supp. 998, 999 (S.D. Ind. 1978); Cox v. City of Kansas City, Mo., 76 F.R.D. 459 (W.D. Mo. 1977). Monetary relief may be equitable if it is an integral part of the primary equitable relief granted. Curtis v. Loether, supra, 415 U.S. at 196.

It is well established that bankruptcy courts are essentially courts of equity. See Katchen v. Landy, 382 U.S. 323, 337, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966); Young v. Higbee Co., 324 U.S. 204, 214, 65 S.Ct. 594, 89 L.Ed. 890 (1945); Pepper v. Litton, 308 U.S. 295, 304, 60 S.Ct. 238, 84 L.Ed. 281 (1939); Local Loan Co. v. Hunt, 292 U.S. 234, 240, 54 S.Ct. 695, 78 L.Ed. 1230, 93 A.L.R. 195 (1934); Barton v. Barbour, 104 U.S. (14 Otto) 126, 134, 26 L.Ed. 672 (1881). In Katchen v. Landy, supra, 382 U.S. at 336-38, the Supreme Court held that a creditor who filed a proof of claim in a bankruptcy case was not entitled to a jury trial on the trustee's action to recover a voidable preference. The Court emphasized the equitable nature of bankruptcy proceedings and the existence of a "specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury." Id. at 339. Likewise, determination of the dischargeability of debts is fundamental to the administration of bankruptcy cases. The Code and Rules provide an effective mechanism for the expeditious resolution of dischargeability issues, which lie at the heart of the debtor's "fresh start." For purposes of the Seventh Amendment, these matters are essentially equitable in character. Accordingly, this Court concludes that there is no Seventh Amendment right to trial by jury on the question of dischargeability. Such a right, if one exists, must be found in the statute itself. Thus, this Court

concludes that determination of the dischargeability of a debt is not an action at law for which there is a consitutional right to a trial by jury. See In re O'Bannon, 49 B.R. 763, 765-66, 13 B.C.D. 49 (Bkrtcy. M.D. La. 1985).

II.

The Right to Trial by Jury on the Issue of Dischargeability Under § 17c(5) of the Bankruptcy Act

The controversy surrounding the issue of the right to trial by jury in dischargeability proceedings began with the 1970 amendments to the Bankruptcy Act. Prior to the amendments, the bankruptcy court would grant a general discharge to the debtor, but the effect of that discharge on specific debts would be determined in subsequent state court proceedings. See Matter of Merrill, 594 F.2d 1064, 1067, 5 B.C.D. 253 (5th Cir. 1979). The Official Form for discharge promulgated by the Supreme Court merely provided that the debtor was "discharged from all debts and claims which are made provable by [the Act], except such debts as are, by said Act, excepted from the operation of a discharge in bankruptcy." Official Form No. 45. As Professor Countryman observed, "all [the order of discharge] really [said] is you are discharged of all debts except those debts which you are not discharged of." Hearing Before Subcomm. No. 4 of the House Judiciary Comm. on S.J. Res. 88, H.R. 6665 and H.R. 12250,

91st Cong., 1st Sess. 72 (Oct. 1, 1969). See also id. at 36 (testimony of Referee Cowans).

Generally, a creditor who desired to escape the effect of the discharge upon its particular claim would sue the debtor in state court, and the debtor would assert his discharge as an affirmative defense. In the course of determining the debtor's liability on the debt itself, the state court would decide the effect of the federal discharge. Matter of Merrill, supra; Matter of Copeland, 412 F.Supp. 949, 952 n. 5 (D. Del. 1976). Congress found that in many instances the debtor, armed with a piece of paper showing he was discharged of all debts, would fail to appear and defend the state court action based upon a misplaced reliance on the discharge, and a default judgment would be taken against him. H.R. Rep. No. 91-1502, 91st Cong., 2d Sess. (Oct. 5, 1970), reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4156. See also Hearings Before Subcomm. No. 4 of the House Judiciary Comm. on S.J. Res. 88, H.R. 6665 and H.R. 12250, 91st Cong., 1st Sess. 42 (Oct. 1, 1969) (Statement of Referee Gene Brooks); id. at 48 (statement of Referee Clive Bare); id. at 66 (statement of Vern Countryman). See generally 1A COLLIER ON BANKRUPTCY ¶ 17.28A[1], at 1735-37 (14th ed. 1978). If the debtor did appear and defend the action and a jury was demanded, the jury would decide both the issue of the existence of the debt and the effect of the discharge. Matter of Merrill, supra, 594

F.2d at 1068. The 1970 amendments added a new Section 17c to the Act. Pub.L. 91-467, 84 Stat. 992 (Oct. 19, 1970). To except a debt from discharge, § 17c(1) provided that the bankrupt or any creditor must file an application with the bankruptcy court to determine the dischargeability of the debt, while § 17c(2) required that "if any debt is determined to be nondischargeable, [the bankruptcy court] shall determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof." Section 17c(5) provided that "[n]othing in this subdivision [c] shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists."

The question of whether § 17c(5) recognized or established the right to jury trial on the issue of dischargeability has been discussed at length by commentators[5] and the courts.[6]

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See e.g., Countryman, "The New Dischargeability Law," 45 Am.Bankr.L.J. 1 (1971); Herzog, "The Case for Jury Trials on the Issue of Dischargeability," 46 Am.Bankr.L.J. 235 (1972); Countryman, "Jury Trials on Dischargeability --A Reply to Referee Herzog," 46 Am.Bankr.L.J. 305 (1972); L. King, 1A COLLIER ON BANKRUPTCY ¶ 17.28A[6], at 1742.5 (14th ed. 1978).

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See e.g., Matter of Bannister, 737 F.2d 225, 226 n. 1, 11 C.B.C.2d 128 (2d Cir.), cert. denied sub nom. Wachovia Bank and Trust Company v. Bannister, 105 S.Ct. 509, 83 L.Ed.2d 400 (1984); Matter of Merrill, 594 F.2d 1064, 1068, 5 B.C.D. 253 (5th Cir. 1979); Law Research Service, Inc. v. Crook, 524 F.2d 301, 305 n. 6 (2d Cir. 1975); Matter of Swope, 466 F.2d 936, 18 A.L.R.Fed. 784 (7th Cir. 1972), cert. denied 409 U.S. 1114, 93 S.Ct. 929, 34 L.Ed.2d 697 (1973); Matter of Copeland, 412 F.Supp. 949 (D. Del. 1976); In re Sneider, 59

Professor Vern Countryman and Professor Lawrence King, two of the architects of the 1970 legislation, each concluded that no right to jury trial on the issue of dischargeability existed:

> While I find no ruling on the point, it is demonstrable, I believe, that there is no constitutional or statutory right to jury trial on the issue of dischargeability as such. If there is a right to jury trial, it is because of other issues involved in the case. In the present context, that proposition means that a right to jury trial exists only if it is accorded because of the nature of the creditor's claim. There frequently will be a right to jury trial on issues of the existence and amount of liability. There is at present no right to jury trial, constitutional or statutory, on the issue of dischargeability.

Countryman, "The New Dischargeability Law," 45 Am.Bankr.L.J. 1, 35 (1971) (footnote omitted).

> To be entitled to a jury trial two requirements must be met: (1) the right must have existed prior to this legislation; and (2) timely demand must be made for jury trial. When such right exists is a troublesome question not easily disposed of. Certainly there is and has been no right to jury trial on the question of dischargeability since that is an issue raised by the Bankruptcy Act which also provides that the bankruptcy court is a court of equity.

F.R.D. 391 (S.D. N.Y. 1973); In re Hinchey, 349 F.Supp. 116 (D. Ore. 1972); Transport Indemnity Company v. Hofer Truck Sales, 339 F.Supp. 247 (D. Kan. 1971); Matter of Palfy, 336 F.Supp. 1269 (N.D. Ohio 1972); In re Schmid, ___ B.R. ___, no. 84-04128G (Bkrtcy. E.D. Pa. Oct. 31, 1985); In re Lee, 50 B.R. 683, 13 B.C.D. 215 (Bkrtcy. D. Md. 1985); In re Carey, 7 B.C.D. 6 n. 1 (Bkrtcy. S.D. Ohio 1980); In re Patterson, 6 B.R. 149, 150, 6 B.C.D. 969 (Bkrtcy. S.D. Ohio 1980); In re Law Research Service, Inc., Bankr.L.Rep. (CCH) ¶ 64,528 (Bkrtcy. S.D. N.Y. 1971).

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> All the amendatory legislation has done is to extend the jurisdictional grant of power. If the issue of dischargeability is not one subject to the right of jury trial the facts necessary for proof on that issue would not seem to create such a right by themselves. The difficulty is that prior to this legislation, the suit would be in the state court on the debt. When the affirmative defense of discharge was pleaded, the elements of false financial statement and reliance (usually a § 17a(2) type of lawsuit), would be raised by the plaintiff in response to the affirmative defense, i.e., that the defense was not valid because the debt was nondischargeable under the Bankruptcy Act. If a jury trial had been demanded, the jury would consider all of the facts, including the falsity of the financial statement and the reliance. Granted that there may well have been a right to jury trial in the action on the debt, did that right encompass the issue of dischargeability necessitating additional facts? It seems not. Now, in the bankruptcy court the isue [sic] is strictly one of dischargeability, a Bankruptcy Act issue. The matter of the debt is somewhat extraneous, albeit important, and may be considered incidental to the main issue.

L. King, 1A COLLIER ON BANKRUPTCY, ¶ 17.28A[6], at 1742.6 (14th ed. 1978).

This has been the unanimous view of the courts and commentators, with the sole exception of Referee Herzog who, in a memorandum opinion[7] and an article in the American Bankruptcy

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7 In re Law Research Service, Inc., supra, Bankr.L.Rep. (CCH) at ¶ 64,528.

Law Journal,[8] argued that § 17c(5) conferred a right to a jury trial. In support of this view, Herzog points first to statements made during Congressional committee hearings on the proposed dischargeability legislation. Professor Charles Seligson, a co-author of the 14th edition of COLLIER ON BANKRUPTCY, and then chairman of the National Bankruptcy Conference, testified before a special subcommittee of the Senate Judiciary Committee that the bill was objectionable because it deprived a creditor of his right to a jury trial if he would get one in the state courts. Hearing Before a Special Subcomm. of the Senate Judiciary Committee on S. 578, S. 1316, H.R. 2517, H.R. 2518 and H.R. 2519, 90th Cong., 1st Sess. (April 3, 1967). The significance of this remark in determining Congressional intent is doubtful, however, for other witnesses appearing at the same hearing expressed contrary opinions. Id. at 49-50 (statement of Referee Harold H. Bobier); id. at 76-80 (statement of Referee Daniel R. Cowans). Perhaps the most illuminating statement at that hearing was that of Referee Daniel Cowans, President of the National Conference of Referees in Bankruptcy:

> I think that by including in the bill a right to a jury trial to the extent that the right exists, it might be left to the courts to determine whether these cases correctly interpret that there is no right to a jury

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8 Herzog, "The Case for Jury Trials on the Issue of Dischargeability," 46 Am.Bankr.L.J. 235 (1972).

> trial. It would leave to the courts the question of the constitutional right to a jury trial.

Id. at 79 (emphasis added).

Later hearings before a subcommittee of the House Judiciary Committee support the view that the 1970 amendments did not prescribe the right to a jury trial but left the issue for judicial determination. At those hearings Professor Countryman testified:

> In hearings on earlier bills, some concern was expressed about depriving the debtor or the creditor of his right to jury trial. That right is preserved by the last sentence of new § 17c(1), beginning at line 20 on page 5 of the bill, which provides that "Nothing herein shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists." What this would mean is that, if either debtor or creditor claimed a jury trial, and demonstrated that he was entitled to it by state or federal constitution or statute, one of two results would follow. Either the bankruptcy court would decline to hear the matter, leaving it to another court, state or federal, in which the objecting party would receive his jury trial, or the matter would be heard before the bankruptcy court, with a jury. This would doubtless mean that it would be heard before the federal district judge, rather than the referee. The Bankruptcy Act is not clear on the power of referees to preside over jury trials. The only jury trials now provided for by the Act itself are, under §19, on questions of insolvency and the commission of an act of bankruptcy arising on the filing of an involuntary petition. The Judicial Conference of the United States in 1960 adopted a resolution that "it is the sense of the Judicial Conference that referees in

> bankruptcy should not preside upon jury trials of involuntary petitions in bankruptcy" and the referees have been conforming to that resolution.

Hearings before Subcomm. No. 4 of the House Judiciary Comm. on S.J. Res. 88, H.R. 6665 and H.R. 12250, 91st Cong., 1st Sess. 68-69, 78 (Oct. 1, 1969). The House Report merely states that the right to jury trial is "preserved." H.R. Rep. No. 91-1502, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code. Cong. & Admin. News, p. 4164. A fair reading of the legislative history points to uncertainty on the part of Congress as to the existence of a right to jury trial on dischargeability. Congress "preserved" but did not "create" the right, and left it to the courts to decide whether the right, in fact, existed at all.

In re Swope, supra, 466 F.2d at 936, was the initial case to hold that § 17c(5) did not confer the right to jury trial on the issue of dischargeability. In a brief, unreported opinion the district court upheld the bankruptcy referee's denial of a jury trial, holding that Congress did not intend "to create a right to a jury trial . . . when none existed there before." Id. at 937. The Seventh Circuit affirmed, adopting Countryman's interpretation of Section 17c(5), viz., that the right to a jury trial existed "only with respect to factual issues subsidiary to the question of dischargeability, but not for the determination of the dischargeability question itself." Id. at 938 (emphasis

added). With the exception of Referee Herzog, all courts which considered the issue have agreed. See cases cited in footnote 6, supra.

A significant decision in which the jury trial issue was particularly well presented and thoughtfully addressed by the Court is Matter of Copeland, supra, 412 F.Supp. at 949. In that case, two creditors filed separate complaints to determine the dischargeability of debt, and demanded a jury trial. The debtors answered the complaint and moved to strike the jury demands. The creditors, arguing for a right to a jury trial, proposed variant positions. Crown Financial Corp. ("Crown") contended that while the dischargeability amendments of 1970 provided no right to jury trial on the sole issue of dischargeability, foreclosure of jury determination would deny it the opportunity to receive a decision on the factual issues, which normally are presented to a jury. People's Bank and Trust Co. ("People's") took a different stance, relying on In re Law Research Service, Inc., supra. People's argued that Section 17c(5) was meant to preserve the same jury trial right which formerly existed in a state court proceeding. In its view, because a party was entitled to a jury trial on the issue of dischargeability in state court, that right existed in proceedings in the bankruptcy court by virtue of § 17c(5).

Relying on Congressional intent, the district court concluded there was no right to jury trial on the issue of

dischargeability. The court noted that Congress intended to eliminate bifurcation of forums and the problems behind shuttling impecunious litigants between federal and state courts. In addition, the use of bifurcated forums resulted in inefficiency and inherent inequities which the 1970 amendments hoped to rectify. Thus no jury trial right existed. However, the court noted that it would grant the right to a jury trial where a debt is found to be nondischargeable, thereby preserving the right to a jury trial on the issue of liability as it previously existed in state court.[9]

A case which parallels Copeland and adopts its rationale is Matter of Merrill, supra, 594 F.2d at 1064. In Merrill, a creditor commenced a proceeding to except from discharge his claim against the debtor. The debtor requested a jury trial. The bankruptcy court denied the debtor's request, and at trial found that the debtor had defrauded the creditor. Accordingly, the court entered judgment declaring the debt nondischargeable.

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Courts may bifurcate the proceeding, and first conduct a jury trial on the existence of liability and the amount of damages, and then hold a bench trial on the issue of dischargeability, or vice versa. This procedure was recognized, followed, or approved in In re Adams, 761 F.2d 1422, 1424-25, 13 B.C.D. 346, 12 C.B.C.2d 1220 (9th Cir. 1985); Matter of Merrill, supra, 594 F.2d at 1068; Matter of Bannister, supra, 737 F.2d at 226 n. 1; Matter of Copeland, supra, 412 F.Supp. at 954; In re O'Bannon, supra, 49 B.R. at 769 n. 15; In re Carothers, 22 B.R. 114, 120, 9 B.C.D. 680 (Bkrtcy. D. Minn. 1982); Matter of Evans, 1 B.R. 229, 230 (Brktcy. S.D. Fla. 1979).

On appeal, the Fifth Circuit concluded that the debtor had no right to a jury trial on the dischargeability issue, finding In re Swope more persuasive than In re Law Research Services, Inc. The Fifth Circuit also agreed with In re Copeland, that if a debt is found to be nondischargeable the debtor is still entitled to a jury on the issues of liability and damages.

III.

The Right to Trial by Jury on the Issue of Dischargeability Under the Bankruptcy Reform Act of 1978 and the Bankruptcy Amendments and Federal Judgeship Act of 1984

The Bankruptcy Reform Act of 1978 (the "Code") superseded the Bankruptcy Act of 1898, as amended, for all cases commenced on or after October 1, 1979. Under the Code, a new Section 1480 was added to Title 28, United States Code. That section provided as follows:

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

The Congressional intent behind the enactment of § 1480 can be gleaned from two passages from the House Report:

> Proposed section 1480 requires that the right of jury trial be preserved as it is under present law. Bankruptcy courts will be required to hold jury trials to adjudicate

> what are under present law called "plenary suits," that is, suits that are brought in State or Federal courts other than the bankruptcy courts.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 12 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News, p. 5973 (footnote omitted).

> Subsection (a) continues any current right of litigants in bankruptcy cases, and cases related to bankruptcy cases, such as plenary actions, to a jury trial. The exception provided in subsection (b) is to the trial of issues arising on the trial of an involuntary bankruptcy petition.

Id. at 448, reprinted in 1978 U.S. Code Cong. & Admin. News, at 6404.

Several courts and commentators noted that the imprecise draftsmanship of 1480(a) did not permit easy application of the statutory standard for jury trials. See, e.g., In re Mozer, 10 B.R. 1002, 1004, 7 B.C.D. 849 (Bkrtcy. D. Colo. 1981); Levy, "Trial By Jury Under the Bankruptcy Reform Act of 1978," 12 Conn.L.Rev. 1, 10 (1979). The apparent restriction in § 1480(a) of preserving the right to trial by jury only where such right was guaranteed by statute was a source of confusion. "Since the right to trial by jury is most often expressed in terms of the right as it existed at common law, and since the common law right to trial by jury is not usually tied to a statute, a rather glaring exception to the right to trial by jury before the bankruptcy judge [appeared] to exist." Levy, supra, at 9-10.

This "literalist' interpretation was generally rejected by the courts, which looked instead to the nature of the issues to be tried. See, e.g., In re Fleming, 8 B.R. 746, 7 B.C.D. 252, 3 C.B.C.2d 589 (N.D. Ga. 1980); Towers v. Titus, 5 B.R. 786 (N.D. Cal. 1979); In re Otis, 13 B.R. 279, 4 C.B.C.2d 1333 (Bkrtcy. N.D. Ga. 1981); In re First Financial Group of Texas, Inc., 11 B.R. 67, 7 B.C.D. 896 (Bkrtcy. S.D. Tex. 1981); In re Mozer, supra, 10 B.R. at 1002.

Neither Section 523 nor its legislative history contains any mention of the right to trial by jury on the issue of dischargeability. In re Schmid, supra. Congress' silence on the jury trial issue in the Bankruptcy Code and its legislative history suggests that it approved of the interpretation given § 17c(5) by the courts. Courts which considered the issue under the Code followed the cases decided under the Act and held that no right to trial by jury existed on the issue of dischargeability. See In re Schmid, supra; In re Lee, supra, 50 B.R. at 684; In re O'Bannion, supra, 49 B.R. at 763; In re Carothers, supra, 22 B.R. at 120.

Few courts had an opportunity to consider the issue under the Code before Marathon intervened. On June 28, 1982, the Supreme Court held that Congress had acted unconstitutionally in granting non-Article III bankruptcy judges the power to hear and adjudicate proceedings "related to" a bankruptcy case. Northern

Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598, 6 C.B.C.2d 785 (1982). The Court stayed the effect of its decision until October 4, 1982, and again until December 24, 1982, at which time the decision began to apply prospectively. When the stay expired on December 24, district courts across the country, including the district court for Utah, adopted a Model Interim Rule for the continuation of the bankruptcy system, which was proposed by the Judicial Conference of the United States. The Emergency Rule provided at subdivision (d)(1)(D) that bankruptcy judges could not conduct jury trials. In re Color Craft Press, Ltd., 27 B.R. 962, 967, 10 B.C.D. 182, 8 C.B.C.2d 93 (D. Utah 1983). The Rule continued in effect until July 10, 1984, when the Bankruptcy Amendments and Federal Judgeship Act of 1984 was signed by the President.[10]

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It was contemplated that under the new Bankruptcy Rules, which became effective on August 1, 1983, jury trials would be conducted by bankruptcy judges. See Bankruptcy Rule 9015. The conflict between the Emergency Rule and Rule 9015 created uncertainty as to the status of jury trials before the enactment of the 1984 Bankruptcy Amendments. See In re Kaiser, 722 F.2d 1574, 11 B.C.D. 529, 9 C.B.C.2d 910 (2d Cir. 1983); In re Proehl, 36 B.R. 86, 12 B.C.D. 321, 11 C.B.C.2d 1084 (W.D. Va. 1984); Matter of Paula Saker & Co., Inc., 37 B.R. 802 , 11 B.C.D. 743 (Bkrtcy. S.D. N.Y. 1984); In re Martin Baker Well Drillings, Inc., 36 B.R. 154 (Bkrtcy. D. Me. 1984); In re O.P.M. Leasing Services, Inc., 35 B.R. 854, 11 B.C.D. 821 (Bkrtcy. S.D. N.Y. 1983), aff'd in part, rev'd in part, 48 B.R. 824, 13 B.C.D. 114, 12 C.B.C.2d 1322 (S.D. N.Y. 1985). See also 1 COLLIER ON BANKRUPTCY ¶ 3.01[b], at 3-63 (15th ed. 1985).

Section 1480 was repealed by the 1984 Amendments.[11]

The statutory authority for jury trials in bankruptcy proceedings is now found at 28 U.S.C. § 1411, which provides:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.
>
> (b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

There is absolutely no legislative history to guide courts in ascertaining the Congressional intent behind Section 1411. On its face, § 1411 is merely declaratory of the right to a jury trial for a limited class of contingent tort claims, which may only be tried before the district court. In re Morse Electric Company, Inc., 47 B.R. 234, 238, 12 B.C.D. 957 (Bkrtcy. N.D. Ind. 1985). See 28 U.S.C. §§ 157(b)(2)(B) and 157(b)(5). One view is that bankruptcy judges are no longer empowered to conduct jury trials. 1 COLLIER ON BANKRUPTCY, supra, at ¶ 3.01[i]. Another is that despite the restrictive language of § 1411, Congress did not intend to change prior law, except to insure that personal

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11 For an explanation of the internal inconsistencies in the jury trial provisions contained in the 1984 Amendments and the reasons for this Court's determination that 28 U.S.C. § 1480 was repealed, see In re O'Bannon, supra, 49 B.R. at 766-67.

injury and wrongful death tort claims not be heard in bankruptcy courts.[12]

This Court does not find it necessary to determine whether and under what circumstances it may be appropriate to preside over a jury trial. It is sufficient, for purposes of this Constitutional and statutory analysis, to observe that the 1984 Bankruptcy Amendments did not enlarge the right to a jury trial on the issue of dischargeability.[13]

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12 See In re Rodgers & Sons, Inc., 48 B.R. 683 (Bkrtcy. E.D. Okla. 1985). See also 130 Cong. Rec. S 7618-19 (daily ed. June 19, 1984) (debate on H.R. 5174); Riley, "More Complications for Manville Cases?," The National Law Journal 3,40 (July 23, 1984).

13 The Court's conclusion that the parties do not enjoy the right to jury trial on the issue of dischargeability is reinforced when one considers the language of 28 U.S.C. § 157. In Curtis v. Loether, supra, 415 U.S. at 189; Sibley v., Fulton Dekalb Collection Service, 677 F.2d 830, 832 (11th Cir. 1982); Gnossos Music v. Mitken, Inc., 653 F.2d 117, 119 (4th Cir. 1981); and Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir.), cert. denied 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978), the word "court," as it appeared in the Fair Housing provision of the Civil Rights Act of 1968, the Fair Debt Collection Practices Act, the 1976 Copyright Act and the Truth in Lending Act, respectively, was found to mean either the "judge" singularly, or "judge and jury," for purposes of the right to trial by jury on the issue of statutory damages. In contrast, 28 U.S.C. § 157 refers specifically to the bankruptcy judge. Section 157(b)(1) provides that a bankruptcy judge may hear and determine all core proceedings arising under Title 11. Section 157(b)(2)(I) adds that "determinations as to the dischargeability of particular debts" are "core proceedings."

CONCLUSION AND ORDER

There are two possible sources of a right to jury trial on a statutory cause of action. First, Congress may provide for trial by jury in the statute itself, regardless of the nature of the claim. Second, if the claim involves rights and remedies of the sort traditionally enforced in an action at law, the Seventh Amendment preserves the right to jury trial.

An action to determine the dischargeability of a debt has two aspects. The first is the underlying action for a money judgment on the creditor's claim. This generally arises under state law and would be triable in a state court where the parties would enjoy the right to a jury trial absent the existence of the bankruptcy case. The other is the determination of dischargeability itself. If a jury is available in a dischargeability proceeding at all, it would only be for the purpose of establishing the amount of the plaintiff's claim, which is sought to be excepted from discharge. In the present case, defendants do not appear to have put in issue the existence or amount of their indebtedness.

There is nothing in the 1984 Amendments, the Bankruptcy Code, the former dischargeability law, the Seventh Amendment, nor the policy underlying the statute which permits a jury trial on the issue of dischargeability. The Court therefore concludes that this action to determine the dischargeability of a debt lies

within its equitable jurisdiction and no right to jury trial exists. Accordingly, it is hereby

ORDERED, that the defendants show cause in writing with citations to all legal authorities upon which they intend to rely, if any cause they have, within ten days of the date of entry of this order, why an order should not be entered consistent with the foregoing memorandum striking their demand for a jury trial, and why trial and determination of the issues of dischargeability and liability on plaintiff's claims should not be held before the undersigned United States Bankruptcy Judge; and it is further

ORDERED, that a final pre-trial conference to resolve any matters raised in this memorandum and to consider the proposed pre-trial orders submitted by the parties, shall be, and the same hereby is, scheduled before the undersigned on Monday, January 6, 1986, at the hour of 10:30 a.m., in Room 369, U.S. Courthouse, 350 South Main Street, Salt Lake City, Utah.

DATED this 20 day of December, 1985.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE