

October 2011

UNLAWFUL REPRIEVE: AN ANALYSIS OF THE CONSTITUTIONALITY OF SECTION 747 OF THE CONSOLIDATED APPROPRIATIONS ACT

J. Michael Morgalis

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>

Recommended Citation

J. Michael Morgalis, *UNLAWFUL REPRIEVE: AN ANALYSIS OF THE CONSTITUTIONALITY OF SECTION 747 OF THE CONSOLIDATED APPROPRIATIONS ACT*, 79 U. Cin. L. Rev. (2011)
Available at: <https://scholarship.law.uc.edu/uclr/vol79/iss2/13>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

UNLAWFUL REPRIEVE: AN ANALYSIS OF THE CONSTITUTIONALITY OF SECTION 747 OF THE CONSOLIDATED APPROPRIATIONS ACT

*J. Michael Morgalis**

I. INTRODUCTION

In July 2009, President Barack Obama declared his strong opposition to congressional measures aimed at restoring dealerships terminated in the Chrysler Group LLC (Chrysler) and General Motors (GM) bankruptcies.¹ Further, the Obama Administration stated that such congressional action would create “dangerous precedent” because of the possible intervention into closed judicial bankruptcy proceedings.² Despite this opposition, in December 2009 Congress passed a bill providing rejected car dealerships a chance for reinstatement by appealing their cases to an arbitrator.³ The result of the legislation has been twofold: on the one hand, hundreds of dealerships have been reinstated; however, on the other hand, the bill has raised questions regarding Congress’s constitutional authority to enact such a bill.⁴ This Comment will focus on the latter and suggests that Congress acted unconstitutionally when it enacted Section 747 of the Consolidated Appropriations Act. Specifically, congressional action seemingly reopened final judicial judgments from the Chrysler and GM bankruptcy proceedings, and the consequences of its actions could create a

* Associate Member, 2009–2010 University of Cincinnati Law Review; A.B. Harvard College. The author would like to thank Professor Aaron Bryant for his suggestion of the topic and his guidance; Professor Michael Solimine for his global comments and reference to important sources of information; and Professor Kristin Kalsem for her comments. Also, many thanks to Jonah Knobler, Esq. for his editing efforts.

1. Brian Faler, *Obama Opposes House Plan to Protect Chrysler, GM Dealerships*, BLOOMBERG, July 15, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aioxPp9w.vzM>; Ken Thomas, *Obama Auto Task Force Warns Against Dealer Plan*, CRAIN’S DETROIT BUS., July 21, 2009, <http://www.crainsdetroit.com/article/20090721/FREE/907219975#> (stating that Chrysler and GM “had far too many dealers relative to the number of cars they were selling” and that the average Toyota dealer was selling four times as many vehicles as the average Chevrolet dealer).

2. Thomas, *supra* note 1.

3. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009).

4. Tom Krisher, *Chrysler to Let 50 Dealers Rejoin Sales Network*, ABC NEWS, Mar. 26, 2010, <http://abcnews.go.com/Business/wireStory?id=10209751> [hereinafter Krisher, *50 Dealers*]; Tom Krisher, *More U.S. Dealers Appeal Chrysler, GM Shutdowns*, MANUFACTURING.NET, Jan. 22, 2010, <http://www.manufacturing.net/News-More-Dealers-Appeal-Chrysler-GM-Shutdowns-012210.aspx> [hereinafter Krisher, *Dealers Appeal*].

precedent allowing for similar acts in the future.

In early 2009, Chrysler and GM faced declining revenues and an inability to pay their creditors. As a result, each filed for bankruptcy in the spring of 2009 under Chapter 11 of the Bankruptcy Code.⁵ Within forty days of their respective bankruptcy filings, Chrysler and GM successfully completed their transactions that created the entities “New Chrysler” and “New GM.”⁶ In forming these new entities, each car manufacturer abrogated a large number of franchise agreements within their dealership networks to become more cost-effective and competitive.⁷ Dealerships objected to such actions but were unable to persuade the bankruptcy court to reinstate their agreements.⁸

Subsequently, Congress sought information explaining why certain dealerships were closed and on what grounds.⁹ Congress eventually responded to the termination of thousands of dealerships by enacting Section 747 of the Consolidated Appropriations Act,¹⁰ which provided potential remedies for discontinued dealerships via an arbitration process with either Chrysler or GM. Since the passage of the bill, Chrysler and GM have granted reprieve to hundreds of arbitration-eligible dealerships that were scheduled to be eliminated through the reorganization process of each company.¹¹ Thus, this legislation allowed car dealerships, permissibly terminated in bankruptcy proceedings, to circumvent the final judgments issued by the Southern District of New York Bankruptcy Court and the Second Circuit Court of Appeals.

This Comment argues that Congress’s enactment of Section 747 of Consolidated Appropriations Act is unconstitutional as it pertains to the separation of powers. Part II of this Comment outlines the jurisprudence of bankruptcy courts as well as their inherent authority despite being non-Article III judges. It also discusses the GM and Chrysler bankruptcy court decisions and Congress’s reaction. Part III considers two prominent Supreme Court cases dealing with congressional actions

5. Jim Rutenberg & Bill Vlastic, *Chrysler Files for Bankruptcy; U.A.W. and Fiat to Take Control*, N.Y. TIMES, May 1, 2009 at A1; Bill Vlastic & Nick Bunkley, *Obama is Upbeat for G.M. Future on Day of Pain*, N.Y. TIMES, June 2, 2009 at A1.

6. Tomoeh Murakami Tse, *Chrysler Gets Judge’s Approval for Asset Sale*, WASH. POST, June 1, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/01/AR2009060100804.html>; Steven Mufson & Tomoeh Murakami Tse, *Post-Bankruptcy GM Will Have Work Cut Out For It*, WASH. POST, July 7, 2009, at A11, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/07/06/AR2009070600450.html>.

7. Associated Press, *GM Begins Announcing its 1,100 Dealership Closures*, FOX NEWS, May 15, 2009, <http://www.foxnews.com/story/0,2933,520281,00.html>.

8. *In re General Motors Corp.*, 407 B.R. 463, 515 (Bankr. S.D.N.Y. 2009).

9. H.R. RES. 591, 111th Cong. (2009).

10. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009).

11. Krisher, *50 Dealers*, *supra* note 4.

2010]

UNLAWFUL REPRIEVE

827

to reopen or limit judicial decisions. Part IV examines the constitutionality of Section 747, a provision that offered Chrysler and GM car dealerships retroactive opportunity for arbitration. Finally, Part V concludes that the measures taken by Congress were unconstitutional, but because of the unique relationship between the car companies and the federal government, no legal actions will likely ensue. Without a challenge to Congress's authority to circumvent final judicial decisions, precedent will exist allowing for similar behavior in the future.

II. BACKGROUND

To understand the issues raised by Section 747 of Consolidated Appropriations Act and the Chrysler and GM bankruptcies, it is necessary to discuss the jurisprudence surrounding bankruptcy courts and their authority to grant final decisions. This Part first discusses the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹² Next, it outlines Congress's reaction to *Northern Pipeline*, which essentially codified the Court's holding and established the bankruptcy infrastructure still intact today. This Part then describes the Chrysler and GM bankruptcy decisions. Finally, it analyzes the bill Congress passed in response to the automotive bankruptcy proceedings.

A. Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

In *Northern Pipeline*, the Court considered whether the jurisdictional grant to bankruptcy judges in the Bankruptcy Act of 1978 violated Article III of the Constitution.¹³ The Act prescribed that bankruptcy judges were to be appointed by the President and confirmed by the Senate for terms of fourteen years.¹⁴ The judges were subject to removal for extreme behavior and their salaries statutorily set.¹⁵ The Act also granted bankruptcy judges jurisdiction over all civil proceedings brought under or arising under Chapter 11 of the Bankruptcy Code.¹⁶ Panels of three judges could also be established to hear appeals of final judgments, orders, decrees, and interlocutory

12. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion).

13. *Id.* at 52.

14. *Id.* at 53.

15. *Id.* The salaries could be adjusted through the Federal Salary Act. Judges could be removed for "incompetency, misconduct, neglect of duty or physical or mental disability." *Id.* (quoting 28 U.S.C. § 153(b) (1976 ed., Supp. IV)).

16. *Id.* at 54 (citing 28 U.S.C. § 1471(b) (1976 ed., Supp. IV)).

appeals.¹⁷

When considering the constitutionality of the Bankruptcy Act, the Court cited Article III of the Constitution, which states:

The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.¹⁸

From this clause the Court concluded it was the Framers' intent to have an *independent* judiciary that enjoys life tenure with fixed and irreducible compensation.¹⁹ Because under the Bankruptcy Act the bankruptcy judges were not given life tenure and their compensation could be reduced, the Court found that the judges were clearly not Article III judges.²⁰ The Court concluded that the Bankruptcy Act impermissibly removed judicial power from Article III courts and gave that power to non-Article III adjunct courts.²¹

B. Congress's Response to Northern Pipeline

On July 10, 1984, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984.²² Pursuant to the statute, in each judicial district, bankruptcy courts would constitute a unit of the district court.²³ The Act stated that bankruptcy judges were to be appointed by the United States court of appeals of the circuit in which a particular district was located.²⁴ The judges were to have terms of fourteen years and serve as judicial officers of the United States district court established under Article III of the Constitution.²⁵ However, bankruptcy judges could be removed during their term for "incompetence, misconduct, neglect of duty, or physical or mental disability" when a majority of the judicial council of the circuit in which the judge's official duty station is located support the removal.²⁶ Bankruptcy judges

17. *Id.* at 55 (citing 28 U.S.C. §§ 160, 1482 (1976 ed., Supp. IV)).

18. U.S. CONST. art. III, § 1, *quoted in N. Pipeline*, 458 U.S. at 58–59.

19. *N. Pipeline*, 458 U.S. at 60 (emphasis added).

20. *Id.* at 61.

21. *Id.* at 87. Such courts are also called Article I courts.

22. 28 U.S.C. § 152 (2006).

23. 28 U.S.C. § 151 (2006).

24. 28 U.S.C. § 152(a)(1) (2006). The appointments are to be based on the recommendations of the Judicial Conference. *Id.*

25. *Id.*

26. 28 U.S.C. § 152(e) (2006).

2010]

UNLAWFUL REPRIEVE

829

were appointed to work full-time and receive a salary at the annual rate determined by statute.²⁷

The Act further stipulated that district courts could refer any or all cases that arose or related to a case under Chapter 11 to the bankruptcy judges of that district.²⁸ Once presented with a case under Chapter 11, bankruptcy judges could enter appropriate orders and judgments (that were subject to review) for any core proceedings.²⁹

The Act gave the federal district courts jurisdiction to hear appeals from final judgments, orders, and decrees entered by bankruptcy judges.³⁰ However, a panel of bankruptcy judges could comprise an appellate panel so long as a majority of district judges in the district of the appeal authorized such an appeal.³¹ The Act also gave the courts of appeals jurisdiction over appeals of all final decisions, judgments, orders, and decrees when certain issues have not been previously addressed, when a split among courts exists on an issue, or when an immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken.³²

Despite some minor amendments, the Bankruptcy Amendments and Federal Judgeship Act of 1984 remains in force today. The Act addressed the exact holding of *Northern Pipeline*, leaving no doubt that bankruptcy judges are not Article III judges. However, despite bankruptcy judges being inferior to Article III judges in the eyes of the Constitution, the Act's language seemingly permits bankruptcy judges to issue final judgments, which is important for the purpose of this Comment.³³ Additionally, the Act outlines the conditions under which

27. 28 U.S.C. § 153(a) (2006). The current version reads: "a salary at an annual rate that is equal to 92 percent of the salary of a judge of the district court of the United States as determined pursuant to section 135 [28 U.S.C. § 135 (2006)], to be paid at such times as the Judicial Conference of the United States determines." 28 U.S.C. § 153(a) (2006).

28. 28 U.S.C. § 157(a) (2006).

29. 28 U.S.C. § 157(b)(1) (2006). Core proceedings can include such things as: matters concerning the administration of the estate; allowance or disallowance of claims against the estate or exemptions from property of the estate; counterclaims by the estate against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to determine, avoid, or recover preferences; motions to terminate, annul, or modify the automatic stay; proceedings to determine, avoid, or recover fraudulent conveyances; determinations as to the dischargeability of particular debts; objections to discharges; determinations of the validity, extent, or priority of liens; confirmations of plans; orders approving the use or lease of property, including the use of cash collateral. *Id.* § (b)(2)(A–M). However, a bankruptcy judge could hear a non-core proceeding where the case was related to Title 11. *Id.* § (c)(1). Cases, with consent of both parties, could also be referred from the district courts to the bankruptcy courts. *Id.* § (c)(2).

30. 28 U.S.C. § 158(a) (2006).

31. 28 U.S.C. § 158(b–c) (2006).

32. 28 U.S.C. § 158(d)(2)(a) (2006).

33. While 28 U.S.C. § 158 does not define what constitutes a final decision, case law is

830 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

appeals may be heard by appellate courts, which is important in the context of the Chrysler and GM bankruptcies.

C. Reorganization of Chrysler and GM

1. Dire Financial Struggles

By early 2009, it was apparent that Chrysler and GM would not survive despite billions of dollars in federal funding they received the previous fiscal year.³⁴ Because of their financial troubles, both automobile giants had essentially one option: file for reorganization under Chapter 11 of the Bankruptcy Code. However, unlike many Chapter 11 filings, the Chrysler and GM scenarios were different because neither company could fiscally sustain a long, drawn-out bankruptcy process.³⁵

Chrysler and GM were faced with liquidating their assets and receiving roughly 10% of book value for those assets or agreeing to be purchased by third parties including the United States Treasury, Canada, Ontario, and Fiat.³⁶ However, liquidation could have been a “disastrous result”³⁷ for the creditors of both companies leaving as the only practical choice the sale of their assets under § 363(b) of Chapter 11.³⁸ Traditionally, companies in Chapter 11 must submit a reorganization plan for the bankruptcy court to approve prior to a sale of assets; however, § 363 allows for debtors to sell their assets without submitting a plan in certain situations.³⁹

The economic environment leading up to the GM and Chrysler bankruptcies made evident the urgency and necessity for a quick sale of assets. First, President Obama’s statements made clear that time was critical:

instructive on the matter. Courts have found that the confirmation of organization plans is a final judgment. *See* *Holsten v. Brill*, 987 F.2d 1268, 1270 (7th Cir. 1993); *Kham & Nate’s Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1354 (7th Cir. 1990); *Sanders Confectionery Prods. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992). Courts have also held that 11 U.S.C. § 363 sales are final decisions. *See In re Sax*, 796 F.2d 994, 996 (7th Cir. 1986); *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 732 (8th Cir. 2004); *Gekas v. Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012 (7th Cir. 1988).

34. *See In re Chrysler LLC*, 405 B.R. 84, 89–91 (Bankr. S.D.N.Y. 2009).

35. *See In re General Motors Corp.*, 407 B.R. 463, 476 (Bankr. S.D.N.Y. 2009), *aff’d*, *Parker v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 430 B.R. 65 (S.D.N.Y. 2010).

36. *Id.* at 481–83.

37. *Id.* at 474.

38. 11 U.S.C. § 363(b) (2006). The bankruptcy code is complex and beyond the scope of this Comment; however, this subsection will present enough information about the Chrysler and GM bankruptcies for the reader to analyze Part IV of this Comment.

39. *See In re Chrysler*, 405 B.R. at 94–96.

2010]

UNLAWFUL REPRIEVE

831

What I'm talking about is using our existing legal structure as a tool that, with the backing of the U.S. Government, can make it easier for General Motors . . . to *quickly* clear away old debts that are weighing [it] down so that [it] can get back on [its] feet and onto a path to success

What I'm not talking about is a process where a company is simply broken up, sold off, and no longer exists. We're not talking about that. And *what I'm not talking about is a company that's stuck in court for years, unable to get out.*⁴⁰

Second, a successful sale quickly accomplished would help the companies avoid systemic failure, allow for continued employment of many Americans and restore consumer confidence in Chrysler and GM products.⁴¹ Finally, there was a lack of merger partners, acquirers, and investors willing and able to acquire the automobile companies, especially through a potentially long and tenuous bankruptcy.⁴² Given this environment, the court approved both transactions finding no realistic alternatives available.⁴³

2. The Chrysler Transaction

With the establishment of New Chrysler and the transaction that closed on June 10, 2009, the United States Treasury had a 9.85% stake while Export Development Canada had 2.46%.⁴⁴ The new retirement pension of the autoworkers—VEBA—had a 67.69% ownership interest and Fiat held 20%, with an opportunity to acquire more.⁴⁵ The transaction also included the transfer of most of the operating assets from Chrysler to New Chrysler.⁴⁶ For consideration, New Chrysler paid \$2 billion to Chrysler and assumed many of its liabilities.⁴⁷

3. The GM Transaction

Under the terms of sale finalized on July 10, 2009, New GM acquired all of GM's assets with the exception of some cash, equity interests in other entities, property, and employee benefit plans.⁴⁸ New GM also assumed certain liabilities from the old entity in the areas of product

40. *In re General Motors*, 407 B.R. at 479.

41. *Id.* at 480.

42. *Id.* at 484.

43. *Id.*

44. *In re Chrysler*, 405 B.R. at 92 n.11.

45. *Id.*

46. *Id.* at 92.

47. *Id.*

48. *In re General Motors*, 407 B.R. at 481.

liability claims, warranty and recall obligations and all employee related obligations.⁴⁹ The terms of the deal stipulated that the United States Treasury would own 60.8% of the common stock as well as \$2.1 billion of New GM Series A preferred stock. Export Development of Canada would own 11.7% of New GM's common stock on an undiluted basis, as well as \$400 million of New GM Series A Preferred Stock.⁵⁰ The preexisting GM entity would own 10–12% of New GM's common stock and the remaining 17.5% of common stock would be owned by the New Employees Beneficiary Association Trust.⁵¹

4. Rejected Dealer Franchise Agreements

For GM, the § 363 transaction included the assignment of dealer franchise agreements for 4,100 of its 6,000 dealerships to New GM.⁵² These franchise agreements were modified to help make GM more competitive.⁵³ However, New GM could not take every dealership on the same basis, so it had the option of either terminating certain agreements or agreeing to modified versions, known as “Participation Agreements.”⁵⁴ For the dealerships that New GM would not go forward with, GM provided seventeen months notice before their “Deferred Termination Agreements” would be terminated.⁵⁵ Both participation and deferred termination agreements included waivers of dealers' rights in connection with their franchises.⁵⁶

In addressing the Chrysler dealerships, the court was terse in its description of the process surrounding the franchise agreements to be rejected in the proposed transaction.⁵⁷ However, the court's opinion did reference a motion by Chrysler from May 14, 2009 in which Chrysler sought to reject executory contracts and unexpired leases affecting 789 domestic car dealerships.⁵⁸ Approximately 3,200 dealerships were in operation at the time Chrysler filed bankruptcy.⁵⁹

49. *Id.*

50. *Id.* at 482.

51. *Id.* at 482–83.

52. *Id.* at 476.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. There is no section devoted to describing the Chrysler dealership network.

58. *In re Chrysler LLC*, 405 B.R. 84, 88 (Bankr. S.D.N.Y. 2009).

59. Peter Valdes-Dapena, *Chrysler Closing 789 Dealerships*, CNNMONEY.COM, May 15, 2009, http://money.cnn.com/2009/05/14/autos/chrysler_dealer_closings/index.htm.

2010]

UNLAWFUL REPRIEVE

833

D. Dealership Executory Contracts in Bankruptcy

In the GM case, Bankruptcy Judge Robert E. Gerber addressed the claim that the termination of executory contracts between GM and certain dealerships was coerced and unlawful.⁶⁰ Judge Gerber responded to the notion that the terminations were coerced by reminding the objecting parties that federal bankruptcy policy permits debtors, for the benefit of all creditors, to alter creditor and counterparty contractual rights.⁶¹ Next, the judge stated that for decades counterparties have had knowledge that their executory contracts could be rejected by bankruptcy debtors.⁶² Judge Gerber also refused to prohibit the modifications and rejections to dealership franchise agreements because such action would be “squarely inconsistent” with the purpose of corporate reorganizations.⁶³ Finally, the court relied on Judge Gonzalez’s opinion from the Chrysler bankruptcy case that suggested that the rejection of dealership agreements was a valid exercise of business judgment.⁶⁴

The court also addressed the legality of rejecting executory contracts when such rejection could violate state franchise laws.⁶⁵ The court stated that where state laws frustrate the purpose of 11 U.S.C. § 365, they are preempted by federal bankruptcy law.⁶⁶ Specifically, “to the extent that laws . . . —either state or federal—impair the ability to reject, or to assume and assign [franchise agreements], they must be trumped by federal bankruptcy law.”⁶⁷ The court thus found the rejection of executory franchise agreements to be far from extraordinary within the reorganization process and concluded that making dealerships more competitive was not a bad thing, but rather, precisely the point.⁶⁸

Despite the court’s refusal to reverse the termination of Chrysler and

60. *In re General Motors*, 407 B.R. at 513. Interestingly, the party raising this issue was a non-GM dealership that wanted the dealership agreements reinstated because GM was gaining a competitive advantage by being permitted to go through bankruptcy. Thus, it seems their argument was to allow GM to proceed in hopes they would become insolvent, lessening competition in the auto industry.

61. *Id.*

62. *Id.* at 514.

63. *Id.* at 515.

64. *Id.* The business judgment rule generally states that so long as the leaders of a corporation do not make a decision that no other reasonable person would make, courts will defer to their judgment because they are in the best situation to know what is in their corporation’s best interest.

65. *Id.*

66. *Id.*

67. *Id.* (citing *In re Old Carco LLC*, 406 B.R. 180, 205–06 (Bankr. S.D. N.Y. 2009)) (“Where a state law ‘unduly impede[s] the operation of federal bankruptcy policy, the state law will have to yield.’”).

68. *Id.* at 516.

834 *UNIVERSITY OF CINCINNATI LAW REVIEW* [Vol. 79]

GM dealerships, many dealerships still found the process unfair. Their cause was strengthened by members of Congress, who demanded that Chrysler and GM provide the criteria used to reject franchise agreements.⁶⁹ The ground was thus laid for Congress to take action to help alleviate the concerns of the thousands of dealerships affected by the Chrysler and GM bankruptcies.

E. Consolidated Appropriations Act, 2010

On December 16, 2009, Congress passed the Consolidated Appropriations Act.⁷⁰ The bill contained a myriad of appropriations for the fiscal year ending September 30, 2010. This Comment will focus on Section 747 of the Act, which deals with the arbitration process for those dealerships terminated through the Chrysler and GM Chapter 11 proceedings.

Section 747 begins by defining key terms. First, a “covered manufacturer” is defined as either an automobile manufacturer in which the United States has an ownership interest, a manufacturer to whom the United States has provided financial assistance under the Emergency Stabilization Act, or an automobile manufacturer “which acquired more than half of the assets of an automobile manufacturer in which the United States Government has an ownership interest.”⁷¹ A “covered dealership” is one that had a franchise agreement for selling and servicing a particular brand or brands of a “covered manufacturer,” but had said agreement terminated, not assigned to another brand, not renewed, or not continued from October 3, 2008 through December 31, 2010.⁷²

Section 747 also states that covered manufacturers, within thirty days of the passage of the bill, had to provide all covered dealerships not lawfully terminated prior to April 29, 2009⁷³ with criteria for why they were terminated, not renewed, or not assumed and assigned to a covered

69. See H.R. RES. 591, 111th Cong. (2009).

70. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009).

71. *Id.* § 747(a)(1)(A)–(B). Interestingly, this language essentially applies to only Chrysler and GM, yet the two are not referenced by name within the statutory language.

72. *Id.* § 747(a)(2).

73. The usage of April 29, 2009 is extremely perplexing. The public, as well as the dealerships themselves, only knew about the affected dealerships in the middle of May 2009. See Valdes-Dapena, *supra* note 59. Moreover, in looking at those dealerships that took advantage of the arbitration available to them in Section 747, it would appear that the numbers match those that were announced in the middle of May 2009. Thus, the date seems to be entirely based on Chrysler’s filing for bankruptcy, which was April 30, 2009. In other words, this was the latest date that Congress could put in the statute without blatantly butting heads with the decisions pursuant to the automobile manufacturers respective Chapter 11 bankruptcy proceedings.

2010]

UNLAWFUL REPRIEVE

835

manufacturer.⁷⁴ Any qualifying dealer could elect to seek a binding arbitration within forty days of the passage of the bill against a covered manufacturer.⁷⁵ Once a dealer elected to pursue arbitration, the case had to commence as soon as was practicable and then be submitted for a decision by the arbitrator no later than 180 days after passage of the bill.⁷⁶

The statute further provided that the two parties could select an arbitrator from the Regional Office of the American Arbitration Association in the region in which the dealership was located.⁷⁷ The arbitration was to be conducted in the state where the dealership was located.⁷⁸ Further, each party was responsible for its own expenses, fees, and costs, with the parties splitting equally all costs associated with the arbitration, such as arbitrator fees, meeting room charges, and administrative costs.⁷⁹ No arbitration could result in the arbitrator awarding compensatory, punitive, or exemplary damages.⁸⁰

Once in arbitration, dealers and manufacturers could present any relevant information they deemed necessary to argue their agreement was wrongfully terminated, and the arbitrator could balance the economic interests of the dealers, manufacturers, and the public at large when considering reinstating a dealership.⁸¹ The arbitrator was also to examine seven factors before issuing each decision: (1) profitability of the dealership for the previous four years; (2) the manufacturer's overall business plan; (3) the dealership's current economic viability; (4) the dealership's performance vis-à-vis the objectives within its franchise agreement; (5) the demographic and geographic characteristics of the dealership's market territory; (6) the dealership's performance in relation to the criteria used by the manufacturer to terminate, not renew, not assume, or not assign the covered dealership's franchise agreement; and (7) the length of experience of the dealership.⁸²

The Section also required arbitrators to issue written determinations

74. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 747(c), 123 Stat. 3034 (2009).

75. *Id.* § 747(d).

76. *Id.* However, for good cause, that period can be extended an additional thirty days. *Id.* A dealer and manufacturer can opt to voluntarily enter into a binding agreement after their own negotiations; however, such an agreement will represent a waiver of the dealership's rights to pursue arbitration pursuant to Section 747. *Id.* § 747(f).

77. *Id.* § 747(e).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* § 747(d). The American Arbitration Association is neither an Article I nor an Article III court.

82. *Id.*

no later than seven business days after a case had been fully submitted.⁸³ The written determination of the arbitrator had to include: (1) a description of the dealership; (2) a clear statement that indicated whether the franchise agreement in dispute was to be renewed, continued, assigned, or assumed by a covered manufacturer; (3) the key facts relied upon in making the determination; and (4) an explanation of how the arbitrator's decision was supported by the balance of economic interests.⁸⁴ If an arbitrator decided in favor of a dealership, upon completion of necessary agreements and prerequisites, the dealership was to return any financial compensation previously provided by a manufacturer for its decision to terminate, not renew, not assign or not assume the covered dealership's applicable franchise agreement.⁸⁵

The enactment of Section 747 of the Consolidated Appropriations Act appears to be an attempt by Congress to bypass the bankruptcy decisions of Chrysler and GM. As the Bankruptcy Amendments and Federal Judgeship Act of 1984 makes clear, bankruptcy courts have the ability to issue final decisions. Using case law, the next Part addresses Congress's ability to explicitly enact legislation that effectively limits the powers of the Judiciary.

III. LEADING SUPREME COURT CASE LAW

The Supreme Court has dealt with the separation of powers issues between Congress and the Judiciary on two occasions relevant to this Comment. The first arose from the return of property captured by the United States government during the Civil War to the original Confederate owners. In *United States v. Klein*, the Court addressed a congressional act aimed at limiting the ability of courts to hear evidence of former Confederates' new oaths of allegiance to the United States.⁸⁶ The second case involved a statute of limitation issue that barred a plaintiff from bringing a fraud and deceit claim under the Securities Exchange Act. In *Plaut v. Spendthrift Farm Incorporated*, the Court found unconstitutional an amendment to the Securities Exchange Act to reopen final judgments of Article III courts.⁸⁷ Each case will be discussed in detail below.

83. *Id.* § 747(e).

84. *Id.* § 747(d).

85. *Id.* § 747(e).

86. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

87. *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211, 246 (1995) (Breyer, J., concurring).

2010]

UNLAWFUL REPRIEVE

837

A. United States v. Klein

During and after the Civil War, Congress focused on reconstructing the Union. One particular issue was how to address the proceeds of abandoned and captured property that the U.S. gained possession of during the war. The government was forced to devise a way that Southerners, some of whom were formerly loyal to the Confederacy, could retain their property.

In its first attempt to distribute property back to its rightful owners, Congress passed an act (Act I) on July 17, 1862 authorizing the President to extend pardon and amnesty to all persons who may have participated in the existing rebellion, with exceptions that he may deem convenient for the public welfare.⁸⁸ Congress then passed the Abandoned and Captured Property Act of March 12, 1863 (Act II), which allowed for the retention of property as long as the use of that property was not for carrying on war against the United States.⁸⁹ With proof that one had never given aid or comfort to the rebellion, one class of individuals could retrieve their property.⁹⁰

Finally, almost a year and a half after Congress had given the President the authority to pardon, President Lincoln, on December 8, 1863, issued a proclamation that offered a full pardon, with restoration of all property rights, to qualifying individuals previously engaged in rebellion as actual participants or as aiders and abettors.⁹¹ After a series of amended pardons via a proclamation, on December 25, 1868, the President issued a pardon available without exception, unconditionally, and without reservation to all who participated in the rebellion with no oath requirement.⁹²

Congress, perhaps uncomfortable with former Confederates being granted leniency, repealed Act I, which authorized the President to pardon any and all with any conditions or qualifications he saw fit.⁹³ The *Klein* Court found this act of Congress to have little if any effect on the President's pardon, as it would not reduce any obligations of Congress under the Constitution to give Lincoln's proclamation its full

88. *Klein*, 80 U.S. at 130.

89. *Id.* at 130–31. Arms, ships, steamboats, military supplies, and munitions were examples of excluded property to be returned. *Id.* at 131.

90. *Id.*

91. *Id.* at 131–32. The pardon was contingent on individuals taking an oath that promised that they would thereafter abide by and support the Constitution of the United States, all acts of Congress, and all proclamations of the President in reference to slaves. *Id.* at 132.

92. *Id.* at 141.

93. *Id.*

intended effect.⁹⁴ Moreover, the Court could not envision a scenario in which those who had taken the oath would not be entitled to their property.⁹⁵ The *Klein* Court stated that once the oath was taken, an individual had an absolute right to the restoration of his political rights and to deny the same would be a breach of faith by the government.⁹⁶

With these facts in mind, the Court analyzed Klein's case. During the rebellion, V.F. Wilson had become the surety on bonds of several members of the Confederate army.⁹⁷ After President Lincoln's proclamation on December 8, 1863, V.F. Wilson took an oath of allegiance.⁹⁸ After Wilson's death in 1965, Klein, the administrator of Wilson's estate, filed a petition in the Court of Claims to obtain the proceeds of the cotton that Wilson had abandoned to the Treasury of the United States.⁹⁹ In May 1869, the Court of Claims found Wilson's estate was entitled to receive the proceeds of his cotton and allotted \$125,300 to Klein.¹⁰⁰ The United States appealed directly to the Supreme Court.¹⁰¹

While the appeal was pending, Congress passed a provision within a general appropriations bill that attempted to use the acceptance of a pardon as conclusive evidence of the acts pardoned, but not, however, as evidence of the rights conferred by the pardon in the Court of Claims¹⁰² or in the Supreme Court.¹⁰³ The proviso also stated that:

[p]roof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty, or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.¹⁰⁴

The Court saw the proviso of Congress as an attempt to deny the pardons granted by the presidential proclamations which Congress had

94. *Id.* at 142.

95. *Id.*

96. *Id.*

97. *Id.* at 132.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. The *Klein* Court describes the history of the court of claims as originally assisting in the preparation of bills to be submitted to Congress. However, the court of claims grew to have a larger jurisdiction and was authorized to render final judgments. The court of claims thus exercised all the functions of a court, but was still an inferior court authorized by Congress. *Id.* at 145.

103. *Id.* at 144.

104. *Id.* at 143.

2010]

UNLAWFUL REPRIEVE

839

originally authorized.¹⁰⁵ Further, the language unambiguously denied the Court jurisdiction when certain circumstances presented themselves, which the Court said was “not an exercise of the acknowledged power of Congress.”¹⁰⁶

To support its claim, the Court referenced its decision in *Pennsylvania v. Wheeling Bridge Co.* In *Wheeling*, the Court found that the bridge in question was a nuisance.¹⁰⁷ Subsequently, Congress passed an act legalizing the bridge and making it a “post-road.”¹⁰⁸ The Court denied a motion to enforce its original holding, as it found that the bridge was no longer a nuisance because of a *constitutionally permissible action* taken by Congress.¹⁰⁹ The Court distinguished the act at issue in *Wheeling* from the proviso now before it by observing that the *Wheeling* Court had found that Congress did not act arbitrarily and that the congressional act in *Wheeling* had created a set of *new circumstances*.¹¹⁰ In the *Klein* Court’s eyes, however, Congress’s actions dealing with the evidentiary value of presidential pardons did not create a set of new circumstances.¹¹¹

The Court also referenced the Constitution’s language within Article III, which states “in all cases other than those of original jurisdiction, ‘the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.’”¹¹² From this language, Congress has the power to amend the Court’s appellate jurisdiction, but in the instance of the Court of Claims, Congress on the one hand granted appellate review, and then through the proviso, took it away.¹¹³ The *Klein* Court found that Congress aimed to circumvent the Court of Claims’s final decision because of the unfavorable results to the government.¹¹⁴

B. *Plaut v. Spendthrift Farm, Inc.*

In 1995, Justice Scalia wrote for the court in *Plaut v. Spendthrift Farm, Inc.* which addressed the question of whether § 27A(b) of the Securities Exchange Act of 1934 violated the Constitution’s separation

105. *Id.* at 145.

106. *Id.* at 146.

107. *Id.*

108. *Id.*

109. *Id.* (emphasis added).

110. *Id.* at 146–47 (emphasis added).

111. *Id.* at 147.

112. *Id.* (quoting U.S. CONST. art. III, § 2).

113. *See id.*

114. *See id.*

of powers principle and the Due Process Clause of the Fifth Amendment.¹¹⁵ The case originated in the Eastern District of Kentucky, where Plaut brought claims against Spendthrift alleging fraud and deceit in the selling of stock in violation of § 10(b) of the Securities and Exchange Act of 1934 as well as rule 10b-5 of the Securities and Exchange Commission.¹¹⁶ The case was ultimately not decided on its merits as claims brought under Rule 10b-5 had to be commenced one year after discovery of the facts surrounding the violation and within three years of the actual violation.¹¹⁷ Thus, the statute of limitations for Plaut's claim had run, and the federal court accordingly dismissed the case with prejudice.¹¹⁸ In September 1991, the decision became final because an appeal was not filed within thirty days of the dismissal.¹¹⁹

Three months later, the President signed the Federal Deposit Insurance Corporation Improvement Act of 1991 into law, which gave Plaut some new procedural options.¹²⁰ Section 476 of the Act read:

(a) Effect on pending causes of action

The limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) Effect on dismissed causes of action

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.¹²¹

115. *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211, 213 (1995). Specifically, the Court looked at the constitutionality of § 10(b) of the Act's requirement for federal courts to reopen final judgments in private civil actions. *Id.* The decision was a 7–2 majority decision with Justices Rehnquist, C. J., O'Connor, Kennedy, Souter, and Thomas joining Justice Scalia's opinion. Justice Breyer filed an opinion concurring in the judgment. *Id.* at 240 (Breyer, J., concurring). Justice Stevens filed a dissenting opinion that Justice Ginsburg joined. *Id.* at 246 (Stevens, J., dissenting).

116. *Id.*

117. *Id.* at 214.

118. *Id.*

119. *Id.* (citing 28 U.S.C. § 2107 (2006)).

120. *Id.*

121. *Id.* at 214–15. (quoting 15 U.S.C. § 78aa-1 (1988 ed., Supp. V)).

2010]

UNLAWFUL REPRIEVE

841

Using these new procedural options, Plaut filed a motion to reinstate his previously dismissed action; the district court found that Plaut satisfied the statutory language, but also held that § 27A(b) was unconstitutional.¹²² The Sixth Circuit Court of Appeals affirmed the district court's decision.¹²³

In his majority opinion, Justice Scalia first addressed the argument suggesting the statute did not call on courts to reopen final judgments because the language “the laws applicable in the jurisdiction” referenced the law announced in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.¹²⁴ However, Justice Scalia stated that *Lampf* provided a uniform national statute of limitations, as opposed to a jurisdiction-specific one, and therefore, the new statute could not be construed as referencing *Lampf* because the language would be contradictory.¹²⁵

Plaut suggested another possible reason the statute did not require courts to reopen final decisions was that the statutory language allegedly only applied to cases that were still pending.¹²⁶ Finding this argument weakened in light of the fact that pending cases could not be reinstated, Justice Scalia concluded that there was no “reasonable construction on which § 27A(b) does not require federal courts to reopen final judgments in suits dismissed with prejudice by virtue of *Lampf*.”¹²⁷

The majority opinion discussed prior Supreme Court decisions and identified ways in which certain legislation may run counter to Article III of the Constitution.¹²⁸ The first was the *Klein* doctrine,¹²⁹ which found a statute to impermissibly limit the capacity of the judicial department in cases before it.¹³⁰ Second, members of the Executive Branch could not be empowered by Congress to review decisions of Article III courts.¹³¹ The Court found § 27A(b) different from either scenario, so Justice Scalia focused on the “deeply rooted” power of the Article III courts to conclusively decide matters before them as well as the notion that only superior Article III courts had the power to review final judgments.¹³² Because § 27A(b) retroactively *commanded* the federal courts to reopen final judgments, the *Plaut* Court found that

122. *Id.* at 215.

123. *Id.*

124. *Id.* at 215–16.

125. *Id.* at 216.

126. *Id.* at 217.

127. *Id.* at 217.

128. *Id.* at 218.

129. *See supra* Part III.A.

130. *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211, 218 (1995).

131. *Id.*

132. *Id.* at 218–19.

Congress had disregarded the fundamental principle that only the judiciary could issue dispositive judgments.¹³³

To support the conclusion that Congress had acted impermissibly, the Court relied on documents from the pre-constitutional era which shared a common theme: there should be a sharp division between legislative and judicial powers.¹³⁴ Echoing this same motif, the Court also cited Alexander Hamilton, who said:

[t]he theory neither of the British, nor the state constitutions, authorises the revisal of a judicial sentence, by a legislative act. . . . A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.¹³⁵

Finally, the Court referenced case law that found the legislative branch lacking the power to set aside, vacate, or annul a final judgment of an Article III court.¹³⁶

The Court acknowledged that Congress could always revise Article III court judgments by making new laws that must then be applied to cases *still pending* on appeal.¹³⁷ The Court then reiterated that the function of appellate courts was to decide cases on the law existing *at the time* of the appeal, and thus, the Court discussed the feasibility of an appellate court reversing an inferior court based on a change in the law.¹³⁸ Justice Scalia noted a key difference between cases on appeal and those having received final decisions: “[h]aving achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.”¹³⁹ In the present case, § 27A(b) purported to allow revisiting final judgments in cases that were properly dismissed based on statute of limitation grounds; the Court held that no legislative act could rescind such judgments for “even the *very best* of reasons, such as the legislature’s genuine conviction (supported by all the law professors in the land) that

133. *Id.* at 219.

134. *Id.* at 220 (quoting THE FEDERALIST NO. 81).

135. *Id.* at 222.

136. *Id.* at 223–26 (referencing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Bates v. Kimball*, 2 D. Chip. 77 (Vt. 1824); *Merrill v. Sherburne*, 1 N.H. 199 (1818); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *United States v. O’Grady*, 89 U.S. 641, 647–48 (1875); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856)).

137. *Id.* at 226 (emphasis added).

138. *Id.* at 227 (emphasis added).

139. *Id.*

2010]

UNLAWFUL REPRIEVE

843

the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.”¹⁴⁰

The *Klein* and *Plaut* cases present rare times in American jurisprudence where the Court was asked whether Congress exceeded its constitutional powers to effectively limit the powers of the Judiciary. It is clear the Court in both instances found the congressional act before it to be impermissible. However, neither case explicitly dealt with non-Article III courts.¹⁴¹ Part IV will address the application of *Klein* and *Plaut* with respect to the bankruptcy courts decisions in Chrysler and GM.

IV. DISCUSSION

This Part develops the authority of non-Article III courts as it pertains to their autonomy and ability to issue final judicial decisions. Upon establishing that the bankruptcy decisions in Chrysler and GM were final, the applicability of *Klein* and *Plaut* will be discussed. This Part then analyzes the outcome of Section 747 and concludes that despite the impermissible actions of Congress, Chrysler and GM will not likely challenge the constitutionality of the statute. Finally, this Part outlines the potential perils that accompany the precedent set forth by Section 747.

A. Finality of Decisions in Non-Article III Bankruptcy Courts

The *Klein* and *Plaut* decisions did not directly address either the status of bankruptcy courts as non-Article III courts or their ability to issue final decisions. Before analyzing the Chrysler and GM bankruptcies under *Klein* and *Plaut*, however, this subsection will establish that bankruptcy courts are actually quite similar to Article III courts because of their autonomy. This subsection then suggests that the bankruptcy decisions of Chrysler and GM were both final decisions.

140. *Id.* at 228.

141. Although *Klein* dealt with a court of claims—a non-Article III court—scholarship is quite clear that *Klein*'s exact holding cannot be that narrow. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 304 (6th ed. 2009) (suggesting that there are at least four possible interpretations of *Klein*: (1) Congress cannot grant jurisdiction to a certain degree and then force jurisdiction to cease when special circumstances arise; (2) Congress cannot dictate rules to the Judiciary for cases pending before it; (3) Congress cannot infringe on the power of the Executive by rescinding a presidential pardon; and (4) Congress cannot make exceptions and prescriptions to the appellate power of the Judiciary).

1. Bankruptcy Courts Enjoy Autonomy Similar to That of Article III Courts

The plurality opinion in *Northern Pipeline* makes clear the dichotomy between Article III courts and Article I courts. For the Court, the lack of life tenure and a fixed salary were enough to differentiate the two.¹⁴² However, the fact that the Bankruptcy Amendments and Federal Judgeship Act of 1984 only established fourteen year terms and salaries determined by statute for bankruptcy judges does not preclude bankruptcy courts from similar autonomy as Article III courts. To the contrary, some scholars suggest that bankruptcy courts are actually more insulated from political pressures despite their lack of tenure and fixed salary.¹⁴³ Because bankruptcy judges are appointed based on their professional merit and not on their political ideology, they are less susceptible to outside political influence.¹⁴⁴

Another component of the *Northern Pipeline* plurality opinion was the belief that placing non-Article III judges on par with Article III judges could dilute the prestige and high public opinion of federal courts.¹⁴⁵ However, bankruptcy courts are now widely recognized as an extension of Article III courts.¹⁴⁶ As Justice White's dissent noted in *Northern Pipeline*, bankruptcy courts handle matters that Article III judges have little interest in adjudicating.¹⁴⁷ It is thus not surprising that despite the fact that Article III courts have appellate review over bankruptcy decisions, Article III courts give great deference to bankruptcy court decisions, and as a result, hear few cases on appeal.¹⁴⁸ This trend is equally present for bankruptcy decisions dealing with

142. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (plurality opinion).

143. Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 793 (2010) (suggesting that bankruptcy judges are independent because they are selected on merit and not political ideology and they do not seek higher offices).

144. *Id.* Moreover, the "connection between the bench and the bar, and the lingering desire for professional integrity, individualism, and reputation, provide the insulation from political actors expected of Article III courts." *Id.* at 805.

145. *N. Pipeline*, 458 U.S. at 60 n.10.

146. McKenzie, *supra* note 143, at 766 (citing 28 U.S.C. § 151 (2006)).

147. *N. Pipeline*, 458 U.S. at 116 (White, J., dissenting).

148. McKenzie, *supra* note 143, at 777. ("There are at least three reasons for the low rate of bankruptcy appeals. As an initial matter, the standard of review in appeals of bankruptcy decisions is deferential to bankruptcy judges on key—and often determinative—questions. Second, the constraints of bankruptcy litigation, with its ever-present pressures of time and concerns about draining the debtor's estate by litigation costs, also limit the likelihood of frequent and effective appellate review. In addition, the Article III judiciary does not have a keen appetite for bankruptcy cases, a fact that tends to dampen the impact of bankruptcy appeals."). In some instances, appeals of bankruptcy court decisions have even been given to magistrate judges before district judges. *Id.* at 791.

2010]

UNLAWFUL REPRIEVE

845

major asset sales like Chrysler and GM, making bankruptcy courts “immune from attack” from appellate courts in all but rare circumstances.¹⁴⁹ The argument can thus be made that, practically speaking, bankruptcy courts today are currently as impartial and immune from political pressures as Article III judges and their decisions, when reviewed, are given great deference by Article III courts.

2. Chrysler and GM Were Final Bankruptcy Decisions

In analyzing the Chrysler and GM bankruptcies vis-à-vis Congress’s subsequent action, it must be determined whether the decisions were final. In the instance of Chrysler, the finality analysis is straightforward. The Bankruptcy Amendments and Federal Judgeship Act of 1984 is explicit that circuit courts have appellate review of all “final decisions, judgments, orders, and decrees” when certain issues have not been previously addressed, when a split among courts exists on an issue, or when an immediate appeal “may materially advance the progress of the case or proceeding in which the appeal is taken.”¹⁵⁰ Federal appellate courts do not, however, review the opinions, factual findings, reasoning, or explanation of bankruptcy judges.¹⁵¹ Thus, from the statutory language, and the fact that the Second Circuit Court of Appeals affirmed the case,¹⁵² it is conclusive that *In re Chrysler* was a final decision when it was issued, and the subsequent affirmation by the Second Circuit Court of Appeals only strengthened its finality.

The finality of *In re General Motors* is also evident. A bankruptcy final order is one that resolves litigation, decides the merits, or determines the rights of any party to the bankruptcy case.¹⁵³ Other courts have determined that a bankruptcy decision is final if the litigation is decided on the merits, and there is nothing left for the court to do but execute the judgment.¹⁵⁴ Where there are activities still to be

149. *Id.* at 778 (citing Rachael M. Jackson, Note, *Responding to Threats of Bankruptcy Abuse in a Post-Enron World: Trusting the Bankruptcy Judge as the Guardian of Debtor Estates*, 2005 COLUM. BUS. L. REV. 451).

150. 28 U.S.C. § 158(d) (2006).

151. *Spierer v. Federated Dep’t Stores, Inc. (In re Federated Dept. Stores, Inc.)*, 328 F.3d 829, 833 (6th Cir. 2003).

152. *Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 127 (2d Cir. 2009) (“For the foregoing reasons, we affirm the June 1, 2009 order of the bankruptcy court authorizing the Sale.”).

153. *White v. Univision of Va., Inc. (In re Urban Broadcasting Corp.)*, 304 B.R. 263 (Bankr. E.D. Va. 2004), *aff’d on other grounds*, 401 F.3d 236 (4th Cir. 2005).

154. *See, e.g., Official Comm. of Unsecured Creditors v. Farmland Indus. (In re Farmland Indus., Inc.)*, 397 F.3d 647 (8th Cir. 2005).

carried out by the court, a final decision has not been entered.¹⁵⁵ However, where a bankruptcy proceeding is akin to orders that were deemed final in other bankruptcy cases, that precedent can be considered dispositive on the similar case in question.¹⁵⁶

Given the definitions of finality found in the case law, Judge Gerber's decision in *In re General Motors* was final. After a very thorough review of all the petitions before him, Judge Gerber thought that GM's sale to New GM was the only way to save the company in the prescribed time frame. The only remaining action after his decision was to execute the sale, and thus, the decision could be considered final. In addition, aggrieved parties appealed to the district court asking it to grant a stay in order to prevent the sale, but the court refused to overturn the "exhaustive, careful, and thoughtful decision" and allowed the transaction to close.¹⁵⁷ Finally, because the opinion of Judge Gerber followed closely paralleled Judge Gonzalez's *In re Chrysler* opinion, it could be assumed that the circuit court's affirmation of *In re Chrysler* was dispositive for the GM decision as well. Judge Gerber's decision can thus be deemed a final decision because it left nothing else for the court to do, the district court denied the stay enabling the sale, and the Second Circuit's affirmation in the Chrysler case was controlling in the GM decision.

B. Applying the Holdings of *Klein* and *Plaut* to Section 747

With the bankruptcy decisions of Chrysler and GM determined to be final, the next question is whether the enactment of Section 747 by Congress was constitutional under *Klein* and *Plaut*. It will be suggested that the application of *Klein* to Section 747 does not conclusively yield that Congress's actions were constitutionally impermissible. However, because Section 747 reopens final judgments, it is unconstitutional under *Plaut*.

1. *Klein* Analysis

A possible holding of *Klein* was that Congress cannot prescribe rules that limit appellate review procedures of the judicial branch for cases still pending.¹⁵⁸ This holding, however, does not directly address the

155. *WRS, Inc. v. Plaza Ent., Inc.*, 402 F.3d 424, 427 (3d Cir. 2005).

156. *Nova Info. Sys. v. Premier Operations (In re Premier Operations, Ltd.)*, 290 B.R. 33, 42 (S.D.N.Y. 2003).

157. *In re GMC*, No. 09-50026, 2009 U.S. Dist. LEXIS 61279 (S.D.N.Y. July, 9, 2009).

158. *See supra* note 141.

2010]

UNLAWFUL REPRIEVE

847

constitutionality of Section 747. First, both the Chrysler and GM asset sales were completed in the summer of 2009, making their respective bankruptcies effectively finalized. Moreover, both decisions were final, and, therefore, neither can be thought of as still pending. Also making *Klein* inapposite in this case is that Section 747 does not change the circumstances of the issues before the court. Even assuming the cases were no longer pending and Section 747 did not change the circumstances surrounding the bankruptcies, a potential application of *Klein* cannot be dismissed.

It does not appear that the intent of Section 747 was to create rules that denied courts appellate review of the bankruptcy proceedings of Chrysler and GM. Rather, the aim of Section 747 was to create an option for certain dealerships to be granted reinstatement of their franchise agreements via an arbitration process. But the fact that the statutory language does not deny appellate review may not end the analysis. The effect of Section 747 was to give dealerships an additional option beyond the appeal available to them during the bankruptcy process. Thus, although dealerships had a chance to appeal the Chrysler and GM decisions to reduce their dealership networks, Section 747 could be seen as circumventing the judicial review process by granting appellate jurisdiction to an arbitrator that is not the Judiciary—possibly making it legislation that might be perceived as invading the “judicial province.”¹⁵⁹

Another possible holding of *Klein* may be that Congress cannot create “a means to an end” to remedy an unfavorable outcome.¹⁶⁰ In *Klein*, it was clear that members of Congress were privy to the inevitable truth that many of those Southerners that fought against the Union would be given back their property so long as they pledged their loyalty via an oath. The statute was created for the sole purpose of preventing such an inevitable outcome.¹⁶¹ Similarly, Section 747 is the work of Congress to right the wrong that purportedly resulted from the rejection of dealerships nationwide. The House and Senate spoke of the pillars that car dealerships represented to this country and their respective cities.¹⁶² Congress also found the governmental taskforce assigned to evaluate the

159. Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53, 57 (2010) (suggesting that *Klein* may stand for the proposition that Congress should be prevented from “enacting legislation that genuinely might so invade the judicial province”).

160. See *supra* note 141.

161. Senator Edmunds, in response to a question whether the provision at issue in *Klein* would simply require dismissal of the appeal leaving the lower court’s judgment intact said, “No; . . . we say they shall dismiss the case out of court for want of jurisdiction; not dismiss the appeal, but dismiss the case—everything.” *Id.* (quoting Cong. Globe, 41st Cong., 2nd Sess. 3824 (1870)).

162. 155 CONG. REC. S13,128 (2009); 155 CONG. REC. H14,477 (2009).

financial viability of Chrysler and GM unqualified to make judgments on which dealerships to keep and which to terminate.¹⁶³ Similar to *Klein* then, with a little less than a year before all affected dealerships would be closing their lots, Congress stepped in to remedy a situation they found unsatisfactory.

There are thus two possible applications of *Klein* to Section 747. First, Section 747 could be seen as granting appeals to dealerships using arbitrators, thereby bypassing an appellate review process statutorily granted by Congress to the Judiciary. However, Congress could argue it has the right to amend the appellate review process for non-Article III bankruptcy courts because it originally created the appellate review process in the Bankruptcy Amendments and Federal Judgeship Act of 1984. Second, Section 747 is a clear act by Congress to correct what they found to be an unfair result of bankruptcy. This argument is similarly weakened considering that Congress often enacts statutes to remedy outcomes it disagrees with. Because the two potential applications of *Klein* are not particularly compelling and because *Klein*'s application in general is questioned by scholars,¹⁶⁴ a constitutional challenge to Section 747 under *Klein* is improbable.

2. *Plaut* Analysis

The fact pattern in *Plaut*, while not identical, appears quite similar to the facts surrounding the enactment of Section 747. In *Plaut*, Congress created a law that provided that any claims previously dismissed under the old statute of limitations, that would have a different outcome with the new statute of limitations, should be reinstated.¹⁶⁵ The *Plaut* Court found "no instance in which Congress ha[d] attempted to set aside the final judgment of an Article III court by retroactive legislation."¹⁶⁶ Justice Scalia thus found that the new statute retroactively reopened final judgments, and was therefore beyond the powers vested in Congress by the Constitution.¹⁶⁷

As was mentioned in subsection IV.A, the Chrysler and GM bankruptcies were final decisions. Section 747 explicitly reopens matters that were already adjudicated and gives dealerships the right to

163. 155 CONG. REC. H14,475 (2009).

164. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (expressing uncertainty as to the precise scope of *Klein*); *Nat'l Coalition to Save our Mall v. Norton*, 269 F.3d. 1092, 1096 (D.C. Cir. 2001) (stating "*Klein*'s exact meaning is far from clear").

165. *Plaut*, 514 U.S. at 214–15.

166. *Id.* at 230.

167. *Id.* at 227.

2010]

UNLAWFUL REPRIEVE

849

appeal the rejection of their executory contracts to an arbitrator. The intent of the statute to retroactively go around the bankruptcy court's final decisions cannot be ignored when looking at the final comments made in Congress just before the bill passed:

[Senator] Stabenow[:] When negotiating an agreement for arbitration was it the Chairman's intent that the dealers entitled to this arbitration process would only be the dealers that were terminated as a result of the bankruptcy?

[Senator] Durbin[:] Yes, it is my understanding that the only dealerships entitled to arbitration are those dealerships that were terminated as a result of the manufacturers' bankruptcy, rather than those that may have closed for other business reasons.¹⁶⁸

Thus, because the intent of the statute is clearly to reopen final decisions of bankruptcy courts, it is likely that a court could find Congress exceeded its constitutional authority in enacting Section 747.

C. The Aftermath of Section 747 for GM and Chrysler

Through January 27, 2010, four hundred nine Chrysler dealerships whose contracts were rejected during bankruptcy filed for arbitration.¹⁶⁹ On March 6, 2010, GM announced that 661 of the roughly 1,100 dealers that applied to go through the arbitration process would be reinstated as part of the dealership network.¹⁷⁰ While these numbers suggest that the legislation had the effect Congress intended, three questions remain: (1) did the legislation have a beneficial effect; (2) why do not Chrysler and GM contest the constitutionality of the congressional mandate that forces them to arbitrate; and (3) what is to stop Congress from enacting similar legislation in the future?

1. An Undesirable Outcome for GM and Chrysler

Listening to the voices of lawmakers, one would believe that the outcome of their legislation was optimal. The "short-sighted"

168. 155 CONG. REC. S13,130 (2009).

169. See Edward Niedermeyer, *1,550 Dealers Filed For Arbitration*, THE TRUTH ABOUT CARS, Jan. 29, 2010, <http://www.thetruthaboutcars.com/tag/rejected-dealer/>; CHRYSLER GROUP LLC AND CONSOLIDATED SUBSIDIARIES, UNAUDITED INTERIM CONDENSED CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE THREE MONTHS ENDED MARCH 31, 2010, at 14 (2010), available at chryslercorp.net/pdf/news/3-31-10-financial-statement.pdf ("Approximately 400 of those rejected dealers have filed for arbitration seeking to be added to the Company's dealer network based on the criteria set forth in the legislation.").

170. Nick Bunkley, *Eye on Sales, G.M. Offers to Reinstate 661 Dealers*, N.Y. TIMES, Mar. 6, 2010, at B1.

850 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

bankruptcy decisions to reject dealership contracts were reversed.¹⁷¹ As a result, 661 GM dealerships and 50 Chrysler dealerships reopened their doors.¹⁷² The reinstatement of dealerships perhaps provided revenge against an auto taskforce that determined the dealership network needed to be trimmed in early 2009—the same auto taskforce deemed “a strange collection of people that didn’t have any experience in the auto industry” because many members did not own cars and those that did, owned foreign cars.¹⁷³

Despite the jobs and the economic interest of the public at large, the effect of Section 747 on GM and Chrysler has been anything but optimal. First, although President Obama signed the bill, the same day GM announced its reinstatement of 661 dealerships, the press reported “[t]he White House has opposed [Section 747] over concerns that it could hurt GM’s and Chrysler’s efforts to rebound from their government-led bankruptcies.”¹⁷⁴ Second, the same sentiment was echoed by the director of GM’s dealer network, who said, “[b]y [reinstating dealerships], we save a lot of time, energy and dollars, saving us and dealers from going through what could be a very long arbitration process.”¹⁷⁵ Finally, the legislation ignores the rights of creditors that likely agreed on settlement terms based on the knowledge that the number of dealerships within Chrysler and GM would be reduced. Despite these sentiments, Section 747 opened the door to numerous arbitrations that were both time consuming and costly and allowed dealerships to reopen the issues that were already deemed to have a detrimental effect on Chrysler and GM’s competitiveness. Thus, the end result of Congress enacting Section 747 was Chrysler and GM agreeing to reinstate dealerships, not because it was necessarily in the best interest of the corporation, their shareholders, or the creditors of either, but because they could not afford to allocate the resources to deal with all the arbitrations in the four-month window the statute provided.

2. Unlikely Constitutional Challenge

The *Plaut* holding is clear that Section 747 is unconstitutional because it retroactively reopened final decisions of bankruptcy courts. However,

171. 155 CONG. REC. H14,477 (2009).

172. Nick Bunkley, *Chrysler Offers Reinstatement to 86 Dealerships It Told to Close*, N.Y. TIMES, Mar. 27, 2010, at B3.

173. 155 CONG. REC. H14,475 (2009).

174. Mike Boyer, *GM Will Reinstate 661 Dealerships*, CINCINNATI ENQUIRER, Mar. 6, 2010, at A11.

175. Bunkley, *supra* note 170.

2010]

UNLAWFUL REPRIEVE

851

it is not surprising that GM and Chrysler have not filed any lawsuit challenging the congressional mandate. Chrysler's CEO, Sergio Marchionne, has publicly expressed his desire to challenge the constitutionality of the arbitrations, but has yet to act.¹⁷⁶ Marchionne and Edward Whitacre, GM's CEO, are in uniquely precarious positions to take a strong stance against Congress.

Since the latter part of 2008, the economic environment that Chrysler and GM faced was arguably unlike anything they had experienced in their storied pasts. Their financial situations necessitated the receipt of government bailout money that allowed them to stay in business. As explained in subsection II.C.1, in the spring of 2009, the companies were left with few options but to file bankruptcy and subsequently sell their assets to create new entities. However, the structuring of the deals left the United States Treasury essentially the owner of 12% of Chrysler and 62% GM.

With an ownership stake in both companies, Congress justified Section 747 as one way that taxpayers would see the quickest return on their investment in the companies.¹⁷⁷ In Congress's view, reinstating dealerships across the nation was indubitably an action that would benefit Chrysler and GM—notwithstanding the likelihood that the elimination of the dealerships may actually have been in the best interest of GM and Chrysler. Congress failed to acknowledge this possibility, and instead, followed its own business judgment on what *it thought* was best because of the possible implications on taxpayers, rather than what Chrysler and GM *independently thought* was best based on the evolving demands to be successful in the automotive industry. Regardless of which side was “correct” in this debate, the knowledge that GM and Chrysler may not exist without receiving troubled asset relief money (TARP) or having the United States Treasury as a stakeholder is likely sufficient to prevent the threat of a constitutional challenge.

Another reason why Chrysler or GM executives may be reticent to challenge Section 747 would be the turnover of leadership prior to their bankruptcies. Since the government has become involved with the auto dealerships, the Obama Administration has not been shy about threatening to replace leadership at the companies.¹⁷⁸ While it may be unlikely that a constitutional challenge would lead to such a drastic result, the federal government's majority stake in GM makes such an action possible. Because the United State Treasury is a large

176. Krisher, *Dealers Appeal*, *supra* note 4.

177. 155 CONG. REC. H14, 478–79 (2009).

178. Peter Valdes-Dapena, *Do or Die for GM and Chrysler*, CNNMONEY.COM, Mar. 30, 2009, http://money.cnn.com/2009/03/29/news/companies/gm_bailout/index.htm.

852 *UNIVERSITY OF CINCINNATI LAW REVIEW* [Vol. 79]

stakeholder in Chrysler and GM, either could effectively oust certain leaders for unpopular moves, making a constitutional challenge of Section 747 by Chrysler or GM unlikely.

3. A Dangerous Precedent

With a constitutional challenge of Congress's actions by Chrysler or GM unlikely, the precedent established by Section 747 could start a new trend for creditors in bankruptcy. Congress felt that the bankruptcy process was unfair to rejected Chrysler and GM dealerships. Moreover, Congress noted that the dealerships were integral parts to communities around America. With such rationale as an explanation for why dealerships should be reinstated, the question becomes: What creditor, who has had their own executory contracts rejected via a Chapter 11 bankruptcy, cannot make the *same argument* for Congress to grant them arbitration, with a chance of the reinstatement of their contract? Will the creditor have to be the same size as Chrysler and GM? Will the creditor need to demonstrate a presence in all fifty states? Will the loss of jobs to hundreds or thousands of American workers because of the rejected contract be sufficient? If all are prerequisites for congressional action, perhaps few entities will qualify. However, it is fair to assume that at least some entities could satisfy all of these arbitrary requirements, as well as making the claim of being treated unfairly and being integral parts to their communities. If such action by Congress gains traction, it will undermine the authority of bankruptcy decisions because there will always be the possibility of an exception that could be granted by Congress.

Moreover, the repercussions of Section 747 may not be exclusively limited to bankruptcy decisions. Because Congress has effectively reopened final decisions of an arm of the Judiciary and has not been challenged for its actions, there exists precedent for Congress to retroactively act on final judicial decisions from Article I and Article III courts in the future. In sum, the true effects of Section 747 are not yet readily discernible but the potential for a dangerous precedent cannot be denied.

V. CONCLUSION

Section 747 of the Consolidated Appropriations Act is likely to be viewed as a piece of legislation that helped dealerships across the United States re-establish their storied histories with Chrysler and GM. Members of Congress can say they successfully represented the rights of

2010]

UNLAWFUL REPRIEVE

853

their constituents by restoring employment for some and exposing others to American automobiles and servicing facilities. To the average observer, Section 747 gave reprieve to the victims of two iconic bankruptcies.

However, as demonstrated in this Comment, the rejection of the executory contracts by debtors in bankruptcy is far from extraordinary. Such actions by debtors are commonplace in Chapter 11 reorganizations as companies attempt to reincarnate themselves as leaner, more cost-efficient versions of their previous selves. Moreover, the sales of assets as well as the rejection of franchise agreements of Chrysler and GM were presented to bankruptcy judges and found to be permissible given the dire financial circumstances of each corporation.

Given the final judgments of the courts on each of the bankruptcy sales, there can be little doubt that the actions of Congress were designed to evade the bankruptcy and appellate court rulings. Because the decisions were not pending on appeal, and were final, it is clear that Section 747 is retroactive legislation, and thus unconstitutional under *Plaut*. However, given the unique fact that a constitutional challenge regarding the powers of the federal government would be challenging the same entity that is a large equity owner in each auto manufacturer, the chances of Chrysler or GM challenging the statute is unlikely, and therefore, creates a dangerous precedent by opening the door to similar retroactive legislation in the future.