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Judicial Restraint in the Early Days Following *Stern v. Marshall*

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Over five months have passed since the United States Supreme Court entered its landmark decision of *Stern v. Marshall*, 131 S. Ct. 2594 (2011) [2011 BL 165774] the Court's first key ruling in decades on bankruptcy court jurisdiction.[1] In *Stern*, the Court ruled, in a 5-4 decision, that a bankruptcy court "lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."[2]

As of the date of this article, over 100 bankruptcy court cases across all circuits have cited to *Stern*, many grappling with their ability to issue final judgment in cases ranging from proceedings for relief from the automatic stay to fraudulent transfer proceedings. Courts struggle with the implications of the *Stern* decision, and will continue to do so while the courts of appeal begin to provide needed clarity on the various questions *Stern* raises.

Although courts have only just begun to determine the meaning of *Stern*, certain trends have emerged. Generally, courts have interpreted *Stern* narrowly. At the same time, however, courts are also proceeding with caution in their assessments of the case's impact on bankruptcy jurisdiction lest they overstep their constitutional authority. Indeed, not all courts have found *Stern* to be limited–some courts have even gone so far as to hold, for example, that fraudulent conveyance and preference claims are "non-core" and thus not susceptible to their issuing of a final judgment. So far, this interpretation appears to be the exception rather than the rule, however. In sum, post-*Stern* decisions reflect an obvious tension between the bankruptcy courts' natural desire to preserve their authority and their deference to constitutional constraints.

This article discusses certain trends in the post-*Stern* jurisprudence, including: (I) bankruptcy courts' general tendency to interpret *Stern* narrowly; (II) the trend among courts to proceed with caution, often requiring additional briefing of *Stern*'s implications or providing alternative rulings to protect against an appellate court later holding that the bankruptcy court lacked authority to enter a final judgment under *Stern*; (III) the general confirmation by bankruptcy courts that parties remain able to consent to jurisdiction; and (IV) bankruptcy courts' treatment of fraudulent transfer and other avoidance actions under *Stern*.

I. General Trend: Interpreting Stern Narrowly

A current snapshot of cases interpreting *Stern* reveals that, despite initial concerns surrounding the potential broader implications of the decision, most courts have interpreted the case narrowly and, consistent with *Stern's* own self-imposed limitation, these courts have held that *Stern* does *not* limit their ability to enter a final order in a wide variety of contexts:

fraudulent transfer proceedings;[3]

turnover proceedings;[4]

proceedings for relief from the automatic stay;[5]

claim objection proceedings where the proof of claim addressed issues identical to those in a prepetition state court action;[6] and

proceedings for approval of a settlement pursuant to Bankruptcy Rule 9019.[7]

Although some litigants have argued that the mere presence of state-law issues in a bankruptcy proceeding limits the bankruptcy court's ability to issue a final judgment, courts have declined to apply such a broad principle. Indeed, in several instances, courts have indicated that their authority to enter a final judgment does *not* hinge on whether a bankruptcy court will need to apply state law in resolving the case at issue—or at least that determination of the issue alone does not dispose of the jurisdictional question.[8]

Notably, one exception to the trend of interpreting *Stern* narrowly has arisen in the avoidance action context. While many courts have held that *Stern* has not affected the ability of bankruptcy courts to enter final judgment in such cases, a number of courts have stated that *Stern* created enough of a question about such authority that they have been hesitant to enter final judgment, and have instead entered proposed findings of fact and conclusions of law. A minority of courts, as discussed in greater detail below, have gone so far as to hold that they lack the constitutional authority to enter final judgment on fraudulent transfer claims and preference actions.

II. Proceeding with Caution

Even if *Stern* ultimately proves to be exceedingly limited in its application, it has in the meantime created a good deal of uncertainty among bankruptcy judges regarding their authority to render final judgments. In this "cloud of uncertainty,"[9] a number of bankruptcy courts have tread carefully by: (i) requiring parties to submit additional briefing addressing *Stern*'s implications; (ii) issuing a judgment that also comports with different outcomes of the *Stern* analysis; or (iii) out of an abundance of caution, submitting only proposed findings of facts and conclusions of law to the district court rather than entering final judgment as contemplated by 28 U.S.C. § 157(c)(1).

– A. Approach #1: Specific Briefing

Despite the reassurance by the majority in *Stern* that its decision would not have a material effect on the current bankruptcy system,[10] the "cloud of uncertainty" remains, compelling bankruptcy judges in many cases to require additional briefing on *Stern*'s impact.[11]

Judge Peck in the *Lehman Brothers* case recently directed both parties in an adversary proceeding over fraudulent transfers and other claims to present an analysis of the court's authority to enter a final judgment as to *each* claim at issue.[12] After initially asking the parties to address *Stern*'s effects on the asserted claims, Judge Peck expressed his discontent when the position memoranda submitted by both parties did not specifically provide, among other things, how "each count [was] tied to the claims allowance process or otherwise passe[d] the *Stern* test."[13] The court then ordered the parties to submit further, more concrete briefing as to why each of the forty-nine counts in the complaint "is or is not susceptible to" (i) "a ruling by the bankruptcy court with respect to the pending motion to dismiss"; (ii) "final adjudication by the bankruptcy court"; and (iii) "the issuing of a report and recommendation to the district court regarding each such count."[14]

Although here the broader implications of *Stern* remain open and Judge Peck has not yet ruled on the *Stern* issues before him, his approach illustrates one court's determination to vet *Stern* issues methodically and carefully.[15]

– B. Approach #2: Alternative Rulings

Another growing trend is that many bankruptcy courts have proceeded to enter final judgments but have proposed rulings in the alternative in an effort to address *Stern*'s uncertainty. For example, a number of courts have expressly noted that, in the event that a district court later finds that the bankruptcy court lacked constitutional authority to render the final judgment, the bankruptcy court's decision should constitute a report and recommendation to the district court in accordance with 28 U.S.C. § 157(c)(1).

The bankruptcy court in *Springel v. Prosser (In re Innovative Communication Corp.)*[16] noted, for example, that "[a]ssuming, *arguendo*, that the District Court disagrees and reads *Marshall* broadly to conclude that the dicta in the opinion limits this court's jurisdiction to making a Report and Recommendation, this Memorandum Opinion in its entirety constitutes our Report and Recommendation to the District Court."[17]

Even bankruptcy judges who believe that *Stern* does not impact the matters before them appear to recognize the lingering uncertainty. Not wanting to be overruled, these courts have attempted to offer such alternative rulings as an apparent means of preserving their decisions.

– C. Approach #3: A Modified "Safe Approach"

Finally, some courts, have taken a modified "safe" approach of submitting proposed findings of fact and conclusions of law—even while acknowledging that *Stern*'s impact on the case at issue is unclear.

In *Medical Educational Health & Services, Inc.*, for example, the bankruptcy court noted that (i) *Stern*'s impact "is not yet clear"; (ii) the opinion may be "restricted by its facts"; and (iii) *Stern*'s applicability to the state-law claims at issue "is non conclusory."[18] Despite the court's acknowledgement, however, the court

concluded that the "safe interpretation" of *Stern*'s limitations is that the court should only submit proposed findings of fact and conclusions of law.[19]

Similarly, in *In re Tevilo Industries, Inc.*, the bankruptcy court noted that it was following the "most prudent and expedient course of action" with respect to the plaintiff's motion for default judgment in a preference action when, in lieu of entering a final judgment, the court submitted a report and recommendation to the district court.[20] The court reasoned that the "presently-confused state of the law" did not provide concrete guidance as to the court's authority with respect to actions under Chapter 5 of the Bankruptcy Code.[21] Out of an abundance of caution, the court submitted its report and recommendation but left open the possibility that, after briefing in a full adversarial contest, the court nevertheless may have authority to enter final judgment.[22]

Regardless of the particular cautionary approach, the message from the bench is clear: in certain situations, *Stern* (i) offers minimal guidance; [23] (ii) confuses the state of the law; [24] and (iii) engenders a great deal of uncertainty.[25]

III. Is Jurisdiction by Consent Still Alive?

The initial uncertainty stemming from *Stern* has also cast doubt upon bankruptcy jurisdiction by consent of the parties. In *Stern*, the Court acknowledged that the defendant, Pierce Marshall, had consented to the bankruptcy court's jurisdiction to enter a final order,[26] yet the Court nevertheless ultimately held that the bankruptcy court could not, consistent with Article III of the Constitution, issue a final judgment.[27] Naturally, bankruptcy practitioners have expressed concern that bankruptcy courts as a result would be unable to enter final judgments on non-core claims, even where the parties have consented.[28]

To date, however, bankruptcy jurisdiction by consent appears to remain alive and well. Virtually every case discussing *Stern* that has addressed the issue of consent has concluded that, with respect to non-core, "related to" proceedings–that is, proceedings that are not "core proceedings" under 28 U.S.C. § 157(b)(1) but are "related to a case under" the Bankruptcy Code–a bankruptcy court may issue final judgment with the parties' consent.

For example, the court in *In re GB Herndon & Associates*, in considering a party's argument that the court lacked authority to grant summary judgment on a counterclaim, concluded that "even after *Stern v. Marshall*, the bankruptcy court may adjudicate a proceeding, without running afoul of Article III, when there has been consent by the parties." [29] The court in *Samson v. Blixseth (In re Blixseth)*,[30] when considering its authority to determine equitable subordination, fraudulent transfer and preference claims, similarly concluded that "Bankruptcy courts . . . may even issue final judgments in non-core proceedings if all parties consent, 28 U.S.C. § 157(c)(2)."[31] The rationale of these cases is that while a party cannot consent to subject matter jurisdiction where there is none, there *is* subject matter jurisdiction in "related to" cases in the bankruptcy court. The *Stern* issue only affects *how* the bankruptcy court may exercise that jurisdiction, not *whether* it has jurisdiction.

It appears that only one case to date raises some doubt about whether consent would be effective to authorize a bankruptcy court to enter final judgment with respect to "non-core" matters. In *BearingPoint, Inc.*,[32] the first case to interpret *Stern*, the trustee of a liquidating trust established under the debtor's plan of reorganization moved for entry of an order relieving the trustee from the obligation to bring certain claims against former directors and officers of the debtor in bankruptcy court or the U.S. District Court for the Southern District of New York.[33] In considering the trustee's motion, the court noted that "at least without an appropriate consent (assuming that after *Stern v. Marshall*, consent would still be effective), either a district judge would have to make the factual determinations (or conduct a jury trial for that purpose), or I'd have to issue proposed Findings of Fact and Conclusions of Law, for a supplemental round of *de novo* review by the district court."[34] The court then modified the earlier confirmed plan to allow the trustee to bring such claims in state court in order to avoid future procedural hurdles based on the court's potential lack of constitutional authority to enter a final judgment with respect to "non-core" claims.[35]

Although jurisdiction by consent appears to remain intact, no courts of appeal to date have squarely addressed this issue.

IV. Varied Approaches in Avoidance Actions

The ultimate determination of whether a bankruptcy court has jurisdiction to enter final judgment after *Stern* has depended in large part on the issue at stake–and even then, courts have come to differing conclusions. Fraudulent transfer and preference actions, historically an integral part of bankruptcy jurisprudence, in particular have been the subject of much attention and debate in the post-*Stern* world.

– A. Cases Affirming That Bankruptcy Courts Have Authority to Enter Final Judgment

Many courts have, when confronted with the question of whether they have jurisdiction to enter a final judgment on an avoidance action, construed *Stern* narrowly and concluded that such jurisdiction remains intact. In support, some courts have noted that any suggestion in *Stern* to the contrary is mere dicta and, thus, does not determine the issue.

For example, in *In re Heller Ehrman LLP*,[36] the bankruptcy court, when considering its authority to enter final judgment on a fraudulent transfer action, held that "[w]hile dicta in *Stern* may indicate that fraudulent transfer actions cannot be finally heard and determined by an Article I judge, the holding is much narrower."[37] Rather, the court held, "fraudulent transfer actions are core whether arising directly under section 548 of

the Bankruptcy Code or from state law (but made available to a bankruptcy estate under section 544(b)) and . . . Section 157(b)(2)(H) (fraudulent transfers) does not violate Article III of the Constitution by authorizing bankruptcy judges to decide them."[38]

The district court in *Kelley v. JPMorgan Chase & Co.*[39] similarly construed *Stern* narrowly when asked to withdraw the reference in an avoidance action, concluding that fraudulent transfer claims remained within a bankruptcy court's authority to enter a final ruling.[40] The court distinguished the facts from *Stern*, reasoning that the preferential and fraudulent transfer claims against the defendant were "quintessential core bankruptcy claims," while the claim at issue in *Stern* was "in no way derived from or dependent upon bankruptcy law." Thus, the court concluded, "*Stern* does not require this Court to withdraw the reference at this time."[41]

– B. Cases Holding That Bankruptcy Courts Lack Authority to Enter Final Judgment

A few courts, however, have adopted a more expansive reading of *Stern*, in some instances holding that bankruptcy courts lack the constitutional authority to enter final judgment in certain kinds of avoidance actions.

One such example is *Samson v. Blixseth (In re Blixseth)*.[42] In *Blixseth*, the court confronted a variety of claims, including fraudulent transfer, preference, and equitable subordination. Although the court agreed that the preference and equitable subordination claims arise under the Bankruptcy Code, the court concluded that, not only did it lack authority to enter a final judgment on the fraudulent conveyance claims, but it lacked the ability to even hear the claim at all:

Since Trustee's fraudulent conveyance claim is essentially a common law claim attempting to augment the estate, does not stem from the bankruptcy itself and would not be resolved in the claims allowance process, it is a private right that must be adjudicated by an Article III court. This Court's jurisdiction over that claim as a core proceeding is therefore unconstitutional. However, the equitable subordination and preferential transfer claims arise from the Bankruptcy Code and the claims allowance process, therefore, this Court's jurisdiction over those claims is constitutionally acceptable. . . . Since this Court may not constitutionally hear the fraudulent conveyance claim as a core proceeding, and this Court does not have statutory authority to hear it as a non-core proceeding, it may in no case hear the claim. Therefore, this Court grants the parties fourteen days in which to move the District Court to withdraw its reference, in whole or in part, pursuant to 28 U.S.C. § 157(e), or else it will dismiss the fraudulent conveyance claims for lack of subject matter jurisdiction.[43]

The court in *Sitka Enterprises*[44] came to a similar conclusion. In *Sitka Enterprises*, a Chapter 7 trustee sought to avoid allegedly fraudulent transfers of property of the debtor's estate under sections 548 and 549 of the Bankruptcy Code. In considering the impact of *Stern* on its ability to enter judgment on the claims, the court held that because a trustee's action to recover a fraudulent conveyance involves private rather than public rights, the fraudulent conveyance action "cannot be adjudicated by the Bankruptcy Court since it lacks constitutional authority to do so under the restrictions placed by Article III."[45] The court noted that *Stern* "has its roots in *Granfinanciera*"[46] and that it interpreted *Granfinanciera* as "reject[ing] the . . . argument that a fraudulent conveyance action by a bankruptcy trustee fell with the public rights exception."[47]

A number of other bankruptcy courts have reached similar conclusions, holding, for example, that *Stern* created too much uncertainty for the court to be able to enter final judgment on fraudulent conveyance action,[48] that the taking of property in a preference action under 11 U.S.C. § 550 is exclusively reserved for an Article III judge, and that such matter should be treated as non-core.[49] One bankruptcy court, in considering a motion to withdraw the reference involving a fraudulent transfer action, declined to determine whether fraudulent conveyance actions were "non-core" and merely "related to" bankruptcy proceedings (while noting that *Stern* made the answer to that question uncertain) but confirmed that in either event the court may at least hear the claims and propose findings of fact and conclusions of law to the district court.[50] Another court, in a Chapter 15 context, in considering avoidance claims, concluded that such actions were non-core in part because the causes of action at issue arose under foreign law.[51]

Yet another court took a divided approach, holding that a bankruptcy court could enter final judgment on claims arising under sections 548 and 549 of the Bankruptcy Code, since those causes of action were created under bankruptcy law, but could only recommend proposed findings of fact and conclusions of law for fraudulent transfer claims arising under state law through section 544 (providing the trustee with power to avoid transfers that are voidable under applicable law).[52] The court reasoned that *Stern*'s dicta created uncertainty regarding the court's authority to hear and determine fraudulent conveyance actions brought pursuant to section 544(b) of the Bankruptcy Code.[53] The court also noted that if the district court were to read *Stern* more broadly, then the bankruptcy court's final judgment on the Bankruptcy Code claims would instead constitute a report and recommendation to the district court. [54]

The diversity of views on this issue demonstrates the lack of definitive guidance regarding a bankruptcy court's ability to enter final judgment in avoidance action cases. Perhaps as the courts of appeal take on the issue, there will be a greater degree of

consensus. For now, even something as previously fundamental to bankruptcy as jurisdiction to enter final judgment in avoidance actions is not beyond *Stern*'s reach.

V. Conclusion

Consensus regarding *Stern*'s implications may take years to be achieved. The past five months have been a bellwether of sorts as bankruptcy courts across the nation struggle to conduct business as usual, while attempting to avoid overstepping their authority.

The cases thus far have confirmed that many courts are still unsure about what *Stern*'s real implications will be. Will courts continue to develop contingency plans, anticipating that their determinations about *Stern*-related issues may be overturned on appeal? Undoubtedly, courts and practitioners need greater certainty.

Until then, we are a nation "coming to grips."[55]

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[1] *See* "*Stern v. Marshall:* A Jurisdictional Game Changer?" Morrison & Foerster LLP client alert, available at http://www.mofo.com/files/Uploads/Images/110706-Stern-v-Marshall.pdf.

[2] *Stern v. Marshall*, 131 S. Ct. 2594 (2011) [2011 BL 165774] (hereinafter "*Stern*").

[3] *See, e.g.*, *Springel v. Prosser (In re Innovative Communication Corp.)*, Adv. No. 08-3004, No. 07-30012, 2011 BL 203506, at *5-6 (D. V.I. Aug. 5, 2011) (noting that *Stern* holding was narrow and issuing final judgment as to fraudulent conveyance and unauthorized postpetition transfer claims asserted pursuant to Bankruptcy Code sections 548 and 549, respectively). *See also* section IV, *infra*, discussing post-*Stern* treatment of avoidance actions.

[4] *See, e.g.*, *Badami v. Sears (In re AFY, Inc.)*, Case No. BK10-40875-TLS, A10-4054-TLS, 2011 BL 214507, at 1 (Bankr. D. Neb. Aug. 18, 2011) (observing that the *Stern* majority "made a point of noting that Congress exceeded its constitutional authority only in 'one isolated respect.' In particular, no other subsection of 28 U.S.C. § 157(b)(2) was found to be unconstitutional.").

[5] *See, e.g.*, *In re Salander O'Reilly Galleries*, 453 B.R. 106, 117 (Bankr. S.D.N.Y. 2011) [2011 BL 187118] (concluding that *Stern* only addresses constitutionality of state-law counterclaims in that particular case and does not limit bankruptcy court's authority to rule with respect to state-law claims when "determining a proof of claim in the bankruptcy, or when deciding a matter directly and conclusively related to the bankruptcy.").

[6] Court Opinion, *Kurz v. EMAK Worldwide, Inc.*, No. 1:11-cv-00375-NLH (D. Del. Sept. 9, 2011), ECF No. 16 (concluding that *Stern* holding only removes state-law counterclaims from the bankruptcy court's jurisdiction to enter final judgment when they cannot be fully resolved in the claims allowance process) (citing *Salander O'Reilly Galleries*, 453 B.R. at 113).

[7] *In re Ambac Financial Group, Inc.*, Case No. 10-15973 (SCC), 2011 BL 244426, at 15 (Bankr. S.D.N.Y. Sept. 23, 2011) ("Unfortunately, *Stern v. Marshall* has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court. Whatever *Stern v. Marshall* may ultimately be held to mean, this Court is confident that, as a matter of law and practice, it most certainly does not stand for the proposition that the bankruptcy court cannot approve the compromise and settlement of a claim which is indisputably property of a debtor's estate.").

[8] *See, e.g.*, *Salander O'Reilly Galleries*, 453 B.R. at 115 (declining to find that *Stern* limited the court's jurisdiction, reasoning that the jurisdiction of the bankruptcy court to enter final judgment does not depend on whether state law is implicated, but rather on whether the issue decided by the court arises in or under the Bankruptcy Code); Transcript of Record at 90, lines 3-9, *Walker, Truesdell, Roth & Associates. v. The Blackstone Group, L.P. (In re Extended Stay, Inc.)*, Adv. No. 11-02398 (Bankr. S.D.N.Y. Sept. 8, 2011), ECF No. 76 ("*Stern v. Marshall* does not declare that state law-based causes of action may not be heard in a bankruptcy court. *Stern v. Marshall* is a precept of Constitutional authority to be applied on a case-by-case basis, and it depends upon the particulars of each claim to be adjudicated."); *AFY, Inc.* 2011 BL 214507, at 1, ("This court is not deprived of subject matter jurisdiction simply because resolution of the lawsuit may require the application of state law") (citing *Salander O'Reilly Galleries*, 453 B.R. at 112-113); *In re Safety Harbor Resort and Spa*, Case No. 8:10-bk-25886, 2011 BL 224482, at *9 (Bankr. M.D. Fla. Aug. 30, 2011) (rejecting the idea that *Stern* removes all state-law counterclaims from bankruptcy court's jurisdiction and concluding that bankruptcy court may resolve counterclaim if it stems from bankruptcy or that "nothing remains for adjudication of the counterclaim once the bankruptcy judge resolves the claim objection"); *Liberty Mutual Ins. Co. v. Citron (In re Citron)*, Case No. 08-71442-ast, Adv. Proc. No. 09-8125-jbr, 2011 BL 258742 (Bankr. E.D.N.Y. Oct. 6, 2011) (concluding that a counterclaim seeking setoff that relied upon a finding of liability under the Bankruptcy Code did not fall within *Stern*'s narrow ruling).

[9] Case Management Order in Relation to Impact of *Stern v. Marshall* at 2, *Lehman Brothers Holdings Inc. v. JPMorgan Chase Bank, N.A. (In re Lehman Brothers Holdings Inc.)*, Adv. No. 10-03266 (Bankr. S.D.N.Y. Aug. 15, 2011), ECF No. 93.

[10] *Stern*, 131 S. Ct. at 2619.

[11] *See, e.g.*, *Federal Insurance Co. v. DBSI, Inc. (In re DBSI, Inc.)*, Adv. No. 09-52031 (Bankr. D. Del. July 22, 2011), ECF No. 386 (court granted motion for partial summary judgment that the movants' directors' and officers' liability policy covers defense costs incurred in the liquidating trustee's RICO action and avoidance actions; however, court asked parties to submit briefing regarding *Stern*'s impact on court's authority to enter order); Findings of Fact and Conclusons of Law After Trial at 17, *Dragisic v. Boricich (In re Boricich)*, Adv. No. 08-ap-00728 (Bankr. N.D. Ill. June 29, 2011), ECF No. 102 (in nondischargeability action, court declined to enter dollar judgment with respect to nondischargeable debt, but reserved jurisdiction to enter money judgment upon further briefing demonstrating it had constitutional authority to do so).

[12] *Lehman Brothers Holdings Inc.* at 3, Adv. No. 10-03266, ECF No. 93.

[13] *Id.*

[14] *Id.*

[15] In a motion for withdrawal of the reference from the bankruptcy court, defendant JPMorgan Chase Bank, N.A. argued that *Stern* precluded the bankruptcy court from adjudicating any of the claims in the amended complaint, including both the common-law and fraudulent transfer and preference claims. Memorandum of Law in Support of JPMorgan's Motion to Withdraw the Reference, *Lehman Brothers Holdings Inc. v. JPMorgan Chase Bank, N.A.*, Case No. 11-06760 (S.D.N.Y. Sept. 27, 2011), ECF No. 2. The Official Committee of Unsecured Creditors, plaintiff, responded that JPMorgan's interpretation of the case was "overbroad" and a "radical alteration" of the respective roles of bankruptcy and district courts. Plaintiffs' Opposition to the Motion of JPMorgan to Withdraw the Reference, *Lehman Brothers Holdings Inc. v. JPMorgan Chase Bank, N.A.*, Case No. 11-06760 (S.D.N.Y. Sept. 27, 2011), ECF No. 27. As of the date of this article, JPMorgan's motion to withdraw the reference is pending in the United States District Court for the Southern District of New York.

[16] *Innovative Communication Corp.*, 2011 BL 203506, at 8.

[17] *See also Tibble v. Wells Fargo Bank, N.A. (In re Hudson)*, 455 B.R. 648, 657 (Bankr. W.D. Mich. 2011) [2011 BL 211778] ("This judge cannot envision a core proceeding that is more 'core' than lien avoidance. The court will enter a final order. If this court's order is appealed, and the district court decides this court is not constitutionally authorized to issue a final order in this adversary proceeding, this Opinion should be treated as a report and recommendation."); *Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, Case No. 08-32514DM, Adv. No. 10-3203DM, 2011 BL 268164 at *8-9 (Bankr. N.D. Cal. Sept. 28, 2011) ("If I keep these matters and the district court on appeal disagrees with my determination that a matter is core, or perhaps is 'unconstitutionally core,' it can simply treat my findings of fact as 'proposed findings' and review them de novo. I can simplify the process by committing that any findings of fact I make at trial should be treated as proposed if the district court concludes that I lacked authority actually to enter those findings.").

[18] Opinion and Order at 27, *In re Medical Educational and Health Services, Inc. v. Municipality of Mayaguez*, Adv. No. 10-00148 (Bankr. D. P.R. Sept. 2, 2011), ECF No. 130.

[19] *Id.*

[20] Amended Report and Recommendation at 3, *Richardson v. BDSM Corp. (In re Tevilo Indus., Inc.)*, Adv. No. 11-80300 (Bankr. W.D. Mich. Aug. 30, 2011), ECF No. 7.

[21] *Id.* (the court notes that it will await "guidance from higher authority regarding the effect of *Stern*" on such actions).

[22] *Id.*

[23] *Meoli v. The Huntington National Bank (In re Teleservices Group, Inc.)*, 456 B.R. 318, 2011 BL 214498, at *6 (Bankr. W.D. Mich. 2011) (fraudulent transfer action)

> . . . [P]rior to Stern, I did have a standard–28 U.S.C. § 157(b)(2)–to serve as my guide. But now I am told that that standard is unreliable when tested against the Constitution itself. My frustration with *Stern* is that it offers virtually no insight as to how to recalibrate the core/non-core dichotomy so that I can again proceed with at least some assurance that I will not be making the same constitutional blunder with respect to some other aspect of Authority Section 157(b)(2).
>
> (emphasis added).

[24] *Tevilo Indus., Inc.* at 4, Adv. No. 11-80300, ECF No. 7 (on motion for default judgment in preference action)

> I believe that, in a default setting and until the bankruptcy courts receive guidance from higher authority regarding the effect of *Stern* on causes of action under Chapter 5 of the Bankruptcy Code, the most prudent and expedient course of action requires me to make a recommendation, rather than enter a final judgment. By proceeding in this fashion, I am attempting to insulate the ultimate judgment from collateral attack given the presently-confused state of the law. I leave open the possibility, after briefing in a full adversarial contest, that I may have the authority under 28 U.S.C. § 157(b) to enter final judgment in actions premised on Chapter 5 of Title 11, United States Code.
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> (emphasis added).

[25] *Lehman Brothers Holdings Inc.* at 2, Adv. No. 10-03266, ECF No. 93.

> The position papers regarding *Stern* have done nothing to dispel the cloud of uncertainty relating to the Court's authority to decide the pending motion to dismiss or to enter a final judgment as to the various counts of the Amended Complaint. Plaintiffs contend that the Court can do everything while JPMorgan contends that the Court can do nothing except rule in its favor.
>
> (emphasis added).

[26] *Stern*, 131 S. Ct. at 2608 ("Given Pierce's conduct before the Bankruptcy Court we conclude that he consented to that court's resolution of his defamation claim (and forfeited any argument to the contrary).").

[27] *Id.* at 2603.

[28] Note that if bankruptcy court jurisdiction by consent is unavailable, then the jurisdiction of a magistrate judge to enter a final judgment by consent of the parties in district court may also be in danger.

[29] *Adams National Bank v. GB Herndon & Assocs. (In re GB Herndon & Assocs.)*, Case No. 10-00945, Adv. Proc. No. 10-10052, 2011 BL 255890 at *29 (Bankr. D. D.C. Oct. 4, 2011).

[30] *Samson v. Blixseth (In re Blixseth)*, Case No. 09-60452-7, Adv. No. 10-00088, 2011 BL 199140, at *6 (Bankr. D. Mont. Aug. 1, 2011).

[31] *See also e.g.*, *Teleservices Group, Inc.*, 2011 BL 214498, at *33 ("I believe that I could still enter a final judgment against Huntington in this case were Huntington and Trustee both to consent."); *Stoebner v. PNY Techs., Inc. (In re Polaroid Corp.)*, 451 B.R. 493, 495 (Bankr. D. Minn. 2011) (holding that it could not enter final judgment in deciding trustee's motion for partial summary judgment on contract claim against creditor, a non-core "related to" claim, absent parties' express consent); *Medical Educational and Health Services, Inc.* at 18, Adv. No. 10-00148, ECF No. 130 ("In non-core 'related to' proceedings, however, only the district court may enter final orders absent consent of the parties.") (citing 28 U.S.C. § 157(c)); Opinion at 13, *Meek v. Questex Media Group, LLC (In re Oxford Expositions, LLC)*, Case No. 10-16218-DWH, Adv. Proc. No. 11-01095-DWH, 2011 BL 234040, at 13 (Bankr. N.D. Miss. Sept. 13, 2011) (". . . a party can consent to the bankruptcy court's entering a final judgment in a non-core matter as contemplated by § 157(c)(2)"); *Brook v. Ford Motor Credit Co., LLC (In re Peacock)*, 455 B.R. 810, 812 (Bankr. M.D. Fla. 2011) [2011 BL 228558] ("Similarly, *Stern* does not impact a bankruptcy court's ability to hear non-core matters under 28 U.S.C. § 157(c), albeit not decide them absent the parties' consent."); Additional Conclusions of Law on Debtor's Counterclaims to Centerpoint's Claim at 11, *In re Olde Prairie Block Owner, LLC*, No. 10-22668 (Bankr. N.D. Ill. Aug. 25, 2011), ECF No. 1007 ("The Supreme Court's opinion in *Stern* in no way altered the system of final adjudication by consent embodied in § 157(c)(2)."); *Safety Harbor Resort and Spa*, Case No. 8:10-bk-25886, 2011 BL 224482, at *1 ("Besides, parties can still consent–either expressly or impliedly–to a bankruptcy court's jurisdiction after *Stern*."); *Pro-Pac, Inc. v. Chapes (In re Pro-Pac, Inc.)*, Case No. 06-26608-svk, Adv. Proc. No. 07-02110, 2011 BL 246874, at *4 (Bankr. E.D. Wis. Sept. 27, 2011) ("However, *Stern* confirms that the bankruptcy court has the authority to render final judgments even in non-core proceedings with the consent of the parties."); *In re Fairfield Sentry Ltd.*, No. 11 MC 224 (LAP), 11 MC 230 (LAP, 11 MC 231 (LAP), 11 MC 235 (LAP), 11 MC 236 (LAP), 11 MC 237 (LAP), 2011 BL 238703, at *44-45 (S.D.N.Y. Sept. 19, 2011) ("They are therefore not core claims and may not be adjudicated by an Article I court absent consent"); *Matrix IV, Inc. v. American Nat'l. Bank and Trust Co. of Chicago*, 649 F.3d 539, 550 (7th Cir. 2011) [2011 BL 196599] ("Bankruptcy courts may also hear actions that are 'related to' core proceedings but cannot resolve these 'non-core' proceedings unless all parties consent.") (citing Bankruptcy Code § 157(c)(1), (2)).

[32] *In re BearingPoint, Inc.*, 453 B.R. 486, 492 (Bankr. S.D.N.Y. 2011) [2011 BL 181078].

[33] *Id.* at 494.

[34] *Id.* at 497 (emphasis added).

[35] *Id.* at *495 ("I failed to consider how litigants could tie a case up in knots by exploiting their rights to an Article III judge determination when litigation against them is non-core."). The fact that the court reopened a confirmed plan is particularly telling as to the court's concern about *Stern*'s impact; courts are typically very reluctant to do so, but the uncertainty created by *Stern*–and perhaps the risk that litigation over the issue would stall the case–clearly was a sufficient motivator for the court to proceed cautiously.

[36] *In re Heller Ehrman LLP*, 2011 BL 268164.

[37] *Id.* at *10.

[38] *Id.* at *11-12; *see also Safety Harbor Resort and Spa*, 2011 BL 224482, at *10-11 (actions to recover preferential transfers are core and bankruptcy court may enter final judgment) ("Bankruptcy courts should not invalidate a Congressional statute, such as section 157(b)(2)(F)–or otherwise limit its authority to finally resolve other core proceedings–simply because dicta in *Stern* suggests the Supreme Court may do the same down the road. The

Supreme Court does not ordinarily decide important questions of law by cursory dicta. And it certainly did not do so in *Stern*.").

[39] *Kelley v. JPMorgan Chase & Co.*, Civil Nos. 11-193 (SRN/JJG), 11-194 (SRN/JJG), and 11-196 (SRN/JJG), Civil No. 11-197 (SRN/JJG), 2011 BL 240776 (D. Minn. Sept. 21, 2011).

[40] *Id.* at 23-24.

[41] *Id.* at 24. *See also Hudson*, 455 B.R. at 656 (avoidance claim pertaining to the determination of the validity, extent, or priority of asserted mortgage lien) ("Except for the types of counterclaims addressed in *Stern v. Marshall*, a bankruptcy judge remains empowered to enter final orders in all core proceedings.").

[42] *Samson*, 2011 BL 199140.

[43] *Id.* at *21-22.

[44] *Sitka Enterprises, Inc. v. Segarra-Miranda*, No. CIVIL 10-1847CCC, 2011 BL 209191 (D. P.R. Aug. 12, 2011).

[45] *Id.* at *4.

[46] *Id.* at *2 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)).

[47] *Id.* at *4.

[48] *Teleservices Group, Inc.*, 2011 BL 214498, at 44-45 (bankruptcy court submitted findings to the district court a non-core matter on report and recommendation).

[49] *Tevilo Industries, Inc.* at 3, Adv. No. 11-80300, ECF No. 7 ("After my review, I determined that although the Complaint sought avoidance of a preference–a cause of action arising under Title 11 of the United States Code–it also presaged the taking of property to augment the estate under 11 U.S.C. § 550, which the Supreme Court recently suggested may, in the absence of consent, fall within the exclusive authority of a judge with life tenure and salary protection as prescribed in Article III of the United States Constitution.").

[50] Memorandum Opinion and Order at 6-7, *Paloian v. American Express Co. (In re Canopy Financial, Inc.)*, No. 11-cv-05360 (N.D. Ill. Sept. 1, 2011), ECF No. 24.

[51] *See Fairfield Sentry Ltd.*, 2011 BL 238703, at *12 (court found avoidance claims were non-core) ("After reviewing the parties' submissions to the Bankruptcy Court and to this Court, the Court concludes that these cases do not fall within the Bankruptcy Court's core jurisdiction for two reasons. First, these cases do not 'arise under' title 11 nor do they 'arise in' a title 11 case. Second, the assertion of subject matter jurisdiction over these cases by an Article I court contravenes the principle of separation of powers enshrined in Article III of the Constitution.").

[52] *See Innovative Communication Corp.*, 2011 BL 302506, at *97.

[53] *See id.* at 5.

[54] *See id.* at 5-6.

[55] *Lehman Brothers Holdings Inc.* at 1, Adv. No. 10-03266, ECF No. 93.