



Supreme Court Set to Rule on Waiver of Article III Rights

Bankruptcy practitioners are anxiously awaiting a U.S. Supreme Court ruling that will determine whether a party can waive its right to trial before an Article III tribunal.

In *Exec. Benefits Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012), the Ninth Circuit held that a non-creditor defendant waives its right to an Article III hearing by litigating in a bankruptcy court without challenging the court's jurisdiction. In that case, the chapter 7 trustee filed a fraudulent transfer action against a non-creditor that had received a transfer of substantial assets from the chapter 7 debtor. The bankruptcy judge entered summary judgment on behalf of the trustee and the non-creditor defendant appealed, arguing for the first time on appeal that under *Stern v. Marshall*, 131 S.Ct. 2594 (2011), the bankruptcy court lacked authority to enter a final judgment.

Citing *Stern*, the Ninth Circuit reasoned that a party should not be able to fully litigate a fraudulent conveyance action before the bankruptcy court and then only raise the question of Article III rights when it does not win. "[T]he consequences of a litigant sandbagging the court - remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor - can be . . . severe." *In re Bellingham*, 702 F.3d at 570 (citing *Stern*, 131 S.Ct. at 2609).

Reaching an opposite conclusion, the Sixth Circuit held in *Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012) that a party cannot waive their Article III rights. There, the court stated that such an argument "implicates not only [a party's] personal rights, but also the structural principle advanced by Article III. And that principle is not [a party's] to waive." *Id.* at 918.

If the Supreme Court adopts the Ninth Circuit's approach, litigants will need to take care to preserve all Article III-related objections early in litigation and, on a practical level, must engage in a cost-benefit analysis of whether they intend to remain in the bankruptcy court for the duration of proceedings. Oral arguments were held before the Supreme Court on January 14, 2014 and a ruling is expected in June 2014.

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