

Stern v. Marshall -- Digging for Gold and Shaking the Foundation of Bankruptcy Courts (or Not)

Katie Drell Grissel

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***Stern v. Marshall*—Digging for Gold and Shaking the Foundation of Bankruptcy Courts (or Not)**

*Katie Drell Grissel**

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On June 23, 2011, the United States Supreme Court handed down *Stern v. Marshall*,¹ which has quickly become the hottest topic in bankruptcy law in quite some time. This Article (1) briefly describes the historical authority of bankruptcy courts; (2) discusses the Supreme Court’s ruling and rationale in *Stern*; and (3) discusses the ramifications of *Stern* through the lens of recent case law discussing *Stern*, as well as other issues that have not yet been addressed by the courts. As will be shown in this Article, the majority’s pronouncements in *Stern* have led lower courts to widely disparate conclusions about the breadth of the *Stern* decision, and those pronouncements have also dealt a significant blow to the foundational authority of bankruptcy courts, the full effects of which have not yet come to fruition. At least for now, the United States bankruptcy system is still running, despite an unclear foundation for doing so.

1. 131 S. Ct. 2594 (2011).

I. BANKRUPTCY COURT AUTHORITY

A. *Pre-Bankruptcy Code*

In the beginning, there was debtors' prison. As a vestige of British practice (which itself derived from ancient and medieval practices), as late as the early 19th Century in the United States, debtors were often imprisoned for unpaid debts. However, because the U.S. Constitution, enacted in 1789, provided for Congressional authority to create laws on the subject of bankruptcies,² Congress made attempts at creating a federal bankruptcy law in response to the increasing unpopularity of debtors' prison.³ Prior to 1898, Congress passed three Bankruptcy Acts: one in 1800 (set in motion by a depression beginning in 1793), which was repealed three years later; one in 1841 (set in motion by the Panic of 1837), which was repealed two years later; and one in 1867 (set in motion by the Panic of 1857), which was amended in 1874 and finally repealed in 1878.⁴ In the meantime, most states had insolvency laws, which operated in the absence of federal bankruptcy law.⁵ After those three failed attempts, Congress then enacted the Bankruptcy Act of 1898.⁶

Under the Bankruptcy Act of 1898, bankruptcy jurisdiction was conferred on "courts of bankruptcy," "court" was defined to mean "the judge or referee of the court of bankruptcy," and "courts of bankruptcy" to "include" the district judges. That Act gave the referees jurisdiction, subject to review by a district judge, to perform all duties conferred on "courts of bankruptcy" as distinguished from those conferred on "judges," which were to be performed only by district judges. Rules of Bankruptcy Procedure promulgated by the Supreme Court in 1973 redesignated the referees as "bankruptcy judges."⁷

Under the 1898 Act, "referees" were appointed by district courts for six year terms; were removable for "incompetence,

2. See Article I, § 8 of the United States Constitution, which authorizes Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8.

3. See DAVID A. SKEEL, JR., *DEBT'S DOMINION, A HISTORY OF BANKRUPTCY LAW IN AMERICA* 25 (2001).

4. *Id.*

5. *Id.*

6. *Id.*

7. Vern Countryman, *The Bankruptcy Judges: Jurisdiction by Neglect*, 92 COM. L.J. 1, n. 1 (1987).

misconduct, or neglect of duty"; were given fixed compensation that "could be increased but not reduced by the Judicial Conference of the United States," which was payable from a fund made up of fees and levies from bankruptcy estates; and were so called because "a wide variety of cases under the old Act were referred to them."⁸

Courts of bankruptcy under the 1898 Act had summary jurisdiction over three areas.⁹ First, they had "exclusive jurisdiction over 'matters of administration'" in the bankruptcy case (including petitions; the bankruptcy res; the allowance, rejection, and reconsideration of claims; the reduction of claims to money; the "determination of preferences and priorities to be accorded to claims presented for payment"; supervision of trustees; the granting of discharges; and the confirmation of debt adjustment plans).¹⁰ Second, they had jurisdiction to decide "controversies over property in the actual or constructive possession of the court."¹¹ Finally, "other actions by the trustee [were to] be brought only in courts where the bankrupt could have brought [them] in the absence of bankruptcy, unless by consent of the defendant[s]."¹²

B. The Bankruptcy Code

In 1978, the Bankruptcy Code came into being. The Bankruptcy Code eliminated the referee system under the old Act and established "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district."¹³ Judges of the newly formed bankruptcy courts were "appointed to office for 14-year terms by the President, with the advice and consent of the Senate" and were "subject to removal by the 'judicial council of the circuit' on account of 'incompetency,

8. Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 2 (1985).

9. *Id.* at 3. This summary jurisdiction exists in contrast to a district court's plenary jurisdiction. Comment, *Consent to Summary Jurisdiction*, 34 FORDHAM L. REV. 469 (1966).

10. Countryman, *supra* note 8, at 3.

11. *Id.*

12. Countryman, *supra* note 7, at 1-2; see also Countryman, *supra* note 8, at 3. This third subset of consent jurisdiction was subsequently irreverently referred to as "jurisdiction by ambush" when by Bankruptcy Act amendments in 1952, the absence of objection to summary jurisdiction was deemed consent. Countryman, *supra* note 8, at 5-6.

13. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982) (citing 28 U.S.C. § 151(a) (1976 ed., Supp. IV)).

misconduct, neglect of duty or physical or mental disability.”¹⁴ Further, “the salaries of the bankruptcy judges are set by statute and are subject to adjustment under the Federal Salary Act.”¹⁵

The 1978 Bankruptcy Code did *not* vest bankruptcy court authority in Article III judges; however originally it was presumed Article III judges would preside over bankruptcy courts.

The federal commission that produced the first draft of what became the new Bankruptcy Code recommended that the jurisdiction problems under the old Act be eliminated by giving bankruptcy courts jurisdiction over “all controversies that arise out of a bankruptcy case” without regard to possession of property or the consent of the defendant. Essentially, Congress adopted that recommendation, although an effort by the House to elevate bankruptcy judges to Article III status failed.¹⁶

The jurisdiction of bankruptcy courts under the 1978 Code was “broader than that exercised under the former referee system,” eliminated “the distinction between ‘summary’ and ‘plenary’ jurisdiction,” and instead granted bankruptcy courts “jurisdiction over all ‘civil proceedings arising under title 11 . . . or arising in or

14. *Id.* (citing 28 U.S.C. §§ 152, 153(a)–(b) (1976 ed., Supp. IV)).

15. *Id.* (citing 2 U.S.C. §§ 351–61 (1976 ed. and Supp. IV); 28 U.S.C. § 154 (1976 ed., Supp. IV)).

16. Countryman, *supra* note 7, at 3–4 (internal citations omitted). The Supreme Court in *Marathon* also explained that:

It should be noted, however, that the House of Representatives expressed substantial doubts respecting the constitutionality of the provisions eventually included in the Act. The House Judiciary Committee and its Subcommittee on Civil and Constitutional Rights gave lengthy consideration to the constitutional issues surrounding the conferral of broad powers upon the new bankruptcy courts. The Committee, the Subcommittee, and the House as a whole initially concluded that Art. III courts were constitutionally required for bankruptcy adjudications. The Senate bankruptcy bill did not provide for life tenure or a guaranteed salary, instead adopting the concept of a bankruptcy court with similarly broad powers but as an “adjunct” to an Art. III court. The bill that was finally enacted, denying bankruptcy judges the tenure and compensation protections of Art. III, was the result of a series of last-minute conferences and compromises between the managers of both Houses.

458 U.S. at n.12 (citations omitted). *See also* Louis W. Levit and Richard J. Mason, *Where Do We Go From Here? Bankruptcy Administration Post-Marathon*, 87 COM. L.J. 353, 354 (1982) (“The House bill, however, encountered substantial objection on policy grounds. To meet those objections, the Senate produced bill S.2266 whereunder the status of the new court was reduced to that of a non-tenured adjunct of the district court.”).

related to cases under title 11.¹⁷ Under that umbrella, bankruptcy courts could hear claims based on state law as well as on federal law.¹⁸ Under the 1978 Code, appeals from bankruptcy courts were to be heard by three-bankruptcy-judge-panels (pursuant to 28 U.S.C. § 160) or, if no panel had been appointed by the chief circuit judge, by the district court (under 28 U.S.C. § 1334); the court of appeals then had jurisdiction over appeals from the appellate panels or the district court (under 28 U.S.C. § 1293); however, there was also an option for direct appeal to the court of appeals from a final order of a bankruptcy court under 11 U.S.C. § 1293(b).¹⁹

C. Marathon

Bankruptcy court authority came under attack in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*²⁰ (*Marathon*), decided by the Supreme Court on June 28, 1982, and which resulted in a ruling that the broad grant of jurisdiction to bankruptcy judges under the Bankruptcy Act of 1978 was unconstitutional. Four justices of the Supreme Court concluded that “the broad grant of jurisdiction to the bankruptcy courts contained in 28 U.S.C. § 1471 (1976 ed. Supp. IV) is unconstitutional” and explained that:

28 U.S.C. § 1471 (1976 ed. Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of “the essential attributes of the judicial power” from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress’ power to create adjuncts to Art. III courts.²¹

In reaching that conclusion, the four justices reasoned that bankruptcy courts were not authorized as Article I legislative courts (specifically, they did not fall within any of the recognized exceptions, namely the “public rights” exception, to required Article III adjudication), nor were they authorized as adjuncts of Article III courts because bankruptcy judges wield too much

17. *Marathon*, 458 U.S. at 54 (citing 28 U.S.C. § 1471(b) (1976 ed., Supp. IV)).

18. *Id.* (citing 1 W. COLLIER, BANKRUPTCY ¶ 3.01, at 3-47 to 3-48 (15th ed. 1982)).

19. *Id.* at 55.

20. 458 U.S. 50 (1982).

21. *Id.* at 87.

power.²² Two additional justices, in a concurring opinion, reasoned instead that only “so much of the Bankruptcy Act of 1978 as enables a [b]ankruptcy [c]ourt to entertain and decide” Northern’s state law contract action was “violative of Article III of the United States Constitution.”²³ However, because these two justices believed that grant of authority to bankruptcy courts under 28 U.S.C. § 1471 was not severable from the remaining grant of authority to bankruptcy courts, they concurred in the judgment, ruling the Bankruptcy Code’s grant of jurisdiction to bankruptcy courts unconstitutional.

D. The Bankruptcy Amendments and Federal Judgeship Act of 1984

After *Marathon*, district courts adopted an interim “Emergency Rule,” which allowed bankruptcy courts to continue to function until an appropriate Congressional solution could be reached.²⁴ When Congress legislatively responded to *Marathon* (approximately two years later), it did so by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”) in which bankruptcy courts were not given Article III status; instead, “Congress undertook in a new Section 157 of the Judicial Code to specify what [bankruptcy courts] can do.”²⁵ In fact, the Emergency Rule “provided a basis for what was eventually adopted as 28 U.S.C. § 157.”²⁶ 28 U.S.C. § 1334 confers jurisdiction on district

22. *Id.* at 76, 86.

23. *Id.* at 91.

24. Countryman, *supra* note 7, at 6. Indeed, the Supreme Court had stayed its judgment in *Marathon* for just over a mere three months in order to “afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication.” Levit & Mason, *supra* note 14, at 353. “The emergency rule was initiated by the Judicial Conference of the United States in September 1982 by a resolution requiring the Director of the Administrative Office of the United States Courts to promulgate a rule for use by the circuits in the event that Congress failed to act by the end of the stay in *Marathon*.” Jeffrey T. Ferriell, *Core Proceedings in Bankruptcy Court*, 56 UMKC L. REV. 47, n. 74 (1987) (citing Judicial Conference of the United States, *Report of Proceedings* 91 (Sept. 1982)).

25. Countryman, *supra* note 7, at 6.

26. One commentator has explained:

Like 28 U.S.C. § 157(a), the emergency rule provided for reference of “[all] cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 . . . to the bankruptcy judges of th[e] district.” The bankruptcy judge was empowered to enter final orders and judgments in all proceedings other than those designated as “related proceedings[, which were the province of the district court].”

courts (a) “originally and exclusively over bankruptcy cases” and (b) “originally but not exclusively over all civil proceedings arising under the Bankruptcy Code or ‘arising in or related to’ a bankruptcy case.”²⁷ 28 U.S.C. § 157(a) allows district courts to refer this jurisdiction to bankruptcy judges, and all district courts have done so, with most if not all such referrals being accomplished by a general order of reference from the district court.²⁸ 28 U.S.C. § 157 provides for two types of bankruptcy court adjudications: (1) decisions subject to appellate review by a district court under 28 U.S.C. § 157(b)(1) and § 158(a)(1) (“core” proceedings arising under title 11 or arising in a case under title 11) and (2) decisions subject to *de novo* review under 28 U.S.C. § 157(c)(1) (“non-core” proceedings otherwise related to a case under title 11) in which the bankruptcy judge is to submit proposed findings of fact and conclusions of law to the district court. Although the Bankruptcy Code has been amended a number of times since 1984, bankruptcy court adjudicatory authority has not been undermined since *Marathon* until *Stern*.

With this brief summary of the history of bankruptcy court authority in mind, we now turn to *Stern*, which unearthed certain lingering *Marathon* concerns by its ruling unconstitutional, as violative of Article III of the Constitution, the exercise of bankruptcy court authority over certain “core” proceedings, at least in certain circumstances, under 28 U.S.C. § 157(b)(2)(C).

II. *STERN V. MARSHALL*

A. *Majority Opinion*

In a 5 to 4 split, the majority²⁹ in *Stern* held, as applied to the facts of that case, that 28 U.S.C. § 157(b)(2)(C) is unconstitutional. Section 157(b)(2)(C) provides that:

Ferriell, *supra* note 24, at 57. The validity of the Emergency Rule was brought into serious doubt, but under the circumstances, in that state of emergency, everyone appeared to play along until Congress enacted BAFJA in 1984. *Id.* at 59.

27. Countryman, *supra* note 7, at 6.

28. *Id.*; Allen B. Kamp, *Court Structure Under the Bankruptcy Code*, 90 COM. L. J. 203, 208 (1985).

29. The majority consists of Roberts, writing for the Court, joined by Scalia (who also wrote a concurring opinion), Kennedy, Thomas, and Alito. Breyer filed a dissenting opinion in which Ginsburg, Sotomayor, and Kagan joined.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . .

(2) Core proceedings include, but are not limited to –

...
(C) counterclaims by the estate against persons filing claims against the estate.³⁰

Specifically, the majority held that the bankruptcy court lacked the constitutional authority, even though it had the statutory authority, to enter judgment on a state-law counterclaim/common law tort claim, explaining: “Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984.”³¹ Thus, the Supreme Court affirmed the Ninth Circuit and concluded that the bankruptcy court’s exercise of its core jurisdiction pursuant to § 157(b)(2)(C) was unconstitutional because the “Bankruptcy Court below 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.”³² The majority also stated its rationale another way at the outset of the opinion: “The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection.”³³

This case arose out of longstanding litigation between Vickie Lynn Marshall (also known as Anna Nicole Smith, now deceased) and Pierce Marshall, the son of Vickie’s former husband, J. Howard Marshall (also now deceased).³⁴ After J. Howard’s death, Vickie filed for bankruptcy, and Pierce filed a complaint seeking a declaration and also filed a proof of claim in Vickie’s bankruptcy proceeding for defamation based upon allegations that Vickie induced her lawyers to tell the press that Pierce engaged in fraud in controlling J. Howard’s assets. Vickie defended by asserting “truth” and filed a counterclaim to the proof of claim alleging Pierce’s tortious interference, asserting that Pierce fraudulently induced J. Howard to sign a living trust that did not include Vickie

30. 28 U.S.C. § 157(b)(2)(C) (2006).

31. *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011).

32. *Id.*

33. *Id.* at 2601.

34. The attached Appendix A is a chart detailing the procedural history of the *Stern* case, which is described in more detail herein.

even though J. Howard meant to give her half of his property.³⁵ Pursuant to 28 U.S.C. § 157(b)(2)(C), the bankruptcy court³⁶ found Vickie's counterclaim to be a "core proceeding," and rendered summary judgment against Pierce on his defamation claim and, in a bench trial, awarded Vickie over \$400 million in compensatory damages and \$25 million in punitive damages on her counterclaim.³⁷ Pierce appealed.

The district court³⁸ disagreed with the bankruptcy court's determination that the counterclaim was a "core" proceeding and believed that "it would be unconstitutional to hold that any and all counterclaims are core."³⁹ The district court then held that the counterclaim was not "core" and accordingly considered the bankruptcy court's ruling to be proposed rather than final (pursuant to 28 U.S.C. § 157(c)(1)) and conducted an independent review of the record.⁴⁰ By that time, a Texas probate court (in which Vickie had sued Pierce asserting tortious interference and in which Pierce had counterclaimed for defamation) had conducted a jury trial on the merits of the parties' dispute and had entered judgment in Pierce's favor,⁴¹ but the district court declined to give it preclusive effect and instead ruled in Vickie's favor on the counterclaim and awarded her compensatory and punitive damages of \$44,292,767.33.⁴² An appeal on a different ground⁴³ was previously taken, was reversed by the Ninth Circuit,⁴⁴ and was reversed again by the Supreme Court.⁴⁵ On remand from the Supreme Court, the Ninth Circuit held that 28 U.S.C. § 157 mandated "a 'two-step approach' under which a bankruptcy judge may issue a final judgment in a proceeding only if the matter both meets Congress's definition of a core proceeding *and* arises under

35. See *infra* Appendix A.

36. The Bankruptcy Court opinion may be found at 253 B.R. 550 (Bankr. C.D. Cal. 2000).

37. *Stern*, 131 S. Ct. at 2601.

38. The District Court opinion may be found at 275 B.R. 5 (C.D. Cal. 2002).

39. *Stern*, 131 S. Ct. at 2602.

40. *Id.*

41. The Texas probate court's ruling can be found at *Marshall v. MacIntyre (Estate of Marshall)*, prob. juris. noted, no. 276-815-402 (Harris Cnty., Tex. Dec. 7, 2001).

42. *Stern*, 131 S. Ct. at 2602.

43. The first Supreme Court appeal focused on whether the probate exception deprived the bankruptcy court of jurisdiction over Vickie's counterclaim.

44. The first Ninth Circuit opinion may be found at 392 F.3d 1118 (9th Cir. 2004), *rev'd*, 54 U.S. 293 (2006).

45. The first Supreme Court opinion may be found at 547 U.S. 293 (2006) (holding that probate exception did not deprive the bankruptcy court of jurisdiction over Vickie's counterclaim).

or arises in title 11.”⁴⁶ Thus, the Ninth Circuit held that certain proceedings *listed* as “core” may not *be* “core” if they do not also arise “under or in” title 11. The Ninth Circuit found that Vickie’s counterclaim was not “core” because the counterclaim was not so closely related to Pierce’s “proof of claim that the resolution of the counterclaim [was] necessary to resolve the allowance or disallowance of the claim itself.”⁴⁷ The result of the Ninth Circuit’s holding that Vickie’s counterclaim was not core meant that the bankruptcy court’s order was not “final.” Therefore, the Texas state court’s judgment in favor of Pierce on the tortious interference claim was, instead, the earliest final judgment on the matter and was, therefore, entitled to preclusive effect.⁴⁸

The Supreme Court granted certiorari. The Court considered two main questions:

- (1) Whether the Bankruptcy Court had the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on Vickie’s counterclaim; and
- (2) If so, whether conferring that authority on the Bankruptcy Court is constitutional.⁴⁹

The Court disposed of the first issue in a straightforward way. The Court considered whether 28 U.S.C. § 157(b)(2)(C) conferred statutory authority to the bankruptcy court to issue a final judgment on Vickie’s counterclaim and concluded that it did.⁵⁰ Based upon the plain language of the statute, and declining to accept Pierce’s more convoluted readings of the statutory language, the Court reasoned that the “detailed list of core proceedings in § 157(b)(2) provides courts with ready examples” of proceedings (including counterclaims against persons filing claims against the estate) over which bankruptcy courts may exercise “core” jurisdiction.⁵¹

The Court’s analysis of the second issue, however, undermines the bankruptcy court’s statutory authority recognized in the Court’s analysis of the first issue. As the Court explained: “Although we

46. *Stern*, 131 S. Ct. at 2602 (citing *In re Marshall*, 600 F.3d 1037, 1055 (9th Cir. 2010)).

47. *Id.* (citing *Marshall*, 600 F.3d at 1058).

48. *Id.* at 2602–03.

49. *Id.* at 2600.

50. *Id.* at 2608.

51. *Id.* at 2605. The Court further explained: “In past cases, we have suggested that a proceeding’s ‘core’ status alone authorizes a bankruptcy judge, as a statutory matter, to enter final judgment in the proceeding. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 50 (1989) (explaining that Congress had designated certain actions as ‘core proceedings’ which bankruptcy judges may adjudicate and in which they may issue final judgments...).” *Id.* at 2604.

conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.⁵²

The Court's analysis is involved, but, distilled to its essence, concludes that the Constitution requires that only Article III courts—whose judges have life tenure and are protected against salary reductions—decide “a suit . . . made of ‘the stuff of the traditional actions at common law.’”⁵³

The Court noted its prior decision in *Marathon*, in which the Court “considered whether bankruptcy judges serving under the Bankruptcy Act of 1978—appointed by the President and confirmed by the Senate, but lacking the tenure and salary guarantees of Article III—could ‘constitutionally be vested with jurisdiction to decide [a] state-law *contract* claim’ against an entity that was not otherwise part of the bankruptcy proceedings” and held that such jurisdiction violated Article III of the Constitution.⁵⁴ Similarly, in this case, the Court found the bankruptcy court's exercise of “core” jurisdiction over a state common law *tort* claim unconstitutional.⁵⁵

1. Categorical Bases for Allowing Bankruptcy Court to Resolve State Common Law Claims are Inapplicable

In supporting its ruling, the majority considered the applicability of various categorical bases for allowing a bankruptcy court, as a non-Article III tribunal, to decide state common law claims. The Court first went into great detail about the “public rights” category of cases that can be constitutionally assigned by Congress to Article I “legislative courts” for resolution and determined that Vickie's counterclaim did not fall into the admittedly inconsistent various formulations of that category in the Court's prior cases.⁵⁶

The Court cited *Murray's Lessee v. Hoboken Land & Improvement Co.*⁵⁷ for the proposition that “Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty” but that:

52. *Id.* at 2608.

53. *Id.* at 2609 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)).

54. *Id.* at 2609–10 (citing *Northern Pipeline*, 458 U.S. at 52, 87 n.40) (emphasis added).

55. *Id.* at 2611.

56. *Id.* at 2611–15.

57. 18 How. 272 (1856).

At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”⁵⁸

The Court noted, however, that the “public rights” exception was originally limited to instances in which the cases arise “between the Government and persons subject to its authority in connection with the performance of constitutional functions of the executive or legislative departments,” as opposed to private rights,⁵⁹ and is limited by more recent jurisprudence to a case “in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is essential” to a regulatory objective.⁶⁰ The Court cited the following cases in that regard:

- *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932) (allowing administrative adjudicator to make specialized, narrow factual determinations regarding particularized area of law, with order enforceable only by district court).
- *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 584 (1985) (statutory arbitration regarding compensation did not violate Article III because “[a]ny right to compensation . . . results from [the statute] and does not depend on or replace a right to such compensation under state law”).
- *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 836 (1986) (CFTC jurisdiction over broker’s counterclaim did not violate Article III because (1) claim and counterclaim concerned a “single dispute;” (2) CFTC’s assertion of authority was “narrow” and in “particularized area”; (3) law in question was governed by limited federal regulatory scheme; (4) parties elected to resolve differences before CFTC; and (5) order only enforceable by order of the district court).
- *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989) (if statutory right is not “closely intertwined with a federal regulatory program Congress has power to enact” and “if that right neither belongs to nor exists against the

58. *Id.* at 2612.

59. *Id.*

60. *Id.* at 2613.

Federal Government, then it must be adjudicated by an Article III court”).

- *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011) (what makes a right public rather than private is that the right is integrally related to particular federal government action).

Based on the foregoing public rights exception precedent, the majority first explained that the substance of Vickie’s state law counterclaim “d[id] not flow from a federal statutory scheme.”⁶¹ The Court also determined that that Vickie’s counterclaim was not “completely dependent upon” adjudication of a claim created by federal law, as in *Schor*.⁶² The Court further explained that “Pierce did not truly consent to the resolution of Vickie’s claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie’s estate”⁶³ and that:

Pierce did not have another forum in which to pursue his claim to recover from Vickie’s pre-bankruptcy assets, rather than take his chances with whatever funds might remain after the Title 11 proceedings. . . . as we recognized in *Granfinanciera*, the notion of “consent” does not apply in bankruptcy proceedings as it might in other contexts.⁶⁴

The Court also decided that the substance of Vickie’s claim was not limited to a particularized area of the law where an “expert and inexpensive method” for resolving it would be available (as is the case with certain issues given to administrative agencies specially assigned thereto).⁶⁵ Instead, the Court concluded that:

[T]his case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous “public right,” then Article III would be transformed from the guardian of individual liberty and

61. *Id.* at 2614.

62. *Id.*

63. *Id.* at 2614–15 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989) (noting that “[p]arallel reasoning to *Schor* is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims.”)).

64. *Id.* at n.8.

65. *Id.* at 2615 (citing *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

separation of powers we have long recognized into mere wishful thinking.⁶⁶

2. *Distinguishing Katchen and Langenkamp*

Next, the Court considered Vickie's argument that *Marathon* and *Granfinanciera* could be distinguished on the basis that in those cases, the defendants had not filed proofs of claim while Pierce had. Because Pierce filed a claim in Vickie's bankruptcy case, she argued that the bankruptcy court had authority to adjudicate her counterclaim.⁶⁷ The Court said this distinction was of no consequence because state law creates property interests, and Pierce's defamation claim did not affect the nature of Vickie's claim as being a tort claim at common law that attempts to bring property into the bankruptcy estate.⁶⁸

The Court distinguished *Katchen v. Landy* on the basis that, in that case, the Court allowed a bankruptcy court to summarily adjudicate a debtor's preference claims against a creditor of the estate where "it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue."⁶⁹ Put another way, "the same issue [arose] as part of the process of allowance and disallowance of claims."⁷⁰ The Court limited its prior language in *Katchen* that "he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure" to circumstances in which the claim of the debtor must be resolved in order to determine the allowability of the creditor's claim.⁷¹

The Court distinguished *Langenkamp* on the basis that, there, a preference action was allowed to be heard where the allegedly preferred creditor had filed a claim because "then 'the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship.'"⁷² Because the

66. *Id.*

67. *Id.* at 2616 (citing to *Katchen v. Landy*, 382 U.S. 323 (1966); *Langenkamp v. Culp*, 498 U.S. 42 (1990)).

68. *Id.*

69. *Id.* (citing *Katchen*, 382 U.S. at 329–30, 332–33, n.9, 334). The statute at issue in *Katchen* was Bankruptcy Act, § 57(g), the predecessor to 11 U.S.C. § 502(d), which requires that amounts owed on account of avoidance actions be paid to the estate before claims of entities from which property is recoverable through avoidance will be allowed.

70. *Id.* (citing *Katchen*, 382 U.S. at 336).

71. *Id.* (citing *Katchen*, 382 U.S. at 333, n.9).

72. *Id.* at 2617 (citing *Langenkamp*, 498 U.S. at 44).

bankruptcy court in Vickie's case "was required to and did make several factual and legal determinations that were not 'disposed of in passing on objections' to Pierce's proof of claim for defamation," such resolution was not integral as in *Langenkamp*.⁷³ "There was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim."⁷⁴ As pointed out by the United States as *amicus curiae*, the issue presented is whether the bankruptcy court has authority to enter a final order on a compulsory counterclaim⁷⁵ where adjudication of that counterclaim requires resolution of issues that are not all implicated by the creditor's claim against the estate.⁷⁶ The Court held that a bankruptcy court has no such authority.⁷⁷

The Court also distinguished *Katchen* and *Langenkamp* on the basis that the actions brought by the trustees in those cases arose under federal bankruptcy law, not state common law, like Vickie's counterclaim.⁷⁸

3. Bankruptcy Courts Are Not Adjuncts of Article III Courts

The Court next considered Vickie's argument that bankruptcy courts are mere "adjuncts" of Article III Courts.⁷⁹ The Court concluded that "a court exercising such broad powers is no mere adjunct of anyone."⁸⁰ The Court explained that after the 1984 amendments to the Bankruptcy Code, "[t]he new bankruptcy courts, like the old, do not 'ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law' or engage in 'statutorily channeled factfinding functions.'"⁸¹ Indeed, a bankruptcy court resolving a counterclaim pursuant to § 157(b)(2)(C) has the power to enter final judgment subject to

73. *Id.*

74. *Id.*

75. *Id.* The majority noted that "[t]here was some overlap between Vickie's counterclaim and Pierce's defamation claim that led the courts below to conclude that the counterclaim was compulsory or at least in an 'attenuated' sense related to Pierce's claim." *Id.* (citations omitted). The dissent also notes that the counterclaim was compulsory because it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." *Id.* at 2626 (Breyer, J., dissenting) (citing FED. R. CIV. P. 13(A); FED. R. BANKR. P. 7013).

76. *Id.* at 2617.

77. *Id.* at 2617-18.

78. *Id.* at 2618.

79. *Id.*

80. *Id.* at 2611.

81. *Id.* at 2618 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982)) (alteration in original).

review *only* if a party chooses to appeal.⁸² Thus, as in *Marathon*, the Court found that this authority is Article III authority being exercised by a non-Article III court.⁸³ “[A] bankruptcy court can no more be deemed a mere ‘adjunct’ of the district court than a district court can be deemed an ‘adjunct’ of the court of appeals.”⁸⁴ That current bankruptcy judges are appointed by courts of appeals rather than the President (which was a post-*Marathon* Congressional change intended to aid in bankruptcy court jurisdiction) is irrelevant.⁸⁵

4. That the Majority Opinion Restricts a Bankruptcy Court’s Ability to Enter Final Judgments on Certain State Law Counterclaims may be Administratively Burdensome does not Change the Result

The Court made short shrift of the fact that bankruptcy courts not having core adjudicatory authority over such counterclaims would be administratively burdensome. The Court explained that “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”⁸⁶ Moreover, not all issues are currently consolidated before the bankruptcy courts—certain other state law matters may already be heard by state courts.⁸⁷ Further, the district courts already have *de novo* review of “related to” matters pursuant to § 157(c)(1), and the district courts are permitted to withdraw the reference from the bankruptcy court on the motion of a party or on its own.⁸⁸ The Court did not believe its holding would prevent bankruptcy courts from hearing state law counterclaims; rather, it would prevent bankruptcy courts only from entering final orders on such counterclaims.⁸⁹

B. Justice Scalia’s Concurrence

Justice Scalia found “something . . . seriously amiss” with the jurisprudence in this area in light of the numerous, varied, and seemingly “random[]” reasons given by the majority for finding

82. *Id.* at 2619.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (citing *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

87. *Id.* at 2619–20 (citing 28 U.S.C. § 1334(c)(1) & (2)).

88. *Id.* at 2620.

89. *Id.*

§ 157(b)(2)(C) unconstitutional under Article III.⁹⁰ Scalia explained that, in his view, an Article III judge is required in “all federal adjudications” unless there is some “firmly established historical practice to the contrary,” though that subject was not briefed by the parties.⁹¹

C. Dissent (Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan)

The dissent agreed with the majority that § 157(b)(2)(C) authorizes a bankruptcy court to adjudicate a compulsory counterclaim to a proof of claim filed in a bankruptcy case but did not agree with the majority that the statute is unconstitutional. Instead, the minority explained that “the statute is consistent with the Constitution’s delegation of the ‘judicial Power of the United States’ to the Judicial Branch of Government,” and, consequently, the statute is constitutional.⁹² In other words, this delegation of authority to a non-Article III tribunal—the bankruptcy courts—is no affront to Article III.

The dissent maintained that the majority emphasized the wrong precedent. The dissent believed the majority’s focus on *Murray’s Lessee*, as a source of the limits of Article III Judicial Power, relied on dicta. Instead, the dissent thought the focus should be on the public/private right distinction and noted that some public rights are outside the cognizance of the Article III courts.⁹³

The dissent also believed the majority underemphasized the importance of *Crowell v. Benson*, in which the Court allowed a grant of administrative adjudicative power to an agency regarding questions of law and fact, with legal conclusions to be reviewed *de novo* and fact-finding reviewed under a “supported by evidence in the record” standard of review.⁹⁴ Under that precedent, such a delegation did not violate Article III, and a similar delegation to bankruptcy courts also should not violate Article III. The majority’s narrow reading of *Crowell*, which limited it to the allowance of specialized tribunals for factual determinations in particularized areas of law, would be an affront to other Congressional delegations of authority, *e.g.*, to the National Labor Relations Board, the Commodity Futures Trading Commission, the

90. *Id.* at 2621 (Scalia, J., concurring).

91. *Id.* at 2620–21.

92. *Id.* at 2622 (dissenting opinion).

93. *Id.* at 2623.

94. *Id.*

Surface Transportation Board, and the Department of Housing and Urban Development.⁹⁵

Rather than leaning on *Marathon*, the dissent would look instead to *Thomas* and *Schor*, “with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.”⁹⁶ Accordingly, the dissent would examine five factors in determining whether a non-Article III tribunal has adjudicatory authority without running afoul of Article III: (1) the origins and importance of the right to be adjudicated; (2) the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts; (3) the extent to which the delegation nonetheless reserves judicial power for exercise by Article III courts; (4) the presence or absence of the parties’ consent to initial adjudication before a non-Article III tribunal; and (5) the concerns that drove Congress to depart from adjudication in an Article III court.⁹⁷ The dissent explained that the first factor weighed against bankruptcy court adjudication because the claim is a tort claim, but the fact that it is in a *compulsory counterclaim* undercuts the negative aspect of that factor.⁹⁸ The remaining factors weighed in favor of bankruptcy court adjudication: (2) the tribunal has similar protections as Article III judges that safeguard their protection from improper political influence; (3) the district courts control and supervise bankruptcy determinations (with respect to core matters, findings of fact reviewed for clear error, conclusions of law, *de novo*), and district courts can withdraw the bankruptcy reference; (4) the parties consented to the bankruptcy court’s jurisdiction (and Pierce could have brought his claim in state or federal court since he argued it was nondischargeable); and (5) the bankruptcy courts serve important legislative purposes—to “create an efficient, effective federal bankruptcy system,” to deal with “restructuring of debtor-creditor relations,” to interpret and apply the uniform laws on the subject of bankruptcies as set forth in Article I § 8 of the Constitution, and to resolve claims (and counterclaims) in bankruptcy cases in a consolidated forum.⁹⁹ Therefore, “any intrusion on the Judicial Branch can only be termed *de minimis*.”¹⁰⁰

95. *Id.*

96. *Id.* at 2625.

97. *Id.*

98. *Id.* at 2626.

99. *Id.* at 2626–29.

100. *Id.* at 2629.

Finally, the dissent noted the staggering frequency with which compulsory counterclaims based on state law claims arise in bankruptcy and lamented the now “constitutionally required game of jurisdictional ping-pong between courts,” which will “lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.”¹⁰¹

III. ISSUES AND IMPLICATIONS

A. *Are We Facing Marathon Problems Again?*

That the Supreme Court has held unconstitutional part of the statutory scheme relating to bankruptcy courts’ exercise of adjudicatory authority in the realm of district courts’ bankruptcy jurisdiction, which was enacted for the purpose of remedying *Marathon* issues with respect to bankruptcy courts, may provide a basis for future litigation challenging the jurisdictional foundation of bankruptcy courts generally. Even though the majority represented that it did not “think the removal of counterclaims such as Vickie’s from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute,”¹⁰² frighteningly, the majority also explained that: “With respect to such ‘core’ matters, however, the bankruptcy courts under the 1984 Act exercise the same powers they wielded under the Bankruptcy Act of 1978.”¹⁰³ Might this analysis be used to argue that the exercise of adjudicatory authority over “core” proceedings by bankruptcy courts—some or all exercises of it—is an unconstitutional encroachment into Article III Judicial Power, as it was in *Marathon*? The Court proceeded to shake the foundation of bankruptcy court authority further by stating: “Nor can the bankruptcy courts under the 1984 Act be dismissed as mere adjuncts of Article III courts, any more than could the bankruptcy courts under the 1978 Act.”¹⁰⁴ If bankruptcy courts are not “adjuncts” under Article III notwithstanding their being designated as “units” of the district courts by 28 U.S.C. § 151,¹⁰⁵ then on what authority do they operate?

101. *Id.* at 2630.

102. *Id.* at 2620.

103. *Id.* at 2610.

104. *Id.* at 2611.

105. 28 U.S.C. § 151 provides:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under

Bankruptcy courts must be authorized constitutionally—either under Article I § 8, as a legislative tribunal, or under Article III, as a court exercising judicial power, or possibly as an adjunct thereof. But, the plurality in *Marathon* determined the bankruptcy courts were *not* Article I courts because they did not fit within the defined categories (territorial courts, courts martial, or “public rights” courts) and expressly noted that Congress established the bankruptcy courts as “adjuncts” and *not* as legislative courts.¹⁰⁶ The *Marathon* plurality did note, however, that

[the] restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former *may well be a ‘public right,’* but the latter is not.¹⁰⁷

But, in *Stern*, the Court backed off of that statement in footnote 7 of the majority opinion. Because neither party before the Court asked it to consider whether “the restructuring of debtor-creditor relations is in fact a public right,” the Court did not decide that issue.¹⁰⁸ However, the Court did, with eerie implications, state that it was taking the same view expressed in *Granfinanciera*: that “we did not mean to ‘suggest that the restructuring of debtor-creditor relations is in fact a public right.’”¹⁰⁹ In sum, if bankruptcy courts are not Article I courts per *Marathon* and the intentionally unanswered question in *Stern* (because they are not territorial courts or courts martial, and because the Court refused to even suggest that bankruptcy courts are courts resolving “public rights”)¹¹⁰ then, to have some constitutional foundation, they must fall within Article III; however, we know bankruptcy judges are not blessed with the constitutionally-required lifetime tenure, non-reducible salary, and Presidential appointment with Senate confirmation that Article III judges have, so they cannot be Article

this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 151 (2006).

106. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63 n.13 (1982); see also 28 U.S.C. § 151 (2006).

107. *Marathon*, 458 U.S. at 71 (emphasis added).

108. *Stern*, 131 S. Ct. at 2614, n.7 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56, n.11 (1989)).

109. *Id.*

110. *Marathon*, 458 U.S. at 71.

III Courts, and we know further from *Stern* that bankruptcy courts are “no mere adjunct of anyone.”¹¹¹ As the *Stern* Court explained: “[S]uch judges should not be in the business of entering final judgments in the first place” if they are “deemed a mere ‘adjunct’ of the district court.”¹¹²

Accordingly, it is unclear, at best, what the constitutional authority for bankruptcy courts actually is, and *Stern* was careful not to answer that question.¹¹³ Although the Court expressly limited its holding to bankruptcy courts’ adjudicatory authority under 28 U.S.C. § 157(b)(2)(C) over state law counterclaims not otherwise resolved in the claims resolution process, the Court’s reasoning arguably undermines the soundness of the bankruptcy court adjudicatory scheme as a whole.

Courts have, to date, been divided on how far *Stern* reaches. On one end of the spectrum, a bankruptcy court has ruled it cannot even *hear*, much less enter a final order on, fraudulent conveyance actions because they are “quintessentially suits at common law” and because there is no statutory mechanism for entering a report and recommendation on an unconstitutional core proceeding.¹¹⁴ At the other end, courts have ruled that *Stern* is to be construed narrowly and that bankruptcy courts have core adjudicatory authority over various kinds of actions under the “public rights” exception,¹¹⁵ notwithstanding *Stern*’s admonition that “We noted [in *Granfinanciera*] that we did not mean to ‘suggest that the restructuring of debtor-creditor relations is in fact a public right.’”¹¹⁶

111. *Stern*, 131 S. Ct. at 2611.

112. *Stern*, 131 S. Ct. at 2619.

113. The most constitutionally sound answer to this question this author can muster is that bankruptcy courts must be Article I courts, authorized to adjudicate bankruptcy cases based upon a modern formulation of the “public rights” doctrine (in that bankruptcy cases are “integrally related to particular Federal Government action,” *Id.* at 2598 (citing *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011))), with necessary reference to the Bankruptcy Code, as the embodiment of the legislative bankruptcy power in Article I § 8, as described above. But, this conclusion contradicts precedent and applicable legislative statements. Thus, one is left to wonder what the constitutional basis currently underlying bankruptcy court authority actually is.

114. *See, e.g., Samson v. Blixseth (In re Blixseth)*, No. 09-60452-7, 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011).

115. *See, e.g., In re Okwonna-Felix*, No. 10-31663, 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011); *Sanders v. Muhs (In re Muhs)*, No. 09-10564, 2011 WL 3421546 (Bankr. S.D. Tex. Aug. 2, 2011); *Husky Int’l Elecs., Inc. v. Ritz (In re Ritz)*, 459 B.R. 623 (Bankr. S.D. Tex. 2011); *In re Bigler, L.P.*, 458 B.R. 345 (Bankr. S.D. Tex. 2011).

116. *Stern*, 131 S. Ct. at 2614 n.7 (citing *Granfinanciera*, 492 U.S. at 56).

B. Cases Applying Stern¹¹⁷

1. On Counterclaims

In *Turner v. First Community Credit Union (In re Turner)*, the Bankruptcy Court for the Southern District of Texas considered whether it had jurisdiction over an adversary proceeding initiated by a debtor against its bank regarding the freezing of its bank account and denial of access to funds.¹¹⁸ The court determined that the adversary proceeding was a core proceeding under the general catchall: “a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.”¹¹⁹ The court raised the issue of whether *Stern* affected its adjudicatory authority. The court explained that:

Because the Debtors’ suit against First Community is in effect a counterclaim against this institution which filed proofs of claim in the Debtors’ main case, at first blush it would appear that *Stern* is on all fours and therefore that: (1) this Court does not have the constitutional authority to enter a final judgment in this dispute; and (2) this Court must therefore submit proposed findings of fact and conclusions of law to the District Court, together with a proposed judgment to be signed by that Article III Court.¹²⁰

But the court distinguished *Stern* because (1) while state law issues were at the heart of the counterclaim in *Stern*, in this case, the alleged stay violations were based upon Bankruptcy Code § 362(a) and (2) the Debtors’ requested relief was based upon an express Bankruptcy Code provision: § 362(k).¹²¹ Alternatively, the court determined that the stay violation dispute fell within the “public rights” exception to Article III adjudicatory authority, noting that “what makes a right ‘public’ rather than private is that the right is integrally related to particular federal government action.”¹²² The

117. Please reference the accompanying case chart, attached as Appendix B, which divides the cases discussed herein by subject matter and then by circuit, and which also notes whether the holdings represent expansive or narrow readings of *Stern*.

118. *Turner v. First Cmty. Credit Union (In re Turner)*, 2011 WL 2708907, at *1, *3 (Bankr. S.D. Tex. July 11, 2011).

119. *Id.* at *3 (quoting *In re Southmark Corp.*, 163 F.3d 925, 930 (5th Cir. 1999)).

120. *Id.*

121. *Id.* at *4.

122. *Id.*

court concluded that it may exercise authority over essential bankruptcy matters under the “public rights” exception under the *Thomas v. Union Carbide Agricultural Prods. Co.* statement of that exception, which maintains that “a right closely integrated into a public regulatory scheme . . . may be resolved by a non-Article III tribunal.”¹²³

The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including “the exercise of exclusive jurisdiction over all of the debtor’s property, the equitable distribution of that property among the debtor’s creditors, and the ultimate discharge that gives the debtor a ‘fresh start’ by releasing him, her, or it from further liability for old debts.”¹²⁴

Thus, the court ruled that it could enter a final judgment in this matter.¹²⁵

In *Jones v. Mandel (In re Mandel)*, the Bankruptcy Court for the Eastern District of Texas considered issues relating to a breach of contract proof of claim and corresponding adversary proceeding relating to non-payment under a building contract.¹²⁶ The court determined, with respect to a counterclaim for restitution (based upon improper use of exclusive, copyrighted plans for the subject property being used on another property) asserted in the adversary proceeding, that “[i]n light of the recent opinion by the Supreme Court in *Stern v. Marshall*, the court does not have the constitutional authority to decide this counterclaim—at least not in the absence of the parties’ express consent.”¹²⁷

In *In re Olde Prairie Block Owner, LLC*, a Northern District of Illinois bankruptcy court determined it had the authority to enter a final order on counterclaims asserted by the debtor either (1) where the parties consented or (2) where the counterclaims were resolved in the process of adjudicating claims.¹²⁸ In reaching its conclusion, the court explained that *Stern* held a bankruptcy court “lacks the

123. *Id.* (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985)).

124. *Id.* (citing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982)). *But see Stern v. Marshall*, 131 S. Ct. 2594, 2614 n. 7 (2011) (“We noted [in *Granfinanciera*] that we did not mean to ‘suggest that the restructuring of debtor-creditor relations is in fact a public right.’”).

125. *Id.* at *5.

126. *Jones v. Mandel (In re Mandel)*, 2011 WL 2728415, at *3 (Bankr. E.D. Tex. July 12, 2011).

127. *Id.*

128. *In re Olde Prairie Block Owner, LLC*, 2011 WL 3792406, at *1 (Bankr. N. D. Ill. Aug. 25, 2011).

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"¹²⁹ and noted that the Supreme Court specified that its holding is a "narrow" one and "does not change all that much."¹³⁰ The court also explained that, under *Stern*, a counterclaim that falls within the public rights exception, and thus does not require the parties' consent for final adjudication by the bankruptcy court, is one that stems from the bankruptcy or would be necessarily resolved in the claims allowance process.¹³¹ Two of the debtor's counterclaims were "defensive" in nature and "had to be resolved in order to rule on" proofs of claim that were filed.¹³² Three of the debtor's counterclaims were not so resolvable because they "each required legal and factual determinations different from [the creditor's] contract claim," and, after *Stern*, though they are "core" under 28 U.S.C. § 157(b)(2)(C), they must be treated as non-core because final adjudication by a bankruptcy court over them would be unconstitutional.¹³³ However, because the parties gave consent to the entry of final orders by the bankruptcy judge as to all five counterclaims, the court retained that authority under 28 U.S.C. § 157(c)(2).¹³⁴ The court concluded:

The Supreme Court's opinion in *Stern* in no way altered the system of final adjudication by consent embodied in § 157(c)(2). . . . The issue at hand, therefore, is not whether the parties here could consent to a Bankruptcy Judge's jurisdiction, but whether they could consent to a Bankruptcy Judge's power to enter final judgment.¹³⁵

In *Siegel v. FDIC (In re Indymac Bankcorp. Inc.)*,¹³⁶ the District Court for the Central District of California refused to withdraw the reference regarding a bankruptcy court's adjudication of non-core counterclaim dispute over ownership of \$50 million in tax refunds. The court acknowledged that the issue was non-core and noted the similarities to *Stern* due to the counterclaim's posture and the fact that the counterclaim is a private right of action, not public.¹³⁷ However, the court refused to withdraw the

129. *Id.* at *3.

130. *Id.* at *5.

131. *Id.* at *4.

132. *Id.* at *5.

133. *Id.* at *6.

134. *Id.*

135. *Id.* at *7-8.

136. *Siegel v. FDIC (In re Indymac Bankcorp. Inc.)*, 2011 WL 2883012, at *1 (C.D. Cal. July 15, 2011).

137. *Id.* at *6.

reference because (1) the bankruptcy court had greater familiarity with the facts, (2) the bankruptcy court held a unique vantage point from the center of the overall bankruptcy proceeding, (3) withdrawal would likely increase costs and lead to duplicative efforts, and (4) withdrawal would invite new disputes, such as for transfer of venue.¹³⁸ Thus, the court determined it would be best to decline to withdraw the reference and that it would instead review the report and recommendation *de novo*.¹³⁹

2. On State Law Issues

A Maine district court in *United Systems Access Telecom, Inc. v. Northern New England Telephone Operations, LLC*, refused to rule on *Stern* grounds with respect to the question of whether the bankruptcy reference should be withdrawn by the district court with respect to a dispute based largely upon FCC regulation under § 157(d), which requires withdrawal of the reference where “consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce” are involved.¹⁴⁰ The court determined that telecommunications are subject to extensive FCC regulation under federal statute, and even though certain state public utilities commissions are delegated some authority, the dispute is “all within the context of overall federal regulation.”¹⁴¹ As such, the plaintiff’s alternative arguments that “state law rather than federal law governs these disputes;[therefore] . . . the Constitution demands that the disputes be tried in this Article III court” and the defendant’s arguments that “no interpretation of federal telecommunication law is required to resolve the disputes, and that under *Stern*, the public rights exception allows the state law issues to be adjudicated in the Bankruptcy Court” did not form the basis of the court’s opinion.¹⁴² The judge explained that he “need not reach the issue whether *Stern* would alternatively require withdrawal of the reference, and I [did] not decide the contours of the public rights exception.”¹⁴³

In *NYU Hospitals Center v. HRH Construction LLC (In re HRH Construction LLC)*, the Bankruptcy Court for the Southern District of New York adjudicated on a final basis a state breach of

138. *Id.* at *7.

139. *Id.*

140. 456 B.R. 148 (D. Me. 2011).

141. *Id.* at 149.

142. *Id.*

143. *Id.*

contract action, which had been removed to the district court and then referred to the bankruptcy court, because “[p]ursuant to letters filed on the docket in July of 2011, the parties consented to the entry of th[e] decision [by the bankruptcy court] as a final judgment.”¹⁴⁴

The Bankruptcy Court for the Southern District of New York in *In re Salander O’Reilly Galleries* denied a motion by an art-consignor-creditor (with a \$9.5 million claim relating to a Botticelli painting) seeking a lift of the stay to enforce a contractual choice of law provision against a liquidation trustee of an art gallery’s bankruptcy estate with respect to whether the Botticelli painting was property of the debtor prior to the bankruptcy under New Jersey law.¹⁴⁵ The court reasoned that the determination was an “essential and inseparable element of an action under Bankruptcy Code § 544(a)” and was “inextricably bound up with the resolution of the art claim and proof of claim it filed” in the case.¹⁴⁶ The court emphasized that

Stern is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case, and the ruling does not remove from the bankruptcy court its jurisdiction over matters directly related to the estate that can be finally decided in connection with restructuring debtor and creditor relations.¹⁴⁷

Further, “[n]owhere in *Marathon*, *Granfinanciera*, or *Stern* does the Supreme Court rule that the bankruptcy court may not rule with respect to state law when determining a proof of claim in the bankruptcy, or when deciding a matter directly and conclusively related to the bankruptcy.”¹⁴⁸ If the court were to grant the lift-stay request, then the creditor’s claim would be adjudicated by someone other than the bankruptcy court, which “may not be done—allowance of claims is indisputably the realm of the bankruptcy court.”¹⁴⁹ Thus, the court determined that “[a]rbitration of whether the Botticelli was property of the debtor or property of the estate would improperly sever an element of the § 544 action” and that other creditors are not bound by the choice of law clause, including the bank (with a lien on the Botticelli) and the trustee (as assignee

144. No. 09–23665(RDD), 2011 WL 3359576, at *6 (Bankr. S.D.N.Y. Aug. 2, 2011).

145. 453 B.R. 106 (Bankr. S.D.N.Y. 2011).

146. *Id.* at 115.

147. *Id.* at 115–16.

148. *Id.* at 117.

149. *Id.* at 118 (citing 28 U.S.C. § 1334(e)(1)).

of that lien).¹⁵⁰ Simply because state law may apply to the issue does not remove it from the jurisdiction of the bankruptcy court.¹⁵¹ “Bankruptcy courts may apply state law as part of the resolution of core proceedings.”¹⁵² The court also determined that it was not required to send the matter to arbitration under the contractual clause for myriad reasons.¹⁵³

In *Buffets Holdings, Inc. v. California Franchise Tax Board*,¹⁵⁴ the Delaware Bankruptcy Court considered summary judgment motions presenting issues regarding the apportionment of debtors’ income that is taxable under California law and whether the debtors qualified for a “Manufacturers’ Investment Credit,” also under California law.¹⁵⁵ The court explained that it “ha[d] core jurisdiction over the motions for summary judgment, which essentially involve[d] the allowance of the [Tax Board]’s claims.”¹⁵⁶ The court cited *Stern* for the proposition that “the question [of bankruptcy court jurisdiction] is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process” and cited the *Stern* dissent for the proposition that “when the individual files a claim against the estate, that individual has ‘triggered the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court’s equitable power.’”¹⁵⁷

In *In re The Salem Baptist Church of Jenkintown*, a Pennsylvania bankruptcy court explained in a footnote that

[a]lthough the precise implications of the Supreme Court’s decision in *Stern* on the related-to jurisdiction of bankruptcy courts remain to be determined, the Supreme Court’s holding that bankruptcy courts may not decide “a common law cause of action, when the action neither derives from nor depends on any agency regulatory regime” . . . suggests that, consistent with this Court’s decision herein, this Court would lack jurisdiction to hear the Debtor’s claims against [the defendants].¹⁵⁸

150. *Id.* at 120.

151. *Id.* (citing *Stern* and *Butner v. U.S.*, 440 U.S. 48 (1979)).

152. *Id.* at 123.

153. *Id.* at 127–29.

154. 455 B.R. 94 (Bankr. D. Del. 2011).

155. *Id.* at 96.

156. *Id.* (citing 11 U.S.C. § 505(a)(1); 28 U.S.C. §§ 157(b)(1)(B) & 1334).

157. *Id.* (citing *Stern v. Marshall*, 131 S. Ct. 2594, 2618, 2629 (2011) (internal citations omitted)).

158. 455 B.R. 857, 863 n.6 (Bankr. E.D. Pa. 2011).

In this case, the court granted motions to dismiss actions relating to insurance coverage of certain claims and the issue of whether insurance proceeds were property of the estate. Thus, the court believed that *Stern* extends to “common law causes of action” whether or not in a counterclaim posture and that *Stern*’s ruling was jurisdictional.

In *Barnhart v. Demarco (In re Demarco)*, a Pennsylvania bankruptcy court held that an adversary proceeding, in which state and federal law claims against the debtor and certain non-debtors were asserted, could have no possible effect on the debtor’s estate and, thus, that the court lacked related-to jurisdiction over the adversary proceeding where the chapter 7 trustee in the debtor’s case entered a report of no distribution stating that there was no properly available over and above exempted property and requesting discharge of the debtor.¹⁵⁹ The court also noted that, “to the extent that a plaintiff has joined its § 523 action with claims against third-party, nondebtor entities, it is doubtful that a bankruptcy court would, in a no-asset, chapter 7 case, retain jurisdiction over the claims against nondebtor entities.”¹⁶⁰ The court bolstered that conclusion by noting that:

Although the precise implications of the Supreme Court’s decision in *Stern* on the related-to jurisdiction of bankruptcy courts remain to be determined, the Supreme Court’s holding that bankruptcy courts may not decide “a common law cause of action, when the action neither derives from nor depends on any agency regulatory regime” suggests that, consistent with this Court’s decision herein, this Court would lack jurisdiction to hear the Plaintiff’s claims against nondebtor entities.¹⁶¹

In *Fed. Ins. Co. v. DBSI, Inc. (In re DBSI, Inc.)*, the Delaware Bankruptcy Court considered a motion for summary judgment on the issue of whether the debtor’s director and officer (D&O) insurance policy covers the defense costs of certain D&Os sued based upon certain actions (including RICO and avoidance actions) where the actions were filed after the D&O policy coverage period.¹⁶² The court determined that the movants were entitled to the coverage of defense costs at 100% where the claim at issue

159. 454 B.R. 343, 344, 346 (Bankr. E.D. Pa. 2011).

160. *Id.* at 348.

161. *Id.* at n.2 (quoting *Stern*, 131 S. Ct. at 2599).

162. No. 08–12687(PJW), 2011 WL 3022177, at *1–2 (Bankr. D. Del. July 22, 2011).

involved a covered matter and a non-covered matter.¹⁶³ However, the court refused to “enter[] an order at this time because [it was] concerned that this Court’s jurisdiction may be in question in light of the Supreme Court decision in *Stern v. Marshall*. Before proceeding further with this matter, [the court invited] the parties to file written submissions on whether *Stern v. Marshall* permit[ted the judge] to issue an order.”¹⁶⁴

A West Virginia district court in *Cline v. Quicken Loans*¹⁶⁵ determined that it had “related-to” jurisdiction over a civil action asserting myriad state law causes of action, which was removed to that court from the West Virginia state court, even though a related proof of claim was also filed, and explained that “the proof of claim does not transform the State Court Action filed by Plaintiffs into a core proceeding.”¹⁶⁶ The court noted that the plaintiffs had filed a supplemental briefing on *Stern* with the court on the issue of core adjudicatory authority, but did not further discuss *Stern*. The court determined that mandatory abstention applied and that comity and judicial economy did not weigh in favor of retaining the action in federal, as opposed to state, court.¹⁶⁷

The Fifth Circuit Court of Appeals in *Sigillito v. Hollander (In re Hollander)*¹⁶⁸ remanded a case for the bankruptcy court to decide whether, under Louisiana law, the debtor’s false representations constituted fraud and further explained that it would “leave it to the district court below to determine in the first instance whether *Stern* has applicability to further proceedings in this matter.”¹⁶⁹

Before deciding a motion for partial summary judgment filed by a secured creditor as to the validity of its lien, the Louisiana Bankruptcy Court in *South Louisiana Ethanol, LLC v. Whitney National Bank (In re South Louisiana Ethanol, LLC)* provided the following caveat: “To the extent this Court does not have subject matter jurisdiction over this matter pursuant to *Stern v. Marshall*, this Opinion will be considered a Report and Recommendation to the U.S. District Court.”¹⁷⁰

In *Rogers v. The CIT Group/Equipment Financing, Inc. (In re B.C. Rogers Poultry, Inc.)*,¹⁷¹ a Mississippi bankruptcy court

163. *Id.* at *5.

164. *Id.* at *6.

165. No. 5:11CV63, 2011 WL 2633085 (N.D.W. Va. July 5, 2011).

166. *Id.* at *5.

167. *Id.* at *7.

168. 2011 WL 3629479 (5th Cir. Aug. 16, 2011).

169. *Id.* at *4 n.1.

170. 438 Fed.Appx. 274, n. 1 (Bankr. E.D. La. 2011).

171. 455 B.R. 524 (Bankr. S.D. Miss. 2011).

determined it could enter a final order on various Mississippi state law contract and tort claims of a debtor in an adversary proceeding. The court explained that the proceeding was core, notwithstanding *Stern*, because “[t]he implications of the *Stern* decision, including the extent to which it curtails bankruptcy court jurisdiction, remain to be determined by the Fifth Circuit,” and the court’s ruling was in accord with prior Fifth Circuit precedent.¹⁷²

In *Christian v. Soo Bin Kim (In re Soo Bin Kim)*, a Western District of Texas bankruptcy court denied a motion seeking dismissal of a complaint requesting a declaration of non-dischargeability of a debt, liquidation of that debt, and a monetary judgment against the debtor, which argued that the judgment sought fell within the “probate exception” to bankruptcy courts’ subject matter jurisdiction.¹⁷³ The court responded to a defendant’s argument that, under *Stern*, the bankruptcy court “cannot hear any of this matter because it touches on probate issues” by explaining that “the defendant overreads that case and its application to this proceeding” and instead followed binding Fifth Circuit precedent on the probate issue implicated.¹⁷⁴ The court refused to dismiss the complaint notwithstanding the fact that “[i]n resolving the bankruptcy question posed, the court may necessarily be called upon to make findings of fact and conclusions of law that might have some preclusive effect in a later state court action.”¹⁷⁵ However, the court determined it would abstain from “liquidation” of the claim or involving “disposition of assets of the probate estate” in favor of the probate court.¹⁷⁶

In *In re Crescent Resources, LLC*, the Bankruptcy Court for the Western District of Texas determined that *Stern* did not apply to the matter before it: a motion to compel turnover of documents, the determination of which depended upon whether certain documents were subject to a joint privilege, who can claim such privilege, and whether the files could be used against certain parties.¹⁷⁷ The court determined that the matter was a core proceeding under 28 U.S.C. § 157(b)(2)(A), (E), and (H) and expressed that it “[w]as of the opinion, at th[at] point, that *Stern* . . . should be applied narrowly. The facts and issues in *Stern* do not relate to matters under consideration of the Court. The Court therefore [found] that *Stern* does not apply to this case.”¹⁷⁸

172. *Id.* at 548, n.31.

173. 2011 WL 2708985, at *1 (Bankr. W.D. Tex. July 11, 2011).

174. *Id.* at *2 n.2.

175. *Id.* at *2.

176. *Id.*

177. 457 B.R. 506, 509 n.2 (Bankr. W.D. Tex. 2011).

178. *Id.* at 510, n.2.

The Chief Judge of the Bankruptcy Court for the Northern District of Texas denied a motion to dismiss a title dispute adversary proceeding in *In re Crusader Energy Group*.¹⁷⁹ The plaintiff filed the adversary proceeding seeking a determination that certain mineral interests that had been scheduled as property of the estate by the debtors were instead property of the plaintiff. The plaintiff sought a broad application of *Stern*. The defendant argued that *Stern* was a narrow ruling that applied to only certain types of counterclaims and certainly not to a title dispute in which the defendant was not asserting a counterclaim. In denying the motion to dismiss, Judge Houser opined from the bench that determining what is property of the estate is central to the jurisdiction of the bankruptcy court via referral from the district court.¹⁸⁰ Judge Houser also ruled that, in the event her ruling on jurisdiction was incorrect, she would request that the district court review her prior rulings in the adversary proceeding on summary judgment motions and accept them as a report and recommendation to the district court.¹⁸¹ The plaintiff argued that, in a core proceeding for which there is no constitutional authority for the bankruptcy court to enter a final judgment, the bankruptcy court can, in fact, do *nothing*, not even submit a report and recommendation on the matter to the district court (citing to *Blixseth*, discussed in more detail herein).¹⁸² The defendant argued that, while a submission of a report and recommendation to the district court is mandatory in non-core matters, there is nothing that prohibits the bankruptcy court from doing so in other matters; thus, the bankruptcy court may submit a report and recommendation to the district court in a core matter even if the bankruptcy court does not have constitutional authority to enter a final judgment.¹⁸³ Judge Houser agreed with the defendant and explained that the plaintiff's position would render an absurd result, leaving the bankruptcy court with no options, and federal judges are not supposed to construe statutes in a manner that yields absurd results.¹⁸⁴

In *In re Miller*, an Ohio bankruptcy court determined that it would be acting "within the court's constitutional authority as analyzed by" *Stern* by entering a final order over determinations of whether certain property was property of the estate, or

179. *Earthwise Energy, Inc., et al. v. Crusader Energy Group, Inc. (In re Crusader Energy Group)*, Case No. 09-31797-bjh-11; Adv. Proc. No. 09-03141-bjh (Bankr. N.D. Tex. Aug. 25, 2011 [Docket No. 134]).

180. *Id.* at Docket No. 133.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

alternatively, whether such property was exempted under state law.¹⁸⁵

In *Tibble v. Wells Fargo Bank (In re Hudson)*, the Bankruptcy Court for the Western District of Michigan decided whether Wells Fargo's lien in real property was valid where the mortgage contained an incorrect description of the real property—it referenced the wrong lot number.¹⁸⁶ The court determined that it had jurisdiction, by reference from the district court, under 28 U.S.C. § 1334, and that the proceeding was core.¹⁸⁷ After determining that any mortgage asserted by Wells Fargo was avoidable by the trustee under 11 U.S.C. § 544(a)(3) and that the trustee could administer the real property free and clear of any lien asserted by the bank, the court addressed *Stern*.¹⁸⁸ The court explained the ruling in *Stern* but distinguished the case before it on the basis that:

This adversary proceeding, even though it requires reviewing, discussing and deciding state law issues, pertains to the determination of the validity, extent, or priority of the Bank's asserted mortgage lien in Lot 5. Regardless of the state law issues, this adversary proceeding "arises under" § 544(a)(3) of the Bankruptcy Code.¹⁸⁹

The court ended with a cautionary note: In the event the court's order were to be appealed, and if the district court were to decide that the bankruptcy court was not constitutionally authorized to enter a final order, the bankruptcy court's opinion is to be deemed a report and recommendation.¹⁹⁰

In *Mason v. Szerwinski (In re Szerwinski)*, an Ohio bankruptcy court determined its "decision [was] within the court's constitutional authority under the Supreme Court's analysis in" *Stern* where it dealt with the issues of avoidability of a lien based upon applicable Ohio property law.¹⁹¹

In *Keybank National Association v. Martinez (In re Martinez)*, an Ohio bankruptcy court determined that *Stern* did not limit its core authority over a state law conversion claim and issues relating to dischargeability.¹⁹² The court simply stated that its "decision is

185. 2011 WL 3741846, at *1 (Bankr. N.D. Ohio Aug. 24, 2011).

186. 455 B.R. 648 (Bankr. W.D. Mich. 2011).

187. *Id.* at 650.

188. *Id.* at 656.

189. *Id.* at 657 (citing *In re Salander Galleries*, 453 B.R. 106 (Bankr. S.D.N.Y. 2011)).

190. *Id.*

191. 2011 WL 2551012, at *1 (Bankr. N.D. Ohio June 27, 2011).

192. 2011 WL 2925481, at *1 (Bankr. N.D. Ohio July 18, 2011).

within the court's constitutional authority as analyzed by" *Stern*, and in any event, "the parties have consented to the entry of a final order by this court."¹⁹³

In *Dragisic v. Boricich (In re Boricich)*,¹⁹⁴ an Illinois bankruptcy court considered an adversary proceeding commenced against a debtor, which asserted the non-dischargeability of a \$1.5 million claim on various grounds supporting exception to discharge relating to larceny, fraud while acting in a fiduciary capacity, defalcation while acting in a fiduciary capacity, and embezzlement. Even though applicable Seventh Circuit precedent pre-*Stern* had allowed bankruptcy courts to enter a final money judgment on a state law claim in a non-dischargeability action, in light of *Stern*, the court refused to enter judgment as to the amount of non-dischargeable debt.¹⁹⁵ Instead, the court reserved jurisdiction to entertain a motion to amend the judgment supported by briefs submitted by the parties discussing whether *Stern* leaves such constitutional authority to a bankruptcy judge in this scenario.¹⁹⁶ The court determined that \$659,160.85 was not dischargeable and owed to Dragisic.¹⁹⁷

In *Gecker v. Flynn (In re Emerald Casino, Inc.)*,¹⁹⁸ an Illinois bankruptcy court ruled that *res judicata* did not apply with respect to certain counterclaims that were intentionally severed because the claims were previously asserted to be "different."¹⁹⁹ Prior to reaching that conclusion, the court determined that, under *Stern*, the trustee's claims against the defendants were counterclaims and thus would likely need to be decided by an Article III judge. However,

even if the trustee's bankruptcy complaint were wholly within the scope of the *Stern* decision, and so removed from core jurisdiction, it would still affect the extent of the estate available to pay Emerald's creditors. Therefore, the trustee's complaint would at least be within the "related-to" jurisdiction of the bankruptcy court and, as set forth in 28 U.S.C. § 157(c)(1), a bankruptcy judge may propose findings and conclusions to the district court for that court's entry of judgment pursuant to such jurisdiction.²⁰⁰

193. *Id.*

194. 2011 WL 2600692, at *1 (Bankr. N.D. Ill. June 29, 2011).

195. *Id.* at *9.

196. *Id.*

197. *Id.* at *11.

198. 459 B.R. 298 (Bankr. N.D. Ill. 2011).

199. *Id.* at 300.

200. *Id.*

The court also dispensed with the defendant's argument, based on *Blixseth* (discussed herein), that the court could not even *hear* the unconstitutional core matter because no provision of § 157 provides for that where such a proceeding is not non-core. The court explained that:

The argument . . . ignores the remedy flowing from *Stern*'s holding that the statute unconstitutionally allows judgments to be entered by a non-Article III court. . . . [T]he remedy for this constitutional violation [in *Stern*] is to remove counterclaims covered by the decision from core jurisdiction. . . . As a result, to the extent that the estate's claims are not subject to a final judgment by the bankruptcy court, they are non-core, and fully within the definition of related-to jurisdiction in § 157(c)(1).²⁰¹

Further, “[e]ven if the Supreme Court had not already directed a more reasonable remedy for the constitutional violation it found in *Stern*, the perverse effect of the remedy suggested by the defendants’ argument would require that it be rejected.”²⁰² The court, accordingly, denied summary judgment on the core but unconstitutional proceeding, preferring to “leave the entry of ultimate judgment to the district court.”²⁰³

In *Stoebner v. PNY Technologies, Inc. (In re Polaroid Corp.)*,²⁰⁴ a Minnesota bankruptcy court held it could not enter final judgment in deciding a trustee's motion for partial summary judgment on a breach of contract claim (Count II), which was filed in an adversary proceeding after corresponding claims were filed against the debtor in the bankruptcy cases, absent parties' express consent. Notwithstanding conflicting statements on the issue of consent in the bankruptcy context in *Stern*, the bankruptcy court explained that:

Absent consent, a presiding bankruptcy judge will have to suggest a rationale and a possible outcome to the district court, at some appropriate time—if, that is, the outcome would be dispositive of Count Two on the present record. With consent, a bankruptcy judge would direct entry of judgment here, i.e., by the clerk of the bankruptcy court.²⁰⁵

201. *Id.* at n.1.

202. *Id.*

203. *Id.* at 301.

204. 451 B.R. 493 (Bankr. D. Minn. 2011).

205. *Id.* at 496.

The court accordingly ordered that the parties file express written statements as to their consent or non-consent to the entry of final judgment by a bankruptcy judge on Count II.²⁰⁶ The court was also critical of treatment in briefing of the issue as one of *jurisdiction*, when after *Stern*, it is adjudicatory authority as between the district and bankruptcy courts that is at issue; jurisdiction lies in the district court.²⁰⁷

In *Garden v. Central Nebraska Housing Corp. (In re Roberts)*, the Nebraska Bankruptcy Court considered an interpleader complaint filed by the trustee, which requested the reformation of mistakes in the legal description of property that was sold after the trustee was granted stay relief, in order to quiet title among the parties claiming an interest in the property.²⁰⁸ The court determined that in this chapter 7 case, where the debtor received a discharge, the post-discharge fight is between the deed of trust trustee and two bidders over the validity of the sale and also among creditors claiming an interest in the proceeds therefrom.²⁰⁹ Because the court determined that the outcome of the litigation was unlikely to affect the administration of the bankruptcy estate significantly, it concluded that the matter did not arise under title 11, or in a case under title 11, and was not related to a case under title 11 and that the bankruptcy court lacked jurisdiction to hear it.²¹⁰ The court further explained that *Stern* “made clear that bankruptcy courts should refrain from impinging upon the exclusive jurisdiction of the Article III courts by entering judgments on state law claims involving non-debtor third parties.”²¹¹

In *Schmidt v. Klein Bank (In re Schmidt)*,²¹² the Eighth Circuit Bankruptcy Appellate Panel reversed and remanded a bankruptcy court’s ruling that certain replevin actions (which included claims for breach of promissory note, breach of personal guaranties, breach of security agreement, and replevin, and which were asserted against debtors and non-debtor corporations owned by the debtors) filed by a bank were core, and thus, the bankruptcy court was not required to mandatorily abstain from hearing them. The replevin actions had been originally asserted in state court and then removed to the bankruptcy court where debtor-principals (and guarantors) of the companies sued had filed their individual

206. *Id.* at 498.

207. *Id.* at 496–98.

208. 2011 WL 3035268, at *1 (Bankr. D. Neb. July 19, 2011).

209. *Id.*

210. *Id.*

211. *Id.* at *2 (citing *Stern v. Marshall*, 131 S. Ct. 2594, 2594 (2011)).

212. 453 B.R. 346 (B.A.P. 8th Cir. 2011).

bankruptcy petitions.²¹³ The panel made this determination based upon *Stern*. The bankruptcy court had determined that it was not required to abstain under 28 U.S.C. § 1334(c)(2) because the replevin actions were core under 28 U.S.C. § 157(b)(2)(A) (matters concerning the administration of the estate); (B) (the allowance or disallowance of claims against the estate); and (O) (other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship).²¹⁴ The panel believed that *Stern* compelled reversal because, even if a matter fits into one of the enumerated examples of § 157(b)(2), it must also “arise in a bankruptcy case or under title 11.”²¹⁵ Thus, even if the replevin actions could fit under an enumerated category in § 157(b)(2), they were, in essence, only related to a case under title 11, and thus, not core.²¹⁶ The court also noted that “absent extraordinary circumstances, if a principal wishes to use the Bankruptcy Code to protect the assets of its corporation, or wants a bankruptcy court to decide causes of action against the corporation, it needs to file a bankruptcy case on behalf of the corporation.”²¹⁷

In *In re Fressadi*, the Arizona Bankruptcy Court considered a motion to convert a debtor’s chapter 11 case to chapter 7.²¹⁸ After considering the entire record in the case, as well as a number of adverse judgments entered against the debtor in litigation against the debtor that had been removed to the bankruptcy court, the court determined that the debtor’s case had been filed in bad faith and dismissed it *sua sponte*.²¹⁹ The court noted that each of the state law cases that had been removed to the bankruptcy court would be remanded because none of them involved the court’s core jurisdiction.²²⁰ The court loosely stated in a parenthetical that the holding of *Stern* was that it is “unconstitutional for bankruptcy courts as Article I courts to adjudicate common and state law causes of action which are not part of estate’s counterclaim to creditor claim.”²²¹

In *Colony Beach & Tennis Club, Ltd. v. Colony Beach & Tennis Club Association., Inc. (In re Colony Beach & Tennis Club*

213. *Id.* at 347.

214. *Id.* at 351.

215. *Id.*

216. *Id.*

217. *Id.*

218. 2011 WL 2909375, at *1 (Bankr. D. Ariz. July 15, 2011).

219. *Id.* at *2–3.

220. *Id.* at n.1.

221. *Id.*

Association, Inc.),²²² a Florida district court on appeal considered whether to remand to state court claims relating to a state law issue regarding a resort hotel's obligations to pay for repairs with respect to common elements of a beach and tennis club association. The bankruptcy court below considered the claims against a debtor to be core proceedings because they involved "allowance or disallowance of claims against the estate" and "other proceedings affecting . . . the adjustment of the debtor-creditor . . . relationship."²²³ However, because the claims were "purely state law claims, asserted in state court," the court determined that they could not qualify as a core proceeding because, if they did, "virtually any claim would entitle a bankruptcy court to enter a final judgment," which would run afoul of *Marathon* and *Stern*.²²⁴ As a consequence, the district court reviewed the bankruptcy court's findings and conclusions *de novo* and reversed the bankruptcy court on many points of error.²²⁵

3. On Avoidance Actions

In *Miller v. Greenwich Capital Financial Products, Inc. (In re American Business Financial Services)*, the Delaware Bankruptcy Court considered whether it had jurisdiction after *Stern* over an adversary proceeding in which the trustee asserted fraudulent transfer, avoidance, and recovery claims under federal and state law as well as fiduciary duty claims.²²⁶ The court explained that many of the counts asserted were core and that no parties objected to the court's final adjudicatory authority.²²⁷ The court then noted that the decision in *Stern* "is a 'narrow one' which focuses on whether the action at issue stems from the bankruptcy itself."²²⁸ Here, where the claims arose after the bankruptcy petition was filed and "relate[d] entirely to matters integral to the bankruptcy case" and where "[i]f not for the bankruptcy, these claims would [have] never exist[ed]," the court determined that it had authority to hear the proceeding.²²⁹

222. 456 B.R. 545 (M.D. Fla. 2011).

223. *Id.* at 551.

224. *Id.* at 552.

225. *Id.* at 552, 566.

226. 457 B.R. 314, 319 (Bankr. D. Del. 2011).

227. *Id.* at 319 (citing 28 U.S.C. §§ 157(b)(2)(A), 157(b)(2)(B), 157(b)(2)(E), 157(b)(2)(H), & 157(b)(2)(O)).

228. *Id.* (citing *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011)).

229. *Id.* at 319–20 (citing *In re Salander O'Reilly Galleries*, 453 B.R. 106, 117 (Bankr. S.D.N.Y. 2011) ("Nowhere in . . . *Stern* does the Supreme Court

In *Springel v. Prosser (In re Innovative Communication Corp.)*, in response to a complaint filed in an adversary proceeding initiated by the trustee for the ICC Debtors—which sought avoidance of fraudulent conveyances to certain defendant adult children of an insider of the debtors—the defendants filed a motion to dismiss the fraudulent conveyance action.²³⁰ The defendants argued that *Stern* divested the bankruptcy court of jurisdiction to determine the fraudulent conveyance action because that action involved private, and not public, rights, and “because *only* an Article III Court can adjudicate fraudulent conveyance actions” after *Stern*.²³¹ On August 5, 2011, the court denied the motion to dismiss,²³² explaining that the limitation on bankruptcy court authority over core proceedings is “narrow” and limited to “one isolated respect” as pronounced by the majority in *Stern*—to state law counterclaims, but not to fraudulent conveyances.²³³

In *Meoli v. The Huntington National Bank (In re Teleservices Group, Inc.)*,²³⁴ the Bankruptcy Court for the Western District of Michigan considered Huntington’s motion requesting that the court amend a pretrial order so as to eliminate its designation of an adversary proceeding, over a potentially multi-million dollar fraudulent transfer judgment, as a matter in which the bankruptcy court was authorized to enter a final order subject only to appellate review under *Stern*.²³⁵ The court ruled that it lacked the constitutional authority to enter such a final judgment.²³⁶ In reaching that conclusion, the judge explained that his confidence in his capacity to render “final judgments in many, but not all, matters arising in connection with a bankruptcy proceeding” in accordance with 28 U.S.C. § 157 was clearly “misplaced,” as shown by *Stern*.²³⁷ The judge explained his frustration:

Everyday I am presented with numerous orders that Congress expects me to either sign as final or forward on with a report and recommendation. However, prior to *Stern*, I did have a standard—28 U.S.C. § 157—to serve as

rule that the bankruptcy court may not rule with respect to state law . . . when deciding a matter directly and conclusively related to the bankruptcy.”).

230. No. 08-03004, 2011 Bankr. LEXIS 3040 (Bankr. D.V.I. Aug. 5, 2011).

231. *Id.*

232. *Id.*

233. *Id.* at *9–10.

234. 456 B.R. 318 (Bankr. W. D. Mich. 2011).

235. *Id.* at 321.

236. *Id.*

237. *Id.*

my guide. But now I am told that that standard is unreliable when tested against the Constitution itself.²³⁸

The court then proceeded to discuss bankruptcy court authority throughout the history of the United States and finally reached the following conclusion:

[W]hile *Granfinanciera's* historical references to the recovery of fraudulent conveyances and preferences through the common law courts offers additional insight, it is not a necessary component to my decision that any judgment that will enter against Huntington in this adversary proceeding must be entered by an Article III judge. *Stern*, coupled with the Court's earlier decision in *Murray's Lessee*, is all that is needed to realize that the taking that Trustee has in mind in this adversary proceeding requires the oversight of a judicial officer with the independence that is only guaranteed by life tenure and salary protection.²³⁹

The court did, however, note that it believed it "could still enter a final judgment against Huntington in this case were Huntington and Trustee both to consent."²⁴⁰ In conclusion, the bankruptcy judge lamented:

Unfortunately, *Stern* has not only corrected my misunderstanding [that Section 157 solved the constitutional questions that plagued Bankruptcy Courts post-*Marathon*] but has also raised yet another constitutional problem.²⁴¹ The result is that there is no easy solution to what I suspect will

238. *Id.* at 322.

239. *Id.* at 338.

240. *Id.*

241. The court explained in great detail how *Murray's Lessee* created another, yet unaddressed, problem. *Id.* at 344. Not only did the Court in *Murray's Lessee*, as cited in *Stern*, explain that "we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Id.* at 329, 342, & 344 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)). *Murray's Lessee* further explained that "nor, on the other hand, can [Congress] bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." *Id.* at 329. The court was troubled by the fact that if the district court is given authority over bankruptcy-related issues that do *not* require judicial process (*i.e.*, things a trustee could unilaterally do regarding the debtor's voluntarily handed-over property), would it not also, under *Murray's Lessee*, be unconstitutional to have an Article III court handle a non-judicial issue such as a sale of debtor's property under 11 U.S.C. § 363? *See id.* at 326.

be years of uncertainty as the bankruptcy process grinds on.²⁴²

In *In re Klug*, a Kentucky bankruptcy court dismissed a plaintiff's state law fraudulent transfer action against a debtor post-discharge, reasoning that the automatic stay was in place and prevented such action where the plaintiff did not seek a lift of the stay and because the chapter 7 trustee, who had not abandoned the claim, was the only party with standing to assert such claim.²⁴³ The court noted that the defendant contended that the court lacked authority under *Stern* over state law *in rem* claims, without further analysis. However, the court concluded that the proceeding was core under § 157(b)(2)(H) without further comment.²⁴⁴

In *Samson v. Blixseth (In re Blixseth)*,²⁴⁵ upon considering a defendant's motion for mandatory or permissive abstention and motion to dismiss for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine relating to an adversary proceeding to set aside a marital settlement agreement between a debtor and her former husband and to recover avoidance actions, a Montana bankruptcy court considered *sua sponte* whether it had subject matter jurisdiction over equitable subordination and fraudulent transfer and preference claims. The court reasoned that it had core jurisdiction over equitable subordination and fraudulent transfer and preference claims by statute but that such "authority may not be exercised unless it is also constitutional."²⁴⁶ Under *Stern*, "[s]ince bankruptcy courts are neither Article III courts nor adjuncts thereof, they generally may not hear claims that must be adjudicated by Article III courts."²⁴⁷ However,

fraudulent conveyance claims in bankruptcy do not fall within the public rights exception as they are "quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." 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

242. *Id.* at 326.

243. No. 10-53071, 2011 WL 3352468 (Bankr. E.D. Ky. Aug. 3, 2011).

244. *Id.* at *2.

245. No. 09-60452-7, 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011).

246. *Id.* at *10.

247. *Id.*

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.²⁴⁸

The court found that equitable subordination and preference claims, however, were constitutionally within the court's jurisdiction because they "arise from the claims allowance process."²⁴⁹ The court also explained that "[u]nlike in non-core proceedings, a bankruptcy court has no statutory authority to render findings of fact and conclusions of law for core proceedings that it may not constitutionally hear."²⁵⁰ Here, the court explained that "[w]hile 28 U.S.C. § 157(c)(1) allows a bankruptcy judge to render findings and conclusions in 'a proceeding that is *not* a core proceeding but that is otherwise related to a case under title 11,' no other code provision allows bankruptcy judges to do the same in core proceedings."²⁵¹ Therefore, the court concluded that it lacked statutory authority to hear the fraudulent transfer claims *at all*, as a core or a non-core proceeding, and granted the parties 14 days in which to move the district court to withdraw its reference.²⁵² Otherwise, the bankruptcy court would dismiss the fraudulent conveyance claims for lack of subject matter jurisdiction.²⁵³

4. On Federal Bankruptcy Issues

In *In re Franchi Equipment Co., Inc.*, a Massachusetts bankruptcy court considered whether it had jurisdiction to approve fees of a chapter 7 trustee and his counsel for services rendered in connection with the termination of an ERISA plan and quoted the following passage from *Stern* for an overview of bankruptcy court jurisdiction:

The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved. Bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." "Core proceedings include, but are not limited to" 16 different types of matters, including "counterclaims by [a debtor's] estate against persons filing

248. *Id.* at *11 (quoting *Granfinanciera v. Nordberg*, 492 U.S. 33, 56 (1989); citing *Stern v. Marshall*, 131 U.S. 2594, 2618 (2011)).

249. *Id.*

250. *Id.* at *12.

251. *Id.* (emphasis added).

252. *Id.*

253. *Id.*

claims against the estate.” Parties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards.

When a bankruptcy judge determines that a referred “proceeding . . . is not a core proceeding but . . . is otherwise related to a case under title 11,” the judge may only “submit proposed findings of fact and conclusions of law to the district court.” It is the district court that enters final judgment in such cases after reviewing *de novo* any matter to which a party objects.²⁵⁴

The court then determined that it had core jurisdiction over the fee award because Congress conferred the responsibilities at issue to trustees under Bankruptcy Code § 704(a)(11), and trustees “literally ‘arise under’ the Bankruptcy Code.”²⁵⁵

In deciding whether mandatory abstention was appropriate, the District Court for the Southern District of New York said in *Little Rest Twelve, Inc. v. Visan*²⁵⁶ that *Stern* was distinguishable and inapplicable to the determination of whether certain claims relating to conversion of ownership interests in the debtors were core (after being removed to that court from state court and being related to Florida bankruptcy proceedings) where the claims at issue were not specifically enumerated in 28 U.S.C. § 157: “The Supreme Court’s decision in [*Stern*] does not affect this conclusion. *Stern* dealt with a counterclaim by a bankruptcy estate against a person filing a claim against the estate, a category of claim explicitly identified by statute as core.”²⁵⁷

In *In re Bearing Point*,²⁵⁸ couching its ruling on a motion seeking limited relief from a debtor’s confirmation order as either abstention or as relief from the confirmation order, the Bankruptcy Court for the Southern District of New York granted the motion and ruled that the trustee would not be required to litigate retained causes of action against officers and directors stemming from certain plan releases in bankruptcy court.²⁵⁹ The court based its ruling in large part on *Stern*. After acknowledging (1) that, previously in the confirmation order, it had “failed to consider how

254. 452 B.R. 352, 356 (2011) (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2603–04 (2011)) (citations omitted).

255. *Id.* at 360.

256. 458 B.R. 44 (S.D.N.Y. 2011).

257. *Id.* at 57 n.8.

258. 453 B.R. 486 (Bankr. S.D.N.Y. 2011).

259. *Id.* at 490.

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,” (2) that, after *Stern*, “it’s fair to assume that it will now be argued, that consent, no matter how uncoerced and unequivocal, will never again be sufficient for bankruptcy judges ever to issue final judgments on non-core matters,” and (3) the potential for motions seeking withdrawal of the reference to be filed, the bankruptcy court refused to require the trustee to attempt to litigate such non-core matters in that court.²⁶⁰

In *In re Okwonna-Felix*,²⁶¹ the Bankruptcy Court for the Southern District of Texas confronted the issue of whether to approve a compromise relating to the settlement of a lawsuit against a company insuring a debtor’s homestead under Bankruptcy Rule 9019. The court determined that it had jurisdiction over this core matter under 28 U.S.C. § 157(b)(2)(A), (B), and (O) and distinguished *Stern*.²⁶² The court explained that Rule 9019 “gives bankruptcy courts discretion to approve a compromise. State law has no equivalent to Bankruptcy Rule 9019.”²⁶³ Moreover, the factors a bankruptcy court considers in determining whether to approve a 9019 settlement “have been developed entirely by the federal courts, including the Supreme Court of the United States.”²⁶⁴

Accordingly, because the resolution of the Motion is not based on state common law, but entirely on federal bankruptcy law (both the Rule and the case law instructing how to apply the Rule), the holding in *Stern* is inapplicable, and this Court has the constitutional authority to enter a final order in this contested matter pursuant to 28 U.S.C. § 157(a) and (b)(1).²⁶⁵

Alternatively, the court explained that the public rights exception, as discussed in *Stern*, applies because:

The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including “the exercise of exclusive jurisdiction over all of the debtor’s property, the equitable distribution of that property among the debtor’s creditors, and the ultimate discharge that gives

260. *Id.* at 489–90.

261. No. 10-31663, 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011).

262. *Id.* at *4.

263. *Id.*

264. *Id.*

265. *Id.*

the debtor a ‘fresh start’ by releasing him, her, or it from further liability for old debts.”²⁶⁶

A key issue in this case as to whether to approve the settlement was whether property of the estate was exempt, which is an issue established by the Bankruptcy Code and central to the bankruptcy scheme.²⁶⁷ Accordingly, the court concluded that it was authorized to enter a final order.²⁶⁸

In *Sanders v. Muhs (In re Muhs)*,²⁶⁹ the Bankruptcy Court for the Southern District of Texas ruled that a debtor’s debt was non-dischargeable under Bankruptcy Code § 523(a)(2)(B) because the debt was obtained by use of a written statement that was materially false as to his financial condition, and the creditor reasonably relied on that statement, which the debtor made with the intent to deceive.²⁷⁰ Before reaching that conclusion, however, the court examined its authority under *Stern*.²⁷¹ The court noted that after *Stern*, a bankruptcy court’s “authority over matters involving state-law causes of action is particularly questionable.”²⁷² However, the court concluded that it “may exercise authority over essential bankruptcy matters under the ‘public rights’ exception” under the *Thomas v. Union Carbide Agricultural Products Co.* statement of that exception, which maintains that “a right closely integrated into a public regulatory scheme may be resolved by a non-Article III tribunal.”²⁷³

The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including “the exercise of exclusive jurisdiction over all of the debtor’s property, the equitable distribution of that property among the debtor’s creditors, and the ultimate discharge that gives

266. *Id.* at *5 (quoting *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006); citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982); and contrasting *Stern v. Marshall*, 131 S. Ct. 2594, 2614 n.7 (2011) (“We noted [in *Granfinanciera*] that we did not mean to ‘suggest that the restructuring of debtor-creditor relations is in fact a public right.’”)).

267. *In re Okwanna-Felix*, 2011 WL 3421561, at *5.

268. *Id.*

269. No. 09-10564, 2011 WL 3421546 (Bankr. S.D. Tex. Aug. 2, 2011).

270. *Id.* at *6–7.

271. *Id.* at *1.

272. *Id.*

273. *Id.* (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985)).

the debtor a ‘fresh start’ by releasing him, her, or it from further liability for old debts.”²⁷⁴

Further, there are two overlapping classes of claims that still fall within the bankruptcy court’s authority post-*Stern*: “(1) matters invoking the Court’s *in rem* jurisdiction over the estate and (2) disputes over rights created by the Bankruptcy Code as an integral part of the public bankruptcy scheme.”²⁷⁵ Here, where the dispute arose over the debtor’s right to a discharge and any amounts excepted therefrom, and a discharge is established by the Bankruptcy Code and central to the bankruptcy scheme, the court retained authority to determine the dispute.²⁷⁶

In *Husky International Electronics, Inc. v. Ritz (In re Ritz)*,²⁷⁷ the Bankruptcy Court for the Southern District of Texas considered whether a debtor was liable for non-dischargeable debts relating to the transfer of assets away from a corporation that could not pay its creditors because it was insolvent.²⁷⁸ The court concluded that the plaintiff failed to establish the liability of the individual debtor for the debts of the corporation and thus that there was no debt to discharge.²⁷⁹ As to the court’s authority, the court explained that the dispute was core under § 157(b)(2)(A), (I), and (O).²⁸⁰ The court noted that *Stern* limited the pool of matters previously subject to bankruptcy court authority and explained that the broader applicability of *Stern* “remains unclear.”²⁸¹ The court determined, as it did in *In re Muhs*, however, that it had authority under *Thomas*’ “public rights” exception.²⁸² Here, where the dispute was over the debtor’s discharge, the right to a discharge is central to the public bankruptcy scheme and is established by the Bankruptcy Code.²⁸³ The bankruptcy court also “has the authority

274. *Id.* (quoting *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006); citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 72 (1982); and contrasting *Stern v. Marshall*, 131 S. Ct. 2594, 2614 n.7 (2011) (“We noted [in *Granfinanciera*] that we did not mean to ‘suggest that the restructuring of debtor-creditor relations is in fact a public right.’”)).

275. *Id.* at *2.

276. *Id.*

277. 459 B.R. 623 (Bankr. S.D. Tex. 2011).

278. *Id.* at 626.

279. *Id.*

280. *Id.* at 630–31.

281. *Id.* at 631.

282. *Id.* (citing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006); *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 72 (1982); *but see Stern v. Marshall*, 131 S. Ct. 2594, 2614 n.7 (2011) (“We noted [in *Granfinanciera*] that we did not mean to ‘suggest that the restructuring of debtor-creditor relations is in fact a public right.’”)).

283. *Id.* at 631.

to determine when the statutorily established right to a discharge does *not* apply. . . . Such determinations are inextricably tied to the bankruptcy scheme and involve adjudication of rights created by the Bankruptcy Code.”²⁸⁴ Thus, the court determined that it had core adjudicatory authority to enter a final judgment.²⁸⁵

In *In re Bigler, LP*,²⁸⁶ the Bankruptcy Court for the Southern District of Texas ruled that it could enter a final order on a dispute involving lien priority over assets that were once property of the estate.²⁸⁷ The court reasoned that such a suit fits within the “public rights” exception because “it involves the exercise of the Bankruptcy Court’s *in rem* jurisdiction over the estate.”²⁸⁸ The court further explained, as it had in *In re Muhs* and *In re Ritz*, that it had authority to enter final orders on matters that fall within the “public rights” exception.²⁸⁹ The court noted: “In simpler terms if a bankruptcy court can enter a final judgment on anything, it would be a final order resolving a dispute as to who gets a slice of the pie and how big that slice is.”²⁹⁰ Where the dispute arose from an express provision of the Plan, the court concluded that the dispute also “involve[d] a right created by the Bankruptcy Code—distribution of property of the estate to creditors pursuant to the Plan.”²⁹¹

In *In re Jordan River Resources, Inc.*,²⁹² a Michigan bankruptcy court had before it a liquidating trust’s objection to certain preferred interests asserted by an insider party.²⁹³ The court considered whether based on those asserted interests the interest holder was entitled to share in distributions under a confirmed plan.²⁹⁴ The court, citing to *Stern*, concluded that it could “enter final judgment because the controversy involve[d] claims to a *res* within the court’s jurisdiction (permissibly resolved by a bankruptcy judge) rather than a proceeding to augment the estate (presumptively within the purview of a life-tenured district judge

284. *Id.* at 632.

285. *Id.*

286. 458 B.R. 345 (Bankr. S.D. Tex. 2011).

287. *Id.* at 369.

288. *Id.*

289. *Id.* (citing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006)) (emphasis omitted). However, the court did note that the Supreme Court in *Stern* stated that “we did not mean to suggest that the restructuring of debtor-creditor relations is in fact a public right.” *Id.* (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2614 n.7 (2011)).

290. *Id.* at 370 n.24.

291. *Id.* at 371.

292. 455 B.R. 657 (Bankr. W.D. Mich. 2011).

293. *Id.* at 660.

294. *Id.*

with salary protections under Article III of the U.S. Constitution).”²⁹⁵ “The court can enter final judgment in this matter, subject to appellate review under 28 U.S.C. § 158, because resolving the Plaintiff’s objection to [the] Preferred Interests ‘stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.’”²⁹⁶

In *In re Ramsey*,²⁹⁷ an Ohio bankruptcy court determined that its “decision [was] within [that] court’s constitutional authority as analyzed by” *Stern*, with respect to a creditor’s motion to lift a stay to litigate its claims against the debtor based on state law (including breach of contract and fraud), which were filed in state court over a year pre-petition, and concluded that it would be judicially efficient for the state court to continue its hearings on those claims.²⁹⁸

In *Palazzola v. City of Toledo (In re Palazzola)*,²⁹⁹ an Ohio Bankruptcy Court determined that a count in a complaint asserting a claim under 42 U.S.C. § 1983 for deprivation of rights by one acting under color of law did not arise under title 11, was not “related to” a case under title 11, and would have no effect on the administration of the estate, thus, the court lacked jurisdiction over the § 1983 claim. The plaintiff argued that the claim arose out of the bankruptcy case because “the substantive right created by § 524 of the Bankruptcy Code, that is, the right to be free from collection attempts on discharged debts by a creditor post-discharge, the claim is at least arguably a proceeding ‘arising in’ their case under title 11 and, thus, a core proceeding.”³⁰⁰ The court explained, however, that in *Stern*, the Supreme Court “ma[de] clear that the statutory authority under § 157 alone is insufficient to confer subject matter jurisdiction where the exercise of such jurisdiction would be in contravention of Article III of the United States Constitution”³⁰¹ and that the § 1983 action was a personal injury tort claim and, thus, was “a suit at common law.”³⁰² Accordingly, the court dismissed the § 1983 claim for lack of subject matter jurisdiction.³⁰³

295. *Id.* (citing *Stern v. Marshall*, 131 S. Ct. 2594, 2601 (2011)).

296. *Id.* (citing *Stern*, 131 S. Ct. at 2601).

297. No. 10-16609, 2011 WL 2680575 (Bankr. N.D. Ohio July 7, 2011).

298. *Id.* at *1–2.

299. No. 09-37696, 2011 WL 3667624, at *4 (Bankr. N.D. Ohio Aug. 22, 2011).

300. *Id.* (citing *Stern*, 131 S. Ct. at 2605).

301. *Id.* at *4.

302. *Id.* at *6.

303. *Id.*

The Chief Judge of the Nebraska Bankruptcy Court entered three opinions dealing with *Stern*, which all arose out of the same bankruptcy case: *In re AFY, Inc.* They will be discussed here as *AFY I*,³⁰⁴ *AFY II*,³⁰⁵ and *AFY III*.³⁰⁶

In *AFY I*, the court considered whether to dismiss an adversary proceeding for lack of jurisdiction under *Stern* and phrased the *Stern* holding this way:

the Supreme Court determined that while the bankruptcy court had statutory authority under 28 U.S.C. § 157(b)(2)(C) to enter final judgment on a counterclaim, it lacked the constitutional authority to do so on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.³⁰⁷

The court also noted that *Stern's* holding was narrow and that Congress had exceeded its constitutional authority "only in 'one isolated respect.'"³⁰⁸ Here,

This adversary proceeding was filed to identify and force the turnover of certain property alleged to be property of the debtor's bankruptcy estate, which constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(E). Further the trustee's right to bring a turnover proceeding is created by Title 11, 11 U.S.C. § 542. This court is not deprived of subject matter jurisdiction simply because resolution of the lawsuit may require the application of state law.³⁰⁹

In *AFY II*, the same court ruled, where the trustee sought payment of a \$4.5 million receivable and argued that it was entitled to turnover under 11 U.S.C. § 542, that, unlike *AFY I*, the proceeding was *not* core.³¹⁰ Here, the court phrased the *Stern* holding in a more broad fashion: "[t]he *Stern* decision circumscribes the ability of non-Article III judges to enter final judgments on certain types of claims, limiting the bankruptcy

304. *Badami v. Sears (In re AFY, Inc.)*, No. BK10-40875-TLS, 2011 WL 3812598 (Bankr. D. Neb. Aug. 18, 2011) [hereinafter *AFY I*].

305. *Badami v. Ainsworth Feed Yards, LLC (In re AFY, Inc.)*, No. BK10-40875-TLS, 2011 WL 3800120 (Bankr. D. Neb. Aug. 18, 2011) [hereinafter *AFY II*].

306. *Badami v. Sears Cattle Co. (In re AFY, Inc.)*, No. BK10-40875-TLS, 2011 WL 3800041 (Bankr. D. Neb. Aug. 18, 2011) [hereinafter *AFY III*].

307. *AFY I*, at *1 (citing *Stern v. Marshall*, 131 S. Ct. 2594 (2011)).

308. *Id.*

309. *Id.* (citing *In re Salander O'Reilly Galleries*, No. 07-30005, 2011 WL 2837494, at *10-13 (Bankr. S.D.N.Y. July 18, 2011)).

310. *AFY II*, at *2.

court's constitutional authority to do so to core proceedings stemming from the bankruptcy itself and actions that 'would necessarily be resolved in the claims allowance process.'"³¹¹ The court determined that the proceeding to recover the \$4.5 million receivable was not subject to turnover in § 542 because under § 542(b), turnover actions apply to debts that are "matured, payable on demand, or payable on order."³¹² Here, where the money sought was not clearly a receivable it was "beyond the scope of § 542" and was an action that "normally, would, be adjudicated outside of bankruptcy."³¹³ Thus, the court determined that the action did not arise under Title 11, did not arise in the bankruptcy case, and would not be resolved in the claims allowance process, and therefore that the bankruptcy court was not the appropriate forum for the trial.³¹⁴ The bankruptcy court accordingly vacated its prior summary judgment on the matter, granted defendant's motion for relief from judgment, and recommended that the district court withdraw the reference.³¹⁵

Similarly to *AFY II*, the court in *AFY III* analyzed *Stern* broadly and ruled that it should grant defendant's motion for relief from prior judgment on trustee's claim for collection of an account receivable of just under \$300,000, because *Stern* prevented it from entering a final order on a collection action, *even though* the action fell within the ambit of Bankruptcy Code § 542 as a turnover action.³¹⁶ The court reasoned that "[w]hile [the action] falls within the scope of § 542(b), it nevertheless is simply a collection action . . . [that] normally would[] be adjudicated outside of bankruptcy."³¹⁷ The court accordingly granted defendant's motion for relief from judgment, vacated its prior judgment in relevant part, and recommended withdrawal of the reference to the district court.³¹⁸ Unlike *AFY II*, the court here requested that the district court consider its prior order on the matter as proposed findings and conclusions to be adopted, entering judgment for the plaintiff.³¹⁹

In *Musich v. Graham (In re Graham)*,³²⁰ a Colorado bankruptcy court considered the issue of non-dischargeability of certain debts of a debtor under Bankruptcy Code § 523(a)(6). Upon

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at *2.

316. *AFY III*, at *1–2.

317. *Id.* at *2.

318. *Id.*

319. *Id.* at *3.

320. 455 B.R. 227 (Bankr. D. Colo. 2011).

concluding that the debt was nondischargeable, the court addressed *Stern* in a footnote. The court explained that *Stern*

may put into doubt this Court’s ability and authority to rule on this issue because it emanates from an interpretation of Colorado civil tort law and criminal law. The alleged tortious conduct—the assault and wrongful acts under state law—have been fully adjudicated by the state court. This Bankruptcy Court is dealing only with the question of dischargeability. Moreover, the matter at hand is agreed to by the parties to be a “core” proceeding under 28 U.S.C. § 157(b)(2)(A) and (I) and this matter indeed appears to be a ‘core’ proceeding—statutorily and constitutionally—thus, this Court believes it can issue this ruling accordingly.³²¹

In *FNB Bank v. Carlton (In re Carlton)*, an Alabama bankruptcy court determined that an adversary complaint filed by a bank seeking a declaration that it was not prohibited from post-confirmation foreclosure, and counterclaims asserted by the debtor asserting a violation of the confirmation order and claims under the Truth in Lending Act (“TILA”), were all “core” proceedings.³²² The court reached the conclusion that each of these matters was core because (1) the parties agreed that the adversary complaint and the confirmation-order-violation counterclaim were each core and (2) the TILA counterclaim

Involve[d] the allowance of the Bank’s claims—or more accurately, the reconsideration of their allowance pursuant to § 502(j). If the Debtor is entitled to recover on her TILA claims, then the Bank’s allowed claims will be subject to set-off via reconsideration under § 502(j). Allowance, and likewise reconsideration of allowance, are core proceedings under 28 U.S.C. § 157(b)(2)(B).³²³

The court noted, however, the following in a footnote:

The Court is confident of its conclusion that adjudication of the TILA claims are within its core jurisdiction under 28 U.S.C. § 157(b)(2). However, the Bank did not challenge this Bankruptcy Court’s jurisdiction based on an argument that a non-Article III judge does not have subject matter jurisdiction to hear the TILA claims asserted in the counterclaim. Nonetheless, because an adjudication of the

321. *Id.* at n.27.

322. No. 10–40388–JJR–13, 2011 WL 3799885 (Bankr. N.D. Ala. Aug. 26, 2011).

323. *Id.* at *1.

TILA claims would be the basis for a reconsideration of allowance of the Bank's claims via setoff, it appears this non-Article III judge does in fact have the necessary subject matter jurisdiction to enter a final order on the TILA claims.³²⁴

In *In re Safety Harbor Resort and Spa*³²⁵ a Florida bankruptcy court held that *Stern* did not prevent it from imposing "lock-up" restrictions on the debtors' business and non-debtor guarantors as part of plan confirmation because plan confirmation is a "core" proceeding.³²⁶ The court noted that "the few cases that have considered whether confirmation is a core proceeding have universally agreed that it is."³²⁷ Here,

the lock-up provisions are an integral part of the order confirming the plan under which the non-debtor guarantors will receive the benefit of an injunction protecting them from being sued on their guarantees during the term of the plan. Unquestionably, the Court's consideration of such terms falls within this Court's core jurisdiction under section 157(b)(2)(L).³²⁸

The court reached that conclusion over the debtor's objection based on *Stern*, noting that "[t]he debtor reads *Stern* too broadly."³²⁹ The court stated the holding of *Stern* as follows:

The Supreme Court merely held that Congress exceeded its authority under the Constitution in one isolated instance by granting bankruptcy courts jurisdiction to enter final judgments on counterclaims that are not necessarily resolved in the process of ruling on a creditor's proof of claim. Nothing in *Stern* limits a bankruptcy court's jurisdiction over other "core" proceedings. Nor does the *Stern* Court's reliance on its earlier decision in *Granfinanciera* somehow impose some new limitation on this Court's jurisdiction that has not existed since that case was decided over twenty years ago. Besides, parties can still consent—either expressly or impliedly—to a bankruptcy court's jurisdiction after *Stern*.³³⁰

324. *Id.* at n.5 (citing *Stern v. Marshall*, 131 S. Ct. 2594 (2011)).

325. 456 B.R. 703 (Bankr. M.D. Fla. 2011).

326. *Id.* at 719.

327. *Id.* at 716.

328. *Id.* at 719.

329. *Id.* at 705.

330. *Id.*

Before reaching that conclusion, the court engaged in a thorough description of the analysis set forth in *Stern*.³³¹ In determining that the holding in *Stern* was narrow, the court explained that “[i]n fact, the Supreme Court’s holding does not even remove all state-law counterclaims from the bankruptcy court’s jurisdiction”³³² and stated that “nothing in the Supreme Court’s opinion actually limits a bankruptcy court’s authority to adjudicate the other ‘core proceedings’ identified in section 157(b)(2).”³³³ Interestingly, the court noted that,

It is understandable that some would view that language [in *Stern* that an issue must stem from the bankruptcy itself or be resolved in the claims allowance process in order to be “core”] as a new limit on the Court’s constitutional authority to finally resolve other “core” proceedings, such as fraudulent conveyance or preference actions. But the *Stern* Court’s use of the word “reaffirm” makes clear that nothing has changed. The sole issue in *Granfinanciera* was whether the Seventh Amendment conferred on petitioners a right to a jury trial in the face of Congress’ decision to allow a non-Article III tribunal to adjudicate the claims against them. *Granfinanciera* did not hold that bankruptcy courts lack jurisdiction to enter final judgments on fraudulent conveyance claims. In fact, the Supreme Court went to great lengths to emphasize that the issue was not even before it in that case. . . . And the language from *Granfinanciera* that some courts and commentators fear may limit bankruptcy courts’ jurisdiction—language relied on by the *Stern* court—has been the law for over twenty years. Yet, this Court is not aware of a single case during the twenty years preceding *Stern* challenging a bankruptcy court’s authority to enter final judgments in fraudulent conveyance actions.³³⁴

Finally, the court explained that:

Of course, years from now, the Supreme Court may hold that section 157(b)(2)(F) dealing with fraudulent conveyances is unconstitutional, just as it did with section 157(b)(2)(C). But the job of bankruptcy courts is to apply the law as it is written and interpreted today. Bankruptcy courts should not invalidate a Congressional statute, such

331. *See id.* at 707–19.

332. *Id.* at 715.

333. *Id.*

334. *Id.* at 717 (citations omitted).

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*.³³⁵

5. On Jurisdictional Determinations

In *The Fairchild Liquidating Trust v. State of New York and the New York State Department of Transportation (In re The Fairchild Corporation)*,³³⁶ the Delaware Bankruptcy Court had before it, *inter alia*, the issue of whether adversary proceedings asserting claims for breach of contract and various forms of takings with respect to certain property should be dismissed for lack of subject matter jurisdiction based upon sovereign immunity and noted that *Stern* was “inapplicable” because

the issue in *Stern v. Marshall* was when, under the United States Constitution, the bankruptcy court could enter a final judgment as opposed to proposed findings of fact and conclusions of law in a case where subject matter jurisdiction existed under 28 U.S.C. § 1334(a). As such, *Stern v. Marshall* is not a case about subject matter jurisdiction. Rather, it addresses the power of the bankruptcy court to enter final orders, *assuming that subject matter jurisdiction exists*.³³⁷

The court’s power to enter a final order was not implicated, and thus, *Stern* did not apply.³³⁸

In an opinion ruling a bankruptcy court’s remand of a state-law removed action non-appealable, the Seventh Circuit in *Townsquare Media, Inc. v. Brill*³³⁹ briefly addressed the issue of whether supplemental jurisdiction would expand a bankruptcy court’s jurisdiction, and, without deciding whether supplemental jurisdiction would apply in a bankruptcy context, the court explained that supplemental jurisdiction would be “inconsistent with the statutory treatment of ‘related to’ jurisdiction (and why should supplemental jurisdiction be broader?) and is in tension

335. *Id.* at 718 (citations omitted).

336. 452 B.R. 525 (Bankr. D. Del. 2011).

337. *Id.* at n.14 (citations omitted).

338. *Id.*

339. 652 F.3d 767 (7th Cir. 2011) (citing, *inter alia*, *Stern v. Marshall*, 131 S. Ct. 2594 (2011)).

with the Supreme Court's reluctance to allow bankruptcy judges dispositive authority over state-law claims. But that's another issue we need not resolve.”

The Seventh Circuit in *Matrix IV, Inc. v. American National Bank and Trust Co. of Chicago* considered whether RICO and common law fraud claims were subject to res judicata and/or collateral estoppel.³⁴⁰ The district court ruled that the claims were subject to both res judicata and collateral estoppel because the exact claims had been litigated and lost in the bankruptcy proceedings.³⁴¹ The circuit court affirmed, though on narrower grounds, because:

the res judicata argument exposes some tension in our caselaw and a lopsided circuit split on how claim preclusion applies in this context. The Supreme Court's recent decision [in *Stern*] suggests that resolving the conflict may be a bit more complicated than the caselaw presently admits. Because collateral estoppel—issue preclusion—blocks this new suit in its entirety, we affirm on this narrower ground of decision and leave the resolution of the conflict for a future case in which it will actually matter.³⁴²

The doctrine of “res judicata bars not only those issues actually decided in the prior suit, but all other issues which could have been brought,” while collateral estoppel is narrower as it bars re-litigation of an issue that was actually litigated previously.³⁴³ The court reached its conclusion because of conflicting case law on the subject, including its own precedent, which held that RICO claims, which are non-core, are not barred by res judicata as to core claims that are already resolved, as compared against the precedent in “every other circuit” that has rejected the core/non-core distinction for purposes of res judicata.³⁴⁴

The Idaho Bankruptcy Court in *In re Clark* cited *Stern* for the proposition that 28 U.S.C. § 157(b)(5) “is not ‘jurisdictional’ but instead addresses *where* such claims shall be tried.”³⁴⁵

340. 649 F.3d 539 (7th Cir. 2011).

341. *Id.* at 546.

342. *Id.* at 542.

343. *Id.* at 547.

344. *Id.* at 551.

345. No. 10–20466–TLM, 2011 WL 3294040, at n.16 (Bankr. D. Idaho July 29, 2011).

6. Minor Citations to *Stern*

In *Correia v. Deutsche Bank National Trust Co. (In re Correia)*, the Bankruptcy Appellate Panel for the First Circuit determined that a debtor lacked standing to challenge the assignment of a mortgage to the bank because the Debtor was not a party to the relevant assignment documents.³⁴⁶ The court expressly declined to “reach the question whether the bankruptcy court’s jurisdiction was properly invoked to adjudicate the state law anent the foreclosure sale’s validity” and explained that “[h]ere we can easily resolve the matter on the merits, without considering whether the bankruptcy court’s exercise of jurisdiction was constitutional.”³⁴⁷

In *In re Taylor*, the Third Circuit Court of Appeals cited *Stern* for the proposition that a bankruptcy court’s factual findings are reviewed for clear error.³⁴⁸

In a *qui tam* action relating to a patent marking violation, a Pennsylvania district court in *Hollander v. Ranbaxy Laboratories, Inc.* cited *Stern* for the proposition that “[s]eparation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others.”³⁴⁹

A Pennsylvania bankruptcy court in *Schatz v. Chase Home Finance (In re Schatz)* also cited *Stern* for the three types of jurisdiction and quoted *Stern* for the proposition that “[b]ankruptcy judges may hear and enter final judgments on ‘all core proceedings arising under title 11, or arising in a case under title 11.’”³⁵⁰ In *Schatz* the court held that it lacked subject matter jurisdiction over certain causes of action that subsequently re-vested in the debtor, which were not within the “arising under,” “arising in,” or “related to” jurisdiction because they were not property of the estate after the re-vesting.³⁵¹

A Virginia bankruptcy court in *In re Loy* cited *Stern* for the proposition that “[p]arties may appeal final judgments of a

346. 452 B.R. 319 (B.A.P. 1st Cir. 2011).

347. *Id.* at n.3 (citing *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *U.S. v. Vilches-Navarrete*, 523 F.3d 1, 9 n.6 (1st Cir. 2008) (“The maxim that courts should not decide constitutional issues when this can be avoided is as old as the Rocky Mountains and embedded in our legal culture for about as long.”)).

348. 655 F.3d 274, 282–83 (3d Cir. 2011).

349. No. 10–793, 2011 WL 2787151 (E.D. Pa. July 18, 2011).

350. 452 B.R. 544, 551 (Bankr. M.D. Pa. 2011).

351. *Id.* at 552.

bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards.³⁵²

In *Kemp v. Segue Distrib., Inc. (In re Kemp)*, a Louisiana bankruptcy court cited *Stern* for the proposition that there are “three types of bankruptcy jurisdiction: ‘arising under,’ ‘arising in,’ and ‘related to’ jurisdiction.”³⁵³ The court determined that it did not have jurisdiction in any of those forms over the issue of whether judicial estoppel bars a personal injury action brought by debtors, which arose three years after plan confirmation.³⁵⁴

In an order on an omnibus claims objection in *In re Pilgrim’s Pride Corp.*, the Northern District of Texas Bankruptcy Court stated in a footnote that:

The U.S. Supreme Court recently suggested in dicta that this court might try a personal injury claim by consent, including implied consent of the claimant. *See Stern v. Marshall*, 131 S. Ct. 2594 (2011). However, under the order of reference to this court, personal injury claims are not referred, and thus, implied consent is not possible.³⁵⁵

In denying the government’s request for a new trial on wire fraud charges because the government “forfeited its ability to now seek retrial based upon its failure to timely assert the claim that the jury had not completed its work by returning the verdicts it did,” a Florida district court in *United States v. Cabrera*³⁵⁶ reasoned that “there would be no reason to allow the government to prevail if it had believed the jury was about to be discharged without completing all of its required functions yet remained silent.” The court cited *Stern* for the proposition that “sandbagging, i.e., ‘remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor’ may result in the forfeiture of even constitutional rights.”³⁵⁷

352. Nos. 07–51040–FJS, 09–51379–FJS, 2011 WL 2619253, at * 5 (Bankr. E.D. Va. July 1, 2011).

353. No. 03–52422, 2011 WL 3664497, at *4 (Bankr. W.D. La. Aug. 19, 2011).

354. *Id.* at *6.

355. No. 08–45664(DML), 2011 WL 3799835, at n.16 (Bankr. N.D. Tex. Aug. 26, 2011) (citation omitted).

356. No. 2:08–cr–94–FtM–99DNF, 2011 WL 2681248 (M.D. Fla. July 11, 2011).

357. *Id.* at *5 (citing *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011)).

C. Consent Analysis

28 U.S.C. § 157(c)(2) allows a bankruptcy court to enter a final order on non-core matters with the consent of the parties:

Notwithstanding the provisions of paragraph (1) of this subsection [dealing with related-to jurisdiction], the district court, *with the consent of all the parties* to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.³⁵⁸

The Supreme Court explained in *Stern* that, although Pierce consented to the bankruptcy court's adjudication of his defamation proof of claim,³⁵⁹ Pierce did not consent to the adjudication of Vickie's counterclaim, *i.e.*, the tortious interference claim.³⁶⁰ Thus, a bankruptcy court's ability to hear and determine matters related to a title 11 case with the consent of all parties, such as the tortious interference counterclaim, should be undisturbed after *Stern*. Indeed, many courts applying *Stern* have expressed the opinion that parties may still consent to a bankruptcy court's final adjudicatory authority over "related to" matters after *Stern* under 28 U.S.C. § 157(c)(2).³⁶¹

358. 28 U.S.C. § 157(c)(2) (emphasis added).

359. *See Stern*, 131 S. Ct. at 2606.

360. *See Stern*, 131 S. Ct. at 2607. When confronted with the question of whether Pierce consented to the resolution of Vickie's counterclaim in the bankruptcy court, the Court in *Stern* explained that

Pierce did not have another forum in which to pursue his claim to recover from Vickie's pre-bankruptcy assets, rather than take his chances with whatever funds might remain after the Title 11 proceedings [A]s we recognized in *Granfinanciera*, the notion of "consent" does not apply in bankruptcy proceedings as it might in other contexts.

Id. at 2614–15, n.8 (emphasis added). Exactly what is meant by the Court's statement that the notion of consent is different in the bankruptcy context is unclear; however, earlier in the opinion, the Court cited to 28 U.S.C. § 157(c)(2) for the proposition that parties may consent to a bankruptcy court's adjudication, so this isolated statement does not appear to undermine that consent statute.

361. *See, e.g., In re Safety Harbor Resort and Spa*, 456 B.R. 703 (Bankr. M.D. Fla. 2011) (parties can still consent—either expressly or impliedly—to a bankruptcy court's jurisdiction after *Stern*); *In re Olde Prairie Block Owner, LLC*, 2011 WL 3792406, at *1 (Bankr. N. D. Ill. Aug. 25, 2011) (bankruptcy court can enter a final order on counterclaims asserted by the debtor (whether or not they were otherwise resolvable in the claims adjudication process) based upon consent of the parties); *Stoebner v. PNY Technologies, Inc. (In re Polaroid Corp.)*, 451 B.R. 493 (Bankr. D. Minn. 2011) (court refused to enter final judgment on state law action in adversary proceeding *absent* consent); *Jones v.*

Yet, some courts are not convinced. In *Bearing Point*, discussed above, Judge Gerber wrote that the Supreme Court found Pierce's consent inadequate for the bankruptcy judge to determine the counterclaim, and he further opined that, now, consent may never be sufficient for a bankruptcy judge to issue final judgments on non-core matters.³⁶² But, Judge Gerber appears to have overlooked that the consent to which the Supreme Court referred concerned Pierce's defamation claim, not Vickie's tortious interference claim. Indeed, there is no suggestion in the opinion that the Supreme Court would have ruled the same way had Pierce expressly consented to the bankruptcy court's entry of a final order on the tortious interference claim. The constitutionality of 28 U.S.C. § 157(c)(2) was not at issue in *Stern*, and, in fact, the Supreme Court cited to § 157(c)(2) with approval regarding the bankruptcy court's determination of the defamation claim.³⁶³ Moreover, the constitutionality of the analogous consent statute in the magistrate context (28 U.S.C. § 636(c)) has passed constitutional muster in several circuits.³⁶⁴ Until the Supreme Court affirmatively holds that 28 U.S.C. § 157(c)(2) is unconstitutional, bankruptcy judges should comfortably preside over matters related to a title 11 case if the parties consent.

Mandel (*In re Mandel*), 2011 WL 2728415, at *3 (Bankr. E.D. Tex. July 12, 2011) (bankruptcy court did not have constitutional authority to decide a counterclaim in the absence of parties' express consent); NYU Hosps. Ctr. v. HRH Constr. LLC (*In re HRH Constr. LLC*), No. 09-23665(RDD), 2011 WL 3359576, at *6 (Bankr. S.D.N.Y. Aug. 2, 2011) (bankruptcy court can enter a final order on state breach of contract action with consent of the parties); Meoli v. The Huntington Nat'l Bank (*In re Teleservices Group, Inc.*), 456 B.R. 318 (Bankr. W. D. Mich. 2011) (bankruptcy court would have authority to enter a final order in a fraudulent transfer adversary proceeding if the parties consent); Keybank Nat'l Ass'n v. Martinez (*In re Martinez*), 2011 WL 2925481, at *1 (Bankr. N.D. Ohio July 18, 2011) (bankruptcy court can enter final order on state law conversion claim and dischargeability issues with parties' consent).

362. See *In re Bearing Point, Inc.*, 453 B.R. 486, 496-97 (Bankr. S.D.N.Y. 2011).

363. See *Stern*, 131 S. Ct. at 2607.

364. See, e.g., *Puryear v. Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins v. Foreman*, 729 F.2d 108 (2d Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (*en banc*); *Wharton-Thomas v. U.S.*, 721 F.2d 922 (3d Cir. 1983). A more thorough discussion of 28 U.S.C. § 636(c)(1) and the similarities with § 157(c)(2) appears near the conclusion of this article.

D. Rerouting and Increasing Court Traffic

The ruling will surely increase traffic on district court dockets while also increasing bankruptcy courts' workloads due to increased motions for permissive abstention under 28 U.S.C. § 1334(c)(1) and by creditors and motions for withdrawal of reference under 28 U.S.C. § 157(d). The ruling might also cause district courts to withdraw bankruptcy court reference more frequently on their own accord, in an effort to streamline the courts' efforts where possible. Bankruptcy courts may also still likely hear state-law claim issues, but they will submit proposed findings and conclusions to the district court subject to *de novo* review instead of issuing final orders on them. This means two judges will effectively have to decide the factual and legal issues instead of one. State courts may also become busier—in order to avoid the conflict/confusion, parties may choose to litigate “civil proceedings arising under title 11 or arising on or related to cases under title 11” in a more piecemeal fashion by going to state court in the first instance because 28 U.S.C. § 1334(b) jurisdiction is original, but non-exclusive.³⁶⁵ In addition to the published opinions discussed *supra*, the following are further examples.

In *In re Extended Stay, Inc.*,³⁶⁶ plaintiffs, as trustee for and on behalf of the Extended Stay Litigation Trust, moved to withdraw the reference under 28 U.S.C. § 157(d) to the district court on both mandatory and permissive grounds, in light of *Stern* as well as Second Circuit jurisprudence limiting post-confirmation jurisdiction of bankruptcy courts. The lawsuits at issue were filed by the trustee on behalf of the creditors of Extended Stay, Inc. relating to a “disastrous” leveraged buyout, siphoning of funds from the debtors to the tune of approximately \$2.1 billion to Blackstone and over \$100 million in improper dividends and distributions to post-buyout equity holders and their affiliates.³⁶⁷ By the time of this motion, the debtors' plan had long been confirmed (July 20, 2010), had become effective (October 8, 2010), and had been substantially consummated.³⁶⁸ The trustee argued in favor of mandatory withdrawal of the reference, notwithstanding the court's retention of jurisdiction over arising in, arising under, and related to matters, explaining that the

365. Note, however, that “the district courts shall have original *and* exclusive jurisdiction of all cases under title 11.” 28 U.S.C. § 1334(a).

366. See Plaintiff's Memorandum of Law in Support of Motion to Withdraw the Reference, Case No. 09-13764 (JMP), Adv. Pro. No. 11-2255 (Bankr. S.D.N.Y. July 29, 2011) [Docket No. 19].

367. *Id.* at 2.

368. *Id.* at 4.

bankruptcy court's ability to enter final judgments on lawsuits initiated against third parties post-confirmation is constitutionally unsettled because of *Stern*.³⁶⁹ Here, the trustee stated that the bankruptcy court has, at best, "related to" jurisdiction over the non-bankruptcy state and federal law claims in the adversary proceeding.³⁷⁰ Citing *Bearing Point*, the trustee pointed out that administrative and procedural delays and hurdles will obtain if the court retains adjudicatory authority over a non-core issue.³⁷¹ Even though some of the claims in the adversary proceeding are admittedly core (seeking avoidance and recovery of fraudulent transfers under the Bankruptcy Code), they are asserted along with state law claims as well.³⁷² The trustee also argued for permissive withdrawal of reference "for cause," citing *Bearing Point*, and in order to promote judicial efficiency, to prevent delay and cost to the parties, and to avoid forum shopping, and because the plan has already been confirmed and the court's jurisdiction was lessened.³⁷³ As of August 2, 2011, the case was referred to the District Court for the Southern District of New York, and on November 15, 2011, the district court denied the motion for withdrawal of the reference.³⁷⁴

E. Basis of "Core" Determination

28 U.S.C. § 157(b)(3) also appears to be undermined by *Stern*:

The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.³⁷⁵

369. *Id.* at 5.

370. *Id.* at 8.

371. *Id.* at 10 (citing *In re Bearing Point, Inc.*, 453 B.R. 486 (Bankr. S.D.N.Y. 2011)).

372. *Id.* at 10–11.

373. *Id.* at 11.

374. *Walker, Truesdell, Roth & Assoc. v. The Blackstone Group (In re Extended Stay, Inc.)*, Case No. 11-cv-5394 (S.D.N.Y. Nov. 15, 2011) [Docket No. 17].

375. 28 U.S.C. § 157(b)(3).

F. Settlements and Compromises

Parties may seek approval of more settlements and compromises under Rule 9019 of the Federal Rules of Bankruptcy Procedure in an effort to short-circuit protracted piecemeal resolution of issues in bankruptcy cases.

G. Filing Proofs of Claim

The *Stern* opinion reminds us that parties filing proofs of claim should think carefully about whether to file them if jurisdiction-challenging counterclaims could be asserted, considering the potential additional expense and delay of resolving such counterclaims. Even before *Stern*, it was well settled that the bankruptcy court can hear and determine avoidance actions filed against a party who files a proof of claim.³⁷⁶ Though it has long been questionable whether some avoidance actions fall within the bankruptcy court's core jurisdiction,³⁷⁷ the filing of a proof of claim tethers the avoidance action to the bankruptcy court's core jurisdiction by way of 11 U.S.C. § 502(d).

H. Bankruptcy Appellate Panels

If a single bankruptcy judge lacks the authority to enter certain types of final judgments, then the authority of a gathering of three bankruptcy judges would be subject to the same constitutional infirmity for the same types of matters.

I. Certification

In *Stern*, the Supreme Court appeared bothered by the fact that the bankruptcy court granted Vickie a huge award (\$425 million) based on a determination of “whether Texas recognized a cause of action for tortious interference with an *inter vivos* gift—something the Supreme Court of Texas had yet to do.”³⁷⁸ Certification of the issue to the Texas Supreme Court for guidance on an unsettled issue in Texas law before awarding such a huge sum of money to Vickie in a very high profile case might have been helpful. Certification is a somewhat extraordinary way to obtain an advisory opinion from a state supreme court on an issue of

376. *Katchen v. Landy*, 382 U.S. 323 (1966).

377. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

378. *Stern v. Marshall*, 131 S. Ct. 2594, 2610 (2011) (citing *In re Marshall*, 275 B.R. 5, 50–51 (C.D. Cal. 2002)).

unsettled law, though the existence and parameters of such certification vary by state. In Texas, unfortunately, neither the bankruptcy court nor the district court would have been entitled to certify the question, but the Ninth Circuit grappling with the *Stern* case could have. The Texas Supreme Court allows certification, but only from federal courts of appeals.³⁷⁹ Also of interest, the New York Court of Appeals similarly allows certification from the U.S. Supreme Court, a federal court of appeals, or a court of last resort of another state.³⁸⁰

J. Are Magistrate Judges Subject to the Same Problems?

Like the bankruptcy judge, the magistrate judge derives jurisdiction and authority by Congressional statute.³⁸¹ Magistrate judges are not Article III judges. 28 U.S.C. § 631(e) provides that the term of a full-time magistrate judge is eight years, and his or her salary is the same as a bankruptcy judge. The purpose of the magistrate judge is to relieve district judges of certain judicial responsibilities that can be separated from their exclusive constitutional duties in order to reduce case loads.³⁸² To further this goal, Congress enacted 28 U.S.C. § 636(c)(1), which allows the magistrate judge to conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case. Under § 636(c)(4), the district court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under the consent statute.

The bankruptcy consent statute in 28 U.S.C. § 157(c)(2) and the magistrate consent statute in 28 U.S.C. § 636(c)(1) are arguably so similar that any pronouncements on the constitutionality of one statute should apply by analogy to the other.³⁸³ Indeed, the constitutionality of § 636(c)(1) has been

379. See TEX. CONST. art. 5, § 3-C (“The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court.”).

380. See N. Y. CONST. art. VI, § 3(b), cl. 9.

381. Magistrate judges derive their authority from 28 U.S.C. § 636. There is no such thing as a “magistrate court.” The court in which a magistrate judge sits is the district court. Cf. 28 U.S.C. § 151 (a “bankruptcy court” is a unit of the district court).

382. U.S. v. Schronce, 727 F.2d 91, 93 (4th Cir. 1984).

383. See Olde Prairie Block Owner, LLC, 457 B.R. 692, 701 (Bankr. N.D. Ill. 2011) (“If *Stern* had destroyed the power of Bankruptcy Judges to enter final judgments by consent in non-core but otherwise related proceedings, that would have called into question the power of Magistrate Judges . . . to make final adjudication by consent . . .”).

challenged on the grounds that a magistrate judge cannot constitutionally enter judgments in civil cases even with the parties' consent because a magistrate judge is not an Article III judge. Yet, several circuits have held that § 636(c)(1) passes constitutional muster.³⁸⁴ In *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, the Ninth Circuit, *en banc*, noted that the constitutional question to be addressed vis-à-vis Congress's enactment of the consent statute is separation of powers. The Ninth Circuit observed that the "standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system."³⁸⁵ The circuit court ultimately held that § 636(c)(1) contains "sufficient protection against the erosion of judicial power to overcome the constitutional objections leveled against it."³⁸⁶ The court concluded that the Article III courts control the magistrate system as a whole.³⁸⁷ The selection of magistrates and their retention in office is the responsibility of Article III judges.³⁸⁸ Moreover, the Article III judge can cancel an order of reference. These factors led the Ninth Circuit to conclude that the reference of civil cases to magistrate judges with the consent of parties, subject to careful supervision by Article III judges, may serve to strengthen an independent judiciary, not undermine it.³⁸⁹

The Article III oversight of magistrate judges discussed in *Pacemaker* is also present with respect to bankruptcy judges.³⁹⁰ Thus, if 28 U.S.C. § 157(c)(2) is ever challenged on the constitutional ground of separation of powers, *Pacemaker* should provide persuasive authority to argue that § 157(c)(2) is constitutional. If *Stern* is construed as concluding that parties cannot consent to the bankruptcy court hearing and determining non-core, related to matters, including the tortious interference counterclaim in *Stern*, then the many cases holding that the

384. See, e.g., *Puryear v. Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins v. Foreman*, 729 F.2d 108 (2d Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (*en banc*); *Wharton-Thomas v. U.S.*, 721 F.2d 922 (3d Cir. 1983).

385. *Pacemaker*, 725 F.2d at 544 (citing *Nixon v. Admin. of General Servs.*, 433 U.S. 425, 443 (1977)).

386. *Id.*

387. *Id.* at 545.

388. *Id.*

389. *Id.* at 546.

390. See, e.g., 28 U.S.C. §§ 151, 152, 154(b), and 157(a), (b)(2)(B), (b)(5), (c)(1), and (d).

magistrate consent statute passes constitutional muster would also be undermined. In *Bearing Point*, Judge Gerber indeed read *Stern* broadly to opine that 28 U.S.C. § 157(c)(2) may be unconstitutional.³⁹¹ But *Stern* does not address the constitutionality of the statute; instead, *Stern* mentions it with approval with regard to Pierce's consent to the bankruptcy court's adjudication of his defamation claim. The holding in *Stern* should not be extrapolated to speak to the constitutionality of a statute not at issue in that case.

While the Supreme Court has not had occasion to specifically address whether either 28 U.S.C. § 157(c)(2) or 28 U.S.C. § 636(c)(1) are constitutional, the Supreme Court in *Roell v. Withrow* held that consent under § 636(c)(1) can be implied from a party's conduct during litigation.³⁹² It strains logic to argue that the Supreme Court would hold that § 636(c)(1) is unconstitutional in light of *Roell*. In fact, Justice Thomas, writing for the dissent, raised constitutional concerns of the majority's holding in *Roell* but only because such consent, he wrote, should be express.³⁹³ In other words, even the dissent in *Roell* supports the notion that a party may consent to have a non-Article III judge decide a civil matter. Thus, any constitutional concerns raised by post-*Stern* cases (or commentators), such as *Bearing Point*, should be ameliorated by the Supreme Court's decision in *Roell*, and the great weight of circuit court authority upholding the constitutionality of 28 U.S.C. § 636(c).

IV. CONCLUSION

Does *Stern v. Marshall* shake the foundation of bankruptcy courts? Maybe, maybe not. In the relatively short time between the issuance of *Stern* and the date of the writing of this article, over 50 bankruptcy opinions have discussed the case, and articles abound on the subject. These opinions and articles have established a wide continuum on the subject, and many have observed that it is not yet clear what the full ramifications of *Stern* will be. However, what is certain after *Stern* is that a bankruptcy judge may not enter final orders on state law counterclaims that are not otherwise resolved in the claims resolution process. Additionally, as a number of post-*Stern* courts have held, *Stern* may even stretch by analogy to stand for the more general proposition that a bankruptcy court cannot enter judgment without the consent of parties on matters that are in substance only "related to" a title 11 case, even if such matters are

391. See *In re Bearing Point, Inc.*, 435 B.R. 486, 496–97 (2011).

392. 538 U.S. 580, 582 (2003).

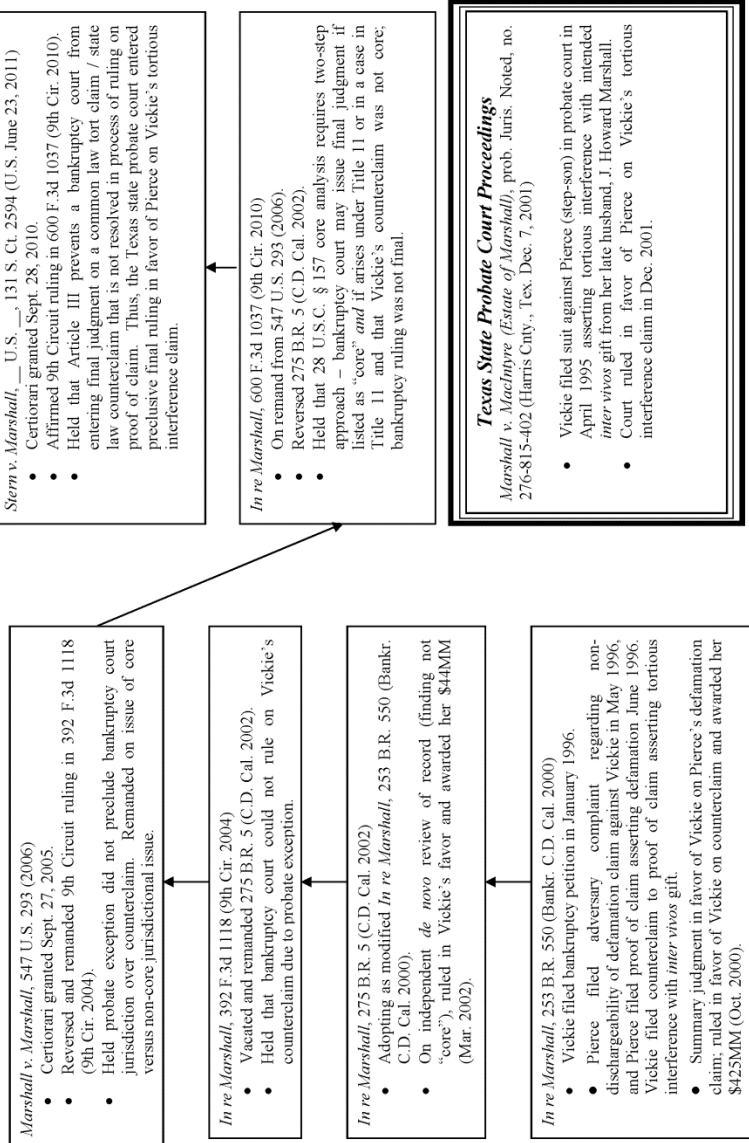
393. See *id.* at 596–97 (Thomas, J., dissenting).

listed in the core proceeding list under 28 U.S.C. § 157(b)(2). Moreover, there is language in *Stern* (and *Granfinanciera*) touching on the fundamental issue of the constitutional authority of bankruptcy courts that may prove useful to future litigants who attempt to use *Stern* to shake the foundation of bankruptcy courts. Until that time, however, it ought to be business as usual in the bankruptcy courts.

APPENDIX A

Stern v. Marshall, ___ U.S. ___, 131 S. Ct. 2594 (U.S. June 23, 2011)

Federal Court Proceedings, Originating in California Bankruptcy Court



APPENDIX B

Subject	Circuit	Decision Date	Case/Comment	Holding Type
Counterclaims	5th	July 11, 2011	Turner v. First Cmty. Credit Union (<i>In re</i> Turner), 462 B.R. 214 (Bankr. S.D. Tex. 2011)—bankruptcy court retains authority over counterclaim not based on state law under “public rights” exception.	Narrow
Counterclaims	5th	July 12, 2011	Jones v. Mandel (<i>In re</i> Mandel), 2011 WL 2728415 (Bankr. E.D. Tex. July 12, 2011)—bankruptcy court cannot decide restitution counterclaim absent consent.	Expansive
Counterclaims	7th	Aug. 25, 2011	<i>In re</i> Olde Prairie Block Owner, LLC, 457 B.R. 692 (Bankr. N.D. Ill. 2011)—bankruptcy court has the authority to enter a final order on counterclaims asserted by the debtor either (1) where the parties consented or (2) where the counterclaims were resolved in the process of adjudicating the claims.	Narrow
Counterclaims	9th	July 15, 2011	Siegel v. FDIC (<i>In re</i> Indymac Bankcorp., Inc.), 2011 WL 2883012 (C.D. Cal. July 15, 2011)—district court refused to withdraw reference of non-core counterclaim under <i>Stern</i> .	Narrow

Subject	Circuit	Decision Date	Case/Comment	Holding Type
State Law Issues	1st	Aug. 5, 2011	United Systems Access Telecom, Inc. v. N. New England Telephone Operations, LLC, 456 B.R. 148 (D. Me. 2011)—withdrawing reference on § 157(d) grounds based upon applicability of FCC regulation without reaching <i>Stern</i> issue as to whether state law applied.	Cautionary
State Law Issues	2nd	Aug. 2, 2011	NYU Hospitals Ctr. v. HRH Constr., LLC (<i>In re</i> HRH Constr., LLC), 2011 WL 3359576, at *6 (Bankr. S.D.N.Y. Aug. 2, 2011)—bankruptcy court adjudicated on a final basis state breach of contract claim removed to the district court and referred to the bankruptcy court on express consent of the parties.	Narrow
State Law Issues	2nd	July 18, 2011	<i>In re</i> Salander O'Reilly Galleries, 453 B.R. 106 (Bankr. S.D.N.Y. 2011)—retained determination over property of the estate determination notwithstanding contrary choice of law (international)/arbitration provision.	Narrow
State Law Issues	3rd	Aug. 15, 2011	Buffets Holdings, Inc. v. Cal. Franchise Tax Board, 455 B.R. 94 (Bankr. D. Del. 2011)—issues of validity of claims and allowance of claims are core issues, and bankruptcy court can enter final order.	Narrow

Subject	Circuit	Decision Date	Case/Comment	Holding Type
State Law Issues	3rd	Aug. 25, 2011	<i>In re</i> The Salem Baptist Church of Jenkintown, 455 B.R. 857, n.6 (Bankr. E.D. Pa. 2011)—noted that <i>Stern</i> extends to common law causes of action and that bankruptcy courts may not decide a common law cause of action when the action neither derives from nor depends on any agency regulatory regime.	Expansive
State Law Issues	3rd	June 28, 2011	<i>Barnhart v. Demarco (In re Demarco)</i> , 454 B.R. 343 (Bankr. E.D. Pa. 2011)— <i>Stern</i> prevents bankruptcy court from hearing non-core actions removed to the bankruptcy court (here, there were no assets in estate for distribution).	Expansive
State Law Issues	3rd	July 22, 2011	<i>Fed. Ins. Co. v. DBSI (In re DBSI, Inc.)</i> , 2011 WL 3022177 (Bankr. D. Del. July 22, 2011) - declining to enter order on issue of D&O insurance coverage until parties briefed <i>Stern</i> 's impact on the issue.	Cautionary
State Law Issues	4th	July 5, 2011	<i>Cline v. Quicken Loans</i> , 2011 WL 2633085 (N.D.W. Va. July 5, 2011)—applied mandatory abstention where comity and judicial economy did not support retaining state law causes of action removed to district court, even though related proof of claim was filed, explaining that the proof of claim did not convert the claims into a core proceeding.	Expansive

Subject	Circuit	Decision Date	Case/Comment	Holding Type
State Law Issues	5th	Aug. 16, 2011	<i>Sigillito v. Hollander (In re Hollander)</i> , 2011 WL 3629479 (5th Cir. Aug. 16, 2011)—remanded case to the bankruptcy court for decision on whether debtor's representations constituted fraud under state law and left to the district court the issue of whether <i>Stern</i> had any applicability.	Cautionary
State Law Issues	5th	July 25, 2011	<i>So. La. Ethanol, LLC v. Whitney Nat'l Bank (In re So. La. Ethanol, LLC)</i> , 438 Fed. Appx. 274 (Bankr. E.D. La. 2011)—with respect to ruling on MSJ regarding validity of lien, court gave caveat that to the extent it lacked jurisdiction, the opinion was to be deemed a report and recommendation.	Cautionary
State Law Issues	5th	Aug. 19, 2011	<i>Rogers v. The CIT Group/Equipment Financing, Inc. (In re B.C. Rogers Poultry, Inc.)</i> , 455 B.R. 524 (Bankr. S.D. Miss. 2011)—because the Fifth Circuit has not yet ruled on the reach of <i>Stern</i> , the Court entered a final order on various state law contract and tort claims of a debtor in an adversary proceeding.	Narrow
State Law Issues	5th	July 11, 2011	<i>Christian v. Soo Bin Kim (In re Soo Bin Kim)</i> , 2011 WL 2708985 (Bankr. W.D. Tex. July 11, 2011)—denial of motion to dismiss probate-related action under <i>Stern</i> .	Narrow

Subject	Circuit	Decision Date	Case/Comment	Holding Type
State Law Issues	5th	July 22, 2011	<i>In re Crescent Resources, LLC</i> , 457 B.R. 506 (Bankr. W.D. Tex. 2011)— <i>Stern</i> is not applicable to state-law privilege issues regarding motion to compel turnover of documents.	Narrow
State Law Issues	5th	Aug. 25, 2011	<i>In re Crusader Energy Group</i> , Adv. Pro. No. 09-03141 (Bankr. N.D. Tex. Aug. 25, 2011) [Docket Nos. 133, 134]— <i>Stern</i> is not applicable to property of the estate determinations.	Narrow
State Law Issues	6th	Aug. 24, 2011	<i>In re Miller</i> – 2011 WL 3741846, at *1 (Bankr. N.D. Ohio Aug. 24, 2011)—bankruptcy court can enter a final order over property of the estate determinations.	Narrow
State Law Issues	6th	Aug. 16, 2011	<i>Tibble v. Wells Fargo Bank (In re Hudson)</i> , 455 B.R. 648 (Bankr. W.D. Mich. 2011)—lien avoidance is a core issue regarding which bankruptcy court can enter a final order.	Narrow
State Law Issues	6th	June 27, 2011	<i>Mason v. Szerwinski (In re Szerwinski)</i> , 2011 WL 2551012, at * 1-2 (Bankr. N.D. Ohio June 27, 2011)—bankruptcy court can resolve issues of avoidability of a lien based upon state law.	Narrow
State Law Issues	6th	July 18, 2011	<i>Keybank Nat'l Ass'n v. Martinez (In re Martinez)</i> , 2011 WL 2925481, at *1 (Bankr. N.D. Ohio July 18, 2011)— <i>Stern</i> does not limit bankruptcy court's core authority over state law conversion claim and issues relating to dischargeability.	Narrow

Subject	Circuit	Decision Date	Case/Comment	Holding Type
State Law Issues	7th	June 29, 2011	Dragisic v. Boricich (<i>In re Boricich</i>), 2011 WL 2600692 (Bankr. N.D. Ill. June 29, 2011)—reserved for further consideration issue of whether bankruptcy court could enter money judgment on state law claim in non-dischargeability action.	Cautionary
State Law Issues	7th	Aug. 26, 2011	Gecker v. Flynn (<i>In re Emerald Casino, Inc.</i>), 459 B.R. 298 (Bankr. N.D. Ill. 2011)— <i>Stern's</i> taking of state law counterclaims out of bankruptcy courts' core authority means only that a bankruptcy judge may propose findings and conclusions on such matters; it does not mean, as espoused in <i>Blixseth</i> , that the bankruptcy court cannot hear such matters at all.	Narrow
State Law Issues	8th	July 7, 2011	Stoebner v. PNY Techs., Inc. (<i>In re Polaroid Corp.</i>), 451 B.R. 493 (Bankr. D. Minn. 2011)—absent consent, a bankruptcy court cannot enter final judgment on state law breach of contract action in adversary proceeding.	Expansive
State Law Issues	8th	July 19, 2011	Garden v. Cent. Neb. Housing Corp. (<i>In re Roberts</i>), 2011 WL 3035268 (Bankr. D. Neb. July 19, 2011)— <i>Stern</i> stands for proposition that bankruptcy courts should not enter judgments on state law claims involving third parties.	Expansive

Subject	Circuit	Decision Date	Case/Comment	Holding Type
State Law Issues	8th	Aug. 3, 2011	Schmidt v. Klein Bank (<i>In re Schmidt</i>), 453 B.R. 346 (8th Cir. B.A.P. Aug. 3, 2011)—bankruptcy court cannot enter final order on actions that might fit within a category listed in § 157(b)(2) where it is in essence only related-to (re: actions against debtor-owned non-debtor companies).	Expansive
State Law Issues	9th	July 15, 2011	<i>In re Fressadi</i> , 2011 WL 2909375 (Bankr. D. Ariz. July 15, 2011)— <i>Stern</i> requires remand of state court actions removed to bankruptcy court where chapter 7 case dismissed for bad faith filing.	Expansive
State Law Issues	11th	July 27, 2011	Colony Beach & Tennis Club, Ltd. v. Colony Beach & Tennis Club Ass'n, Inc. (<i>In re Colony Beach & Tennis Club Ass'n, Inc.</i>), 456 B.R. 545 (M.D. Fla. 2011)—purely state law claims cannot be “core” under <i>Stern</i> .	Expansive
Avoidance Actions	3rd	July 28, 2011	Miller v. Greenwich Capital Fin. Prods., Inc. (<i>In re Am. Bus. Fin. Servs.</i>), 457 B.R. 314 (Bankr. D. Del. 2011)— <i>Stern</i> is inapplicable to the resolution of state and federal avoidance actions.	Narrow

Subject	Circuit	Decision Date	Case/Comment	Holding Type
Avoidance Actions	3rd	July 6, 2011	Springel v. Prosser (<i>In re</i> Innovative Communication Corp.), No. 08-03004, 2011 Bankr. LEXIS 3040 (Bankr. D. U.S.V.I. Aug. 5, 2011)— <i>Stern</i> is not applicable to fraudulent conveyance determination.	Narrow
Avoidance Actions	6th	Aug. 17, 2011	Meoli v. The Huntington Nat'l Bank (<i>In re</i> Teleservices Group, Inc.), 456 B.R. 318 (Bankr. W.D. Mich. 2011)—bankruptcy court authority is vastly undermined by <i>Stern</i> , and Court cannot enter final order in potentially multi-million dollar fraudulent transfer adversary proceeding.	Expansive
Avoidance Actions	6th	Aug. 3, 2011	<i>In re</i> Klug, 2011 WL 3352468 (Bankr. E.D. Ky. Aug. 3, 2011)—denying state law fraudulent transfer claims asserted post-discharge because trustee was only party with standing to pursue and finding the proceeding core under § 157(b)(2)(H).	Narrow
Avoidance Actions	9th	Aug. 1, 2011	Samson v. Blixseth (<i>In re</i> Blixseth), 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011)—After <i>Stern</i> , bankruptcy court cannot even hear, much less enter report and recommendation on, unconstitutional “core” matters, including fraudulent transfer actions (which are “quintessentially suits at common law”).	Expansive

Subject	Circuit	Decision Date	Case/Comment	Holding Type
Federal Bankruptcy Issues	2nd	June 29, 2011	<i>In re Franchi Equipment Co., Inc.</i> , 452 B.R. 352 (Bankr. D. Mass. 2011)—bankruptcy court has core jurisdiction over chapter 7 trustee fee award because trustees “arise under” the Bankruptcy Code.	Narrow
Federal Bankruptcy Issues	2nd	July 20, 2011	<i>Little Rest Twelve, Inc. v. Visan</i> , 458 B.R. 44 (S.D.N.Y. 2011)— <i>Stern</i> inapplicable to determination of whether certain claims relating to conversion of ownership interests were core where the claims at issue were not specifically enumerated in § 157.	Narrow
Federal Bankruptcy Issues	2nd	July 11, 2011	<i>In re Bearing Point</i> , 453 B.R. 486 (Bankr. S.D.N.Y. 2011)—modifying confirmation order to allow trustee to pursue non-core D&O actions in non-bankruptcy court forum based on <i>Stern</i> .	Expansive
Federal Bankruptcy Issues	5th	Aug. 3, 2011	<i>In re Okwonna-Felix</i> , 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011)—bankruptcy court retains final authority over 9019 compromise under “public rights” exception.	Narrow
Federal Bankruptcy Issues	5th	Aug. 2, 2011	<i>Sanders v. Muhs</i> (<i>In re Muhs</i>), 2011 WL 3421546 (Bankr. S.D. Tex. Aug. 2, 2011)—bankruptcy court retains final authority over discharge (a central bankruptcy matter) under “public rights” exception.	Narrow

Subject	Circuit	Decision Date	Case/Comment	Holding Type
Federal Bankruptcy Issues	5th	Aug. 4, 2011	<i>Husky Int'l Elecs., Inc. v. Ritz</i> (<i>In re Ritz</i>), 459 B.R. 623 (Bankr. S.D. Tex. 2011)—bankruptcy court retains final authority over dischargeability under “public rights” exception.	Narrow
Federal Bankruptcy Issues	5th	Aug. 19, 2011	<i>In re Bigler, L.P.</i> , 458 B.R. 345 (Bankr. S.D. Tex. 2011)—bankruptcy court retains final authority over lien priority and distribution of property of the estate issues under “public rights” exception.	Narrow
Federal Bankruptcy Issues	6th	Aug. 16, 2011	<i>In re Jordan River Res., Inc.</i> , 455 B.R. 657 (Bankr. W.D. Mich. 2011)—bankruptcy court can enter final order on determination of whether a preferred interest holder was entitled to distributions.	Narrow
Federal Bankruptcy Issues	6th	July 7, 2011	<i>In re Ramsey</i> , WL 2680575, at *1–2 (Bankr. N.D. Ohio July 7, 2011)—bankruptcy court retains final authority over creditor’s motion to lift stay against debtor to litigate state law claims in state court, which were filed prepetition.	Narrow

Subject	Circuit	Decision Date	Case/Comment	Holding Type
Federal Bankruptcy Issues	6th	Aug. 22, 2011	Palazzola v. City of Toledo (<i>In re Palazzola</i>), 2011 WL 3667624, at *4 (Bankr. N.D. Ohio, Aug. 22, 2011)—§ 157 is insufficient to confer subject matter jurisdiction to bankruptcy courts where it would be unconstitutional to do so, and a § 1983 action is a personal injury tort claim, and thus, a suit at common law, not a core proceeding, despite the applicability of a debtor's right to be free from collection attempts on discharged debts under § 524.	Expansive
Federal Bankruptcy Issues	8th	Aug. 18, 2011	Badami v. Sears (<i>In re AFY, Inc.</i>) (“AFY I”), 2011 WL 3812598 (Bankr. D. Neb. Aug. 18, 2011)—bankruptcy court retains final adjudicatory authority over turnover action, even if court must apply state law.	Narrow
Federal Bankruptcy Issues	8th	Aug. 18, 2011	Badami v. Ainsworth Feed Yards, LLC (<i>In re AFY, Inc.</i>) (“AFY II”), 2011 WL 3800120 (Bankr. D. Neb. Aug. 18, 2011)—bankruptcy court does not retain final adjudicatory authority over turnover action where property is not “matured, payable on demand, or payable on order” and thus falls outside the ambit of § 542 and where it is really a collection action.	Expansive

Subject	Circuit	Decision Date	Case/Comment	Holding Type
Federal Bankruptcy Issues	8th	Aug. 18, 2011	Badami v. Sears Cattle Co. (<i>In re</i> AFY, Inc.) (“AFY III”), 2011 WL 3800041 (Bankr. D. Neb. Aug. 18, 2011)—bankruptcy court does not retain final adjudicatory authority over turnover action even where action falls within the ambit of § 542 where it is really a collection action.	Expansive
Federal Bankruptcy Issues	10th	July 11, 2011	Musich v. Graham (<i>In re</i> Graham), 455 B.R. 227 (Bankr. D. Colo. July 11, 2011)—bankruptcy court retains final authority over dischargeability as “core” proceeding.	Narrow
Federal Bankruptcy Issues	11th	Aug. 26, 2011	FNB Bank v. Carlton (<i>In re</i> Carlton), 2011 WL 3799885 (Bankr. N.D. Ala. Aug. 26, 2011)—counterclaims asserting a violation of a confirmation order and Truth in Lending Act violations (which tie to reconsideration of the bank’s claims’ allowance under § 502(j)) are “core” and subject to final order of the bankruptcy court.	Narrow
Federal Bankruptcy Issues	11th	Aug. 30, 2011	<i>In re</i> Safety Harbor Resort and Spa, 456 B.R. 703 (Bankr. M.D. Fla. 2011); 2011 WL 3841599 (Bankr. M.D. Fla. Aug. 30, 2011)— <i>Stern</i> does not prevent bankruptcy court from entering final order on plan confirmation dispute as a “core” proceeding.	Narrow

Subject	Circuit	Decision Date	Case/Comment	Holding Type
Jurisdiction Determinations	3rd	July 29, 2011	The Fairchild Liquidating Trust v. State of N.Y. and the N.Y. State Dep't of Transp. (<i>In re The Fairchild Corp.</i>), 452 B.R. 525 (Bankr. D. Del. 2011)— <i>Stern</i> not applicable to issue of alleged lack of subject matter jurisdiction due to sovereign immunity.	Narrow
Jurisdiction Determinations	7th	July 21, 2011	Townsquare Media, Inc. v. Brill, 652 F.3d 767 (7th Cir. 2011)—supplemental jurisdiction of bankruptcy courts, if it even exists, would be inconsistent with <i>Stern</i> .	Expansive
Jurisdiction Determinations	7th	July 28, 2011	Matrix IV, Inc. v. Am. Nat'l Bank and Trust Co. of Chicago, 649 F.3d 539 (7th Cir. 2011)— <i>Stern</i> may impact whether the core/non-core distinction is relevant to the applicability of <i>res judicata</i> .	Cautionary
Jurisdiction Determinations	9th	July 29, 2011	<i>In re Clark</i> , 2011 WL 3294040 (Bankr. D. Idaho July 29, 2011)—§ 157(b)(5) is not jurisdictional; rather it only allocates authority.	Narrow
Minor Citations to <i>Stern</i>	1st	June 30, 2011	Correia v. Deutsche Bank Nat'l Trust Co. (<i>In re Correia</i>), 452 B.R. 319 (B.A.P. 1st Cir. 2011)—refusing to reach the issue of whether bankruptcy court had authority over state law foreclosure validity dispute after <i>Stern</i> .	Citation

Subject	Circuit	Decision Date	Case/Comment	Holding Type
Minor Citations to <i>Stern</i>	3rd	Aug. 24, 2011	<i>In re Taylor</i> , 655 F.3d 274 (3d Cir. 2011)—citing <i>Stern</i> for the proposition that a bankruptcy court’s factual findings are reviewed for clear error.	Citation
Minor Citations to <i>Stern</i>	3rd	July 18, 2011	<i>Hollander v. Ranbaxy Laboratories, Inc.</i> , 2011 WL 2787151 (E.D. Pa. July 18, 2011)—citing <i>Stern</i> for the proposition that separation of powers principles are intended, in part, to protect each branch of government from incursion by the others.	Citation
Minor Citations to <i>Stern</i>	3rd	July 25, 2011	<i>Schatz v. Chase Home Finance (In re Schatz)</i> , 452 B.R. 544 (Bankr. M.D. Pa. 2011)—citing <i>Stern</i> for its description of “arising under,” “arising in,” and “related to” jurisdiction.	Citation
Minor Citations to <i>Stern</i>	4th	July 1, 2011	<i>In re Loy</i> , 2011 WL 2619253, at * 5 (Bankr. E.D. Va. July 1, 2011)—citing <i>Stern</i> for proposition that district court reviews bankruptcy court final orders under traditional appellate standards.	Citation
Minor Citations to <i>Stern</i>	5th	Aug. 19, 2011	<i>Kemp v. Segue Distrib., Inc. (In re Kemp)</i> , 2011 WL 3664497, at *4 (Bankr. W.D. La. Aug. 19, 2011)—citing <i>Stern</i> for its description of “arising under,” “arising in,” and “related to” jurisdiction.	Citation

Subject	Circuit	Decision Date	Case/Comment	Holding Type
Minor Citations to <i>Stern</i>	5th	Aug. 26, 2011	<i>In re Pilgrim's Pride, Corp.</i> , 2011 WL 3799835 (Bankr. N.D. Tex. Aug. 26, 2011)—rejecting Supreme Court's suggestion in <i>Stern</i> that a bankruptcy court might try a personal injury claim by consent.	Citation
Minor Citations to <i>Stern</i>	11th	July 11, 2011	<i>United States v. Cabrera</i> , 2011 WL 2681248 (M.D. Fla. July 11, 2011)—citing <i>Stern</i> for the proposition that if a party remains silent about an objection, he may forfeit even constitutional rights.	Citation