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CONCURRENT SESSION

Stern Revisited: *In re Millennium Lab Holdings* and Beyond

Hosted by the Bankruptcy Litigation and Young and New Members Committees

Patrick M. Birney
Robinson & Cole LLP; Hartford, Conn.

Gianfranco Finizio
Kilpatrick Townsend & Stockton LLP; New York

J. Leland Murphree
Maynard Cooper & Gale; Birmingham, Ala.

Shane G. Ramsey
Nelson Mullins Riley & Scarborough LLP; Nashville, Tenn.

Nicole Stefanelli
Cullen and Dykman LLP; Newark, N.J.

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Cullen and Dykman LLP; Newark, NJ

Primer on Third-Party Releases

- ***Third-Party Releases: An Overview***
  - Third Party Release Defined: Chapter 11 plan provisions causing release of certain non-debtor parties ("Released Parties") by other non-debtor parties ("Releasing Parties").
  - Typical Third-Party Release: Enjoins post-confirmation litigation against the Released Parties for certain actions arising during the period leading up to the plan confirmation.
  - Typical Released Party
  - Permitted Under Bankruptcy Code?
- ***Rationalizing Third-Party Releases***
  - Pros:
    - Mechanism to quickly and inexpensively resolve a multitude of potential claims against non-debtors;
    - Fosters finality and promotes the "fresh start" principles embraced by the Bankruptcy Code; and
    - Permits the management to focus on the debtor's critical business operations post-confirmation.
  - Cons:
    - Third-party releases are not generally authorized under the Bankruptcy Code;
    - Potential for abuses; and
    - Tantamount to a bankruptcy discharge without the safeguards of Released Party actually filing for protection under the Bankruptcy Code.

Primer on Third-Party Releases (cont'd)

- ***Consensual/Non-Consensual Third-Party Releases***
  - Consensual
    - Consensual Third-Party Release: Enforceable to the extent they bind those creditors who affirmatively consent to the release.
  - Non-consensual
    - Murky Waters: the Circuit Courts of Appeals are currently split on the issue of enforceability of non-consensual third-party releases.
- ***ABI Commission on Third-Party Releases***
  - "The Commission rejected carte blanche approval of third-party releases, as well as the presumption of in favor of such releases."
  - Consensual Releases: The Commission recommended that consensual third-party releases should be enforceable so long as they were expressly consented to "through a vote on the plan…, a separate indication on the ballot…, or a separate agreement from the creditor."
  - Non-Consensual Releases: The Commission approved a five-factor test initially articulated in In re Master Mortg. Inv. Fund Inc. to determine whether bankruptcy courts should enforce non-consensual third-party releases.

Overview of *Stern v. Marshall*

- ***What Stern (2011) said:***
  - SCOTUS, following its decision in *Northern Pipeline* (1982), held that a bankruptcy court, as a non-Article III court, could not enter a final order on a state law counterclaim pursuant to separation of powers principles under the U.S. Constitution, regardless of whether the claims are "core" or "non-core".
  - A bankruptcy court can enter a final order on "Stern" claims if either element of the (subsequently-termed) "disjunctive test" is met:
    - 1) Does the action at issue stem from the bankruptcy itself – i.e., is the issue a "public right", as opposed to a state law "private right"? OR
    - 2) Would the claim necessarily be resolved in the claims allowance process?
- ***Competing Interpretations of Stern***
  - Narrow Interpretation: Bankruptcy courts lack constitutional authority to enter final judgments on state law counterclaims that are not resolved in the process of ruling on a creditor's proof of claim.
  - Broad(est) Interpretation: Bankruptcy courts cannot enter final judgments on all state law claims, all common law causes of action or all causes of action under state law, or even further, should "examine their ability to enter final orders in all enumerated or unenumerated core proceedings."

Overview of *Stern v. Marshall* (cont'd)

- ***The Continuing Evolution of Stern***
  - In *Arkison* (2013), SCOTUS expressly adopted the process of having a bankruptcy court issue findings of fact and conclusions of law on *Stern* claims, subject to *de novo* review by the district court.
  - In *Wellness* (2015), SCOTUS held that, as with federal magistrate judges, parties may consent, even implicitly, to final adjudication of *Stern* claims by an Article I bankruptcy judge, leaving the determination of "consent" to the lower courts.
  - In 2016, certain Bankruptcy Rules were amended to address *Wellness*, requiring parties to state their consent to the bankruptcy court's entry of a final order or judgment, as opposed to whether the proceeding is "core" or "non-core".
- ***Pre-Millenium Case Law Addressing Third-Party Releases in Light of Stern***
  - *Charles Street African Methodist Episcopal Church of Boston* held that, under *Stern*, a third-party release was not an adjudication of the underlying state law claims. The court based its ruling on the fact that the controversy decided by the court was the confirmation of a plan of reorganization pursuant to the Bankruptcy Code and therefore is a matter of "public rights".
  - *In re MPM Silicones, LLC* held that the bankruptcy court had jurisdiction over the plan's third party release and could issue a final order on the third party plan release under *Stern* in the context of a confirmation proceeding, which is derived from the debtors' rights under the Bankruptcy Code.

Millennium Case Summary

- ***Bankruptcy Court Holding***
  - Judge Silverstein ruled that the Bankruptcy Court had constitutional adjudicatory authority to confirm a plan which contained third party releases in favor of various non-debtor entities, including certain equity holders who contributed $325 million to the estate as part of a settlement contained in the plan, notwithstanding the restrictions on a bankruptcy court's constitutional authority as set forth in *Stern*.
  - A group of lenders that had funded $106.3 million of the loan objected to the inclusion of releases of claims that creditors might assert against the Non-Debtor Equity Holders.
- ***District Court's Remand Decision***
  - The District Court issued a Memorandum Opinion questioning whether "the Bankruptcy Court had the opportunity to consider what is now the main issue on appeal – the Bankruptcy Court's authority post-*Stern* to enter a final order discharging Appellants' nonbankruptcy claims against non-debtors without Appellants' consent."

Millennium Case Summary (cont'd)

- ***The Bankruptcy Court's Decision on Remand***
  - On remand, Judge Silverstein held that the Bankruptcy Court had constitutional adjudicatory authority to approve, in a final order, the nonconsensual third party releases and therefore did not need to strike the nonconsensual release of Voya's claims from the confirmation order, nor make and submit to the district court additional proposed findings of fact and conclusions of law regarding the final disposition of Voya's RICO claims.
  - Judge Silverstein further held that by not raising a *Stern* argument at the confirmation hearing or at any time prior to entry of the order confirming the plan, Voya waived that argument and also independently waived its right to any trial on the merits of its RICO claims in the context of confirmation.

Is *Millennium* Poised to Eviscerate Third-Party Releases?

- **Judge Silverstein's Remand Opinion Gives Third-Party Releases a (Much-Needed) Second Chance**
  - Had Judge Silverstein's opinion held to the contrary (i.e., shared the views of the District Court that a bankruptcy court lacks constitutional authority to approve non-consensual third-party releases contained in a plan), not only would approval of such releases become largely eviscerated, but a substantial component of the plan negotiation process would be eviscerated.
  - Also, third parties may be less willing to make a "substantial contribution" to a debtor's reorganization process, such as an infusion of $100 million in new value, if they are not granted a third party release.
  - Debtors may also be inclined to provide lower recoveries to all creditor constituencies because the value of the recovery must be discounted by the retention of possible claims.

Does *Millennium* Run Afoul of *Stern*?

- The *Millennium* decision stands as a full-throated defense of the power of bankruptcy courts to preside over and resolve complex and contentious chapter 11 cases through the confirmation of a plan, even where the plan would adversely affect a party's non-bankruptcy claims against non-debtors.
- Does this run afoul of *Stern*?
  - On remand, and in its second appeal to the District Court, Voya's main argument is the preclusive effect that the Releases would have on the continued prosecution of the RICO lawsuit (the "RICO Lawsuit"), which they argued should be the focal point of the Bankruptcy Court's *Stern* analysis. Because the Releases effectively foreclosed the RICO Lawsuit, Voya argued that the Bankruptcy Court's confirmation of the Plan is tantamount to adjudicating the merits of the RICO Lawsuit.
  - In rejecting this argument, the Bankruptcy Court ostensibly expanded *Stern* by endorsing a view that all it needed to look at was whether plan confirmation, as the "operative proceeding" before it, was a state law claim. It could be argued that the confirmation order constitutes both a final judgment on the issue of plan confirmation, as authorized under the Bankruptcy Code, *and* a final judgment that directly extinguished Voya's non-bankruptcy claims against the non-debtors on the merits – a result at odds with *Stern*.
  - Importantly, the District Court previously made statements that seemed to agree with this: "The Court does not agree with Debtors that the Plan release did not run afoul of *Stern* because it was not a final adjudication of the claims. ***If Article III prevents the Bankruptcy Court from entering a final order disposing of a non-bankruptcy claim against a nondebtor outside of the proof of claim process, it follows that this prohibition should be applied regardless of the proceeding (i.e., adversary proceeding, contested matter, plan confirmation).***"

Q & A

Stern Revisited: *In re Millennium Lab Holdings* and Beyond

Patrick M. Birney
Robinson & Cole LLP; Hartford, Conn.

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TABLE OF AUTHORITIES

In re MPM Silicones, LLC, 14-22503-RDD, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff'd,* 531 B.R. 321 (S.D.N.Y. 2015), *aff'd in part, rev'd in part and remanded sub nom. Matter of MPM Silicones, L.L.C.*, 874 F.3d 787 (2d Cir. 2017).

In re Owner Mgt. Serv., LLC Tr. Corps, 530 B.R. 711, 721 (Bankr. C.D. Cal. 2015), *aff'd sub nom. OMS, LLC v. Bank of Am., N.A.*, CV 15-3876-R, 2015 WL 12712307 (C.D. Cal. Nov. 6, 2015).

In re S.E. Materials, Inc., 467 B.R. 337, 363 (Bankr. M.D.N.C. 2012).

In re Teleservices Group, Inc., 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011).

In re US Digital, Inc., 461 B.R. 276, 292 (Bankr. D. Del. 2011).

In re Watson, 2009-10002, 2016 WL 3349666, at *9 (D.V.I. June 15, 2016).

Kirschner v. Agoglia, 476 B.R. 75, 80-81 (Bankr. S.D.N.Y. 2012).

Loveridge v. Hall (In re Renewable Energy Dev. Corp.), 792 F.3d 1274, 1279 (10th Cir. 2015), *as amended on denial of reh'g* (July 28, 2015).

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II, LLC), 242 F.Supp.3d 322, 339 (D. Del. 2017).

Rosenberg v. Harvey A. Bookstein, 479 B.R. 584, 588 (Bankr. D. Nev. 2012).

S. Todd Brown, *Constitutional Gaps in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 179, 181 (2012).

Sitka Enterprises, Inc. v. Segarra-Miranda, CIV. 10-1847CCC, 2011 WL 7168645, at *3 (D.P.R. Aug. 12, 2011).

Stern v. Marshall, 564 U.S. 462, 502 (2011).

Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 569 (1985).

Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

I. Introduction

This paper will address the intersection of a bankruptcy court's statutory powers with the judicial powers created under Article III of the U.S. Constitution following the Supreme Court's decision in *Stern v. Marshall*,[1] and in light of the recent decision from the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") in *In re Millennium Lab Holdings II, LLC*,[2] in which Judge Silverstein, on remand from the United States District Court for the District of Delaware (the "District Court") confirmed a chapter 11 plan of reorganization that included a non-consensual release of claims against non-debtor third parties. Judge Silverstein's decision in *Millennium*, which is currently on appeal to the District Court, narrowly interpreted *Stern*, holding that approval of the releases is not tantamount to resolving a "private" rights dispute between non-debtor parties. This paper, which is submitted in conjunction with the panel discussion on the same topics, will provide (i) a brief primer on third-party releases; (ii) the status *Stern* today through the prism of post-*Stern* decisional law*;* (iii) a procedural and substantive review of the *Millennium* decision; and (iv) "Takes" from the Panel regarding *Millennium*, including its potential impact on the enforceability of non-consensual third-party releases as well as its potential to further push the limits of the Supreme Court's decision in *Stern*.[3]

II. Primer on Third-Party Releases

A. *Third-Party Releases: An Overview*

The terms "third party release" or "third party plan release" ("Third-Party Release") refer to provisions included in chapter 11 plans that cause the release of certain non-debtor parties

[1] 564 U.S. 462, 502 (2011).

[2] 575 B.R. 252 (Bankr. D. Del. 2017).

[3] As it relates to the "Takes", the views expressed herein are not the views of the authors or their respective law firms, but are included solely for discussion and analytical purposes.

("Released Parties") by other non-debtor parties ("Releasing Parties"). Standard Third-Party Releases are effectuated through plan provisions that enjoin post-confirmation litigation against the Released Parties for certain actions arising during the period leading up to the plan confirmation. While third-party releases are seemingly ubiquitous in most business chapter 11 plans, the Bankruptcy Code does not expressly permit such releases (except in connection with asbestos liability via section 524(g)'s "channeling injunction").[4]

Who can be included as a Released Party under a plan? The potential beneficiaries of a third-party release are limited only by the circumstances giving rise to the underlying release, and may include officers, directors, creditors (including secured creditors), plan sponsors, guarantors, affiliates, equity security holders, insurers, to name just a few.

B. *Rationalizing Third-Party Releases*

Advocates of third-party releases rationalize their inclusion in chapter 11 plans as a means to quickly and inexpensively resolve a multitude of potential claims against non-debtors that could (i) take years to fully adjudicate and (ii) act as barriers to an expeditious emergence from bankruptcy through a confirmed chapter 11 plan. Stated differently, a typical chapter 11 case involves an array of constituents, many having divergent interests and objectives. The resolution of these issues at the time of plan confirmation—in the form of a third-party release—is intended to foster finality and promote the "fresh start" principles embraced by the Bankruptcy Code. For example, if a debtor is required under its governing documents or state law to indemnify its officers and directors, a third-party release releasing the debtor's directors and officers may be justified by the fact that the release will prevent an indemnification claim against the debtor. It could also permit the officers and directors to focus on the debtor's critical

[4] 11 U.S.C. § 524(g).

business operations post-confirmation, instead of being embroiled in litigation arising from pre-confirmation or pre-petition conduct.

Despite the defensible rationales supporting the inclusion of third-party releases in plans, reluctance regarding their enforceability remain because: (i) third-party releases are not generally authorized under the Bankruptcy Code;[5] (ii) the potential for abuses that may arise from non-debtors getting the benefits of a litigation shield from third parties;[6] and (iii) the third-party release may be tantamount to a bankruptcy discharge without the Released Party actually filing for protection under the Bankruptcy Code.[7]

C. *Consensual/Non-Consensual Third-Party Releases*

Third-party releases usually come in "consensual" and "non-consensual" forms. Consensual third-party releases are deemed enforceable to the extent they bind only those creditors who affirmatively consent to the release. As Judge Walrath noted in *In re Coram Healthcare Corp*,[8] insofar as the law of contracts permits consensual releases, a chapter 11 plan that contains a third-party release is nothing more than a contract that binds those who vote to accept it.[9]

The waters become more murky when wading into the territory of non-consensual third-party releases. Indeed, the Circuit Courts of Appeals are currently split on the issue of

[5] *But see* 11 U.S.C. § 524(g) (allowing third-party releases in connection with asbestos liability).

[6] *See* ABI Commission to Study the Reform of Chapter 11, AMERICAN BANKRUPTCY INSTITUTE, Final Report and Recommendations, at 255 (2014) ("*Final Report and Recommendations*") ("For example, a release provision could be overly broad or not really necessary, particularly in cases where the benefits of the release to the estate are nominal, but the harm to creditors is significant. Accordingly, the Commission rejected carte blanche approval of third-party releases, as well as a presumption in favor of such releases.").

[7] *See Deutsche Bank AG v. Metromedia Fiber Network, Inc.* (*In re Metromedia Fiber Network, Inc.*), 416 F.3d 136, 142 (2d Cir. 2005).

[8] 315 B.R. 321, 336 (Bankr. D. Del. 2004).

[9] *See also In re Arrowmill Dev. Corp,* 211 B.R. 497, 506 (Bankr. D.N.J. 1997) (noting that a consensual third-party release "is no different from any other settlement or contract and does not implicate [section 524(e)]").

enforceability of non-consensual third-party releases.[10] The majority of the Circuit Courts of Appeals approve the enforceability of non-consensual third-party releases in certain limited and appropriate situations. This view has been adopted by the Courts of Appeals for the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits. These courts, however, have not adopted a uniform legal standard governing this issue. Rather, the appropriateness and approval of a non-consensual third-party release has been carefully scrutinized on a case-by-case basis, focusing, in particular, on the "nature of the reorganization."[11]

The Courts of Appeals for the Fifth, Ninth and Tenth Circuits have adopted the minority view, holding that that non-consensual third-party releases are *per se* unenforceable, except when expressly authorized under section 524(g) of the Bankruptcy Code. The rationale of the minority view is born from section 524(e) of the Bankruptcy Code, which provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."[12] In short, the minority view holds that bankruptcy courts are prohibited from relying on the equitable powers vested pursuant to section 105(a) to circumvent the unambiguous provisions of section 524(e) of the Bankruptcy Code, which prohibit the discharge of debts of non-debtors. An additional rationale supporting the minority view is that the debtor, and the debtor alone, has subjected itself to the vigorous mandates of the Bankruptcy Code and, accordingly, only the debtor is entitled to the express discharge provisions contained within the Bankruptcy Code.

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[10] The Eighth Circuit Court of Appeals has not yet opined on the enforceability of non-consensual third-party releases.

[11] *Aradigm Commc'ns, Inc. v. Federal Commc'ns Comm'n* (*In re Aradigm Commc'ns, Inc.*), 519 F.3d 640, 657 (7th Cir. 2008).

[12] 11 U.S.C. § 524(e).

D. *ABI Commission on Third-Party Releases*

The ABI Commission to Study the Reform of Chapter 11 (the "Commission") analyzed the appropriateness of third-party releases and made certain proposals in its *Final Report and Recommendations*. "The Commission rejected carte blanche approval of third-party releases, as well as the presumption of in favor of such releases."[13] The Commission did recommend, however, that consensual third-party releases should be enforceable so long as they were expressly consented to "through a vote on the plan…, a separate indication on the ballot…, or a separate agreement from the creditor."[14]

Regarding non-consensual third-party releases, the Commission approved a five-factor test initially articulated in *In re Master Mortg. Inv. Fund Inc.*[15] to determine whether bankruptcy courts should enforce non-consensual third-party releases. The five factors consider:

1. the identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;
2. whether the non-debtor has contributed substantial assets to the reorganization;
3. whether the injunction is essential to reorganization;
4. whether a substantial majority of the creditors agree to such injunction—specifically, whether the impacted class or classes have "overwhelmingly" voted to accept the proposed plan treatment; and
5. whether the plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.[16]

III. Overview of Stern v. Marshall

In 2011, the Supreme Court issued its well-known opinion in *Stern v. Marshall*.[17] Important for an understanding of the decision, *Stern* stems from the Court's 1982 ruling in

[13] *See Final Report and Recommendations* at 255.

[14] *Id.*

[15] 168 B.R. 930 (Bankr. W.D. Mo. 1994).

[16] *See Final Report and Recommendations* at 256.

Northern Pipeline Const. Co. v. Marathon Pipe Line Co.[18] In *Marathon*, the debtor sought "damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress."[19] Based on the bankruptcy court's statutory authority to hear these state law claims, the Supreme Court held that Congress' broad grant of jurisdiction authority to bankruptcy courts in § 241(a) of the Bankruptcy Act of 1978 "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from Art[icle] III district courts, and has vested those attributes in a non-Art[icle] III adjunct."[20] Simply put, *Marathon* stands for the proposition that "Congress may not vest in a non-Article III court the power to adjudicate a traditional contract action arising under state law."[21] Because this holding held the entire jurisdictional statute unconstitutional, it led to the Bankruptcy Amendments and Federal Judgeship At of 1984, which created the modern bankruptcy jurisdiction structure.[22]

In *Stern*, the Supreme Court similarly held that although the Bankruptcy Code, as amended, defined counterclaims as a "core" bankruptcy proceeding"[23] and, thus, conferred statutory authority on bankruptcy courts to enter final orders on such claims, constitutional principles of separation of powers nonetheless precluded Article I bankruptcy judges from entering final orders on at least some state law counterclaims asserted by a debtor/trustee against a creditor of the bankruptcy estate.[24]

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[17] 564 U.S. 462, 502 (2011).

[18] 458 U.S. 50 (1982).

[19] *Id.* at 56.

[20] *Id.* at 74.

[21] *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 569 (1985).

[22] PL 98–353 (HR 5174), PL 98–353, July 10, 1984, 98 Stat 333.

[23] *See* 28 U.S.C. § 157(b)(2).

[24] *Stern*, 564 U.S. at 503.

In *Stern*, the underlying facts concerned a dispute between a deceased's widow, Vickie Lynn Marshall, and son, Pierce Marshall, following the death of J. Howard Marshall. Vickie sued Pierce in Texas probate court for tortious interference with her expected inheritance from the deceased. During the pendency of the lawsuit, Vickie filed a petition for bankruptcy. Pierce then filed a proof of claim in the bankruptcy and initiated an adversary proceeding for defamation and nondischargeability under section 523 of the Bankruptcy Code. The debtor responded to the adversary proceeding by asserting a counterclaim for tortious interference with her expected inheritance. Analyzing the counterclaim, which arose under state law, the Supreme Court reasoned that the claim was not a "public right" due to its lack of relation to any federal law that could be adjudicated by the bankruptcy court.[25] Citing back to the succinct summary of *Marathon* in the dissent of the Supreme Court's decision in *Thomas v. Union Carbide Agr. Products Co.*,[26] Chief Justice Roberts remarked: "[s]ubstitute 'tort' for 'contract,' and that [reasoning] directly covers this case."[27] The Court further fashioned what Judge Silverstein in *Millennium*,[28] and other courts and commentators, have subsequently termed the "Disjunctive Test" for determining the bankruptcy court's authority to hear these types of claims. As Judge Silverstein stated, "[T]he question is whether the action at issue stems from the bankruptcy itself **or** would necessarily be resolved in the claims allowance process."[29] In *Stern's* conclusion, Chief Justice Roberts attempted to limit the application and practical effects of the Court's holding, stating "[w]e do not think the removal of counterclaims such as Vickie's from core

[25] *Id.* at 493.

[26] *See generally Final Report and Recommendations*, *supra* note 5.

[27] *Stern*, 564 U.S. at 494.

[28] *In re Millennium Lab Holdings II, LLC*, 575 B.R. 252 (Bankr. D. Del. 2017).

[29] *Id.* at 266 (quoting *Stern*, 564 U.S. at 499) (emphasis in original).

bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a 'narrow' one."[30]

A. *Competing Interpretations of Stern*

In response to the Supreme Court's decision, commentators[31] and courts[32] alike worried about and debated the possible implications of the decision. Although the holding was explicitly limited, courts have struggled to determine the proper scope and application of its reasoning. In her *Millennium* opinion, Judge Silverstein identifies the two principal interpretations arising from *Stern*: (1) the "Narrow Interpretation" and (2) the "Broad Interpretation."[33]

Under the narrow formulation, "*Stern* stands for the sole proposition that a bankruptcy judge 'lacked 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.'"[34] For example, following the narrow formulation, courts have held that a bankruptcy court can issue final orders on equitable subordination claims,[35] preference and fraudulent transfer claims,[36] and even certain

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[30] *Stern*, 564 U.S. at 502.

[31] *See, e.g.*, S. Todd Brown, *Constitutional Gaps in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 179, 181 (2012).

[32] *See, e.g.*, *In re Teleservices Group, Inc.*, 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011) ("Every day 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(b)(2)—to serve as my guide. But now I am told that that standard is unreliable when tested against the Constitution itself.").

[33] *Millennium Lab Holdings*, 575 B.R. at 268-69.

[34] *Id*. at 268 (emphasis in original).

[35] *In re US Digital, Inc.*, 461 B.R. 276, 292 (Bankr. D. Del. 2011) ("[E]quitable subordination, is a non-enumerated core proceeding under section 157(b). Moreover, as it does not involve a state law counterclaim to a proof of claim filed by the trustee, the Supreme Court's holding in *Stern* is not applicable." (footnote omitted)).

[36] *In re Direct Response Media, Inc.*, 466 B.R. 626, 644 (Bankr. D. Del. 2012) ("This Court disagrees that the *Stern* decision stands for the Broad Interpretation and proposition that a non-Article III court does not have authority to enter a final judgment on a preference or fraudulent conveyance claim brought by the Debtor to augment the estate, or any other core claim (as defined in 28 U.S.C. § 157(b)(2)) that is not a state law counterclaim.").

common law claims.[37] Likewise, courts have applied this interpretation outside of an adversary proceeding finding that the bankruptcy court has the constitutional authority to enter a final order confirming a chapter 11 plan,[38] selling property of the estate[39] and motions for substantive consolidation.[40] On the other side of the spectrum, the Broad Interpretation posits that, in light of *Stern*, "a bankruptcy judge cannot enter a final judgment on **all state law claims, all common law causes of action or all causes of action under state law**."[41] Interpreting *Stern* broadly, courts have raised *Stern* issues related to state law fraudulent conveyance claims,[42] fraudulent transfer claims under section 548,[43] preference actions[44] and free and clear sale orders.[45]

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[37] *See In re Frazin*, 732 F.3d 313, 319–21 (5th Cir. 2013) (finding constitutional authority to rule on the debtors counterclaims for malpractice and breach of fiduciary duty because they were "necessarily decided by the bankruptcy court in the process of ruling on the Attorneys' fee applications").

[38] *See In re CD Liquidation Co., LLC*, 462 B.R. 124, 136 (Bankr. D. Del. 2011) ("The Injunction Motion does not raise any substantive or state law issues. It involves the most basic and intrinsic authority of this or any court—the authority to enforce its [confirmation] order …[,] which the Court clearly had jurisdiction and authority to issue and which enjoins Paladini from proceeding with the Paladini Action.."); *In re Lazy Days' RV Ctr. Inc.*, 724 F.3d 418, 423 (3d Cir. 2013) ("[T]he Bankruptcy Court in this case did not decide a question of state common law, but rather determined whether, in light of 11 U.S.C. § 365(f)(3), an anti-assignment clause survived the Settlement Agreement it had confirmed as part of a Chapter 11 bankruptcy. Here, the Reorganized Debtors' claim for relief was based on a federal bankruptcy law provision with no common law analogue, so the *Stern* line of cases is plainly inapposite.").

[39] *In re Christ Hosp.*, 502 B.R. 158, 183 (Bankr. D.N.J. 2013), *aff'd,* CIV.A. 14-472 ES, 2014 WL 4613316 (D.N.J. Sept. 12, 2014) ("[I]t is concluded that the dispute before this court is within its jurisdiction to hear and decide; it is a core proceeding, principally arising under title 11 pursuant to § 363 sale processes."); *In re Watson*, 2009-10002, 2016 WL 3349666, at *9 (D.V.I. June 15, 2016).

[40] *In re Owner Mgt. Serv., LLC Tr. Corps*, 530 B.R. 711, 721 (Bankr. C.D. Cal. 2015), *aff'd sub nom. OMS, LLC v. Bank of Am., N.A.*, CV 15-3876-R, 2015 WL 12712307 (C.D. Cal. Nov. 6, 2015).

[41] *Millennium Lab Holdings*, 575 B.R. at 268–69 (emphasis in original). Judge Silverstein also noted a third interpretation, which she labeled the "Broadest Interpretation," where "bankruptcy judges should examine their ability to enter final orders in **all enumerated or unenumerated core proceedings**." *Id. at* 270 (emphasis in original).

[42] *Kirschner v. Agoglia*, 476 B.R. 75, 80-81 (Bankr. S.D.N.Y. 2012) ("[L]ike the tortious interference counterclaim in *Stern,* the Trustee's [fraudulent conveyance] claims in this adversary proceeding 'exist without regard to [the] bankruptcy proceeding.'"); *In re Heller Ehrman LLP*, 464 B.R. 348, 352 (Bankr. N.D. Cal. 2011) ("Upon examination, the Court determines the reasoning of *Stern* does apply to the fraudulent conveyance claims in this case, and that the bankruptcy court cannot enter a final judgment on these claims."); *Rosenberg v. Harvey A. Bookstein*, 479 B.R. 584, 588 (Bankr. D. Nev. 2012) ("[T]he Court holds that the bankruptcy court lacks authority to enter a final judgment on the fraudulent conveyance claims.").

[43] *In re S.E. Materials, Inc.*, 467 B.R. 337, 363 (Bankr. M.D.N.C. 2012) ("Bankruptcy courts may not enter final orders in fraudulent conveyance actions [under Section 544(b) and Section 548], at least where the defendant has not

Prior to *Millennium*, only two reported decisions[46] had specifically addressed the impact of *Stern* on third-party plan releases in the context of a chapter 11 plan. In *Charles Street African Methodist Episcopal Church of Boston*,[47] the bankruptcy court specifically rejected the argument that, under the holding in *Stern*, a third-party release was "tantamount to adjudication of the guaranty [underlying claim]."[48] In so doing, the court reasoned that:

> The matter before the Court is not a suit on the Guaranty; the merits of the Guaranty are not in controversy. To reiterate, the matter before the Court is the confirmation of a plan, a unitary omnibus civil proceeding for the reorganization of all obligations of the debtor and disposition of all its assets. Confirmation of a plan is not an adjudication of the various disputes it touches upon—the Guaranty being here but one of many; it is a total reorganization of the debtor's affairs in a manner available only in bankruptcy. The release may be proposed and approved only as part of a plan and only (if at all) pursuant to powers of adjustment afforded by the Bankruptcy Code, such as in sections 1123(a)(5) and 105(a). Accordingly, the confirmation of a plan—including any third-party release it may propose—is a matter of "public rights" that, under *Stern,* Congress may constitutionally assign to a non-Article III adjudicator … There is no constitutional infirmity in Congress's having provided, in 28 U.S.C. § 157(b)(1)

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filed a proof of claim."); *In re Davis*, 05-15794- GWE, 2011 WL 5429095, at *11 (Bankr. W.D. Tenn. Oct. 5, 2011) ("[I]t makes no difference that a portion of the claim is brought under section 548(a)(2) of the Bankruptcy Code and another portion under section 544(b), which incorporates state law. So long as a defendant has not subjected himself to the claims adjudication process by filing a proof of claim, … [i]t is a matter of private right that cannot constitutionally be determined without a jury if demanded nor by a non-Article III tribunal."); *Sitka Enterprises, Inc. v. Segarra-Miranda*, CIV. 10-1847CCC, 2011 WL 7168645, at *3 (D.P.R. Aug. 12, 2011) ("[T]he resolution of the fraudulent conveyance action brought by the trustee in this case cannot be adjudicated by the Bankruptcy Court since it lacks constitutional authority to do so under the restrictions placed by Article III."); *In re Blixseth*, 09-60452-7, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug. 1, 2011), *order amended on denial of reconsideration,* 463 B.R. 896 (Bankr. D. Mont. 2012). In *Blixseth*, the Court subsequently amended its order holding that *Stern* did not implicate the Court's subject matter jurisdiction. *See In re Blixseth*, 463 B.R. 896, 905 (Bankr. D. Mont. 2012).

[44] *Davis*, 2011 WL 5429095, at *12 ("[W]hen a creditor who has not filed a proof of claim is sued by the bankruptcy trustee to recover a preferential transfer, it is a matter of private right, which, as we have seen, requires the exercise of the judicial power of the United States, a power that cannot be exercised by a non-Article III judge.").

[45] *Teleservices Group*, 456 B.R. at 334 n.49 ("[S]elling the estate's interest free and clear of a secured creditor's lien under Section 363(f) would likely bring *Stern* into play.").

[46] *Millennium Lab*, 575 B.R. at 268 n.64 ("Our independent research did not reveal reported cases post-*Stern* analyzing constitutional authority to enter final confirmation orders containing releases other than those [two] cited by the parties.").

[47] 499 B.R. 66 (Bankr. D. Mass. 2013).

[48] *Id.* at 99.

> and (b)(2)(L), that confirmation of a plan, including one of the variety here presented, is a proceeding that a bankruptcy judge may hear, determine, and enter appropriate orders and judgment on.[49]

Likewise, in *In re MPM Silicones, LLC*[50] the bankruptcy court found that it had "jurisdiction over [the] [third party release] issue …, and that [it] [could] issue a final order on [such issue] within the confines of *Stern v. Marshall*, given that this is in the context of the confirmation of the plan, and pertains ultimately to the debtors' rights under the Bankruptcy Code."[51]

Regardless of the scope of the application of *Stern*'s holding, the ruling in *MPM Silicones* began to blur the lines of the Bankruptcy Code's distinction between "core" and "non-core" claims.[52] For example, in *Exec. Benefits Ins. Agency v. Arkison*,[53] the Supreme Court held that a bankruptcy court can "issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court" on *Stern* claims,[54] a practice already adopted by many courts to avoid overwhelming the district courts with additional caseloads. In other words, the Supreme Court ruled that the procedure in section 157(c) for adjudicating non-core claims would also apply to core claims under section 157(b)(2) that were otherwise outside of the bankruptcy court's authority to issue a final order.[55] As discussed in the following section, the Supreme Court's

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[49] *Id.* at 99-100 (citation omitted).

[50] *In re MPM Silicones, LLC*, 14-22503-RDD, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff'd,* 531 B.R. 321 (S.D.N.Y. 2015), *aff'd in part, rev'd in part and remanded sub nom. Matter of MPM Silicones, L.L.C.*, 874 F.3d 787 (2d Cir. 2017).

[51] *Id.* at *34.

[52] *In re BP RE, L.P.*, 735 F.3d 279, 290 (5th Cir. 2013) ("Under *Stern*'s 'reasoning ... the core/non-core contention urges a distinction without a difference for purposes of Article III.").

[53] *Exec. Benefits Ins. Agency v. Arkison,* 134 S. Ct. 2165 (2014).

[54] *Id.* at 2168.

[55] *Id.* at 2172 ("*Stern* made clear that some claims labeled by Congress as 'core' may not be adjudicated by a bankruptcy court in the manner designated by § 157(b). *Stern* did not, however, address how the bankruptcy court should proceed under those circumstances. We turn to that question now.").

decision in *Wellness Intern. Network, Ltd. v. Sharif*[56] has arguably further eviscerated the "core" vs. "non-core" distinction under the Bankruptcy Code.

B. *Wellness, The Amended Federal Rules of Bankruptcy Procedure and the Continuing Evolution of Stern*

In its 2015 opinion in *Wellness*, the Supreme Court held that, like with federal magistrate judges, parties may consent, even implicitly, to final adjudication of *Stern* claims by an Article I bankruptcy judge.[57] This decision overturned the decision issued by the Seventh Circuit and rejected the reasoning of various other courts on the issue.[58] In 2016, Bankruptcy Rules 7008, 7012, 7016, 9027 and 9033 were amended to address *Wellness*, removing the requirement that parties state in adversary proceedings whether the proceeding is "core" or "non-core."[59] Under these amended Bankruptcy Rules, parties to an adversary proceeding now only must affirmatively state whether they consent to the entry of a final order or judgment by the bankruptcy court.[60] However, these amended Bankruptcy Rules are not automatically applicable to matters outside of adversary proceedings, leaving the courts to determine "consent" under *Wellness* outside of adversary proceedings where *Stern* issues still exist.[61] Many courts, as in

[56] *Wellness Intern. Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

[57] *Id*. at 1942 ("Our precedents make clear that litigants may validly consent to adjudication by bankruptcy courts.").

[58] *See, e.g., In re Fundamental Long Term Care, Inc.*, 501 B.R. 770, 779 (Bankr. M.D. Fla. 2013) (noting that [t]he Fifth Circuit (in *In re Frazin*), Sixth Circuit (in *In re Waldman*), and Seventh Circuit (in *Wellness International Network v. Sharif*) raise a compelling argument in support of the notion that Article III's guarantee of adjudication by an impartial and independent court cannot be waived.").

[59] *Compare* Fed. R. Bankr. P. 7008 and 7012 (amended effective December 1, 2016) *with* Fed. R. Bankr. P. 7008 and 7012.

[60] *Id.*

[61] *See* Fed. R. Bankr. P. 9014(c).

Millennium, appear to be willing to generally infer a party's consent when the party appears, without raising any *Stern* issues, in the proceedings before the bankruptcy court.[62]

IV. *Millennium* Case Summary

On October 3, 2017, Judge Silverstein issued her opinion in *Millennium,* ruling that the Bankruptcy Court had constitutional adjudicatory authority to confirm a plan which contained third-party releases in favor of various non-debtor entities, including certain equity holders who contributed $325 million to the estate as part of a settlement contained in the plan, notwithstanding the restrictions on a bankruptcy court's constitutional authority as set forth in *Stern*.[63]

A. *Background*

On November 10, 2015, Millennium Lab Holdings II, LLC, Millennium Health, LLC, and RxAnte, LLC (collectively, the "Debtors" or "Millennium") filed voluntary petitions under chapter 11 of the Bankruptcy Code along with a prepackaged plan of reorganization (the "Plan"), which provided for a global resolution of claims related to the Debtors' April 2014 $1.825 billion senior secured credit facility, the proceeds of which funded a $1.3 million dividend to the

[62] *See Millennium*, 575 B.R. at 294 ("To the extent that Voya intended to keep its constitutional objection in its back pocket to be used on appeal if it was not successful before me, such gamesmanship is prohibited, establishes intent and implied consent and therefore constitutes waiver."); *In re McCollom Interests, LLC*, 551 B.R. 292, 300 (Bankr. S.D. Tex. 2016) ("Indeed, the Firm filed its Final Fee Application in this Court, [Doc. No. 133]; this Court held two hearings during which two of the Firm's attorneys appeared and gave testimony; and the Firm never objected to this Court's constitutional authority to enter a final order on the Final Fee Application. If these circumstances do not constitute implied consent, nothing does."); *In Matter of Smiley*, 559 B.R. 215, 217 (Bankr. N.D. Ind. 2016) ("Litigants may waive statutory and even constitutional protections that exist for their benefit and they may impliedly consent to things that might otherwise be objectionable, so long as they do so knowingly and voluntarily. That occurs when they actively participate in the proceeding, knowing their rights, but choose not to assert them."); *Cole v. Strauss*, 2:16-CV-04143-NKL, 2017 WL 26906, at *9 (W.D. Mo. Jan. 3, 2017) (finding that party "knowingly and voluntarily consented to the Bankruptcy Court's exercise of jurisdiction, within the meaning of *Wellness*" when it "continued to appear before the Bankruptcy Court to litigate how the sale proceeds would be handled.").

[63] 575 B.R. at 255-56.

Debtors' equity holders, paid off certain debt and provided for working capital.[64] Specifically, the Plan allowed the claims of all bondholders, brought $325 million into the estate (permitting the Debtors to reorganize and make the distributions required under the Plan) and included releases of both debtor and third-party claims against the Non-Debtor Equity Holders (the "Releases").[65] A group of lenders led by Voya Investment Management Co. LLC and Voya Alternative Asset Management LLC (collectively, "Voya") that had funded $106.3 million of the loan objected to the inclusion of releases of claims that creditors, including Voya, might assert against the Non-Debtor Equity Holders, arguing that: (i) the Bankruptcy Court did not have subject matter jurisdiction to grant nonconsensual third-party releases; (ii) the third-party releases were impermissible; (iii) the Plan must permit parties to opt out of the releases; and (iv) the releases did not meet the standard set forth in *Gillman v. Continental Airlines (In re Continental Airlines)*[66]. The day prior to the confirmation hearing, Voya filed a complaint in the District Court against the Non-Debtor Equity Holders asserting RICO and common law fraud claims.

On December 14, 2015, Judge Silverstein entered an order confirming the Plan. The same day, Voya filed a Notice of Appeal together with an emergency motion requesting certification of a direct appeal to the Third Circuit and a motion for stay pending appeal.

B. *The District Court's Remand Decision*

On March 20, 2017, the District Court issued a Memorandum Opinion questioning whether "the Bankruptcy Court had the opportunity to consider what is now the main issue on appeal – the Bankruptcy Court's authority post-*Stern* to enter a final order discharging

[64] *Id.* at 256.

[65] *Id.* at 257.

[66] 203 F.3d 203 (3d Cir. 2000).

Appellants' non-bankruptcy claims against non-debtors without Appellants' consent."[67] Ultimately, the District Court remanded the case for further proceedings to (i) consider whether, or clarify the ruling that the Bankruptcy Court had constitutional adjudicatory authority to approve the nonconsensual release of Voya's direct non-bankruptcy common law fraud and RICO claims against the Non-Debtor Equity Holders, and if not, (ii) submit proposed findings of fact and conclusions of law, or, alternatively, to strike the nonconsensual release of Voya's claims from the confirmation order.[68]

C. *The Bankruptcy Court's Decision on Remand*

On remand, Judge Silverstein held that the Bankruptcy Court had constitutional adjudicatory authority to approve, in a final order, the nonconsensual third-party releases and therefore did not need to strike the nonconsensual release of Voya's claims from the confirmation order, nor make and submit to the district court additional proposed findings of fact and conclusions of law regarding the final disposition of Voya's RICO claims. Judge Silverstein further held that by not raising a *Stern* argument at the confirmation hearing or at any time prior to entry of the order confirming the plan, Voya waived that argument and also independently waived its right to any trial on the merits of its RICO claims in the context of confirmation.

In her analysis, Judge Silverstein enumerated the various interpretations of *Stern*:

- *The Narrow Interpretation – Stern* stands for the sole proposition that bankruptcy courts "lack[] constitutional authority to enter a final judgment on a state law

[67] *Id.* at 259 (quoting *Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II, LLC)*, 242 F.Supp.3d 322, 339 (D. Del. 2017)).

[68] *Id.* at 259.

counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."[69]

- *The Broad Interpretation* – Under *Stern*, bankruptcy courts cannot enter a final judgment on all state law claims, all common law causes of action or all causes of action under state law.[70]
- *The Broadest Interpretation – Stern* requires bankruptcy courts to "examine their ability to enter final orders in all enumerated or unenumerated core proceedings."[71]

Noting that her colleagues on the Delaware bench consistently adopted the Narrow Interpretation of *Stern*, Judge Silverstein concluded that bankruptcy courts have constitutional adjudicatory authority to enter final orders confirming plans containing nonconsensual releases under any interpretation of *Stern* because "the operative proceeding for purposes of a constitutional analysis is confirmation of a plan" which is an enumerated core proceeding under 28 U.S.C. § 157(b).[72] Further, Judge Silverstein explained that in the Third Circuit, nonconsensual third-party releases are permissible in plans of reorganization if they meet the standards of fairness and necessity to the reorganization under *Continental*.[73] These factors do not require a bankruptcy judge to examine or make rulings with respect to the claims that may be released under the third-party releases. Thus, Judge Silverstein concluded, an order confirming a

[69] *Id.* at 268.

[70] *Id.* at 268-69.

[71] *Id.* at 270.

[72] *Id.* at 269, 271.

[73] *Id.* at 272 (citing *Continental*, 203 F.3d at 214).

plan containing third-party releases "does not rule on the merits of the state law claims being released" and therefore does not implicate *Stern*.[74]

Judge Silverstein went on to note that adopting Voya's interpretation of Stern would "dramatically change the division of labor between the bankruptcy and district courts" by requiring district courts to enter final orders in variety of matters, including: (i) section 363 asset sale of assets in which a purchaser seeks to be free of successor liability; (ii) requests to compel annual meetings of stockholders; (iii) substantive consolidation of debtors, and/or debtors and non-debtors (in which the rights of creditors and non-creditors against non-debtor entities are rearranged); (iv) recharacterization and/or subordination (in which state law debts are transformed); (v) requests to establish notice procedures to preserve a debtor's net operating losses by prohibiting trading in stock without certain advance notice (in which trades in derogation of those procedures are declared void ab initio); and (vi) a sale of property subject to a co-debtor stay (in which the court compels the sale of a non-debtors' interest in property).[75] Addressing Voya's assertion that consent to permit a bankruptcy court to enter a final order in these instances might be withheld to leverage a party's position, Judge Silverstein noted that "there is ample room for gamesmanship by both debtors and creditors in the bankruptcy context."[76]

In anticipation of a further appeal by Voya, Judge Silverstein concluded her opinion by stating "I trust this Opinion will aid the district court on appeal."[77] As Judge Silverstein

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[74] *Id.*at 273.

[75] *Id.*at 285-86.

[76] *Id.* at 286.

[77] *Id.* at 298.

anticipated, Voya appealed to the District Court on October 16, 2017. The appeal was still pending as of the date of submission of these materials.

V. Is *Millennium* Poised to Eviscerate Third-Party Releases? Judge Silverstein's Remand Opinion Gives Third-Party Releases a (Much-Needed) Second Chance

As discussed above, the District Court ultimately denied Millennium's motion to dismiss and remanded the question of constitutional authority to the Bankruptcy Court. However, rather than ending its opinion with a directive for remand, the District Court proceeded to assess the strengths and weaknesses of the parties' positions and ultimately took the position that the dissenting lenders had the stronger arguments. Indeed, the District Court found that the dissenting lenders "appear to be entitled to Article III adjudication of [their] claims under *Stern*." Following the District Court's opinion, many commentators argued, and with good reason, that the opinion foretold a death knell for non-consensual third-party releases because any case involving "public rights" must be adjudicated in an Article III court, rather than in an Article I (*e.g.*, bankruptcy court). Judge Silverstein's remand opinion, however, appears to preserve the viability of non-consensual third-party releases, at least within the Third Circuit.

By way of brief background, on remand, and after hearing over six hours of oral argument, Judge Silverstein found that bankruptcy courts do possess constitutional authority to approve the non-consensual third-party release of non-bankruptcy claims against equity holders for three reasons:

- The "operative proceeding" to consider for purposes of the constitutional analysis is not the common law non-bankruptcy claims, but instead confirmation of the plan of reorganization, which is unquestionably a core bankruptcy proceeding. Judge Silverstein distinguished *Stern* by noting that unlike the counterclaim in *Stern*, the confirmation of a plan, even one containing non-consensual third-party releases, requires a bankruptcy judge to apply federal standards and interpret federal law.

- Judge Silverstein also held that although the plan affected the "private rights" of third parties by releasing certain causes of action, she was not ruling on the merits of those causes of action. Rather, her decision only concerned whether the plan and releases satisfied applicable standards under the Bankruptcy Code and Third Circuit precedent.

- Judge Silverstein found that adopting the dissenting lenders' interpretation would effectively end the viability of the U.S. bankruptcy system, because judges at the district court level would be required to be more involved in the bankruptcy process (*e.g.*, district court judges would be required to approve section 363 motions to sell assets because such sales implicate other parties' private rights).

Judge Silverstein's opinion can be read in contrast with District Court Judge Stark's approach. Where Judge Stark found that the dissenting lenders' state law claims did not fall under the "public rights" exception under which such claims may be heard by a non-Article III court, Judge Silverstein disagreed, holding that although the plan affected the "private rights" of third parties by releasing certain causes of action, her ruling only concerned whether the plan and releases satisfied applicable standards under the Bankruptcy Code and Third Circuit precedent, which standards are not easy to meet in the first place.

Judge Silverstein's opinion is important in many respects, but its preservation of a bankruptcy court's jurisdiction to approve non-consensual third-party releases within the context of a plan cannot be overstated. Had the remand opinion held—consistent with the apparent views of the District Court—that a bankruptcy court lacks constitutional authority to approve non-consensual third-party releases contained in a plan, not only would approval of such releases become largely eviscerated, but a substantial component of the plan negotiation process would also be eviscerated.

Indeed, creditors and creditors' committees that are attempting to negotiate a consensual plan will often use a debtor's (and third parties such as a plan sponsor) desire to obtain non-consensual third-party releases as leverage to negotiate for greater recoveries. If, however,

claims that are subject to such releases need to be adjudicated by an Article III judge prior to being released in a plan, a critical aspect of the plan negotiation process would be, for all practical purposes, removed from the equation. This may result in a lose-lose situation for debtors and creditors alike. For example, third parties may be less willing to make a "substantial contribution" to a debtor's reorganization process, such as an infusion of $100 million in new value, and creditors would lose an effective arrow in their quiver in negotiating a debtor's plan.

Importantly, the remand opinion appears to acknowledge the significance of preserving bankruptcy court jurisdiction over the types of releases sought in in *Millennium.* Such releases, while often disputed in a bankruptcy case, more often than not are resolved in the context of plan negotiations and, in many cases (save *Millennium* and others), lead to a consensual plan process.

Furthermore, as such releases are unique to the bankruptcy process, especially the tail end of such process, the issue incentivizes parties to negotiate, rather than litigate, a bankruptcy-centric issue so as to emerge from bankruptcy as swiftly and efficiently as possible. As Judge Silverstein stated, "[T]here is no state law equivalent to confirmation of a plan[.]" She continued, noting that "third party releases do not exist without regard to the bankruptcy proceeding." As such, parties seeking approval for non-consensual third-party releases should know that at least one influential bankruptcy court has found constitutional authority to grant those releases, regardless of whether litigation may be pending in a separate court.

The importance of non-consensual third-party releases to the entire plan negotiating process cannot be overstated, both from the perspective of the debtor or third party and the creditor. Disallowing bankruptcy courts to grant such releases threatens to create a negative feedback loop:

- The debtor struggles to find third parties willing to provide critical new value necessary to keep the debtor operational during the pendency of the bankruptcy

case because third parties know the difficulty in obtaining non-consensual releases from an Article III judge;

- Creditors lose a valuable negotiating position during the plan negotiation process because they have one less tool to offer debtors in return for higher recoveries;

- Debtors are forced to provide lower recoveries to all creditor constituencies because the value of the recovery must be discounted by the retention of possible claims.

Judge Silverstein's remand decision illustrates the necessity of allowing bankruptcy courts authority to approve non-consensual third-party releases. More than a mere negotiating tactic employed by debtor and creditor alike, such releases allow for the orderly administration of the bankruptcy estate—perhaps the ultimate goal of bankruptcy law. With that said, Judge Silverstein's opinion is not likely to be the final word on non-consensual third-party releases. In fact, commentators have said the issue may make its way to the Third Circuit in due time (*i.e.*, not a millennium!).

VI. Does *Millennium* Run Afoul of *Stern*?

As discussed in the preceding sections, the *Millennium* decision stands as a full-throated defense of the power of bankruptcy courts to preside over and resolve complex and contentious chapter 11 cases through the confirmation of a plan, even where the plan would adversely affect a party's non-bankruptcy claims against non-debtors.

But the question remains: does the *Millennium* decision run afoul of *Stern* and push the constitutional authority of bankruptcy courts past *Stern's* intended boundaries? While the answer to this question remains unknown, persuasive arguments can be made that the decision does just that.

The "Disjunctive Test," as articulated in *Stern*, provides that "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the

question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[78]

On remand, and in its second appeal to the District Court, Voya's main argument is the preclusive effect that the Releases would have on the continued prosecution of the RICO lawsuit (the "RICO Lawsuit"), which they argued should be the focal point of the Bankruptcy Court's *Stern* analysis. Because the Releases effectively foreclosed the RICO Lawsuit, the Voya argued that the Bankruptcy Court's confirmation of the Plan is tantamount to adjudicating the merits of the RICO Lawsuit. Under this theory, Voya posited that the Bankruptcy Court should have applied the Disjunctive Test to the RICO Lawsuit itself, rather than with respect to the confirmation of the Plan. Voya asserted that the standard cannot be met because the suit does not stem from the bankruptcy and would not be resolved in the claims allowance process. Accordingly, Voya argued that the Bankruptcy Court did not have the constitutional authority to confirm the Plan with the Releases.

In rejecting this argument, the Bankruptcy Court ostensibly expanded *Stern* by endorsing a view that all it needed to look at was whether plan confirmation, as the "operative proceeding" before it, was a state law claim.[79] It could be argued that the confirmation order constitutes both a final judgment on the issue of plan confirmation, as authorized under the Bankruptcy Code, *and* a final judgment that directly extinguished Voya's non-bankruptcy claims against the non-debtors on the merits – a result at odds with *Stern*. By including a release of claims provision within the terms of the Plan, the Plan, in essence, brought the merits of those claims within the purview of the Bankruptcy Court. It follows, therefore, that by entering the order confirming the

[78] 564 U.S. at 499 (emphasis in original).

[79] *In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 271 (Bankr. D. Del. 2017).

Plan, the Bankruptcy Court entered a final judgment on the merits of the claims, thereby extinguishing such claims without Voya's consent.

Indeed, in its decision in the first appeal, the District Court, in concluding that the third-party releases contained in the Plan constituted a final judgment, expressly stated: "the Plan's release, which permanently extinguished [Voya's] claims, is tantamount to resolution of those claims on the merits against [Voya]."[80]

As enumerated in *Stern*, it is the bankruptcy court's disposition of the claim that implicates the Constitution, not the particular proceeding in which it is extinguished. Thus, while bankruptcy courts have authority to enter final judgments in statutory core proceedings (*i.e.*, plan confirmation) as a general matter, they nevertheless lack the constitutional power in such proceedings to enter judgments extinguishing *Stern* claims without consent.

Moreover, the District Court held as such: "The Court does not agree with Debtors that the Plan release did not run afoul of *Stern* because it was not a final adjudication of the claims. ***If Article III prevents the Bankruptcy Court from entering a final order disposing of a non-bankruptcy claim against a nondebtor outside of the proof of claim process, it follows that this prohibition should be applied regardless of the proceeding (i.e., adversary proceeding, contested matter, plan confirmation).***"[81]

If claims over which a bankruptcy court has no independent jurisdiction could be transformed into proceedings within the bankruptcy court's jurisdiction by simply including their release in a proposed plan, bankruptcy courts could acquire limitless jurisdiction and would end-run the ruling in *Stern*. To allow this type of "back-door" adjudication of non-bankruptcy related

[80] *Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II, LLC)*, 242 F.Supp.3d 322, 339 (D. Del. 2017).
[81] *Id.* (emphasis added).

claims could potentially lead to plans that ultimately violate *Stern*. As other courts have noted, *Stern* does not allow for the notion that claims arising under state law and independent of a debtor's bankruptcy case, while factually intertwined with bankruptcy proceedings, may be sent to a bankruptcy court for final resolution without consent.[82]

By approving the non-consensual releases as part of the confirmation order, the Bankruptcy Court arguably exceeded its powers under Article III to enter a judgment disposing of claims that are based on non-bankruptcy substantive law and not made against the debtor itself. This expansive reading of *Stern* could provide leverage for other chapter 11 debtors to abrogate constitutional limitations and extinguish non-debtor claims in a plan without the objecting creditor's consent.

[82] *See*, *e.g.*, *Loveridge v. Hall (In re Renewable Energy Dev. Corp.)*, 792 F.3d 1274, 1279 (10th Cir. 2015), *as amended on denial of reh'g* (July 28, 2015) ("As we read Stern, it doesn't leave room for the notion that a claim independently arising under state law and not necessarily resolvable in the claims allowance process–but 'factually intertwined' with bankruptcy proceedings–may be sent to bankruptcy court for final resolution without consent.").