Southwest Bankruptcy Conference

CONCURRENT SESSION

General

The Wrath of *Stern*

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2022

SOUTHWEST BANKRUPTCY CONFERENCE

AMERICAN BANKRUPTCY INSTITUTE

FOUR SEASONS LAS VEGAS
LAS VEGAS, NEVADA

SEPTEMBER 8-10, 2022

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SEPTEMBER 8-10, 2022 • FOUR SEASONS LAS VEGAS

THE WRATH OF *STERN*

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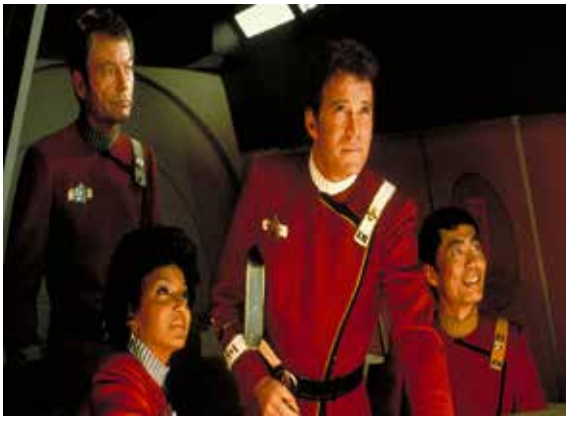

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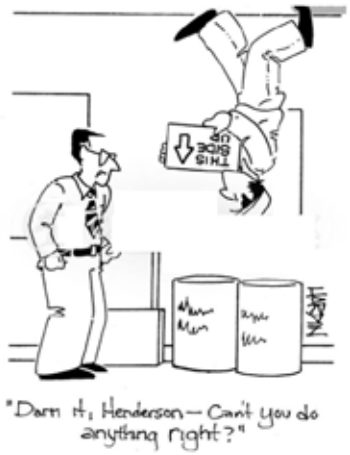
Survey Question

Do You Know How to Take a Survey?
A) Yes
B) No



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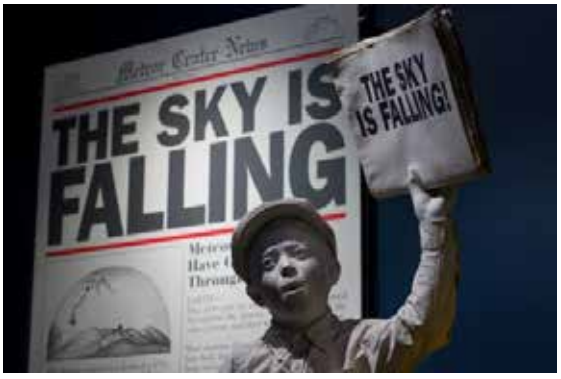
Brief overview of *Stern* and its Holding



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Survey Question

How Does *Stern* impact jurisdiction of the bankruptcy court?

A) Limits which adversaries can be brought
B) Requires findings of facts and conclusions of law in all non-core matters
C) It does not impact jurisdiction
D) I'm here to learn its impact

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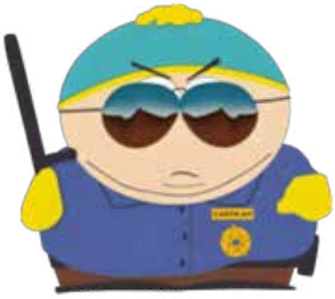
What is the difference between constitutional authority and statutory authority?

- *In re Point Ctr. Fin.*
  (p. 33 of Materials)



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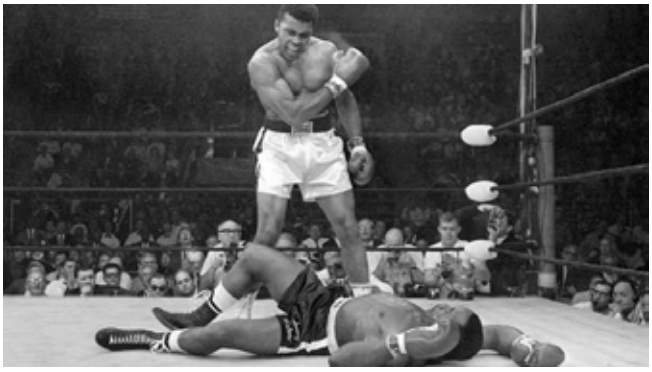
When is a core proceeding potentially not a core proceeding?



- *In re Purdue Pharma* v. *In re Millennium Labs*
  (p. 17-18 of the materials)

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What is the narrowest application of *Stern* and what is the most expansive?

- *In re Dietz* (p. 20) and *In re Moore* (p. 22)

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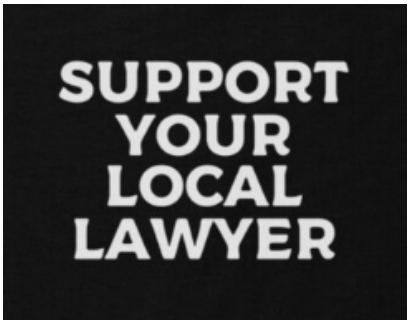
Survey Question

Does your home jurisdiction have a local rule on consent to the Bankruptcy Court's authority?

A) Yes
B) No



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Can you consent to authority and how do you consent?

- FRBP 7008 and 7012 (p. 49-50)
- 28 USC 157
- Local Rules (p. 49 – 55)
- *In re Wellness* (p. 9 – 10)
- *Roell v. Withrow* (p. 36)

"You want informed consent, I want more pudding. Let's make a deal."

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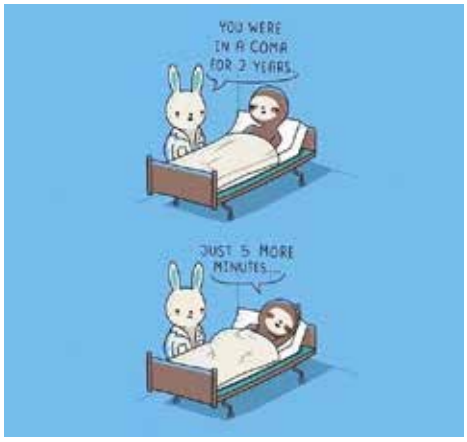
If there is a *Stern* issue – how do I stay in bankruptcy longer?

In re Venture Fin. Group (p. 25)
and *In re Avila* (p. 30)



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If you want the case to stay with BK Court:

- Consent in writing to entry of final order by BK Court
- Consider bringing adversary as claim objection
- Think twice before requesting jury trial

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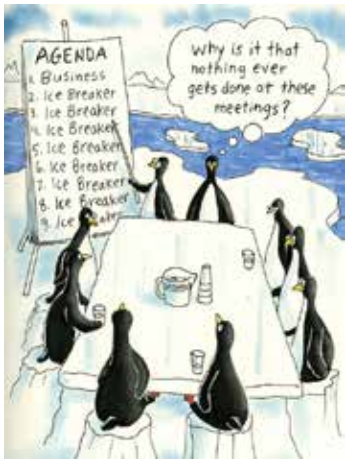
If you prefer the District Court

- Object to entry of final orders (early and often)
- Consider whether to file a proof of claim
- Consider requesting jury trial
- Consider objecting to proposed findings and conclusions (timely and specifically)
- Do you have a PI Claim? (28 USC 157(b)(5))
- Notice of Removal
- Abstentsion



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Survey Question

Does a bankruptcy court have authority to enter a final judgment against a preference defendant who filed a proof of claim in the bankruptcy case but whose claim was disallowed or withdrawn before the complaint was filed?

A) Yes
B) No

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Survey Question

In a chapter 11 case, does a bankruptcy court have authority to enter a final judgment against a preference defendant who has not filed a proof of claim but does have an allowed claim because its claim has been scheduled as undisputed, liquidated and non-contingent?
A) Yes
B) No

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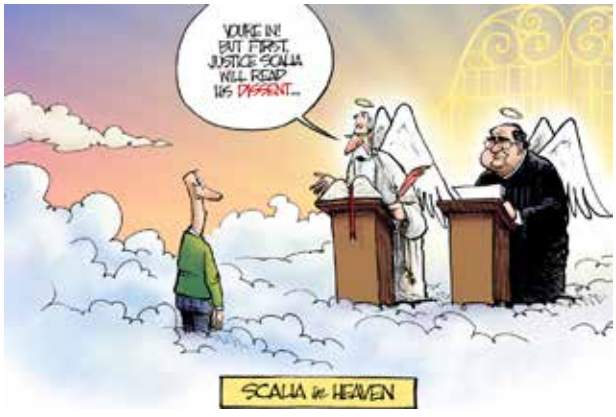
If *Stern* has been raised where are you going to appeal?

- *In re Avila* and *In re Schultze* (p. 30)



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Where have you in your practice seen *Stern* issues and how have you handled them?

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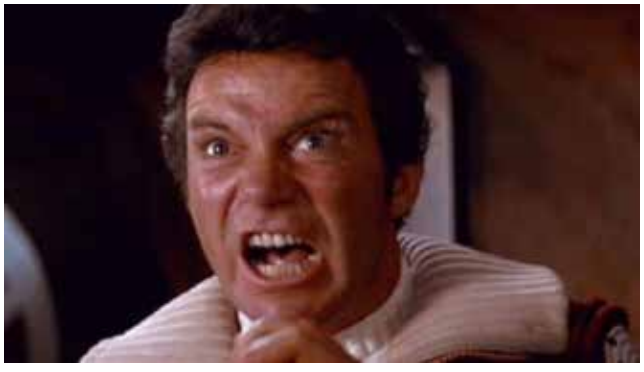
Survey Question

Who do you want to do their best Shatner impersonation except yelling *Stern* instead of Khan?

A) Isaac
B) Candace
C) Malhar
D) John



September 9, 2022

THE WRATH OF *STERN*

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I

INTRODUCTION

A. BACKGROUND

Article III of the U.S. Constitution provides that the judicial power of the United States is vested in one Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." These "Article III courts" are defined by two basic attributes: (1) judges have life tenure, subject only to removal by impeachment; and (2) judges' compensation may not be reduced during their tenure. Although Congress may establish other courts, the "judicial power of the United States" generally may not be conferred upon non-Article III courts. Because bankruptcy judges are appointed for 14-year terms and do not have salary protection, bankruptcy courts are not Article III courts.

Four decades ago, the Supreme Court held that, in 1978, Congress improperly conferred bankruptcy courts with jurisdiction over matters that could only be determined by Article III courts. In *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), a chapter 11 debtor filed a complaint seeking damages for breach of contract and warranty, misrepresentation, coercion, and duress. A plurality of the Court determined that Congress' grant of jurisdiction over such matters to non-Article III courts was unconstitutional. As stated in Justice Brennan's opinion, "The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."[1]

[1] In dissent, Justice Burger characterized the Court's holding as being "limited to the proposition stated by Justice Rehnquist in his concurrence in the judgment – that a 'traditional' state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Art. III court' if it is to be heard by any court or agency of the United States." Thus, Justice Burger

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In response to *Marathon*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. Today, statutes emplaced by the 1984 Act still provide the statutory basis for bankruptcy courts' jurisdiction over bankruptcy cases and proceedings.

When a debtor files for bankruptcy protection, or an involuntary petition is filed against a debtor, the filing commences a "case" under the Bankruptcy Code. Under the 1984 Act, district courts are conferred with original and exclusive jurisdiction of all bankruptcy cases. 28 U.S.C. § 1334(a). Congress also authorized the district courts to refer all bankruptcy cases to bankruptcy judges. 28 U.S.C. § 157(a).

Litigation and other matters that take place in a bankruptcy case are called "proceedings," which are further classified as "arising under" the Bankruptcy Code, "arising in" a bankruptcy case, or "related to" a bankruptcy case. With limited exceptions, Congress conferred on district courts original but not exclusive jurisdiction of all three types of proceedings. 28 U.S.C. § 1334(b). Congress also authorized the district courts to refer bankruptcy proceedings to bankruptcy judges. 28 U.S.C. § 157(a). In certain proceedings, called "core" proceedings, Congress enabled bankruptcy judges to issue final rulings.[2] 28 U.S.C. § 157(b). However, in "non-core" proceedings "related to" bankruptcy cases, unless the parties consent to entry of a final judgment by the bankruptcy judge, bankruptcy judges may only submit proposed findings of fact and conclusions of law to the district court, which then conducts a de novo review and enters a final ruling. 28 U.S.C. § 157(b)(1), (c).

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viewed the holding as affecting only "a relatively narrow category of claims 'arising under' or 'arising in or related to cases under' the" Bankruptcy Code.

[2] For purposes of these materials, a "final" order or judgment is one that is subject to review under 28 U.S.C. § 158, which governs appeals of bankruptcy court orders and judgments.

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A bankruptcy trustee seeking to recover property for the benefit of creditors has a number of weapons at his or her disposal. One is the ability to avoid and recover actual and constructive fraudulent conveyances pursuant to federal bankruptcy and state law. *See* 11 U.S.C. §§ 544, 548, 550. Another is the ability to avoid and recover "preferential" transfers pursuant to federal law. *See* 11 U.S.C. §§ 547, 550. Congress considered such claims to be so integral to the bankruptcy process that it specifically enumerated "proceedings to determine, avoid, or recover fraudulent conveyances" and "proceedings to determine, avoid, or recover preferences" as "core" proceedings. *See* 28 U.S.C. § 157(b)(2)(F), (H). Therefore, as a matter of statutory law, bankruptcy judges are authorized to enter final judgments in such proceedings. If a litigant believes that a bankruptcy judge's ruling should be overturned, the litigant may appeal. *See generally* 28 U.S.C. § 158. If the circuit court in which the proceeding originates has established a bankruptcy appellate panel ("BAP"), and if the district court has authorized the BAP to hear and determine appeals originating in such district, the appeal will be assigned initially to the BAP. *See* 28 U.S.C. § 158(b)(1), (6), (c)(1). However, any party to the appeal may elect to have the appeal heard by the district court. *See* 28 U.S.C. § 158(c)(1).

A district court judge presiding over a bankruptcy appeal applies the same standards of review that a court of appeals would apply in that appeal. For example, the district court reviews a bankruptcy judge's legal conclusions de novo and its factual conclusions for clear error. *In re The Source Hotel, LLC*, ___ F.Supp.3d ___, 2022 WL 2072673, *2 (C.D. Cal. June 8, 2022).[3] If the bankruptcy court's

[3] *Compare* 28 U.S.C. § 157(c)(1) ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.").

judgment results from the grant of summary judgment, it is reviewed by the district court de novo. *Aniel v. HSBC Bank USA, N.A.*, 633 B.R. 368, 375 (N.D. Cal. 2021).

B. ***STERN V. MARSHALL***

In *Stern v. Marshall*, 564 U.S. 462 (2011), the Supreme Court held that Article III prohibits bankruptcy judges from issuing final judgments in some matters, even if Congress identified them as "core" proceedings. In *Stern*, an alleged creditor filed a nondischargeability complaint, seeking to hold the debtor liable for allegedly defamatory statements. He also filed a proof of claim relating to the claims he asserted in the adversary proceeding. In the adversary proceeding, the debtor filed a common-law counterclaim. The bankruptcy court granted summary judgment in favor of the debtor on the claimant's defamation claim. After trial, the bankruptcy court also ruled in favor of the debtor on her counterclaim, awarding damages in excess of $400 million. The district court concluded that the bankruptcy court lacked authority to enter a final judgment on the counterclaim, and independently reviewed the record. The district court determined that the debtor was entitled to judgment, and awarded over $88 million of compensatory and punitive damages.

The Supreme Court discussed and differentiated between a bankruptcy court's jurisdiction and "statutory authority" to issue a final judgment in a proceeding and a bankruptcy court's "constitutional authority" to do so. Bankruptcy courts may hear and enter final judgments in "core" proceedings arising under title 11 or arising in a case under title 11, including, explicitly, "counterclaims by [a debtor's bankruptcy] estate against persons filing claims against the estate," such as the counterclaim asserted by the debtor in *Stern*. 28 U.S.C. § 157(b)(2)(C); *see Stern*, 465 U.S. at 474-75. On the other hand, where a proceeding is not "core," and thus merely "related to" a bankruptcy case, the bankruptcy court may only "submit proposed findings of fact and conclusions of law to the district court." 28 U.S.C. § 157(c)(1). The Court stated that, notwithstanding the designation of estates' counterclaims as "core" proceedings

by statute, "designating all counterclaims as 'core' proceedings raises serious constitutional concerns." *Stern*, 465 U.S. at 477. Specifically, the Constitution's delegation of judicial power under Article III to judges holding life tenure and whose compensation may not be diminished prevents Congress from delegating judicial authority to bankruptcy courts created under Article I of the Constitution, and therefore such courts may not (without consent) adjudicate claims arising "under state common law between two private parties." *Id.* at 493. The Court rejected attempts to categorize the counterclaim as being linked to a determination of a proof of claim, or stemming from the determination of a "public right," or flowing from a federal statutory scheme, which might permit it to be adjudicated by a non-Article III tribunal. *See id.* at 487-95.

The Court was careful not to quarrel with the jurisdictional scheme, stating that "[28 U.S.C.] Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction."[4] *Id.* at 480 (citation omitted). Even though the bankruptcy court had jurisdiction and *statutory* authority to enter a final judgment because the claim fell within a category designated by Congress as "core,"[5] the bankruptcy court lacked *constitutional* authority to do so. *Stern*, 465 U.S. at 482-503.

The Court also was careful to emphasize, at the conclusion of its opinion, that its holding was very narrow:

> Article III of the Constitution provides that the judicial power of the United States may be vested only in courts

[4] Indeed, where subject matter jurisdiction is lacking, "no action of the parties can confer" it. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

[5] *See* 28 U.S.C. § 157(b)(2)(C) ("counterclaims by the estate against persons filing claims against the estate").

> 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. 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.

Id. at 503 (emphasis added). Consistent with this view, the Court also expressed, "We do not think the removal of counterclaims such as [the debtor's] from core 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." *Id.* at 502.

When discussing *Stern*, the focus usually is on its holding regarding the debtor's counterclaims. However, the Court also discussed the bankruptcy court's authority to enter final judgment on the creditor's defamation claim against the estate. *See Stern*, 564 U.S. at 479-82. The creditor characterized his claim as a personal injury claim and asserted that the claim needed to be determined by the district court.[6] The creditor had not raised that argument in the bankruptcy court, and at one point expressly said that he was happy to litigate his defamation claim before the bankruptcy court. Accordingly, without determining whether a defamation claim is or is not a "personal injury tort" covered by 28 U.S.C. § 157(b)(5), the Court concluded that the creditor consented to the bankruptcy court's resolution of the defamation claim and forfeited any argument to the contrary. *Stern*, 465 U.S. at 478-82.

[6] "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose." 28 U.S.C. § 157(b)(5).

The Supreme Court's decision created a category of so-called "*Stern* claims." These are claims arising in proceedings in which bankruptcy courts lack constitutional authority to enter final judgments (at least without consent of the parties) even though they have statutory authority to do so.

C. *EXECUTIVE BENEFITS INSURANCE AGENCY V. ARKISON*

A few years after *Stern*, the Supreme Court issued its decision in *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014). In *Executive Benefits*, a chapter 7 trustee filed an action to avoid and recover fraudulent conveyances. The bankruptcy court entered summary judgment in favor of the trustee. The district court conducted a de novo review, affirmed, and entered a judgment in favor of the trustee. The United States Court of Appeals for the Ninth Circuit ruled that Article III does not allow a bankruptcy court to enter a final judgment on a fraudulent conveyance claim against a non-creditor unless the parties consent. *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 565 (9th Cir. 2012). Because the appellant impliedly consented, and because the bankruptcy court's judgment could be treated as proposed findings of fact and conclusions of law, the Ninth Circuit affirmed. *Id.* at 565-68. The Supreme Court stated that when a bankruptcy court is presented with a *Stern* claim, if the parties have not consented to final adjudication by the bankruptcy court,[7] (1) the bankruptcy court should issue proposed findings of fact and conclusions of law to be reviewed by the district court, and (2) the district court should review the claim de novo and enter a final judgment.[8] *Executive Benefits*, 573 U.S. at 31. Because the district court conducted

[7] *See* 28 U.S.C. § 157(c)(2) (district court, with the consent of all parties to a proceeding related to a bankruptcy case, may refer the proceeding to a bankruptcy court to determine the matter and enter appropriate orders and judgments)."

[8] The Supreme Court expressly did not determine whether the trustee's fraudulent transfer claims were *Stern* claims. *Executive Benefits*, 573 U.S. at 38.

a de novo review of the bankruptcy court's summary judgment, the appellant received the same review from the district court that it would have received if the bankruptcy court had treated the claims as non-core. *Id.* at 38-40. Thus, the Supreme Court affirmed.

D. ***WELLNESS INTERNATIONAL NETWORK, LTD. V. SHARIF***

The following year, the Supreme Court expressly held that parties can knowingly and voluntarily consent to adjudication of *Stern* claims by a bankruptcy court. In *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015), the bankruptcy court entered a judgment determining that assets held by a trust were property of the debtor's bankruptcy estate.[9] While the appeal was pending, the Supreme Court decided *Stern*. The United States Court of Appeals for the Seventh Circuit ruled, among other things, that a litigant may not waive a *Stern* objection. *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 767-73 (7th Cir. 2013). The Supreme Court disagreed. According to the Court, the entitlement to an Article III judge "is 'a personal right' and thus ordinarily 'subject to waiver.' . . . [A]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process." *Wellness*, 575 U.S. at 678. The Court also held that consent need not be express, but may be implied by a litigant's actions as long as it was knowingly and voluntarily given. *Id.* at 683-85 ("[T]he key inquiry is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case' before the non-Article III adjudicator.").[10]

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[9] The plaintiff asserted that the trust was the debtor's alter ego, and therefore assets of the trust should be treated as part of the debtor's estate.

[10] The majority in *Wellness* expressly did not address the question of whether the plaintiff's alter ego claim was a *Stern* claim. *Wellness*, 575 U.S. at 674 n.7. In dissent, Chief Justice Roberts expressed his view that the claim was not a *Stern*

Stern, *Arkison*, *Wellness* and similar cases raise serious questions regarding the authority of bankruptcy courts to enter final judgments that practitioners frequently seek in bankruptcy courts, and the circumstances in which parties may be deemed to consent to the bankruptcy court's final adjudication of Stern claims and non-core proceedings.

II

HOW BROAD IS *STERN*, REALLY?

The majority in *Stern* viewed their decision as a narrow one, potentially limited to "one isolated respect" – i.e., counterclaims not resolved in the process of ruling on a creditor's proof of claim. *Stern*, 564 U.S. at 503. Yet, in the eleven years since its issuance, *Stern* has been cited in over 2,500 bankruptcy decisions, more than 1,100 of which are published.[11]

At least in the Ninth Circuit, *Stern*'s dust appears to have settled on only two categories of claims: (1) state law claims (or counterclaims) against third parties if the claims (or counterclaims) are not resolved in the process of ruling on a proof of claim; and (2) fraudulent conveyance claims against defendants who have not filed proofs of claims. Based on existing Ninth Circuit law, a credible argument can be made that claims to avoid and recover preferential transfers from defendants who have not filed proofs of claims are also *Stern* claims. Such claims are discussed below.

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claim, and therefore "Article III likely poses no barrier to the Bankruptcy Court's resolution of Wellness's claim." *Id.* at 691.

[11] By comparison, the Supreme Court's decision in *Law v. Siegel*, 571 U.S. 415 (2014), has been cited in approximately 400 published decisions.

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Meaningful discussions regarding the applicability and implications of *Stern* have come up in other contexts as well. For example, a few years ago, *Stern* was addressed by courts in the context of chapter 11 debtors' attempts to compel the U.S. Small Business Administration (the "SBA") to make Paycheck Protection Program ("PPP") loans to debtors. Because of *Purdue Pharma*[12] and *Ascena*,[13] the applicability of *Stern* in the chapter 11 plan confirmation context – particularly with respect to third-party releases – is a hot topic. *Stern* also comes up in the context of bankruptcy courts' authority to enter money judgments against debtors in nondischargeability proceedings. These issues, as well as other issues in which courts have addressed *Stern* to one degree are another, are discussed below.

A. PREFERENCE CLAIMS

1. IN THE NINTH CIRCUIT, PREFERENCE CLAIMS AGAINST DEFENDANTS WHO HAVE NOT FILED PROOFS OF CLAIMS MAY BE *STERN* CLAIMS

In 1989, the Supreme Court held that defendants in a fraudulent conveyance action were entitled to a jury trial because they had not filed proofs of claims. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). The next year, the Supreme Court held that defendants in a preference action *were not* entitled to a jury trial because they *had* filed proofs of claims and the preference action was part of the claims-allowance process. *Langenkamp v. C.A. Culp*, 498 U.S. 42, 44 (1990). But, according to the Court, "[i]f a party does not submit a claim against the bankruptcy estate . . . the preference defendant is entitled to a jury trial." *Id.* at 45.

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[12] *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021); *In re Purdue Pharma, L.P.*, 635 B.R. 26, 37 (S.D.N.Y. 2021).

[13] *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641 (E.D. Va. 2022) ("*Ascena*").

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One year after *Stern*, in *Bellingham*, the Ninth Circuit held that fraudulent conveyance claims against non-creditors cannot be adjudicated by non-Article III judges unless the right to a hearing in an Article III court is waived or forfeited. In doing so, the Ninth Circuit said that its "conclusion is buttressed by the Supreme Court's equation of litigants' Article III rights with their Seventh Amendment jury trial rights in bankruptcy-related cases." *Bellingham*, 702 F.3d at 563. According to the Ninth Circuit, "*Stern* fully equated bankruptcy litigants' Seventh Amendment right to a jury trial in federal bankruptcy proceedings with their right to proceed before an Article III judge." *Id.*

In December 2020, an Arizona district court held that preference claims are *Stern* claims. *In re Swift Air, LLC*, 624 B.R. 694 (D. Ariz. 2020). For the district court, this flowed naturally from *Langenkamp* and *Bellingham*. Essentially, under *Swift Air*, if a preference defendant did not file a proof of claim and is entitled to a jury trial, the bankruptcy court cannot enter a final judgment absent the parties' consent.

2. SHOULD THE NON-FILING OF A PROOF OF CLAIM BE DETERMINATIVE?

Are *Langenkamp*, *Stern* and *Swift Air* right to put so much emphasis on whether the defendant filed a proof of claim? According to *Langenkamp*:

> In *Granfinanciera* we recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claims," thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral

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> to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction. As such, there is no Seventh Amendment right to a jury trial. If a party does not submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial.
>
> Accordingly, "a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate." Respondents filed claims against the bankruptcy estate, thereby bringing themselves within the equitable jurisdiction of the Bankruptcy Court. Consequently, they were not entitled to a jury trial on the trustee's preference action.

Langenkamp, 498 U.S. at 44-45.

But what if the defendant was scheduled as having an undisputed, liquidated, non-contingent claim? At least in a chapter 11 case, as long as the claim amount was correctly scheduled, the creditor would have no reason to file a proof of claim. *See* Fed. R. Bankr. P. 3003(c) ("It shall not be necessary for a creditor . . . to file a proof of claim . . . except as provided in subdivision (c)(2) of this rule."). A preference action against such a creditor is no more or less integral to the restructuring of the debtor-creditor relationship than one against a creditor who files a proof of claim.

Also, a former creditor who does not initially file a proof of claim (perhaps because it was paid in full on the eve of the debtor's bankruptcy filing), suffers a judgment for recovery of an avoidable preferential transfer, and satisfies that

judgment, may be entitled to an allowed claim against the estate for the amount repaid. *See* 11 U.S.C. § 502(h). Is a preference action against such a defendant really less "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction" than one against a defendant who files a proof of claim? Arguably, such a claim is precisely what Congress had in mind when it empowered trustees to avoid preferential transfers, to ensure a more fair and equal distribution amongst creditors.

3. WHAT IF THE DEFENDANT'S CLAIM AGAINST THE ESTATE IS DISALLOWED, OR THE PROOF OF CLAIM IS WITHDRAWN, BEFORE THE AVOIDANCE ACTION IS FILED?

Another potential twist (which applies to fraudulent conveyance claims too): What if the defendant's claim against the estate is disallowed before the preference claim is filed against the claimant? For example, in the Madoff Securities Investor Protection Act ("SIPA") proceeding, James Greiff's claim was disallowed pursuant to the procedures adopted in that proceeding. Later, the trustee filed a complaint against Greiff to avoid and recover over $2.5 million of "fictitious profits." A few months before trial, Greiff filed a motion for withdrawal of the reference. In that context, the district court discussed the bankruptcy court's authority to enter a final judgment. *See Picard v. Greiff*, 617 B.R. 198, 205-07 (S.D.N.Y. 2020). Greiff argued that because his claim had been disallowed well before the complaint was filed, the adversary proceeding did not implicate the claims allowance process; however, the district court found this argument to be meritless. *Id.* at 205. According to the district court, a majority of cases conclude that disallowance or withdrawal of a proof of claim does not affect the bankruptcy court's authority to determine a subsequently filed avoidance action against the claimant. *Id.*; *see also In re Bernard L. Madoff Inv. Sec. LLC*, 612 B.R. 257, 266-71 (S.D.N.Y. 2020) (rejecting argument that voluntary withdrawal of proof of claim

reversed the bankruptcy court's authority to determine the trustee's avoiding power claims).[14]

4. WHAT IF THE ESTATE'S AVOIDANCE CLAIM IS SOLD?

In *In re Portland Injury Inst., LLC*, BAP No. OR-21-1138-GTB (9th Cir. BAP Jan. 27, 2022), a bankruptcy court authorized a chapter 7 trustee's sale of substantially all of the estate's tangible and intangible assets, including avoiding power claims. The BAP affirmed, based on its earlier decision in *In re Lahijani*, 325 B.R. 282 (9th Cir. BAP 2005). What impact, if any, does *Stern* have on a bankruptcy court's constitutional authority to enter a final judgment in such matters?

B. ACTIONS BROUGHT BY DEBTORS TO COMPEL THE SBA TO MAKE PPP LOANS

Stern played a role when debtors sought to compel the SBA to make PPP loans. In *Gateway Radiology Consultants*, a debtor sought an injunction against the SBA and moved for court approval of a PPP loan. The bankruptcy court issued a preliminary injunction. According to the United States Court of Appeal for the Eleventh Circuit, the order granting the injunction "came from a non-core proceeding." *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1253 (11th Cir. 2020). However, because the matter needed to be resolved in the course of

[14] The district court also concluded that when Greiff filed his proof of claim he impliedly consented to the bankruptcy court's authority to enter a final judgment on any "antecedent" claims. *Id.* at 206. Greiff filed a proof of claim in January 2009, his claim was rejected in August 2009, and the trustee filed his complaint against Greiff in November 2010 – all before *Stern* was decided in 2011. Query whether a defendant could knowingly and voluntarily consent to a bankruptcy court's adjudication of a statutorily core *Stern* claim before *Stern* was issued.

deciding a core matter – *i.e.*, the debtor's concurrent request for authority to obtain credit – the Eleventh Circuit concluded that the bankruptcy court had authority under *Stern* to issue the preliminary injunction. *Id.* at 1254.

A district court came to the opposite conclusion in *Archdiocese of Santa Fe*. In that case, the debtor filed a complaint against the SBA for declaratory and injunctive relief. In Count I, the debtor alleged that the exclusion of bankruptcy debtors from the PPP exceeded the SBA's statutory authority. In Count II, the debtor alleged that the exclusion was arbitrary, capricious, or an abuse of discretion. The SBA objected to the bankruptcy court's adjudication of those claims. The bankruptcy court entered judgment in favor of the debtor and required the SBA to process the debtor's loan application without regard to its status as a debtor. On appeal, the district court concluded that the claims in Counts I and II were non-core proceedings. *SBA v. Roman Catholic Church of Archdiocese of Santa Fe*, 632 B.R. 816, 830-31 (D. N.M. 2021). Accordingly, pursuant to 28 U.S.C. § 157(c)(1), the bankruptcy court was authorized only to issue proposed findings of fact and conclusions of law. *Id.* at 832.

Neither the Eleventh Circuit in *Gateway Radiology Consultants* nor the district court in *Archdiocese of Santa Fe* determined that the claims at issue were *Stern* claims.[15] Both concluded that the claims were statutorily non-core. But *Stern* still came into play as the courts examined whether the bankruptcy court had constitutional authority to enter a final judgment on non-core claims that needed to be necessarily resolved in the course of deciding a core matter, or would impact the administration of the debtor's estate.

The major lesson from these cases may be that a party asserting non-bankruptcy claims should think about how the claims are framed, or whether there are claims arising under the Bankruptcy Code with which they can be grouped. If the party wants a bankruptcy court to have constitutional authority to issue a final

[15] Again, a *Stern* claim is one where a bankruptcy court has statutory authority to enter a final judgment, but not constitutional authority.

order, the claims should be linked to other claims that are more likely to trigger such authority. *See In re McPherson*, 630 B.R. 160, 173-74 (Bankr. D. Md. 2021) ("The Court recognizes that a debtor may be able to plead an action in a way that transforms a pure state law claim into a claims objection under section 502 or a turnover action under section 542 or 543 of the Code."). That was the case before *Stern* with respect to non-core proceedings, and is more so after *Stern* since a statutorily core matter is not necessarily one in which a bankruptcy court has constitutional authority to enter a final judgment.

C. CLAIMS RESOLVED BY CHAPTER 11 PLANS

Generally speaking, a proceeding regarding confirmation of a chapter 11 plan "stems from the bankruptcy itself" and a bankruptcy court therefore has constitutional authority to enter a final judgment. *See In re Astria Health*, 623 B.R. 793, 797 (Bankr. E.D. Wash. 2021).

In *Millennium*, the bankruptcy court confirmed a chapter 11 plan that provided for the release of claims that non-debtor third parties may have had against equity holders who made a $325 million contribution to the debtors' reorganization. The bankruptcy court and district court held that *Stern* does not apply to plan confirmation proceedings. The United States Court of Appeals for the Third Circuit affirmed. *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019). In doing so, the court focused heavily on *Stern*'s statement that "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* at 135 (quoting *Stern*, 564 U.S. at 499). The Third Circuit emphasized that its holding was limited, and that "under the particular facts of this case, the Bankruptcy Court's conclusion that the release provisions were integral to the restructuring was well-reasoned and well-supported by the record. Consequently, the bankruptcy court was constitutionally authorized to confirm the plan in which those provisions appeared." *Id.* at 140.

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This year, a Delaware bankruptcy court followed *Millennium* when it confirmed a chapter 11 plan with third-party releases in a case involving thousands of lawsuits stemming from the debtor's production and sale of opioid medications and other drugs. *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022).[16]

In *Purdue Pharma*, the bankruptcy court concluded that it had authority under *Stern* to enter a final order granting third-party releases in a chapter 11 plan because the issue arose in the context of a chapter 11 case's adjustment of the debtor/creditor relationship. *In re Purdue Pharma L.P.*, 633 B.R. 53, 99-100 (Bankr. S.D.N.Y. 2021). On appeal, the district court addressed *Stern* but correctly noted that whether the bankruptcy court lacked constitutional authority to grant third-party releases "matters little in the great scheme of things; it changes the level of deference this court should give to Judge Drain's findings of fact, but those findings are essentially unchallenged." *In re Purdue Pharma, L.P.*, 635 B.R. 26, 37 (S.D.N.Y. 2021). In any event, the district court determined that the bankruptcy court had only "related to" jurisdiction over the third-party claims, which neither stemmed from the debtor's bankruptcy nor could be resolved in the claims allowance process. Because entry of an order releasing a claim "finally determines" that claim, the bankruptcy court lacked constitutional authority to grant the releases. *Id.* at 80-82. The district court said that to the extent the bankruptcy court approved the third-party releases, the lower court's opinion should have been tendered as proposed findings of fact and conclusions of law. *Id.* at 82.

In *Ascena*,[17] a Virginia district court also addressed *Stern* when it reversed the bankruptcy court's confirmation of a plan with third-party releases. With

[16] Certain types of claimants were entitled to opt out of the third-party release, and the bankruptcy court therefore found those releases to be consensual. Holders of opioid claims were not entitled to opt out.

[17] *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641 (E.D. Va. 2022).

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respect to determining whether a claim is subject to final adjudication by a bankruptcy court, the district court summarized the law as follows:

> A bankruptcy court has the responsibility to properly classify the claims before it based on the content of the claims and adjudicate them according to those classifications. "It is the bankruptcy court's responsibility to determine whether each claim before it is core or non-core." "A cause of action is constitutionally core when it 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.'" A bankruptcy estate's claim against a creditor "would necessarily be resolved in the claims allowance process when it shares common questions of fact and law with the creditor's claims and when it seeks to directly reduce or recoup the amount claimed." A claim can become core when it "become[s] integral to the restructuring of the debtor-creditor relationship." Conversely, claims by the bankruptcy estate that seek to "augment the estate" but do not "directly modify the amount claimed" do not qualify as a core claim "to be resolved in ruling on the proof of claim."

Ascena, 636 B.R. at 668 (citations omitted). As in *Purdue Pharma*, the district court found that the releases amounted to final adjudication of claims for *Stern* purposes, and that the bankruptcy court lacked the authority to do so. The district court also held that a creditor's failure to return an opt-out form did not constitute consent, under *Wellness*, to adjudication of its claim by a non-Article III court. *Id.* at 674 ("[C]ourts can discern the implication of consent to a non-Article III court based on a party's *actions*. However, they do not permit a finding of consent based on *inaction*.").

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Query whether, at least in the plan confirmation context, this is much ado about nothing. Well before *Stern*, the Ninth Circuit had no problem examining whether bankruptcy courts can confirm plans with third-party releases. *See In re Lowenschuss*, 67 F.3d 1394 (1995). At least in the Ninth Circuit, "[w]hether a bankruptcy court has the power to release claims against a non-debtor is a question of law which we review de novo." *Id.* at 1401. The Ninth Circuit analyzed the question with reference to 11 U.S.C. §§ 524 and 1129(a)(1). *See id.* at 1401-02. Whether a district court addresses the issue as an appellate court or by reviewing proposed findings of fact and conclusions of law, the result likely will be the same.

D. CREDITORS' REQUESTS FOR MONEY JUDGMENTS IN NONDISCHARGEABILITY PROCEEDINGS

A few years after *Stern*, the Ninth Circuit adopted a BAP decision significantly limiting *Stern*'s reach. *See In re Deitz*, 760 F.3d 1038 (9th Cir. 2014) (adopting the BAP's decision, *In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012)). The BAP had emphasized the limited scope of *Stern*:

> [T]he *Stern* decision addressed the constitutionality of a particular subsection of 28 U.S.C. § 157(b)(2) (i.e., "counterclaims by the estate against persons filing claims against the estate"), and only then, under the particular facts of that case. In *Stern*, Chief Justice Roberts made it clear that any constitutional bar to the exercise of judicial power by a bankruptcy court erected by that decision was a very limited one:
>
> > We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. 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.
>
> *Stern*, 131 S.Ct. at 2620. Indeed, in describing the impact of its decision, the majority predicts that the Court's opinion in *Stern* should have few "practical consequences," and that the majority did "not think that the removal of [such] counterclaims . . . from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute . . ." 131 S.Ct. at 2619-20.

Deitz, 469 B.R. at 17-18. The BAP collected numerous cases confirming the limited scope of the Supreme Court's ruling. *See id.* at 19-20. Some courts have expressly declined to extend *Stern* outside of the context of counterclaims governed by § 157(b)(2)(C). *See, e.g.*, *In re AFY, Inc.*, 461 B.R. 541, 547-48 (8th Cir. BAP 2012) ("While there has been an enormous amount of discussion regarding the implications of *Stern v. Marshall*, the Supreme Court itself has cautioned that its holding is a narrow one, affecting only this one small part of the bankruptcy judges' authority. Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional.").

Deitz involved a nondischargeability proceeding in which the debtor argued that the bankruptcy court lacked constitutional authority to liquidate the amount of the plaintiffs' claims or determine that those claims were excepted from discharge. The BAP held otherwise. *Deitz*, 469 B.R. at 24. In its order adopting the BAP's decision, the Ninth Circuit stated that nondischargeability actions are "central to federal bankruptcy proceedings" and are "necessarily resolved during

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the process of allowing or disallowing claims against the estate." *Dietz*, 760 F.3d at 1039.[18]

A similar, more recent decision is *In re Keirns*, 628 B.R. 911 (Bankr. S.D. Ohio 2021). In that case, creditors filed a complaint for a determination that their claims were nondischargeable. Their underlying claims were based on the Ohio Consumer Sales Practices Act. The debtor filed a motion to dismiss, asserting that the bankruptcy court lacked jurisdiction over the CSPA claims. The bankruptcy court denied the motion. *See Keirns*, 628 B.R. at 915.

Not all courts have reached the same conclusion. At least in the Seventh Circuit, "[a]n open question exists whether . . . an Article I bankruptcy court can enter [a] monetary judgment" when a plaintiff asks the court to enter judgment in the amount of the nondischargeable claim. *In re Moore*, 625 B.R. 896, 899 (Bankr. N.D. Ill. 2021). As recounted in *Moore*, prior to *Stern*, the Seventh Circuit encouraged bankruptcy courts to do so. After *Stern*, the Seventh Circuit was not sure bankruptcy courts should still do so. *See Lee v. Christenson*, 558 Fed.Appx. 674, 676 (7th Cir. 2014) ("[I]t is unclear whether *Stern* . . . restricts a bankruptcy court's power to resolve a creditor's state-law claim when the court decides whether that claim is nondischargeable."). A few years later, in a nondischargeability proceeding in which the bankruptcy court declined to enter a monetary judgment, the Seventh Circuit noted that the bankruptcy court could determine whether the parties would consent, or submit proposed findings of fact and conclusions of law to the district court, rather than remit the creditors to their nonbankruptcy remedies. *In re Collazo*, 817 F.3d 1047, 1053-54 (7th Cir. 2016).

[18] The Ninth Circuit also held that bankruptcy courts have authority to enter final judgments in nondischargeability proceedings in *Carpenters Pension Tr. Fund for N. Cal. v. Moxley*, 734 F.3d 864 (9th Cir. 2013).

E. VARIOUS OTHER ISSUES WITH RESPECT TO WHICH PARTIES HAVE RAISED, AND/OR COURTS HAVE SUBSTANTIVELY ADDRESSED, *STERN*

In *In re EPD Inv. Co., LLC*, 821 F.3d 1146 (9th Cir. 2016), a chapter 7 trustee filed a complaint for, among other things, avoidance of fraudulent conveyances. A defendant filed a motion to compel arbitration; among other things, he argued that the claims against him were non-core. The bankruptcy court ruled that they were core and denied the motion. While his appeal of that order was pending, the defendant filed an answer, demanded a jury trial, and asserted that the bankruptcy court lacked jurisdiction to adjudicate the trustee's claims. In the appeal, the defendant argued that the claims should be treated as non-core for purposes of the court's analysis under *In re Thorpe Insulation Co.*, 671 F.3d 1011 (9th Cir. 2012) (in core proceeding, bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision if arbitration would conflict with underlying purposes of the Bankruptcy Code). The Ninth Circuit pointed out that the fraudulent conveyance claims remained statutorily core, and *Stern* "does not affect the statutory designation of matters as core for the purpose of determining whether the bankruptcy court has discretion to deny arbitration . . .." *EPD*, 821 F.3d at 1151. Thus, in the Ninth Circuit, the fact that a claim is a *Stern* claim does not strip the bankruptcy court of its discretion to deny a motion to compel arbitration.

In *In re Somerset Reg'l Water Res., LLC*, 949 F.3d 837 (3d Cir. 2020), a chapter 11 debtor obtained postpetition financing, secured by a tax refund that the debtor's owner expected to receive. The debtor defaulted on the loan. The owner received the anticipated refund and his accountant deposited the funds with the bankruptcy court. The lender filed a motion to recover its share of the refund, but the owner opposed the motion and sought the entire refund for himself. The bankruptcy court ruled in favor of the lender. Later, in an appeal, the owner argued that the refund dispute was not a core proceeding and the bankruptcy court lacked jurisdiction to decide the dispute. The Third Circuit rejected the owner's argument, concluding that the dispute was a core proceeding under § 157(b)(2)(D) ("orders in respect to obtaining credit") and "could have arisen only in bankruptcy," and the

bankruptcy court had authority to interpret and enforce its prior orders. *Somerset*, 949 F.3d at 845.

In *In re Marino*, 577 B.R. 772 (9th Cir. BAP 2017), chapter 7 debtors filed a motion to reopen their case and hold a creditor in contempt for violating the discharge injunction. The bankruptcy court granted the motion, held a trial, and awarded actual damages; however, the bankruptcy court did not award punitive damages because the judge believed that he did not have authority to do so. The BAP reversed that portion of the bankruptcy court's judgment because, under Ninth Circuit law, a bankruptcy court can award punitive damages as long as they are "relatively mild." *Marino*, 577 B.R. at 788-89. After confirming that bankruptcy courts can award punitive damages, the BAP went out of its way to say that "the bankruptcy court might choose to issue proposed findings and a recommended judgment on punitive damages to the district court or refer the matter to the district court for criminal contempt proceedings. *See, e.g.*, *Exec. Benefits Ins. Agency v. Arkison*, —— U.S. ——, 134 S.Ct. 2165, 2173, 189 L.Ed.2d 83 (2014) (When faced with 'core' claims that cannot be adjudicated by the bankruptcy court under *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), '[t]he bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of judgment.')." *Marino*, 577 B.R. at 789. The BAP's citation to *Stern* suggests that, in the BAP's view, a request for punitive damages – or at least one seeking more than "relatively mild" punitive damages – is a *Stern* claim.

In *In re Sinclair*, 563 B.R. 554 (Bankr. E.D. Cal. 2017), a chapter 7 trustee objected to the debtor's claimed exemption in a malicious prosecution suit. The debtor argued that, under *Stern*, the bankruptcy court lacked authority to determine the validity and propriety of his exemption. The bankruptcy court thoroughly discussed and rejected that argument. *Sinclair*, 563 B.R. at 562-66.

In *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090 (9th Cir. 2016), the debtor's owner filed a lawsuit against a creditor for alleged misconduct as chair of the creditors committee. A district court held that the *Barton* doctrine required

the owner to first obtain permission from the bankruptcy court to sue the creditor in another forum (*i.e.*, the district court). The owner then filed such a motion in the bankruptcy court, which denied the motion. In the ensuing appeal, the owner argued that under *Stern* the bankruptcy court lacked jurisdiction to adjudicate the merits of his claim against the creditor. The Ninth Circuit disagreed. *Stern* "precludes bankruptcy courts from deciding common law claims that have no connection to the bankruptcy estate other than that they happen to be assets of the estate. *Barton* claims are different; they concern actions taken in a trustee's or officer's official capacity." *Yellowstone*, 841 F.3d at 1097. Since a suit against a bankruptcy court officer for actions undertaken in his or her official capacity necessarily stems from the bankruptcy itself, *Stern* does not preclude bankruptcy courts from adjudicating *Barton* claims. *Id.*

In *In re Venture Fin. Grp., Inc.*, 558 B.R. 386 (Bankr. W.D. Wash. 2016), a chapter 7 trustee filed a complaint to avoid prepetition and postpetition transfers of tax refunds to the FDIC (acting as agent for a consolidated group of companies, of which the debtor was one). The FDIC asserted that the bankruptcy court lacked authority to enter a final judgment. The bankruptcy court ruled that it had such authority because the FDIC had filed a proof of claim, and because the trustee was not asserting any counterclaims which lied outside of the FDIC's proof of claim. *Venture Fin. Grp.*, 558 B.R. at 397-98. Notably, the bankruptcy court stated that it also had the constitutional authority to determine whether the tax refunds constituted property of the debtor's estate, even though that would require consideration of various state and federal law issues. *Id.* at 398. The court noted that this was "the threshold issue of the Trustee's avoidance actions." *Id.* at 398. It is not clear from the decision whether the bankruptcy court felt that this gave it the authority to adjudicate the avoiding power claims, or just the discrete property-of-the-estate issue. Query whether a bankruptcy court can have authority to issue a final judgment as to certain *issues* raised in a proceeding, even if it lacks such authority with respect to the proceeding on the whole.

In the context of a motion to withdraw the reference, a California district court reached the opposite conclusion in *In re Temecula Valley Bancorp, Inc.*, 523

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B.R. 210 (C.D. Cal. 2014). According to the district court, whatever rights the parties had in the tax refunds did not depend on title 11 for their existence, and a declaratory action of that type could have been brought in a non-bankruptcy court. Thus, the district court determined that the proceeding was non-core.

In re Owner Mgmt. Serv., LLC Tr. Corps, 530 B.R. 711 (Bankr. C.D. Cal. 2015), involved a complaint for substantive consolidation of debtors' estates with non-debtor entities. The defendants argued that, under *Stern*, the bankruptcy court lacked "jurisdiction" to enter a final judgment. The bankruptcy court rejected the argument, stating that substantive consolidation proceedings were not affected by *Stern* and remain core proceedings that can be adjudicated by a bankruptcy judge. *Owner Management Service*, 530 B.R. at 721-22.

In *In re Bataa/Kierland LLC*, 496 B.R. 183 (D. Ariz. 2013), the bankruptcy court entered an order confirming a chapter 11 plan. In connection with the confirmation proceedings, the bankruptcy court approved an agreement between the debtor and an affiliate regarding the debtor's access to parking spaces on the affiliate's property. The nature and extent of debtor's rights were relevant to the bankruptcy court's valuation of the debtor's real property, which in turn was relevant to the bankruptcy court's determination regarding the secured amount of a creditor's claim. The creditor appealed the confirmation order and argued that, under *Stern*, the bankruptcy court lacked jurisdiction to enter the final order. The district court rejected that argument because "resolution of the extent to which Debtor had access to the parking spaces . . . was necessarily integral to the resolution of [the creditor's] claim. . . . [T]he question of the value of the property in which a secured creditor claims an interest is integral to determining the extent of the creditor's secured claim." *Bataa/Kierland*, 496 B.R. at 188, 190.

In *In re Gibler*, 638 B.R. 190 (Bankr. D. Kan. 2022), a bankruptcy court rejected an argument that it lacked authority to enter a final order authorizing a sale free and clear of liens. "Applying *Stern* to suggest that the bankruptcy court does not have authority over a matter simply because it applies state law would create an

absurd result, especially where the Bankruptcy Code explicitly permits such an application." *Gibler*, 638 B.R. at 192-93.

In *BVS Constr., Inc. v. Prosperity Bank*, 18 F.4th 169 (5th Cir. 2021), the United States Court of Appeals for the Fifth Circuit rejected an argument that the bankruptcy court lacked jurisdiction to allow a certain creditor's claim. "[W]hether the bankruptcy court's allowance of [the creditor's] claim was *proper* is an entirely different question from whether it has the *jurisdiction* to do so. The *propriety* of the bankruptcy court's determination to allow or disallow a claim against the debtor's estate is simply not a jurisdictional inquiry." *BVS Constr.*, 18 F.4th at 173.

In *In re Foxwood Hills Prop. Owners Ass'n, Inc.*, 625 BR. 862 (Bankr. D.S.C. 2021), the debtor – a property owners association for a residential development – filed a declaratory relief complaint against over 3,300 defendants who owned property in the development. Among other things, the debtor sought a determination that the defendants were members of the association with equal voting rights and were required to pay dues, fees and assessments. One of the defendants filed a motion to dismiss on the grounds that the bankruptcy court lacked "jurisdiction" to adjudicate the claims because they were state law claims not resolved in the claims allowance process. The bankruptcy court distinguished between subject matter jurisdiction under 28 U.S.C. § 1334 and a bankruptcy court's authority under 28 U.S.C. § 157 to act once that jurisdiction is established, and denied the motion. *Foxwood Hills*, 625 B.R. at 866-67.

F. TOGETHER WITH JURISDICTIONAL PREREQUISITES, COURTS FREQUENTLY CITE *STERN* TO VALIDATE THEIR CONSTITUTIONAL AUTHORITY TO ENTER A FINAL JUDGMENT

Reviewing recent published decisions citing to *Stern*, it is notable how often bankruptcy courts mention *Stern* – even if in just a sentence or two – in proceedings in which no party has challenged the bankruptcy court's authority to issue a final judgment. Matters with respect to which such recitations appear include:

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- Motions to dismiss bankruptcy cases. *See, e.g.*, *In re Carter*, 638 B.R. 379 (Bankr. N.D. Ill. 2022).

- Motions to reopen bankruptcy cases. *See, e.g.*, *In re TTC Ill. Inc.*, 617 B.R. 894 (Bankr. C.D. Ill. 2020).

- Motions to enforce settlements of claims against the estate. *See, e.g.*, *In re Murray Energy Holdings Co.*, ___ B.R. ___, 2022 WL 2387801 (Bankr. S.D. Ohio July 1, 2022).

- Motions for approval of sales and sale procedures. *See, e.g.*, *In re Dalton Crane, L.C.*, ___ B.R. ___, 2022 WL 2357096 (Bankr. S.D. Tex. June 29, 2022).

- Complaints seeking substantive consolidation of an estate with non-debtors. *See, e.g.*, *In re Daniels*, 641 B.R. 165 (Bankr. S.D. Ohio 2022).

- Objections to exemptions. *See, e.g.*, *In re Moore*, 640 B.R. 397 (Bankr. S.D. Ohio 2022); *In re Villavicencio*, 635 B.R. 486 (Bankr. S.D. Ohio 2022); *In re Egizii*, 634 B.R. 545 (Bankr. C.D. Ill. 2021); *In re Pugh*, 522 B.R. 277 (Bankr. S.D. Cal. 2014).

- Complaints to enforce the automatic stay and discharge injunction. *See, e.g.*, *In re Poole*, 639 B.R. 730 (Bankr. N.D. Ohio 2022).

- Complaints for damages caused by violations of the automatic stay or obligations to turn over estate property. *See, e.g.*, *In re Cordova*, 635 B.R. 321 (Bankr. N.D. Ill. 2021).

- Motions to avoid judicial liens under § 522(f). *See, e.g.*, *In re Propst*, 637 B.R. 489 (Bankr. N.D. Ill. 2022).

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- Motions for dismissal of involuntary petitions, or for fees and costs after dismissal of involuntary petitions. *See, e.g.*, *In re Haymond*, 633 B.R. 520 (Bankr. S.D. Tex. 2021); *In re Navient Sols., LLC*, 627 B.R. 581 (Bankr. S.D.N.Y. 2021).

- Complaints seeking determinations regarding the validity, priority and extent of alleged liens. *See, e.g.*, *In re Hall*, 629 B.R. 124 (Bankr. E.D.N.Y. 2021); *In re Gayety Candy Co., Inc.*, 625 B.R. 390 (Bankr. N.D. Ill. 2021).

- Motions to determine whether debtors are eligible to be debtors under 11 U.S.C. § 109 or are eligible for subchapter v of chapter 11. *See, e.g.*, *In re Two Wheels Props., LLC*, 625 B.R. 869 (Bankr. S.D. Tex. 2020); *In re Parking Mgmt., Inc.* (Bankr. D. Md. 2020).

- Motions for extensions of time to file chapter 11 plans. *See, e.g.*, *In re Baker*, 625 B.R. 27 (Bankr. S.D. Tex. 2020).

- Disputes regarding creditors' rights to make an 1111(b) election. *See, e.g.*, *In re Murray Metallurgical Coal Holdings, LLC*, 618 B.R. 825 (Bankr. S.D. Ohio 2020).

- Motions for authority to pay critical vendors. *See, e.g.*, *In re Murray Metallurgical Coal Holdings, LLC*, 613 B.R. 442 (Bankr. S.D. Ohio 2020).

- Complaints seeking determinations regarding dischargeability of debts. *See, e.g.*, *In re Bukovics*, 612 B.R. 174 (Bankr. N.D. Ill. 2020) (student loans); *In re Davis*, 595 B.R. 818 (Bankr. C.D. Cal. 2019) (fraud).

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III

ARE *STERN* ISSUES REALLY WORTH FIGHTING OVER?

Although *Stern* is frequently cited by parties and courts, its holding is narrow. It's also worth noting that even when *Stern* applies, litigating *Stern* is often an academic exercise that makes no long-term difference. The waste of time, effort and expense seems particularly acute in the context of motions for summary judgment and motions to dismiss complaints for failure to state a claim.

Litigating *Stern* issues in the context of a summary judgment motion may be a waste of time. As noted in *In re Avila*, 621 B.R. 53 (Bankr. N.D. Ga. 2020), the bankruptcy court can only decide issues of law based on undisputed facts. Provided that any appeal of the summary judgment goes to the district court, the district court will review it de novo. Whether the de novo review is in the context of an appeal from a summary judgment, or proposed findings of fact and conclusions of law, seems largely immaterial.

Motions to dismiss for failure to state a claim present a similar situation. In *Schultze v. Chandler*, 765 F.3d 945 (9th Cir. 2014), a creditors committee filed a legal malpractice action against the committee's attorney. The bankruptcy court dismissed the complaint for failure to state a claim, and the district court affirmed. The Ninth Circuit determined that the action was a core proceeding. With respect to the bankruptcy court's authority to enter a final judgment the Ninth Circuit wrote, "We need not decide whether the bankruptcy court's entry of final judgment was invalid under *Stern* . . . because in this case, the bankruptcy court dismissed [the] complaint for failure to state a claim, and the district court reviewed this dismissal de novo. . . . As such, Plaintiffs received all the review Article III requires." *Schultze*, 765 F.3d at 948 n.1. Again in this context, whether the de novo review is the context of an appeal, instead of proposed findings of fact and conclusions of law, seems largely immaterial.

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These observations raise two practice pointers: First, if the bankruptcy court's constitutional authority to issue a final judgment is in question, and if either party has withheld consent, parties need to take that into account when deciding whether to elect to have an appeal heard by a district court. The appellee (i.e., the party that prevailed in the bankruptcy court) should strongly consider making the election.[19] If the district court concludes that the bankruptcy court lacked authority to enter a final judgment, it can "convert" the bankruptcy court's rulings into proposed findings of fact and conclusions of law. If the district court proceeds as an appellate court and affirms, the circuit court may circumvent any *Stern* issues because the district court reviewed the bankruptcy court's decision de novo. In contrast, if neither party elects the district court and the appeal proceeds before the BAP, the BAP will need to squarely address the *Stern* issue and will have to vacate the bankruptcy court's judgment if it concludes that the bankruptcy court lacked constitutional authority.

Of course, even if the appeal is heard by a district court, there is no guaranty that the district court will "cut to the chase" and treat the bankruptcy court's "final" findings and conclusions as proposed findings and conclusions. For example, in *In re Kraz, LLC*, 626 B.R. 432 (M.D. Fla. 2020), the debtor filed a complaint objecting to a creditor's claim and asserting counterclaims against the creditor for breach of contract and tortious misconduct. After a trial, the bankruptcy court issued findings of fact and conclusions of law, and entered a final judgment. On appeal, the district court ruled that the bankruptcy court lacked constitutional authority to enter a final judgment, vacated the judgment, and remanded for further proceedings. *Kraz*, 626 B.R. at 445. There is nothing in the decision to suggest that the district court

[19] N.D. Cal. LBR 80031-1(b)(2) requires that a party challenging the constitutional authority of the bankruptcy court to issue a final order must elect to appeal to the district court. This illustrates the need to elect to have the appeal heard by an Article III judge when constitutional authority is in question.

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considered treating the bankruptcy court's determinations as proposed findings of fact and conclusions of law.

Second, if the underlying issues being litigated are going to be appealed to the circuit court anyway, it may be more efficient in the long run to make the *Stern* objection and insist that the bankruptcy court issue proposed findings of fact and conclusions of law. The district court's judgment then becomes the appealable judgment, and the parties can go directly to the circuit court without having to request direct review. *See* 28 U.S.C. § 158(d).

IV

JURISDICTION VS. AUTHORITY

In other contexts the Supreme Court has observed that "jurisdiction" is "a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). The consequences of labeling a particular statutory requirement "jurisdictional" can be drastic. *Wong v. Beebe*, 732 F.3d 1030, 1035 (9th Cir. 2013). Thus, since at least 2004,[20] the Supreme Court has tried to curb "drive-by jurisdictional rulings" by emphasizing the distinction between "true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). The Supreme Court's cautious approach was reflected in *Stern* itself: "Because '[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system . . . we are

[20] *See Kontrick v. Ryan*, 540 U.S. 443 (2004) (period established by Rule 4004 of the Federal Rules of Bankruptcy Procedure ("FRBP") for filing an objection to entry of a debtor's discharge is not jurisdictional).

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not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such." *Stern*, 564 U.S. at 479-80.

It is easy to slip and refer to a court's authority under 28 U.S.C. § 157 in terms of jurisdiction. *See, e.g.*, *Mastro v. Rigby*, 764 F.3d 1090, 1094 (9th Cir. 2014) (parties' consent "gives a bankruptcy court jurisdiction over *Stern* claims"). However, *Stern* itself observed, "Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. See §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. See § 157(c)(2) (parties may consent to entry of final judgment by bankruptcy judge in noncore case)." *Stern*, 564 U.S. at 480. The Ninth Circuit has recognized this distinction as well. *See In re Point Ctr. Fin., Inc.*, 957 F.3d 990, 998 (9th Cir. 2020); *see also Gray v. CPF Assocs. LLC*, 614 B.R. 96, 103 (D. Ariz. 2020) ("A bankruptcy court's jurisdiction and its power to finally adjudicate certain claims are distinct but related concepts."). Thus, although Article III informs the analysis, the question is whether a bankruptcy court has "authority" to enter a final judgment, not whether it has "jurisdiction" to do so. As stated in *In re Dambowsky*, 526 B.R. 590 (Bankr. M.D.N.C. 2015):

> Although they are related concepts . . . the scope of the bankruptcy courts' subject matter jurisdiction, their statutory authority to hear and/or determine any particular matter, and their constitutional authority to do so, each are delineated by different statutory, constitutional, and/or judicial authorities. Section 1334 of title 28 sets forth the extent of bankruptcy subject matter jurisdiction. The bankruptcy courts' statutory authority to hear and/or determine matters is set forth in 28 U.S.C. § 157. Section 157 is not jurisdictional, but simply allocates the statutory authority to enter final judgments between the bankruptcy court and the district court. [Citation omitted.] The bankruptcy courts' constitutional powers, in turn, are governed by the scope

> of power conferred upon Congress under the Bankruptcy Clause of the United States Constitution, Article I, Section 8, Clause 4 ("The Congress shall have Power To ... establish ... uniform Laws on the subject of Bankruptcies throughout the United States ...."), and the scope of authority allocated by and between tribunals created under Articles I and III of the United States Constitution, each as applied and interpreted by the opinions of the United States Supreme Court. Therefore, in order for a bankruptcy court to hear and determine any matter, it must have subject matter jurisdiction under 28 U.S.C. § 1334, statutory authority under 28 U.S.C. § 157, and constitutional authority.

Dambowsky, 526 B.R. at 595.

V

DO COURTS HAVE AN INDEPENDENT DUTY TO DETERMINE WHETHER *STERN* APPLIES?

One bankruptcy court recently stated that "This Court has an independent duty to evaluate whether it has the constitutional authority to sign a final order." *In re Ozcelebi*, 639 B.R. 365, 379 (Bankr. S.D. Tex. 2022) (citing *Stern*); *see also In re AWTR Liquidation, Inc.*, 547 B.R. 831, 833-34 (Bankr. C.D. Cal. 2016). According to a 2013 decision, the Ninth Circuit BAP itself has an independent duty to consider whether the bankruptcy court had constitutional authority to issue a final judgment. *In re Pringle*, 495 B.R. 447, 455 (9th Cir. BAP 2013); *but see In re Tracht Gut, LLC*, 503 B.R. 804, 809 n.5 (9th Cir. BAP 2014) ("[B]ecause no party questioned the constitutional authority of the bankruptcy court to enter final judgment in a proceeding to recover a fraudulent conveyance, "we also express no opinion

concerning that topic."). But is that really the case? Courts have a duty to determine their *jurisdiction* over a proceeding. But *Stern* itself confirms that the question of whether a bankruptcy court can enter a final judgment is one of authority, not jurisdiction. "[N]othing in *Stern* changes anything regarding whether a bankruptcy court has subject matter jurisdiction to hear a proceeding – only whether that court has constitutional power to enter a final order in it." *In re Tyler*, 493 B.R. 905, 920 (Bankr. N.D. Ga. 2013).

Does a bankruptcy court or appellate court have an independent duty to evaluate whether a party has a right to a jury trial?[21] Do courts have an independent duty to evaluate whether a party's constitutional rights have been violated in any way, even if the party has not complained that such a violation has occurred? If nothing else, these courts' statements reflect how difficult it is to distinguish between jurisdiction and constitutional authority in the bankruptcy context.

VI

IMPLIED CONSENT AND FORFEITURE

Wellness held that consent to adjudication by a non-Article III judge may be implied by a litigant's actions as long as it was "knowingly and voluntarily" given. But what does this mean? According to the Supreme Court, "the key inquiry is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case' before the non-Article III adjudicator." *Wellness*, 575 U.S. at 685 (quoting *Roell v. Withrow*, 538 U.S. 580, 590 (2003)).

[21] *See* Fed. R. Bankr. P. 9015; Fed. R. Civ. P. 38.

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Roell is a non-bankruptcy case in which a magistrate judge entered judgment after a jury verdict. The order referring the matter to the magistrate expressly said that the referral order would be vacated if any of the three defendants did not consent, and required the defendants to say in their answers whether they consented. Two of the defendants filed answers but said nothing about the referral. After trial, judgment was entered in favor of the defendants. When the plaintiff appealed, the circuit court sua sponte remanded the matter to the district court to determine whether the parties consented to proceed before the magistrate judge. The two defendants filed a formal letter stating that they consented to all of the proceedings before the magistrate, including final disposition of the matter. Because express consents were not given before the judgment was entered, and because under the Fifth Circuit's precedent consent could not be implied by the parties' conduct, the district court vacated the judgment and the Fifth Circuit affirmed. The issue before the Supreme Court was whether consent could be inferred from a party's conduct during litigation, and a majority of the Court concluded that it may be. *Roell*, 538 U.S. at 582. The Court stated, "[T]he better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge. Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority. Judicial efficiency is served; the Article III right is substantially honored." *Id.* at 590-91.

Based on published decisions, "implied consent" in the bankruptcy context seems to be governed by a I-know-it-when-I-see-it standard, better defined by reference to examples instead of definite formulae. Published decisions reflect that courts have relied on a number of factors in determining whether a party impliedly consented to entry of a final judgment by the bankruptcy court, including:

- the sophistication of the party and its counsel;

- generally, whether the party expressed its lack of consent during the litigation before the bankruptcy court;
- whether the party agreed to the terms of the judgment at issue;
- whether the party admitted that the bankruptcy court had jurisdiction, or that the proceeding was statutorily core, without expressing an objection to the bankruptcy court's constitutional authority to enter a final judgment;
- whether the party engaged in extensive litigation in the bankruptcy court before expressing any lack of consent;
- whether the party requested dismissal, or judgment in its favor, despite having objected to the bankruptcy court's constitutional authority to enter a final judgment;
- whether, in an opposition, the party asked the bankruptcy court to enter an order denying a dispositive motion (as opposed to making proposed findings of fact and conclusions of law so the district court could enter such an order);
- the length of time that the litigation was pending before the party expressed its lack of consent; and
- whether the party failed to raise the issue on appeal.

A. CASES EXAMINING "IMPLIED CONSENT" IN VARIOUS CONTEXTS

In *Richer v. Morehead*, 798 F.3d 487 (7th Cir. 2015), a creditor had invested in real estate owned by a trust that was controlled by one of the individual debtors. The creditor filed a proof of claim. The debtors filed a complaint, asserting that the creditor was entitled to receive a share of the net sales proceeds of the real estate

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only if and when it was sold (which had not occurred). The bankruptcy court ruled against the debtors and allowed the creditor's claim. The Seventh Circuit affirmed. In doing so, the Seventh Circuit noted that the bankruptcy judge "was acting within his jurisdiction in interpreting" the relevant agreement.

> The parties' consent was implicit, but implied consent is good enough . . . at least when as in this case the parties are sophisticated businessmen represented by counsel who can be presumed to be aware of their clients' legal rights. Alternatively (and equivalently) the parties forfeited any objection to the bankruptcy court's adjudication of the contract claim by failing to object at any point during the litigation to the bankruptcy judge's adjudicating the claim

Richer, 798 F.3d at 490.

In *In re Henshaw*, 569 B.R. 800 (Bankr. D. Haw. 2017), a trustee obtained a judgment avoiding a fraudulent conveyance of real property. The trustee then filed a complaint seeking authority to sell the estate's interest in the property together with co-owners' interests. The defendants filed a counterclaim seeking reformation of a deed to reflect what they claimed to be the parties' intention when the deed was prepared. The counterclaim alleged that the bankruptcy court had jurisdiction, but did not say whether they consented to entry of a final judgment by the bankruptcy court. The bankruptcy court stated that the defendants impliedly consented because they had litigated the counterclaim for over four years and had never expressly objected to entry of a final judgment by the bankruptcy court. *Henshaw*, 569 B.R. at 803.

Similarly, in *In re Wash. Coast I, LLC*, 485 B.R. 393 (9th Cir. BAP 2012), a lienholder filed a complaint against another lienholder seeking a determination of their respective rights in proceeds from the debtor's sale of property. The complaint alleged that the proceeding was a core proceeding, and the answer

admitted the allegation. One month after *Stern* was issued, the bankruptcy court issued its ruling. After some additional litigation, it entered a final judgment. On appeal, the appellant argued that the bankruptcy court lacked constitutional authority to enter the judgment. The BAP concluded otherwise. *Wash. Coast*, 485 B.R. at 406-07. The BAP also concluded that the appellant had consented because, among other things, it never challenged the bankruptcy court's authority to enter a final judgment and admitted in the answer that the dispute was a core proceeding. *Id.* at 408. "'[A]n allegation that the proceeding is core serves as an express consent for the bankruptcy court to treat that proceeding as core and enter a final order in that proceeding.'" *Id.* at 408 (quoting *Mercury Cos., Inc. v. FNF Security Acquisition, Inc.*, 460 B.R. 778, 781 (D. Colo. 2011)). Thus, parties who allege or admit that a proceeding is statutorily core, but remain silent as to whether they consent to entry of a final judgment by the bankruptcy court, may be deemed to impliedly consent.

In *In re Gutierrez*, 633 B.R. 768 (Bankr. S.D. Tex. 2021), a creditor objected to confirmation of a chapter 13 plan and filed a motion to strike the plan, for removal of the chapter 13 trustee, and for sanctions against the debtors' counsel. Although the question of express versus implied consent does not appear to have been raised by the parties, the bankruptcy court wrote that "this Court has constitutional authority to enter a final order because [the parties] have consented, impliedly if not explicitly, to adjudication of this dispute by this Court. The parties have engaged in extensive motion practice before this Court and neither party has ever objected to this Court's constitutional authority to enter a final order or judgment. These circumstances unquestionably constitute implied consent. Thus, this Court wields the constitutional authority to enter a final order here." *Gutierrez*, 633 B.R. at 778-79. Thus, *Gutierrez* suggests that parties may be deemed to consent if they engage in significant litigation without objecting to the court's authority.

VSP Labs, Inc. v. Hillair Capital Invs. LP, 619 B.R. 883 (N.D. Tex. 2020), is similar. After the debtor and certain affiliates filed for bankruptcy in Texas, the bankruptcy court stayed certain litigation pending in California. A non-debtor party (VSP) filed a motion for relief from the stay, and two other parties opposed the

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motion. The parties all conferred and were able to agree to most terms of a proposed order, including language prohibiting VSP from pursuing claims against a non-debtor party (Hillair) in the California litigation. A few years later, VSP violated the order by seeking to amend the California complaint to assert claims against Hillair. The bankruptcy court entered an order prohibiting VSP from asserting the claims set forth in the proposed amended complaint (the "Enforcement Order"). Shortly thereafter, the bankruptcy court entered another order sanctioning VSP when it failed to fully comply. VSP then filed a motion for reconsideration of the Enforcement Order, which the bankruptcy court denied. VSP then filed a motion for relief from stay, arguing that the bankruptcy court lacked jurisdiction to enter the earlier, agreed-upon order; the bankruptcy court denied that motion. On appeal, the district court determined that to the extent the original agreed-upon order precluded VSP from asserting claims against Hillair, the bankruptcy court was exercising non-core jurisdiction over those claims. However, the district court also determined that the parties expressly and impliedly consented to entry of a final order by the bankruptcy court.[22] *VSP Labs*, 619 B.R. at 899-900. Accordingly, the bankruptcy court had constitutional authority to enter the agreed-upon order.

Plaintiffs may be at particular risk of being deemed to have impliedly consented to the bankruptcy court's final adjudication of claims. In *In re Pritchard*, 633 B.R. 314 (Bankr. E.D. Tenn. 2021), creditors filed a complaint seeking, among other things, a declaration that their claim was nondischargeable and a judgment unwinding the debtor's transfer of certain real property. The debtor filed a motion to dismiss. In their opposition, the creditors stated that they did not consent to entry of a final judgment. The bankruptcy court stated that this was contrary to the creditors' course of conduct. Among other things: the creditors were seeking

[22] The district court pointed out that VSP (1) requested that the stay be lifted, (2) participated in that proceeding, (3) did not object to or oppose entry of the original order, (4) continued to seek relief from the bankruptcy court by filing a certain motion, (5) was represented by experienced and sophisticated bankruptcy counsel, and (6) negotiated and jointly proposed the language at issue.

a determination that their claim was nondischargeable; their complaint alleged that the bankruptcy court had jurisdiction and that it was a core proceeding; they requested entry of a money judgment against the debtors even though they had obtained relief from stay to seek a money judgment against the debtors in the state court; and they requested that the bankruptcy court deny the dispositive motion to dismiss. Their "course of conduct indicates that they willingly have submitted themselves to fundamental bankruptcy adjudications that can proceed without an express statement of consent." Thus, *Pritchard* suggests that a plaintiff who fails to comply with FRBP 7008 and advances the litigation may be deemed to consent.

Defendants may be at risk of being deemed to consent if they ask the bankruptcy court to enter a substantive, dispositive order. For example, in *In re Carter*, 506 B.R. 83 (Bankr. D. Ariz. 2014), a trustee sought to avoid and recover preferential transfers. The defendant filed an answer, alleging that the bankruptcy court lacked authority to enter a final judgment. The trustee filed a motion for summary judgment, and the defendant filed a cross-motion for summary judgment based on its alleged § 547(c) defenses. The defendant stated that it did not consent to the bankruptcy court's entry of a final judgment *against* the defendant, though at the same time it asked the bankruptcy court to enter a final judgment *for* the defendant against the trustee. The bankruptcy court concluded that the defendant was entitled to summary judgment. Addressing the consent issue, the court was not impressed by the defendant's attempt to have its cake and eat it too:

> [The defendant] has both objected to the constitutional authority of this Court to enter a final judgment under *Stern*, and has, by its motion for summary judgment, specifically asked the Court to enter final judgment in favor of [the defendant]. [The defendant] cannot have it both ways, and it is difficult to understand how both the objection to final judgment and the request for entry of final judgment could have been filed in compliance with Rule 9011(b).

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> . . . If a *Stern* objection were not deemed waived by the party making it seeking summary judgment, then the party could seek or permit a substantive ruling by the Bankruptcy Court, and then waive that objection if the ruling is favorable but insist on it if unfavorable, and get a second bite at the apple. To avoid the possibility of that kind of litigation conduct by virtually any defendant in a bankruptcy adversary proceeding or contested matter, this Court must conclude that *Bellingham* necessarily implies that a *Stern* objection is waived or forfeited whenever the party making it requests a substantive ruling from the Bankruptcy Court.

Carter, 506 B.R. at 88. Thus, *Carter* suggests that even if a party expressly objects, it may be deemed to impliedly consent if it then takes actions inconsistent with the objection.

Perhaps in contrast, in *In re VitaHEAT Med., LLC*, 629 B.R. 250 (Bankr. N.D. Ill. 2021), a chapter 7 trustee filed an amended complaint against the debtor's directors for breach of fiduciary duty, breach of duty of loyalty, and avoidance of fraudulent conveyances. In the complaint, the trustee consented to entry of a final judgment by the bankruptcy court. The defendants filed a motion to dismiss, but did not say whether they consented to the bankruptcy court's entry of a final judgment. The bankruptcy court stated that whether the breach of fiduciary duty claim was core or non-core was uncertain, but the "distinction matters only for entry of final judgment." *VitaHEAT*, 629 B.R. at 254. The bankruptcy court granted the motion, dismissing the amended complaint with leave to amend again. In doing so, the court noted that the core/non-core question would eventually need to be answered. *Id.* at 254 n.2. But by remaining silent while seeking dismissal of the complaint multiple times, did the defendants impliedly consent?

In re Pringle, 495 B.R. 447 (9th Cir. BAP 2013), contains a lengthy discussion regarding implied consent. Prior to the Supreme Court's decision in *Stern*, a trustee

filed a complaint to avoid a fraudulent conveyance against a defendant who had not filed a proof of claim. The Ninth Circuit's underlying decision in the *Stern* case was issued one week before the defendant filed her answer. After a trial, the bankruptcy court entered judgment in favor of the trustee. *Stern* was issued a few months later. In the appeal, the appellant did not argue that the bankruptcy court lacked authority to issue a final judgment until the BAP raised the issue sua sponte. According to the BAP, the appellant "and her counsel were clueless. It was only after this Panel raised the issue that she even formulated an objection to the authority of the bankruptcy judge to 'determine' the matter and enter a final order." *Pringle*, 495 B.R. at 459. The BAP stated that "passive and unwitting participation is not sufficient for a finding of voluntary consent." *Id.* at 461.

> [O]nce a party is alerted, or is held to be alerted, to the potential risks of failing to raise the issue of the tribunal's authority, there is a rebuttable presumption that such failure to act was intentional, and that further purposeful proceeding in the forum indicates consent. If applicable, this presumption then shifts the burden to the objecting party to show a lack of consent, a burden that requires more than a simple statement after litigation has been completed that consent had never been fully given.

Id.

Another "implied consent" case is *True Traditions, LC v. Wu*, 552 B.R. 826 (N.D. Cal. 2015). The trustee filed a complaint to, among other things, avoid a fraudulent conveyance. A defendant filed a motion to dismiss for lack of jurisdiction, which was denied because the defendant really was just arguing that the bankruptcy court lacked constitutional authority to enter a final judgment. The parties then filed cross-motions for summary judgment, with the defendant affirmatively seeking a judgment in its favor. The bankruptcy court denied the defendant's cross-motion because there were triable issues of fact. In doing so, the bankruptcy court concluded that the defendant impliedly consented to entry

of a final judgment by (1) not objecting to the trustee's motion on the grounds that the bankruptcy court lacked such authority, and (2) filing its own cross-motion seeking a final judgment in its favor. After a trial, the bankruptcy court entered a judgment in favor of the trustee. On appeal, the district court agreed that the defendant had impliedly consented. *True Traditions*, 552 B.R. at 837-38. This case demonstrates that if a party does not consent to entry of a final judgment by the bankruptcy court, it needs to be consistent throughout the proceeding. The court may not tolerate "sandbagging" by a litigant, and the objecting party may be found to have impliedly consented.

At least in published decisions discussing "implied consent," courts tend to determine that the objecting party impliedly consented to the bankruptcy court's authority to enter a final judgment. However, as discussed earlier in these materials, in the context of third-party releases in a confirmed plan, at least one court has held that the failure to return an opt-out form does not constitute consent. *See, e.g.*, *Ascena*, 636 B.R. at 674 ("[C]ourts can discern the implication of consent to a non-Article III court based on a party's *actions*. However, they do not permit a finding of consent based on *inaction*.").

B. ARE "IMPLIED CONSENT" AND "JUDICIAL ESTOPPEL" RELATED CONCEPTS?

Although courts do not approach "implied consent" in terms of "judicial estoppel," the two concepts seem similar. Where a party assumes a certain position in a legal proceeding, he or she may not thereafter, simply because his interests have changed, assume a contrary position. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citing *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). This doctrine of judicial estoppel is well-accepted in the Ninth Circuit. *See, e.g.*, *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133-34 (9th Cir. 2012). Its purpose is to protect the integrity of the judicial process. *Yanez v. United States*, 989 F.2d 323, 326 (9th Cir. 1993). "Because the doctrine is designed to protect the integrity of the judicial system, judicial estoppel is frequently described as equitable

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or discretionary in nature." 11 Moore's Federal Practice § 134.31 (3rd ed. 2013) (citing, *inter alia*, *Risetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 601 (9th Cir. 1996), and *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

The following three factors are "typically" considered in determining whether to apply judicial estoppel: the party's later position must be "clearly inconsistent" with its earlier position; whether the party has succeeded in persuading a court to accept its earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Maine*, 532 U.S. at 750-51 (quotations and citations omitted). The Supreme Court noted, however, that the circumstances where judicial estoppel may be applied "are probably not reducible to any general formulation or principle," and that in setting forth the factors, "we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel" such that additional considerations may be used to inform a court's decision in specific contexts. *Id.* (quotations and citations omitted). A party need not have been successful if, by changing his position, he is playing "fast and loose" with the court and "the court finds that its integrity was undermined by the party engaging in 'fast and loose' behavior." *Moore's* at § 134.44[4] (citing *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 324 (3d Cir. 2003) (application of judicial estoppel does not turn on whether party actually benefitted from its attempt to "play fast and loose" with court; presence of any such benefit is merely one factor in determining whether party acted in bad faith); *Ryan Operations G.P. v. Sanitam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996) (benefit is not necessary precondition)).

While judicial estoppel generally applies to a party's factual assertions, the Ninth Circuit has held that the doctrine also bars inconsistent legal assertions. *Id.* at § 134.30 (citing *Baughman*, *supra*, and *Yniguez v. Arizona*, 939 F.2d 727, 738 (9th Cir. 1991)). It also may apply to inconsistent positions taken by a party within the

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same litigation. *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 716 (9th Cir. 1990).

Arguably, some "implied consent" cases are really "judicial estoppel" cases. In some situations, it may be a stretch to say that a party has "knowingly and voluntarily" consented (especially where the party has expressly withheld consent), yet it is appropriate to say that the party is judicially estopped from objecting to entry of a final judgment by the bankruptcy court. At the very least, it appears that when the facts would support judicial estoppel, parties are found to have impliedly consented to the bankruptcy court's authority to adjudicate the matter.

C. CAN A PARTY CHANGE ITS POSITION?

In *Stern*, when discussing the creditor's defamation claim (but not the debtor's counterclaim for tortious interference), the Supreme Court concluded that the creditor consented to the bankruptcy court's resolution of his claim and forfeited any argument to the contrary. *Stern*, 564 U.S. at 481. The Court noted that "the consequences of 'a litigant . . . "sandbagging" the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor' . . . can be particularly severe." *Id.* at 482 (quoting *Puckett v. United States*, 556 U.S. 129, 134 (2009)). Thus, between *Stern* and other cases, it seems clear that courts will not look favorably on litigants who initially consent to the bankruptcy court's authority (or don't say whether they consent) and then object only when it becomes convenient to do so.

But what if it's the other way around? In adversary proceedings, the federal rules require each party to say at the outset whether it consents to final adjudication by the bankruptcy court. If a party files a complaint or answer and says that it does not consent, can it change its position during the proceeding to enable the bankruptcy court to enter a final judgment (presumably in its favor)? With respect to jury trial demands, a properly-made demand "may be withdrawn

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only if the parties consent." Fed. R. Civ. P. 38(d) (made applicable by Fed. R. Bankr. P. 9015(a)). In contrast, FRBP 7008 does not expressly say that a party may "withdraw" its lack of consent to entry of final orders by the bankruptcy court. Should a party be allowed to change its position only if other parties agree?

D. WAIVER AND FORFEITURE

Related to "implied consent," the failure to raise a *Stern* objection may result in forfeiture of the issue on appeal. *See In re Dimas*, 14 F.4th 634, 640 n.3 (7th Cir. 2021) ("*Stern* arguments, however, can be forfeited . . . and neither party raised *Stern* before the bankruptcy court, the district court, or this court. So we do not address it here."); *In re Catholic Bishop of N. Alaska*, 525 B.R. 723, 730 (D. Alaska 2015) (because appellants did not object to bankruptcy court's authority prior to appeal, they waived their right to do so); *see also In re Tracht Gut, LLC*, 503 B.R. 804, 809 n.5 (9th Cir. BAP 2014) ("[B]ecause no party questioned the constitutional authority of the bankruptcy court to enter final judgment in a proceeding to recover a fraudulent transfer, "we also express no opinion concerning that topic."); *but see In re Pringle*, 495 B.R. 447, 455 (9th Cir. BAP 2013) (appellate court has independent duty to determine that bankruptcy court had constitutional authority to enter final order).

In 2022, parties (at least those represented by experienced bankruptcy counsel) can no longer say that they are not aware of their ability to challenge a bankruptcy court's authority to adjudicate *Stern* claims. That was not necessarily the case right after *Stern* was issued. Still, at least in the Ninth Circuit, unawareness of the ability to object was not an excuse. In *In re Wash. Coast I, LLC*, 485 B.R. 393 (9th Cir. BAP 2012), the bankruptcy court issued its ruling one month after *Stern* was issued. After some additional litigation, it entered a final judgment. On appeal, the appellant argued that the bankruptcy court lacked constitutional authority to enter the judgment. It argued that its consent was not knowing and voluntary because, prior to *Stern*, it would not have had a legal basis to contest the

bankruptcy court's authority. The BAP rejected the argument, in part because *Stern* – which affirmed the Ninth Circuit's decision in *In re Marshall*, 600 F.3d 1037 (9th Cir. 2010) – did not result in a wholesale change of Ninth Circuit law.

VII

PERSONAL INJURY TORT CLAIMS

Although not really *Stern*-related, issues relating to mass torts (whether arising in the context of class claims or discharges of tort claims in chapter 11 plans) implicate a bankruptcy court's authority to enter a final judgment. Proceedings relating to the allowance, disallowance or estimation of "personal injury tort" and wrongful death claims are non-core proceedings. *See* 28 U.S.C. § 157(b)(2)(B), (O). Further, § 157(b)(5) provides, "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending." 28 U.S.C. § 157(b)(5). But even personal injury tort claims can be determined by a bankruptcy court if the parties expressly or impliedly consent. *See In re Smith*, 389 B.R. 902, 913 (Bankr. D. Nev. 2008) (parties "may waive the rights attendant to holding a claim classifiable as a personal injury tort claim").

Assuming that consent is not given, the threshold question is whether a claim constitutes a "personal injury tort" or "wrongful death" claim. Defining "personal injury tort claims" has proven difficult. In *Gawker Media*, the bankruptcy court summarized the different approaches to determining whether a claim is a "personal injury tort" claim:

> Lower courts in the Second Circuit and elsewhere have adopted different approaches to determine whether a particular claim constitutes a "personal injury tort" claim. The "narrow view" requires a trauma or bodily injury or

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> psychiatric impairment beyond mere shame or humiliation to meet the definition of "personal injury tort." The broad view interprets "personal injury tort" to "embrace[ ] a broad category of private or civil wrongs or injuries for which a court provides a remedy in the form of an action for damages, and include[ ] damage to an individual's person and any invasion of personal rights, such as libel, slander and mental suffering." Finally, under the intermediate, "hybrid" approach, a bankruptcy court may adjudicate claims bearing the "earmarks of a financial, business or property tort claim, or a contract claim" even where those claims might appear to be "personal injury torts" under the broad view.

In re Gawker Media, LLC, 571 B.R. 612, 620 (Bankr. S.D.N.Y. 2017) (citations omitted). The bankruptcy court adopted the narrow view. *Id.* at 620-21.

In *In re Sklar*, 626 B.R. 750 (Bankr. S.D.N.Y. 2021), the court stated without need for discussion that § 157(b)(5) applied to claims for sexual harassment, assault and battery, and gender-motivated violence. Because at least one of the parties did not consent to adjudication in the bankruptcy court, the claims would need to be adjudicated by the district court.

VIII

FEDERAL AND LOCAL RULES

FRBP 7008 and 7012(b) require that, in adversary pleadings, the initial pleadings state whether the pleader consents to the entry of final relief by the

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Bankruptcy Court.[23] Some courts have adopted local rules to assist with the determination of the consent issue. For example, Northern District of California LBR 7012-2 provides for the bankruptcy court to determine, on the court's own motion or a party's timely motion, whether the bankruptcy court has the authority to enter final orders. Northern District of Texas LBR 5011-1(3) provides that if there is a request for withdrawal of the reference, the bankruptcy court shall hold a status conference at which the court shall consider and determine "whether the proceeding is core or non-core, or both, and with regard to the non-core and mixed issues, whether the parties consent to the entry of a final order by the bankruptcy judge." District of Delaware LBR 7008-1 and 7012-1 provide that a failure to state whether the pleader in an adversary consents to entry of final relief by the bankruptcy court constitutes a waiver of any right to contest the authority of the bankruptcy court to enter final orders or judgments. The District of Nevada local rules provide that, with regard to both adversary cases and contested matters, a failure to state whether the pleader consents to the entry of final relief constitutes consent to the matter being heard and final orders and judgments being entered by the Bankruptcy Court. Bankr. D. Nev. LBR 7008, 7012, 7014.2. Other courts have similar local rules that apply when filing motions or objections, as well for any action that is removed from a state court to bankruptcy court. *See, e.g.*, Bankr. C.D. Cal. LBR 9013.1; Bankr. D. Ariz. LBR 9027-1.

Local rules in select jurisdictions requiring parties to state that they do or do not consent to entry of final orders and judgments by the bankruptcy court, and/or the impact of not raising an objection, are identified below.

[23] FRBP 7008 and 7012(b) are *not* included in the list of Part VII rules that apply in contested matters. *See* Fed. R. Bankr. P. 9014(c).

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A. DISTRICT OF DELAWARE

Rule 7008-1	Statement in Pleadings Regarding Consent to Entry of Order or Judgment in Core Proceeding
Rule 7012-1	Statement in Answer, Motion or Response Thereto Regarding Consent to Entry of Order or Judgment in Core Proceeding
Rule 9013-1(f), (h)	Form of Motion; Objections
Rule 9027-1	Statement in Notice of Removal Regarding Consent to Entry of Order or Judgment in Core Proceeding

B. SOUTHERN DISTRICT OF NEW YORK

None. Former local rules 7008-1, 7012-1, 9027-1 and 9027-2 were repealed in 2016 in light of then-new amendments to FRBP 7008, 7012 and 9027.

C. SOUTHERN DISTRICT OF TEXAS

Rule 7008-1	Statement Regarding Consent to Entry of Orders or Judgment in Core Proceeding
Rule 7012-1	Statement in Responsive Pleading Regarding Consent to Entry of Orders or Judgment in Core Proceeding
Rule 9027-2	Statement in Notice of Removal Regarding Consent to Entry of Orders or Judgment in Core Proceeding
Rule 9027-3	Statement Regarding Consent to Entry of Orders or Judgment in Core Proceeding

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D. DISTRICT OF ALASKA

Rule 7012-1	Consent to Entry of Final Order or Judgment
Rule 9027-1	Notice of Removal

E. DISTRICT OF ARIZONA

Rule 7008-1	Pleading Consent to Entry of Final Order or Judgment
Rule 7012-1	Objection to Bankruptcy Court Authority; Deemed Consent
Rule 9014-2	Consent To Bankruptcy Court Authority

F. CENTRAL DISTRICT OF CALIFORNIA

Rule 9013-1(c)(5)	Form and Content of Motion and Notice / Entering a Final Order
Rule 9013-1(f)(3)	Opposition and Responses to Motions / Entering a Final Order

G. EASTERN DISTRICT OF CALIFORNIA

None.

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H. NORTHERN DISTRICT OF CALIFORNIA

Rule 7008-1	Consent to Entry of Final Order or Judgment
Rule 7012-1	Consent to Entry of Final Order or Judgment by Bankruptcy Court in Responsive Pleading
Rule 9027-1(b)	Removal

I. SOUTHERN DISTRICT OF CALIFORNIA

Rule 7008-1	Consent to Entry of Order
Rule 7008-3	Demand for Judgment

J. DISTRICT OF HAWAII

Rule 9013-1(a)(3)	Authority to Enter Final Order

K. DISTRICT OF IDAHO

None.

L. DISTRICT OF MONTANA

None.

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M. DISTRICT OF NEVADA

Rule 7008-1	Pleading Consent to Entry of Order or Judgment
Rule 9014.2	Contested Matters, Consent to Entry of Final Order or Judgment
Rule 9027	Removal, Statement Regarding Consent to Entry of Orders or Judgment

N. DISTRICT OF OREGON

Rule 7008-1	Consent to Entry of Final Orders or Judgment
Rule 7012-1	Consent to Entry of Final Orders or Judgment – Responsive Pleading

O. EASTERN DISTRICT OF WASHINGTON

Rule 7008-1	Statement Regarding Consent in Adversary Proceedings (Abrogated)
Rule 9014-1	Consent to Bankruptcy Court Adjudication in Contested Matters[24]

[24] Notwithstanding its title, this rule also applies in adversary proceedings because it requires any party contesting the bankruptcy court's authority to enter a final judgment to file and serve a legal brief and evidence at least 14 days before the initial status conference in an adversary proceeding.

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P. WESTERN DISTRICT OF WASHINGTON

Rule 7012-1 Notice Regarding Final Adjudication and Consent to Entry of Final Orders or Judgments by Bankruptcy Judge in an Adversary Proceeding

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