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**What Are the Article III Limits to Bankruptcy Court Jurisdiction,
and Can Parties Consent to Expanded Jurisdiction: Wellness
International Network v. Sharif (13-935)**

Marshall E. Tracht

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What Are the Article III Limits to Bankruptcy Court Jurisdiction, and Can Parties Consent to Expanded Jurisdiction?

CASE AT A GLANCE

In two recent cases, the Supreme Court addressed the limits of the jurisdiction of a bankruptcy court, but left several important issues unresolved. This case requires the Court to clarify those limits and, perhaps more importantly, presents an opportunity for the Court to address whether a bankruptcy court may decide matters that would be outside its jurisdiction if the parties have given their consent. The outcome may have implications for the workload of federal district courts and for the use of magistrates in all manner of litigation, since magistrates, like bankruptcy judges, are not Article III appointees.

Wellness International Network v. Sharif Docket No. 13-935

Argument Date: January 14, 2015
From: The Seventh Circuit

by Marshall Tracht
New York Law School, New York, NY

INTRODUCTION

Bankruptcy judges are not appointed under Article III of the Constitution, as district and courts of appeals judges are, and they do not have the protection of life tenure granted to those judges. In 1984, Congress adopted a bankruptcy jurisdiction act that divided matters in a bankruptcy case into “core” and “non-core” proceedings. Core proceedings are generally those inherently part of the bankruptcy process, and if a matter is core, the bankruptcy judge may handle the matter and enter final judgment, subject to appellate review by the district court. If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge may only propose findings of fact and conclusions of law. The district court must review those findings *de novo* and enter final judgment.

In a 2011 decision, *Stern v. Marshall*, 131 S. Ct. 2594, the Court held that a bankruptcy judge cannot enter a final judgment even in a “core” matter if the underlying cause of action does not “stem from the bankruptcy itself.” That is, even if Congress designated a matter as “core,” if it is simply a suit between the debtor and another party that does not arise from the bankruptcy and would normally be heard by an Article III judge, it cannot be decided by the bankruptcy judge. *Stern* did not decide how such claims should be dealt with, however, given that they cannot constitutionally be handled as the statute provides. In 2014, the Court decided *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, holding that a *Stern* claim can be handled as if it were a non-core claim, with the bankruptcy judge entering proposed findings of fact and conclusions of law.

Lower courts have had an extremely difficult time determining whether various claims “stem from the bankruptcy itself,” giving rise to a great deal of gamesmanship and litigation over jurisdictional issues. *Stern* and *Arkison* also declined to address whether *Stern* claims can be decided by bankruptcy judges if the litigants consent and, if so, whether that consent must be explicit or if failure to object waives the argument that the court lacks jurisdiction. *Wellness International Network v. Sharif* presents these issues.

ISSUES

Does the presence of a state property law issue in a creditor’s action to determine whether property belongs to the bankruptcy estate mean that such action does not “stem from the bankruptcy itself,” depriving the bankruptcy court of constitutional authority to enter a final judgment on the issue?

Does Article III permit the bankruptcy courts to adjudicate claims against a debtor where the debtor has “consented” by voluntarily filing for bankruptcy relief or by not timely raising an objection to the court’s jurisdiction?

FACTS

Wellness International Network, Ltd., obtained a judgment for more than \$655,000 against Richard Sharif for his failure to comply with discovery requests in a suit Sharif had filed against Wellness. Sharif then filed a Chapter 7 bankruptcy case, seeking to discharge the judgment. Wellness filed an adversary proceeding with five counts. The first four argued that Sharif’s debt to Wellness was

nondischargeable, and the fifth sought a declaratory judgment that a trust of which Sharif was trustee was actually Sharif's alter ego. The fifth count further sought judgment that the trust's assets were therefore part of the bankruptcy estate. Sharif continued his dilatory tactics, and the bankruptcy judge entered a default judgment in Wellness's favor. Sharif appealed to the district court.

The Supreme Court then decided *Stern*, setting limits on bankruptcy court jurisdiction, but Sharif did not raise any objection to the bankruptcy court's jurisdiction in his initial appellate brief. However, both Sharif and his sister (the beneficiary of the trust) later raised the argument. The district court held that Sharif waived the issue when he failed to raise it, affirming the bankruptcy court's judgment. The Seventh Circuit reversed, holding that the constitutional argument could not be waived because "it implicates separation of powers principles," not just personal rights of the litigants. While upholding the judgment on the nondischargeability claims, the court of appeals held that, under *Stern*, the bankruptcy court lacked constitutional authority to determine the alter ego claim.

CASE ANALYSIS

Prior to 1978, federal district courts could refer matters within the traditional "summary jurisdiction" of bankruptcy courts to specialized bankruptcy referees. This included claims involving property in the actual or constructive possession of the bankruptcy court. Proceedings to augment the bankruptcy estate, however, implicated the district court's plenary jurisdiction and were not referred to the bankruptcy courts absent both parties' consent.

The Bankruptcy Reform Act of 1978 granted expanded powers to bankruptcy judges, giving them jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." Bankruptcy judges were granted all of the "powers of a court of equity, law, and admiralty," with only a few limited exceptions, although they were not afforded the protections of Article III judges—life tenure and a salary that may not be diminished. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that the 1978 act was unconstitutional to the extent it granted bankruptcy judges jurisdiction to decide a state-law contract claim against an entity not otherwise a party to the bankruptcy. The Court distinguished between cases involving so-called "public rights," which may be removed from the jurisdiction of Article III courts, and cases involving "private rights," which may not, noting that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights."

Congress responded by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984, under which federal district courts have original and exclusive jurisdiction of all bankruptcy cases, and may refer to bankruptcy judges any "proceedings arising under title 11 or arising in or related to a case under title 11." This largely recreated the bifurcated jurisdictional scheme that existed prior to 1978, dividing all matters that may be referred to the bankruptcy court into two categories: "core" and "non-core" proceedings. "Core proceedings" are not defined, but the statute provides a non-exhaustive list of them. The statute authorizes bankruptcy judges to

"hear and determine" core claims and "enter appropriate orders and judgments" on them. A final judgment entered in a core proceeding is appealable to the district court.

For "non-core" proceedings—those that are not core but are "otherwise related to a case under title 11"—the bankruptcy court may hear the matter and "submit proposed findings of fact and conclusions of law to the district court." The district court must review those proposed findings and conclusions de novo and enter any final orders or judgments. However, if all parties "consent," the statute permits the bankruptcy judge to determine a non-core proceeding as if it were core.

In *Stern*, the debtor had filed a common-law counterclaim for tortious interference against a creditor. "Counterclaims by the estate against persons filing claims against the estate" are listed in the statute as core proceedings, but the Court held that Article III would not permit the bankruptcy court to determine this counterclaim. It was a state-law claim that did not stem from the bankruptcy case, and Congress could not vest the power to hear such a claim in a non-Article III court. The decision did not explain how these "*Stern* claims" should be handled, however, creating a great deal of confusion in the lower courts. In *Arkison*, the Court clarified that such cases could be treated as non-core proceedings, although it did not address whether the bankruptcy court could hear such a case if the parties had expressly or impliedly consented.

Sharif (respondent) argues that the bankruptcy court could not constitutionally determine whether the trust was his alter ego as that is a matter of state law that does not stem from the bankruptcy case. That is, he claims it is a "*Stern* claim," an attempt to augment the bankruptcy estate through a suit asserting a claim under non-bankruptcy law.

Petitioners argue that the bankruptcy court was determining whether assets that were within Sharif's (actual or constructive) possession are assets of the bankruptcy estate, and that whether assets belong to the bankruptcy estate is a matter that necessarily arises directly out of the bankruptcy case. That the underlying rules are matters of state law does not matter, according to petitioners—as there is no federal common law, property and contract law questions are necessarily determined by state law, but whether assets belong to the estate is a question that could not exist independent of the bankruptcy case itself. Indeed, the determination of nearly every claim filed by a creditor—perhaps the central indisputable power of a bankruptcy court—requires the application of state law. Moreover, petitioners argue, a bankruptcy court's jurisdiction is primarily in rem, and a court necessarily has power to determine its own jurisdiction. A bankruptcy court has to be able to determine what assets are, and are not, part of the estate. To decide otherwise would render efficient administration of bankruptcy cases almost impossible.

Sharif responds that a bankruptcy court can determine whether assets that are in the debtor's possession are property of the estate, but an action against a third party to bring that party's assets into the estate is another matter. If a third party has a colorable claim to the asset, Sharif argues, it has never fallen within the summary jurisdiction of the bankruptcy courts. Here, Sharif argues, the assets

belong to a trust, which is a separate legal entity, and the beneficial interest is in his sister. As the trustee, Sharif's only interest is "bare legal title," which permits him to exercise administrative powers on behalf of the trust. Thus, Sharif argues, Wellness's claim is an attempt to use a state-law alter ego theory to bring the assets of a third party into the estate. The alter ego action does not arise from the bankruptcy case, he argues, making this similar to *Stern*—an attempt to use a state-law cause of action, independent of the bankruptcy code, to find assets to augment the estate.

The outcome of this issue will depend on both the definition of *Stern* claims (what core claims are outside the constitutional authority of non-Article III judges?) and the characterization of Wellness's cause of action (is it an attempt to determine whether property belonged to Sharif, or an attempt to bring the assets of a third party into the estate?). It is the former question that requires clarification if continued litigation over jurisdictional questions is to be curtailed, and a narrow ruling based on the latter question would do little to resolve matters for lower courts and future litigants.

The second issue is whether a party may consent to bankruptcy court adjudication of a *Stern* claim and, if so, what acts would amount to "consent." This is important because litigants may want to permit the bankruptcy court to hear a dispute, as a matter of efficiency, but if they cannot consent to this, matters will have to be referred to district courts for final adjudication. This would increase the workload of the district courts, and might also have implications for the management of other litigation matters where magistrates or special masters are used to handle various aspects of litigation. Magistrates often enter final judgments, with consent of the parties, on matters that would otherwise be the exclusive province of Article III courts.

Sharif argues that the limits of Article III cannot be avoided by the parties' consent because they are structural protections that are part of the constitutional separation of powers. Wellness responds that Article III has typically been viewed primarily as protecting personal rather than structural interests, and unless Congress is seeking to deprive the Article III courts of their rightful authority, individuals may waive objections under Article III. Moreover, as the bankruptcy courts are divisions of the district court, and the district court may withdraw the reference when it wants to exercise jurisdiction directly, there is no structural Article III issue in the ability to refer matters to the bankruptcy court, Sharif concludes.

Petitioners then argue that Sharif waived any objection to bankruptcy court jurisdiction in two separate ways: first, by filing the bankruptcy petition, Sharif consented to the bankruptcy court's authority to decide the issue; second, he waived any objection to the bankruptcy court's authority by not raising it in a timely manner.

Sharif responds that a waiver must be a knowing and deliberate act, and that he never acted in a way that would waive his objection. He did admit in his answer that Wellness's complaint was a core proceeding but argues that this applied to the first four counts (nondischargeability), and there was no intent to consent to bankruptcy court jurisdiction over the alter ego claim. At the time Sharif answered the complaint, *Stern* had not yet been decided, and

he could not reasonably be understood to have waived an objection based on a ruling the Court had not yet issued. Moreover, notes Sharif, his sister, who arguably holds the beneficial interest in the disputed assets, never consented to the bankruptcy court's authority.

In support, Sharif notes that the Federal Rules of Bankruptcy Procedure require that "in non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties." If "express consent" is required in non-core matters, Sharif argues, waiver or implied consent cannot be deemed adequate consent in a core matter. However, Wellness points out that the bankruptcy jurisdictional statute only requires "consent" for a bankruptcy judge to enter final judgment in a non-core matter, but "express consent" for a bankruptcy court to conduct a jury trial, indicating that implied consent is enough in the former case. And the rules of procedure cannot change the provisions of the statute.

SIGNIFICANCE

The scope of authority that Congress can grant to bankruptcy judges consistent with Article III has important implications for the functioning of the bankruptcy system, and potentially for the overall operation of the federal courts. If the Court gives a broad interpretation to *Stern* claims, many issues now heard by bankruptcy judges would have to be decided by district court judges, increasing their workload. A broad interpretation might also affect the ability of federal courts to delegate responsibilities to magistrates, who play an important role in many types of litigation. Dicta in *Stern* indicates that the Court did not intend a broad reading, however, so this is perhaps unlikely.

The question of consent to bankruptcy court authority over *Stern* claims is perhaps of greater concern. Consent is a keystone to the system of magistrates commonly used, with the authority of the magistrate depending on "consent," which can include implied consent. The American Bar Association has adopted a position that litigant consent should be adequate to cure any Article III problems with bankruptcy court determination of *Stern* claims, and argues that a contrary position would have a significant impact on the workload of the district courts, with a potentially staggering effect if the ruling were to extend to the work of magistrate judges.

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PREVIEW of United States Supreme Court Cases, pages 158–161.
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In December, the Court heard a number of interesting cases. Below we highlight some of the more engaging exchanges between the justices and the advocates during *Elonis v. United States* (13-983). *Elonis* involved threats posted on Facebook and the First Amendment; specifically, the Court was asked to determine whether a conviction for threatening another person requires proof of the speaker’s subjective intent to threaten.

Justice Elena Kagan: [G]etting back to what the Chief Justice asked you, because I was a little bit surprised by your answer: I’m trying to figure out what exactly the level of intent you want is. So one, the very, very highest level might be I affirmatively want to place this person in fear; that’s why I’m doing what I’m doing. All right? There’s a step down from that which is: I don’t want to do that; I’m just fulfilling my artistic fantasies, whatever you want to call it; but I know that I am going to place this person in fear. All right? Is that what—which intent do you want?

Mr. John P. Elwood (on behalf of petitioner): The second.

Justice Kagan: The second.

Mr. Elwood: That if you know that you are placing someone in fear by what you are doing, that is enough to satisfy our version[.]

* * * *

Justice Kagan: Well, what would be wrong with a recklessness standard? Why is that too low? It seems that a recklessness standard has a kind of buffer zone around it. You know, it gets you up one level from what the government wants, so what—who is the person that we should be worried is going to be convicted under a recklessness standard?

Mr. Elwood: I think many of the speakers who are online and many of the people who are being prosecuted now are teenagers who are essentially shooting off their mouths or making sort of ill-timed, sarcastic comments which wind up getting them thrown in jail.

* * * *

Justice Ruth Bader Ginsburg: And could you continue, you were telling me how that would be proved what is in his head. He knew that she or a reasonable person would be put in fear. So how does the government prove that?

Mr. Elwood: The government would prove it by, you know, proving the circumstances, what he said, you know, how he saw people reacting to it, his own personal statements about things at the time.

* * * *

Mr. Michael R. Dreeben (on behalf of respondent): What we want is a standard that holds accountable people for the ordinary and natural meaning of the words that they say in context . . .

Chief Justice John Roberts: Well, but in context is right. What is it? Is it a reasonable person and the examples that were given of the, you know, teenagers on the Internet, or is it a—reasonable teenager on the Internet.

(Laughter.)

Mr. Dreeben: If there is such a thing. Sorry, Mr. Chief Justice.

* * * *

Chief Justice Roberts: Well, I know, but you are asking for a standard that presumably would apply across the board. So if the teenager has a lot of friends on his Facebook page, then you are going to evaluate it by a different standard; you know, friends all over different age groups and everything else, that’s a different standard than if he has only a few friends that have access to his statements?

Mr. Dreeben: It will depend on to whom he is communicating the statement. We all know that if we’re communicating among friends, particularly in face-to-face context, we can say certain things that will be understood as sarcasm. But when we widen the audience and put a statement out in a situation where reasonable people are going to react to it by saying, this requires attention, this is a threat against an elementary school.

* * * *

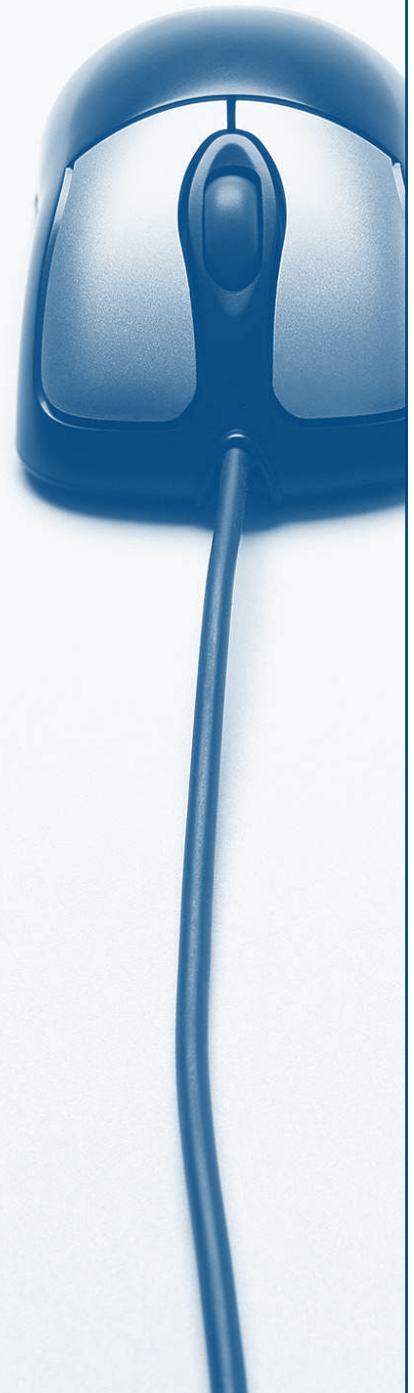
Justice Sonia Sotomayor: We’ve been loathe to create more exceptions to the First Amendment.

Mr. Dreeben: I don’t think that these are . . .

Justice Sotomayor: I don’t know where in the common law you have found a hook to say that we should create this as another exception.

Mr. Dreeben: Well, I don’t think it’s an exception. I think it’s just part of the implementation. ■

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BANKRUPTCY

Wellness International Network v. Sharif

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EMPLOYMENT LAW

Mach Mining v. EEOC

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FAIR HOUSING ACT

Texas Department of Housing and Community Affairs v. Inclusive Communities Project

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FALSE CLAIMS ACT

Kellogg Brown & Root v. Carter

Richard H. Seamon is a coauthor of *Supreme Court Sourcebook* (Aspen, 2013) and author of *Administrative Law: A Context and Practice Casebook* (Carolina Academic Press, 2013). He can be reached at richard@uidaho.edu.

FEDERAL PREEMPTION

Oneok, Inc. v. LearJet, Inc.

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FIRST AMENDMENT

Reed v. Town of Gilbert, Arizona

David L. Hudson Jr. is the Director of Academic Affairs and Professor of Law at the Nashville School of Law. He also is the First Amendment Ombudsman for the Newseum Institute's First Amendment Center. He teaches First Amendment classes at both the Nashville School of Law and Vanderbilt Law School. He is the author of *The First Amendment: Freedom of Speech* (Thomson Reuters, 2012) and a coeditor of *The Encyclopedia of the First Amendment* (CQ Press, 2008). He can be reached at David.Hudson@Nashvilleschoololaw.net.

Williams-Yulee v. Florida Bar

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FOURTH AMENDMENT

Rodriguez v. United States

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IMMIGRATION LAW

Mellouli v. Holder

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SUPREMACY CLAUSE

Armstrong v. Exceptional Child Center

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PREVIEW

OF UNITED STATES SUPREME COURT CASES

Issue No. 5 | Volume 42 | February 23, 2015

Previewing the Court's Entire February and March Calendar of Cases, including ...

Ohio v. Clark

This will be the latest case since *Crawford v. Washington*, 541 U.S. 36 (2004), to examine what is “testimonial” hearsay for purposes of the Confrontation Clause. At least four other cases, including *Crawford*, clearly involved some sort of in-person police questioning. Here, two school teachers with a mandatory statutory duty to report suspected child abuse questioned a young child in their care about his injuries. Whether the questioners’ identity and/or their statutory duty makes any difference regarding “testimonial” hearsay for Confrontation Clause purposes are among the central issues here.

King v. Burwell, Sec. of H&HS

The Affordable Care Act (ACA) provides a federal tax credit to low- and moderate-income individuals who purchase health insurance “through an Exchange established by the State” To implement this provision, the IRS issued a rule that extends the tax credit to low- and moderate-income individuals who purchase health insurance through any state or federal exchange. The plaintiffs challenged the IRS rule, arguing that the ACA does not authorize tax credits for purchasers through a federal exchange.

U.S. SUPREME COURT February and March 2015 **CALENDAR**

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Kerry, Sec. of State v. Din

Coleman v. Tollefson

MARCH 2

Arizona State Legislature v.

Arizona Independent Redistricting Commission

Ohio v. Clark

TUESDAY

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Henderson v. United States

Tibble v. Edison International

MARCH 3

City of Los Angeles v. Patel

Chappell v. Ayala

WEDNESDAY

FEBRUARY 25

Equal Employment Opportunity

Commission v. Abercrombie & Fitch Stores, Inc.

Baker Botts v. ASARCO

MARCH 4

King v. Burwell, Sec. of H&HS

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