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Supreme Court on powers of bankruptcy courts after *Stern*

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Introduction

In January, the US Supreme Court granted certiorari in *Executive Benefits Insurance Agency v Arkison (In re Bellingham Insurance Agency)*.(1) The Supreme Court issued its much-anticipated decision in June,(2) holding that when a bankruptcy court is faced with a bankruptcy-related matter that has been designated as 'core' in Section 157 of the Bankruptcy Code, but which under Article III cannot be finally adjudicated by a bankruptcy judge – labelled a '*Stern* claim' by the Supreme Court – the bankruptcy judge may issue proposed findings of fact and conclusions of law to be reviewed *de novo* by a district court judge.

The *Bellingham* decision was important: a contrary ruling would have required already overburdened district courts to take up a significant portion of the bankruptcy docket and would have called into question the use of magistrates by the district courts in other cases.(3) However, the court did not take advantage of the opportunity to resolve other significant issues regarding the adjudicatory authority of the bankruptcy court, including the scope of matters that, under Article III, Congress may assign to bankruptcy courts for decision and the question of whether litigants may consent to a bankruptcy court's entering final judgment – rather than just issuing proposed findings and conclusions – on claims that Congress cannot constitutionally assign to a non-Article III court for decision.

There is a split among the circuit courts of appeal on the second issue: the Ninth Circuit in *Bellingham* held that the Article III right to a hearing before an independent federal judiciary may be waived, while the Fifth, Sixth, and Seventh Circuits have ruled to the contrary.(4) The Supreme Court declined to address the issue in *Bellingham*, but has the opportunity to do so in its next term. On July 1 2014 the Supreme Court granted certiorari in *Wellness International Network, Ltd v Sharif*(5) to address "[w]hether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and, if so, whether implied consent based on a litigant's conduct is sufficient".(6) The court also granted certiorari on the question of whether the common law alter-ego claim at issue in *Wellness* is one that Congress may assign to bankruptcy court for adjudication.(7) Thus, the Supreme Court may soon provide much-needed guidance on the precise scope of bankruptcy court jurisdiction, which has been the subject of debate among commentators and litigants since the Supreme Court's 2011 landmark decision in *Stern v Marshall*.(8)

For those unfamiliar with the US bankruptcy system, some background is necessary to understand the significance of *Bellingham* and *Wellness*.

Limits on adjudicatory authority of bankruptcy courts

Article III of the US Constitution provides that the judicial power of the United States may be exercised only by judges whose independence from the executive and legislative branches of government is guaranteed by tenure and protections against reductions in salary. These, of course, are judges of the district courts, the circuit courts of appeal and the US Supreme Court. Bankruptcy judges, who are appointed for 14-year terms,(9) lack the aforementioned tenure and salary guarantees and bankruptcy courts are therefore considered legislative courts.

In 1982, the Supreme Court, in a plurality opinion in *Northern Pipeline,*(10) held that the judicial power cannot be shared with another branch of government and thus that Congress cannot vest a bankruptcy court with jurisdiction to decide a state-law contract claim against an entity that is not otherwise a party to the bankruptcy proceedings. While a majority of the Supreme Court agreed that there is a category of cases involving public rights that may be assigned to legislative courts such as bankruptcy courts for adjudication, the justices did not agree on the scope of that public rights

exception.(11)

In response to *Northern Pipeline*, Congress in 1984 amended the statutes governing bankruptcy jurisdiction and courts.(12) Under the 1984 statute, district courts, which have original jurisdiction over bankruptcy cases, may delegate – or refer – such cases to bankruptcy courts. Adopting terminology used by the plurality in *Northern Pipeline*,(13) Congress provided that bankruptcy courts may enter final judgments only in 'core' proceedings concerning the restructuring of the debtor's estate – such as matters concerning the administration of the estate and claims allowance – subject to appellate review by the district court.(14) Bankruptcy courts may also hear 'non-core' proceedings that are related to the bankruptcy case, but may not determine such matters. Rather, they may only propose findings of fact and conclusions of law to the district court, which will review *de novo* any such findings or conclusions to which a party objects and enter any final order or judgment.(15) The Bankruptcy Code also provides that the parties may consent to having the bankruptcy court determine such non-core matters and enter orders and judgments, subject to appellate review by the district court.(16)

Stern v Marshall

Twenty-seven years after these reforms to the Bankruptcy Code, in *Stern v Marshall*, the Supreme Court found that Congress had missed the mark and defined too broadly the scope of core matters that could be determined by bankruptcy courts. In *Stern*, a creditor filed a claim for defamation against the debtor in a bankruptcy court and the debtor filed a counterclaim for tortious interference with a gift. Although the counterclaim was mandatory under the rules of procedure, it was sufficiently discrete that the adjudication of the bankruptcy claim would not resolve the counterclaim. The Supreme Court held that while the counterclaim was a core proceeding as defined by Congress,(17) it was not a matter that Article III permits Congress to assign to a bankruptcy court for adjudication.(18) Citing its 1865 decision in *Murray's Lessee*, the Supreme Court emphasised that the other branches of the federal government cannot confer the "'judicial Power' on entities outside Article III" and that the Supreme Court has "long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty'".(19) The Supreme Court then noted that, in *Northern Pipeline*, it had "recognized that there was a category of cases involving 'public rights' that Congress could constitutionally assign to 'legislative' courts for resolution".(20)

The Supreme Court in *Stern* discussed its previous decisions concerning the concept of the public rights exception to Article III at some length, noting that those decisions have "not been entirely consistent", and that the scope of the public rights exception "has been the subject of some debate".(21) Although earlier cases limited the public rights exception to actions involving the government as a party, the Supreme Court rejected that limitation soon after *Northern Pipeline*.(22) However, the exception remains limited "to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority".(23) "[W]hat makes a right 'public' rather than private," the Supreme Court stated, "is that the right is integrally related to particular federal government action."(24)

The Supreme Court noted that the only other case in which it had considered the public rights doctrine in the bankruptcy context was *Granfinanciera, SA v Nordberg*,(25) in which it held that an action to recover a fraudulent conveyance of money filed on behalf of a bankruptcy estate against a non-creditor did not fall within the public rights exception, and that the parties therefore had a right to a jury trial.(26) The *Stern* plurality held that the debtor's counterclaim, "like the fraudulent conveyance claim at issue in *Granfinanciera*", could not "be deemed a matter of 'public right' that can be decided outside the judicial branch" under any of the various formulations of the public rights doctrine as delineated in the Supreme Court's prior opinions.(27) The plurality gave several reasons for its conclusion, drawing on those various formulations of the public rights concept in previous decisions:

- The counterclaim was a claim "under state common law" between two private parties;(28)
- It was not a claim that "historically could have been determined" by the other branches of government;(29)
- It did not "flow from a federal statutory scheme" and was "not completely dependent upon adjudication of a claim created by federal law";(30)
- The trustee was not "asserting a right of recovery created by federal bankruptcy law";(31)
- The counterclaim defendant had not truly consented to the resolution of the claim in the bankruptcy court proceedings because he had no choice of forum;(32)
- The bankruptcy court's substantive jurisdiction is not limited to a particularised area of law, but reaches "any area of the *corpus juris*";(33) and
- Determining the creditor's defamation claim against the debtor as part of the bankruptcy allowance process would resolve the counterclaim.(34)

The plurality held:

> "*Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.*"(35)

Justice Scalia concurred in the result, agreeing that the counterclaim was outside the scope of the public rights exception. However, he disagreed with the plurality's reasoning, charging that many of

the tests set out in the Supreme Court's prior jurisprudence "have nothing to do with the text or tradition of Article III".(36) He then reiterated his view, expressed previously in his concurring opinion in *Granfinanciera*,(37) that "a matter of public rights… must at a minimum arise between the government and others".(38) Other than matters that may be adjudicated by federal administrative agencies under the court's decision in *Crowell v Benson*, the judge opined, "an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary".(39) He then raised the fundamental question of whether historical practice permits non-Article III judges to determine the allowance or disallowance of claims against debtors – a function close to the heart of bankruptcy reorganisation – but did not state his opinion on the question, as it had not been briefed.(40) The plurality opinion also was careful to note that the court had not ruled on the question of whether "the restructuring of debtor-creditor relations is in fact a public right".(41)

Issues left unresolved in *Stern*

The Supreme Court in *Stern* did not provide clear guidance as to the scope of the public rights exception and concomitant constitutional limits on the adjudicatory authority of bankruptcy courts. The Supreme Court also declined to address the question of whether litigants may waive constitutional limits on the authority of bankruptcy courts and may consent to a bankruptcy judge issuing final judgments on bankruptcy-related matters that do not fall within the public rights exception. Nor did the Supreme Court address the related issue of whether, irrespective of the litigants' consent, a bankruptcy court may hear such matters and propose findings of fact and conclusions of law to the district court for *de novo* review, even though there is no express statutory authority to do so. All three questions were raised in *Bellingham*; the Supreme Court ruled only on the third question. The scope of the public rights exception and the question of whether parties may consent to bankruptcy court jurisdiction are now before the court again in *Wellness*.

Bellingham

Background

In *Bellingham*, Nicholas Palaveda – a principal of the debtor, Bellingham Insurance Agency (Bellingham) – caused the debtor to cease operations and create a new corporation, Executive Benefits Insurance Agency (EBIA). Then, through a series of transactions, Palaveda caused Bellingham to transfer its assets to the new corporation. Palaveda's partners learned of the transfer and initiated an action in state court for return of the funds, but that action was stayed when Bellingham filed for bankruptcy under Chapter 7. Peter Arkison – the bankruptcy trustee – filed a complaint against the transferee EBIA, as well as against Paleveda and a related entity that had participated in the transactions, alleging that the asset transfer to EBIA was a fraudulent conveyance under Bankruptcy Code Section 548 and under state law. EBIA initially demanded a jury trial in district court, which the district court treated as a motion to withdraw the reference. EBIA then asked the district court to stay consideration of the motion so that the bankruptcy court could determine a motion by the trustee for summary judgment. The bankruptcy court granted summary judgment for the trustee and ordered the assets returned to the estate. The district court affirmed after a *de novo* review and entered judgment for the trustee. EBIA appealed to the Ninth Circuit.

While the case was on appeal, the Supreme Court issued its opinion in *Stern*. Before oral argument in the Ninth Circuit, EBIA moved to dismiss its appeal for lack of jurisdiction, arguing that the initial judgment of the bankruptcy court was void as Article III prohibits Congress from vesting the bankruptcy court with authority to determine fraudulent conveyance claims. The Ninth Circuit agreed, holding that *Stern* and *Granfinanciera*, taken together, compelled the conclusion that Article III prohibits a bankruptcy court from entering final judgment in a fraudulent conveyance action against a party that has not filed a proof of claim in the bankruptcy case,(42) because the defendant had not subjected itself to the equitable jurisdiction of the bankruptcy court and the fraudulent conveyance action would not necessarily be resolved in the course of allowing or disallowing a claim against the estate.(43) However, the Ninth Circuit held that parties can consent to the bankruptcy court's adjudication of such a claim and found that EBIA had impliedly waived its Article III right because it had affirmatively assented to the bankruptcy court's entry of judgment on the trustee's motion for summary judgment, and had not raised the Article III argument until the eve of oral argument before the Ninth Circuit.(44)

Decision

The Supreme Court's narrow *Bellingham* decision was that bankruptcy courts may hear *Stern* claims and propose findings of fact and conclusions of law to the district court for entry of a final order.

On certiorari, the Supreme Court did not address whether the fraudulent conveyance claims at issue in *Bellingham* were *Stern* claims. Emphasising that neither party had contested the Ninth Circuit's conclusion on that point, the court deemed it unnecessary to reach the constitutional questions because the district court had reviewed the bankruptcy court's decision *de novo*.(45) Thus the scope of the public rights exception remains as murky as it was after *Stern*.

The Supreme Court noted that *Stern* "made clear that some claims labelled by Congress as 'core' may not be adjudicated by a bankruptcy court in the manner designated by § 157(b)" – a category the court labelled *Stern* claims. Yet *Stern* did not address "how the bankruptcy court should proceed" when faced with a *Stern* claim. It was to that question that the court turned its attention in *Bellingham*.(46)

Section 157 of the Bankruptcy Code provides that a bankruptcy court may enter a final judgment in a core proceeding and submit proposed findings of fact and conclusions of law to the district court in

non-core proceedings. However, no provision expressly allows the bankruptcy court to propose findings and conclusions to the district court in matters labelled core proceedings under Section 157 but, under *Stern*, are matters that may not be adjudicated to final judgment by a bankruptcy court. EBIA argued that there is a gap in the code and that the bankruptcy court therefore has no statutory authority over *Stern* claims and that such claims must be heard in the first instance by the district court.

The Supreme Court disagreed, noting that nothing in the text or historical context of the code indicates that Congress would want to "suspend *Stern* claims in limbo".(47) Relying on the severability provision of the code, the court reasoned that when a claim is found to be a *Stern* claim, the label 'core' is invalid and thus it is "not a core proceeding".(48) Noting that the Ninth Circuit had held – and no party disputed – that Article III prohibits treating the fraudulent conveyance claims as core, and that they were "related to a case under title 11", the Supreme Court concluded that such claims "fit comfortably within the category of claims governed by § 157(c)(1)" – there is no gap in the code.(49) Thus, the bankruptcy court could have followed the procedures set out in § 157(c)(1) by submitting proposed findings and conclusions of law to the district court for *de novo* review.(50)

However, the bankruptcy court had not done so. Instead, it had purported to adjudicate the claims and enter final judgment. On appeal, the district court had then reviewed *de novo* the bankruptcy court's grant of summary judgment – which turned on a legal question – and had issued a separate judgment in favour of the trustee. Neither the bankruptcy court nor the district court in *Bellingham* had addressed whether the fraudulent conveyance claims fell outside the scope of the bankruptcy court's authority (unsurprisingly, given that *Stern* had not yet been decided). Nonetheless, the Supreme Court held, the district court's *de novo* review was the same review it would have conducted if the bankruptcy court had treated the fraudulent conveyance claims as non-core and issued proposed findings and conclusions. In short, the district court's *de novo* review cured any error.

The *Bellingham* decision precludes *post-hoc* challenges to the bankruptcy court's authority by providing that any jurisdictional deficiency may be cured by *de novo* review in the district court. It also makes clear that bankruptcy courts may treat *Stern* claims in the same manner as other non-core proceedings, and may propose findings of fact and conclusions of law in such matters for review by the district court. This, as the Supreme Court noted, has been the practice adopted in many districts in light of *Stern*. However,the court expressly declined to address the more fundamental issue of "whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim", preferring to "reserve that question for another day".(51)

Less than a month later, the court granted certiorari on that question in *Wellness,* as well as on the question of whether the bankruptcy court could issue a final order on the common-law claim at issue in that case.

Wellness International

As described by the Seventh Circuit, *Wellness* involves a "decade-long saga".(52) Richard Sharif – a distributor of health and wellness products for Wellness International – sued Wellness, alleging that it was running an illegal pyramid scheme. Sharif failed to respond to Wellness's discovery requests, which resulted in summary judgment for Wellness and sanctions of more than $650,000 in attorneys' fees against Sharif. Sharif subsequently filed for bankruptcy under Chapter 7. Wellness filed an adversary proceeding in the bankruptcy court, seeking to prevent discharge of Sharif's debts and a declaratory judgment that a trust established by Sharif was Sharif's alter ego as a matter of state law and its assets should be treated as part of Sharif's bankruptcy estate. Sharif again failed to comply with discovery and the bankruptcy court entered a default judgment for Wellness.

Sharif appealed to the district court on the grounds that, under *Stern v Marshall*, the bankruptcy court had no authority to enter final judgment on the alter-ego claim. The district court held that Sharif had waived the issue by not raising it earlier. The Seventh Circuit held that the bankruptcy court did not have constitutional authority to enter a final judgment on the alter-ego claim, which "[i]n almost all material respects" was "indistinguishable" from the state-law counterclaim for tortious interference that had been at issue in *Stern*.(53) Sharif argued that the alter-ego claim comes within the bankruptcy court's authority because it provided grounds for denying discharge of Sharif's debts, and thus satisfies the *Stern* test that the "issue stems from the bankruptcy itself". The court rejected this view. The alter-ego claim is not one that may be determined by the bankruptcy court, the Seventh Circuit held, nothing that the claim:

- is asserted against a non-party to the bankruptcy (the trust) and would not be resolved in claims allowance proceedings;
- is a "state-law claim that does not involve 'public rights'";
- is a dispute "between private parties" that does not involve any governmental parties;
- stems "from a state law rather than a federal regulatory scheme";
- does "not involve a particularised area of law";
- is a "common law claim for which state law provides the rule of decision"; and
- is "intended only to augment the bankruptcy estate".(54)

Notably, the Seventh Circuit also held that "a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment" on a *Stern* claim.(55) In this respect, the Seventh Circuit disagreed with the Ninth Circuit's decision on that issue in *Bellingham*. The Supreme Court granted certiorari on two issues:

- whether the bankruptcy court has constitutional authority to enter a final order on the alter-ego claim in order to determine whether the property is property of the bankruptcy's estate; and
- if the bankruptcy court does not have such authority, whether the parties may consent to the bankruptcy court's entering final judgment on the claim and, if so, whether such consent may be implied from a litigant's conduct.

Comment

Certain language in *Stern* may be read as a signal that there would have been no constitutional impediment to the bankruptcy court adjudicating the counterclaim at issue in *Wellness* if the parties had consented. Among the reasons that the court listed for finding that the debtor's counterclaim did "not fall within" any of the "varied formulations of the public rights exception" was that, unlike in *Commodity Futures Trading Commission v Schor*, the claimant "did not truly consent to resolution of [the counterclaim] in the bankruptcy court proceedings".(56)

However, the Supreme Court in *Schor* was clear that while parties can waive their personal right to impartial and independent federal adjudication, they cannot waive constitutional limits when the structural principles of the separation of powers among the branches of government are implicated. There, the respondent William Schor had filed a claim with the Commodity Futures Trading Commission (CFTC), alleging that his broker had violated the Commodities Exchange Act, and the broker filed a common-law counterclaim. The CFTC ruled for the broker and Schor appealed, arguing for the first time on appeal that Article III did not permit the CFTC to decide the counterclaim. The Supreme Court observed that Article III protects both "the role of the independent judiciary within the constitutional scheme of tripartite government" and the litigants' "right to have claims decided before judges who are free from political domination by other branches of government".(57) The Supreme Court also held that the personal right to impartial and independent federal adjudication may be waived and had been waived by Schor, because he had sought relief from the CFTC and not demanded that the broker's counterclaim be asserted before the district court.

The Supreme Court emphasised in *Schor*, however, that Article III not only protects a personal right, but also bars "congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] . . .' thereby preventing 'the encroachment or aggrandisement of one branch at the expense of another'".(58) The Supreme Court held that:

> "*to the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reasons that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III.*"(59)

When having a non-Article III tribunal adjudicate an Article III matter would "impermissibly threaten the institutional integrity of the Judicial Branch", the Supreme Court held, "notions of consent and waiver cannot be dispositive"(60) of Article III concerns, "because in such cases structural principles are implicated in addition to private rights entitlements"(61) and private parties cannot be expected to protect those institutional interests.(62)

There is much in *Stern* to indicate that these non-waivable structural principles are implicated by Congress' assigning to bankruptcy courts for adjudication matters that are "the stuff of the traditional actions at common law".(63) The court noted that adjudication of *Stern* claims involves:

> "*the most prototypical exercise of judicial power: the entry of a final, binding judgment by a court with broad substantive jurisdiction on a common law cause of action, when the action neither derives from nor depends on any agency regulatory regime.*"(64)

Unlike the regulatory statute in *Schor*, the Supreme Court noted, 28 USC § 157 does purport to confer on non-Article III tribunals the power to enter final judgments, subject only to review on appeal. That is why "[t]he constitutional bar remained" in *Stern*.(65)

However, a long history has countenanced parties consenting to the bankruptcy court adjudicating matters within the judicial power. Under the former Bankruptcy Act of 1898, which was in force until the Bankruptcy Code was enacted in 1978, parties could give consent, actual or implied, to a bankruptcy referee's determination of bankruptcy-related matters that were outside the scope of the referee's statutory authority.(66) Also, under the current statutory scheme parties can consent to the bankruptcy court entering final judgment in non-core matters.(67) What weight, if any, the Supreme Court will give this historic practice when weighed against the structural implications discussed in *Stern* and *Schor* remains to be seen.

If, as a constitutional matter, parties may not consent to the bankruptcy court's entering final judgments on *Stern* claims, the Supreme Court's assurance that its ruling in *Stern* would not "meaningfully change the division of labor"(68) between bankruptcy courts and district courts may prove misplaced. Faced with the requirement of *de novo* review, in many instances it will be difficult for district courts to avoid the conclusion that having a matter heard in the first instance by the bankruptcy court would be a waste of time and resources, and district courts may find themselves hearing from start to finish many matters that up to now have been determined by bankruptcy courts. Moreover, such a constitutional ruling would also imply that Article III is violated by 28 USC § 636(c)(1), which provides that magistrate judges may conduct proceedings and enter final orders in non-jury civil cases with the parties' consent.(69) Unlike *Bellingham,* then, *Wellness* may turn out to be the vehicle for a Supreme Court decision of great consequence for the US bankruptcy system.

For further information on this topic please contact Leslie M Kelleher at Caplin & Drysdale, Chartered by telephone (+1 202 862 5000), fax (+1 202 429 3301) or email (lkelleher@capdale.com). The Caplin & Drysdale website can be accessed at www.caplindrysdale.com.

Endnotes

(1) For further details please see "Supreme Court to rule on adjudicatory authority of bankruptcy judges".

(2) 134 S Ct 2165 (2014).

(3) See 28 USC §636.

(4) See *Wellness Int'l Network, Ltd v Sharif*, 727 F3d 751, 771 (7th Cir 2013), cert granted in part, 134 S Ct 2901 (2014); *In re Frazin*, 732 F3d 313 (5th Cir 2013), cert denied, 134 S Ct 1770 (2014); *Waldman v Stone*, 698 F3d 910 (6th Cir 2012), cert denied, 133 S Ct 1604 (2013).

(5) 134 S Ct 2901 (2014) (granting limited certiorari on questions 1 and 2 raised by the petition).

(6) Petition for writ of certiorari, *Wellness International,* 2014 WL 466827 (USSCt 2014) at *i.

(7) *Id.*

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

(9) See 28 USC § 152.

(10) *N Pipeline Constr Co v Marathon Pipe Line Co*, 458 US 50 (1982) (plurality opinion).

(11) *Id* at 87 n40 (plurality opinion); *id* at 89-92 (Rehnquist, J, concurring in judgment).

(12) Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L No 98-353, 98 Stat 333, 1984. See 28 USC § 151 *et seq*.

(13) See *Northern Pipeline*, 458 US at 71 ("[T]he 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").

(14) See 28 USC §§ 157(b), 158.

(15) See 28 USC § 157(c)(1).

(16) See 28 USC § 157(c)(2).

(17) See 28 USC § 157(b)(2)(C).

(18) *Stern*, 131 S Ct at 2620.

(19) *Id* at 2609, citing *Murray's Lessee v Hoboken Land & Improvement Co*, 59 US 272 (1856).

(20) *Id* at 2610.

(21) *Id* at 2611.

(22) *Id* at 2613.

(23) *Id.*

(24) *Id.*

(25) *Id* at 2614 citing *Granfinanciera, SA v Nordberg*, 492 US 33 (1989).

(26) *Id.*

(27) *Id* at 2611 (plurality); *id* at 2620 (Scalia, J, concurring).

(28) *Id* at 2614 (internal citation omitted).

(29) *Id* at 2614 (internal citation omitted).

(30) *Id* at 2614.

(31) *Id* at 2618.

(32) *Id* at 2614.

(33) *Id* at 2615.

(34) *Id* at 2614, 2617.

(35) *Id* at 2618.

(36) *Id* at 2620 (Scalia, J, concurring).

(37) *Granfinanciera, SA v Nordberg*, 492 US 33 (1989).

(38) *Id.*

(39) *Stern*, 131 S Ct at 2621 (Scalia, J, concurring).

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

(41) *Id* at 2614, n 7.

(42) *Bellingham*, 702 F3d at 564-65.

(43) *Id* at 565.

(44) *Id* at 566-70.

(45) *Executive Benefits Insurance Agency v Arkison (In re Bellingham Insurance Agency),* 134 SCt 2165, 2170, n4 (2014).

(46) *Id* at 2172.

(47) *Id* at 2173.

(48) *Id* at 2173.

(49) *Id* at 2174.

(50) *Id* at 2173-74.

(51) *Id* at 2170, n4.

(52) *Wellness International Network, Ltd,* 727 F3d 751, 754 (7th Cir 2013).

(53) *Id* at 774.

(54) *Id* at 774.

(55) The Seventh Circuit expressly declined to hold that Article III does not permit parties to consent to the bankruptcy court entering final judgment in a non-core proceeding, as provided in 28 USC §157(c)(2) (*Wellness*, 727 F3d at 772). However, it is hard to see how its analysis leads to any other conclusion, in light of the Supreme Court's ruling in *Bellingham* that *Stern* claims are non-core proceedings governed by 157(c).

(56) *Stern*, 131 S Ct at 2614, citing *Commodity Futures Trading Commission v Schor,* 478 US 833, 844 (1986).

(57) *Schor*, 478 US at 848.

(58) *Id* at 850.

(59) *Id* at 850-51.

(60) *Bellingham,* 702 F3d at 567, citing *Schor,* 478 US at 835, 851.

(61) *Id* at 567 n9, citing *Schor*, 478 US at 850-51.

(62) In *Schor,* the Supreme Court upheld a statute authorising the CFTC, a regulatory agency, to decide counterclaims by a broker against his client arising out of a claim in "reparations" asserted by a client against his broker. In explaining why this allocation of authority to the CFTC did "not impermissibly intrude on the province of the judiciary", the court emphasised that:

- the CFTC "deals only with a 'particularised area of law";
- its orders are not final, but instead are enforceable only by order of the district court, after review as to both facts and law; and
- Congress's primary purpose in authorising the CFTC to resolve such counterclaims was to "mak[e] effective a specific and limited federal regulatory scheme", rather than to "allocat[e] jurisdiction among federal tribunals" (*Schor,* 478 US at 851, 852, 854-56).

(63) *Stern,* 131 S Ct at 2609.

(64) *Id* at 2615 (emphasis in original).

(65) *Id* at 2619.

(66) See, for example, *MacDonald v Plymouth Cnty Trust Co*, 286 US 263 (1932).

(67) See 28 USC § 157(c).

(68) *Stern,* 131 S Ct at 2620.

(69) *See* 28 USC §636(c)(1) ("Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves"). In *Roell v Withrow,* 538 US 580 (2003), the Supreme Court held that parties may impliedly consent to having a magistrate judge conduct proceedings by their conduct in litigation. The Supreme Court did not address in that case the question of whether having magistrate judges enter final orders in such proceedings violates Article III.