ROUNDTABLE DISCUSSION:
EXECUTIVE BENEFITS INSURANCE AGENCY v. ARKISON

Professor Harner: I would like to welcome our participants to the ABI Roundtable on the U.S. Supreme Court's opinion in *Executive Benefits Insurance Agency v. Arkison*.[1] My name is Michelle Harner and I am a Professor of Law at the University of Maryland Francis King Carey School of Law. I am honored to be moderating today's Roundtable.

We have four very distinguished panelists participating in the Roundtable. They are the Honorable **Eugene Wedoff** of the United States Bankruptcy Court for the Northern District of Illinois; Dean **Erwin Chemerinsky**, Distinguished Professor of Law, Raymond Pryke Professor of First Amendment Law and Dean of the University of California Irvine School of Law; **Richard Levin**, Partner at Cravath, Swaine & Moore; and **John Rao** of the National Consumer Law Center.

Today's Roundtable will proceed as follows: I will summarize the Court's holding in the *Arkison* case and each panelist will provide some preliminary comments on the holding. We will then drill down on certain legal issues flowing from the *Arkison* opinion and consider the practical implications for both judges and practitioners on the ground. We will conclude today's Roundtable with each panelist's closing remarks.

The *Arkison* opinion is a sequel of sorts to the Supreme Court's 2011 opinion in *Stern v. Marshall*.[2] In *Stern*, the Court held that Article III of the U.S. Constitution did not permit a bankruptcy court to enter a final judgment on a counterclaim for tortious interference, even though the bankruptcy court had statutory authority to do so, where determination of the counterclaim was not necessary to a determination of the creditor's filed claim.[3] The *Stern* opinion raised uncertainty about a bankruptcy court's authority to resolve certain types of claims designated as core by statute under 28 U.S.C. § 157(b). Lower courts have grappled with the implementation of the *Stern* decision.

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[1] Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014) (holding bankruptcy courts may issue proposed finding of fact and conclusion of law regarding Stern claims, but failing to discuss consent issue).

[2] 131 S. Ct. 2594 (2011).

[3] *See id*. at 2620.

The *Arkison* case is just one example of the fallout from *Stern*. In *Arkison*, the chapter 7 trustee of the Bellingham Insurance Agency estate filed a fraudulent transfer claim against the Executive Benefits Insurance Company and others, none of who had filed proofs of claim in the bankruptcy case.[4] The bankruptcy court granted summary judgment in favor of the trustee on the fraudulent transfer claim, and the district court affirmed after *de novo* review.[5] While an appeal of the case was pending in the Ninth Circuit, the Supreme Court issued its opinion in *Stern*, and Executive Benefits moved to dismiss the *Arkison* case for lack of jurisdiction based on *Stern*.[6]

The Ninth Circuit denied the motion to dismiss and affirmed the district court's decision on two grounds. First, Executive Benefits had impliedly consented to the bankruptcy court's resolution of the claim.[7] Second, the district court reviewed the bankruptcy court's findings of fact and conclusions of law on a *de novo* basis, even though the bankruptcy court had not styled them as proposed findings and conclusions.[8] The Supreme Court affirmed the Ninth Circuit's decision in *Arkison* but based its holding solely on the conclusion that any claim that is "not core" and "otherwise related to a case under title 11" is a non-core claim on which a bankruptcy court may issue proposed findings of fact and conclusions of law under 28 U.S.C. § 157(c)(1).[9]

The Court's holding was unanimous, and its opinion was concise. It is perhaps all that the opinion fails to address that makes it so interesting and concerning to some. We will explore several of these issues today. With this background, I would like to ask each panelist for some preliminary thoughts on the *Arkison* opinion. Judge Wedoff, can we please start with you?

Judge Wedoff: Michelle, I actually have two contradictory reactions to the *Arkison* decision depending on which hat I'm wearing. If I'm wearing my hat as a bankruptcy judge in the Seventh Circuit, I have a feeling of great relief because the *Arkison* decision plugs what had been a hole in section 157.[10] We had been told by the Seventh Circuit in a couple of different decisions that the proper interpretation of section 157 as applied to *Stern*-affected claims—that is, claims that are statutorily core but are incapable constitutionally of a final adjudication by a bankruptcy judge—can only be given to a district judge; they cannot be treated by a bankruptcy judge at all.

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[4] *Arkison*, 134 S. Ct. at 2169.
[5] *See id.*
[6] *See id.*
[7] Bellingham Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553, 568 (9th Cir. 2011), *aff'd sub nom.* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014).
[8] *See id.* at 565–66.
[9] *Arkison*, 134 S. Ct. at 2172.
[10] 28 U.S.C. § 157 (2012) (defining bankruptcy jurisdiction over core and non-core proceedings).

The result is that for any *Stern*-affected matter, which could include all avoidance actions, the bankruptcy court could do nothing, not even preside over discovery. The matter would have to be sent in its totality to the district court. *Arkison* says that's not true. For *Stern*-affected matters, although final adjudication in bankruptcy court is unconstitutional, it is possible to have proposed findings of fact and conclusions of law. That is a relief.

On the other hand, if I am wearing my hat as chair of the Advisory Committee on Bankruptcy Rules, I have a problem. The Advisory Committee had given the Supreme Court a set of proposed amendments to cure a problem created by the *Stern* decision. The current rules provide for parties to expressly consent or decline to consent on matters that are statutorily non-core.[11] But for matters that are statutorily core, no pleading of consent or non-consent is required. That presents a problem for *Stern*-affected matters. Because they are statutorily core, they receive no expression of consent under the rules, but at least without consent, they cannot constitutionally be finally adjudicated by a bankruptcy judge.

Our proposed rules would have provided for an expression of consent or non-consent across the board. That way the bankruptcy judge could decide both whether the matter was capable of final adjudication constitutionally in the absence of consent, and, if not, whether a final judgment could be entered based on consent. We withdrew those proposed amendments because of the Supreme Court's grant of certiorari in *Arkison*. We did not want to have the Court passing on rule amendments that would have involved the validity of consent when the Court had granted certiorari to determine whether consent was ever effective.

Now, with the *Arkison* decision failing to decide the question of the validity of consent, our rule process is up in the air again. We do not know the proper way of dealing with the situation, and that is a disappointment.

Professor Harner: Thank you. Dean Chemerinsky, would you like to go next?

Dean Chemerinsky: As everyone knows the Court did not decide the key issue on which certiorari had been granted, which had split the circuits. Can bankruptcy courts issue final judgments in non-core, what they are now calling *Stern* issues, with consent of the parties? What the court does say is, if there is *de novo* review in the district court, then there is no problem under the Constitution under *Stern v. Marshall*. I think what the Court has done then is

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[11] *See* FED. R. BANKR. P. 7012(b) (providing where responsive pleading asserts matter is non-core, "it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge").

clarified what it means for a bankruptcy court to be an adjunct under the federal district court.

The Supreme Court long has said that there could be non-Article III courts if they are adjunct to the district court. In *Northern Pipeline*,[12] the Court said that the bankruptcy court wasn't functioning as an adjunct and in *Stern v. Marshall*, Chief Justice Roberts' majority opinion said, a bit briefly about this, that in no way was the bankruptcy court functioning as an adjunct to the district court. Now the Court has said that so long as there is *de novo* review then it is permissible for the Article I court to proceed, and that is why I think the Court is essentially saying that the bankruptcy court was a permissible adjunct to the district court.

To put it another way, what the Supreme Court is saying is that *de novo* review of the bankruptcy court's decision is sufficient to make it permissible when it's deciding non-core *Stern* issues. What the Court still hasn't decided is—is *de novo* review necessary? Is consent going to be allowed in this circumstance? And that is left to be resolved in the future.

Professor Harner: I think that is a key point that we will certainly dissect as we work our way through the Roundtable this morning; thank you so much. Mr. Levin would you like to go next?

Mr. Levin: Sure, I have a few general reactions. The first is, this decision is boring. The Supreme Court always ducks the interesting issues when possible. I understand from a jurisprudential perspective why they do that, and I don't expect them to get to the consent issue for a very long time if they can find ways out. The severability issue that they ruled on was one way out. My first reaction to the severability ruling was, this was statutory interpretation sleight of hand. Then I looked at it a little more closely and thought, "Well maybe they got it right," but it was a very close call. It was, however, an elegant way to duck the issue.

My second reaction is that it reaffirms a dictum in *Stern* that is very important for the operation of the bankruptcy system, and that is that this ruling doesn't change all that much. *Stern* didn't change all that much and *Arkison* doesn't change all that much. I think that is very positive for the system. As Judge Wedoff said, the decision fills a very big gap that *Stern* left open, and that is very helpful to the operation of the bankruptcy system. Certainly the way the

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[12] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982) ("Congress has vested the 'adjunct' bankruptcy judges with powers over [debtor]'s state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress' own creation.").

Seventh Circuit was handling things under the *Ortiz*[13] decision and the *Wellness International*[14] decision did change very much, contrary to the dictum in the Supreme Court's *Stern* decision. Now I think this will set the needle back to where it was before *Stern*, or at least before *Stern* was expansively interpreted.

Finally, I want to note something very important procedurally about this case, because I think it is going to have a lot of effect going forward. The Supreme Court said the district court gave *de novo* review, even though no one below had specifically requested *de novo* review. Even though the bankruptcy judge, as Michelle had said, did not label the judgment as proposed findings and conclusions. Why? This is the key; this was a grant of a motion for summary judgment, and any review of a summary judgment grant is going to be *de novo* per se. It is a legal issue. The Supreme Court did not even devote a full sentence to that, it was a parenthetical phrase, but I think it is an important thing to remember. It applies not only to summary judgment motions, but also to rulings on motions to dismiss under Rule 12(b),[15] and that is going to give the bankruptcy courts a lot more leeway because any appeal, any review, of such a ruling is by its nature going to be *de novo* even if the bankruptcy judge wrongly determined that a matter was core, when it should have been non-core.

Professor Harner: Thank you, and Mr. Rao would you like to round out the Introduction with some opening comments?

Mr. Rao: Sure. My reaction was similar to when you schedule an appointment with a doctor because you are feeling awful, and have convinced yourself that there is something really wrong and the doctor tells you that there's nothing that could be found and that you seem to be in good health—you react by being both relieved and disappointed. In this case, I'm relieved that the Court found a practical solution that will keep the bankruptcy system running efficiently and will bring us closer to what Chief Justice Roberts said in the *Stern* opinion that some have not really followed very well, that the decision should not change all that much. I am disappointed because the Court did not give all the needed answers, such as to the consent issue.

Professor Harner: Terrific. Let's see if we can drill down on the decision, first discussing some of the legal issues, both in the context of what the Court

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[13] Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 665 F.3d 906, 915 (7th Cir. 2011) (finding bankruptcy judge lacked constitutional authority "to enter a final judgment on the debtor's state-law claims").

[14] Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 755 (7th Cir. 2013) (holding bankruptcy judge lacked constitutional authority to render final judgment on debtor's alter ego claim).

[15] FED. R. CIV. P. 12(b).

decided and what it left open. Mr. Levin, I'd like to start with you and actually go back to something you mentioned in your opening comments. One take on the *Arkison* opinion is that it was a very surgical approach to address the problem at hand: the Court interpreted the statute in a way to avoid the constitutional issue and basically said we do not have any issue here. If you have a claim that is designated as core by statute, but the bankruptcy court lacks constitutional authority to decide that type of claim, you simply drop down to section 157(c)[16] using the severability provision of the statute: if the claim is not core and relates to the bankruptcy case, we can proceed with proposed findings of facts and conclusions of law—no problem. You mentioned that this is an elegant solution. Why isn't it a good enough solution? What is left that could really pose challenges going forward?

Mr. Levin: As has been discussed already, the big challenge is going to be what constitutes consent. Let me take this in a couple of steps. First, I do not think the failure to address consent, while disappointing, is as big a deal as some folks worry. I think courts and lawyers will work around it. Courts and lawyers have been very creative in making the system work, and they will get around the consent problem, whether the Rules Committee adopts changes, which I would like to see them do anyway, or not, and whether the Supreme Court rules on the consent issue.

I think the consent issue is only going to arise where someone makes a mistake—someone forgets to plead consent or waive consent. Most appellate decisions that I see are where something went wrong below and a party tries to correct it with an exception or a ruling on appeal. That's not just in this area, but in all areas of bankruptcy law and all procedural areas. I think that's where we're going to see it here. So for the most part I don't think it's going to have a big effect.

The bigger issue is, what is a *Stern* matter? That's how the Supreme Court characterizes it or labels these things in the *Arkison* decision. I think lawyers and some, especially non-bankruptcy courts, appellate courts, are going to try to argue that everything is *Stern*.

Some lawyer, on one side or the other, is always going to have an advantage by arguing that it's a *Stern* matter and that the bankruptcy court cannot rule on it. I think cooler heads are likely to prevail on that. The Supreme Court has given pretty clear guidance that *Stern* matters are those that are an effort to augment the estate where the ruling is not wrapped up in a ruling on a proof of claim or an otherwise core matter. Four circuits have looked at the issue of what are

[16] 28 U.S.C. § 157(c)(1) (2012) ("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 . . . .").

Stern matters and even though they split on the consent issue, all four of them have got it right. The Fifth, Sixth, Seventh and Ninth circuits have all taken up these matters and have determined what are *Stern* matters and what are not. I think they have made a pretty clear line of it, and I am not troubled by that.

I think the bigger problem that is going to be presented by the lack of ruling on consent is that it might mean that the winner before the bankruptcy court is the one who needs to appeal. Now, the bankruptcy rules may be able to address this, but if the rules address this and set out some consequences for the loser's failing to appeal, they may or may not be effective because of the consent issue. If the defendant loses, and doesn't take the matter to the district court, must the winning plaintiff, the estate representative, take the matter to the district court to get the ruling for it to be effective, or will the failure of the defendant, the losing defendant to do so, result in what amounts to a final judgment by consent?

I'm going to refer you to a decision by Judge Glenn in the Southern District of New York called *In re Oldco M Corporation*,[17] in which he held that in a clear *Stern*-matter, where the defendant did not answer the summons, failed to appear, and the clerk entered the default judgment (the bankruptcy rules say the clerk enters the judgment, not the court),[18] that was adequate as a binding final judgment, even though it didn't go to the district court and even though the bankruptcy court might not have been able to rule as a final matter, because, he said, even in the district court, if the defendant does not appear, the clerk enters the default judgment, and that is adequate.[19] I think if you apply the *Oldco M* decision more broadly to the circumstance where the defendant has appeared but fails to, or refuses to, appeal, because he doesn't want a district court ruling, I think the bankruptcy court's ruling ought to be binding. The consent aspect of this may yet undercut what I am saying, but I think that is going to be the practical solution to the absence of a ruling on consent.

Judge Wedoff: Rich, I wonder if there is another way of looking at it. The final holding that the Supreme Court issued in *Arkison* was that even if the bankruptcy court's entry of summary judgment was invalid, the district court's *de novo* review cured any error. So what the Supreme Court is saying is that the entry of final judgment by a bankruptcy court without consent, giving rise to a potential *Stern* problem, is simply an error that can be cured by *de novo* review. If it is simply an error, then it can also be waived by a failure to take an appeal, so that the judgment issued by the bankruptcy court is in fact a binding

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[17] *In re* Oldco M Corp., 484 B.R. 598 (Bankr. S.D.N.Y. 2012).

[18] *See* FED. R. CIV. P. 55.

[19] *See In re Oldco M*, 484 B.R. at 614–15 (finding defendant's failure to respond, where summons and complaint were properly served, constituted implied consent to entry of a default judgment by bankruptcy judge).

judgment. If it is not appealed, or if appealed and determined to raise only a harmless error, the judgment stands. I think that's really important because if it's not a judgment, if we have some question about whether it's really a valid judgment or only proposed findings and conclusions, then questions arise. Does interest accumulate post-judgment while we are waiting for a decision from the district court? Is there a need to post a bond by the losing party because there is a judgment on appeal? I think it has to be treated as a judgment, as the Supreme Court did here. If it's a judgment, then these questions go away irrespective of whether consent is required.

Mr. Levin: I like your argument as an additional one to the *Oldco M* argument where the losing defendant does nothing. With a losing plaintiff, I am less concerned practically because it's not going to have much effect. But where there is a losing defendant and the defendant takes the petition for review or the appeal, however it's characterized, I would be troubled by allowing enforcement to take place before the district court ruled because if the bankruptcy court's ruling is not effective, if the defendant can't yet be bound, if the "judicial power of the United States" cannot be exercised until the district judge signs that judgment, then I don't think you can treat it as an enforceable judgment before then, unless, as I said earlier, the losing defendant doesn't take it up.

Professor Harner: Mr. Levin and Judge Wedoff, thank you for those additional comments. This exchange is not only interesting and important to the dialogue, but also raises the issue of whether or not we will actually see the consent issue go up. If it's treated as harmless error or a practice develops where, as a matter of course, decisions are presented to the district court for *de novo* review, are we going to find that mistake, Mr. Levin, that you mentioned as the thing that forces a decision on consent?

Mr. Levin: My own view on this is that I go back to the Supreme Court's series of rulings on the new value exception to the absolute priority rule.[20] How is that relevant here? They always find a way to duck the core issues. I think they are going to do the same thing on consent. They are going to find a way out every time or they are not going to grant certiorari. It is too important an issue for the federal judiciary. They do not want to chip away at the independence of the federal judiciary by giving a broad ruling on consent.

Maybe they can't even reach consensus. Remember, *Stern v. Marshall* was a five against four decision, and the only the reason I think *Arkison* was nine-zip

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[20] *See* Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988); Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle Street P'ship, 526 U.S. 434 (1999).

was because it was a narrow statutory construction ruling. I don't think they're going to get there for a long time until somebody wakes up and realizes that Article III really is an important part of the Constitution and it ought to be enforced.

Dean Chemerinsky: I want to disagree with the prediction. I think the Supreme Court is going to deal with the consent issue and they have to deal with it relatively soon. Even if it doesn't come up in the context of bankruptcy courts, it's still got to come up in the context of magistrate judges. If the Supreme Court is going to say that consent is not sufficient to allow a non-Article III court to issue a final judgment, that tremendously changes what magistrate judges can do. Also, I think there are going to be instances where like in the Fifth, the Sixth, the Seventh, and the Ninth Circuit cases, something is going to come up where it wasn't a report and recommendation to the district court. It wasn't *de novo* review by the district court, and whoever lost is going to say that the bankruptcy court issued a final judgment and didn't have the authority to do so. It may also come up in some of the arbitration contexts, because I think one of the things that is lurking in the background is that if it is government-mandated, federal statute mandated arbitration, why is an arbiter any different, if it's in essence issuing a final judgment, than when an Article III court is issuing a final judgment? One way or another, the Court is going to have to deal with this, and I think the split among the circuits is still there after *Arkison*, and that too is why I think the Supreme Court is going deal with this sooner rather than later.

Judge Wedoff: If I can go back to the question of post-judgment interest, that's another way in which this question has to be decided. If we assume that a money judgment is issued in favor of a bankruptcy trustee in an avoidance action, and it takes the district court over a year before the judgment is affirmed, the question arises of whether the defendant owes post-judgment interest from the time the bankruptcy court entered what it said was a judgment and the time that the district court affirms.

If all we had were proposed findings of fact and conclusions of law, there would be no judgment that would be entitled to interest. The district court would have to decide that question in the first instance—was consent valid to let the bankruptcy judge enter the final judgment or was it not? That is regardless of whether there is an affirmance of the bankruptcy court's findings.

Mr. Levin: You've just given me a very good reason representing any defendant never to consent, just for that reason, just the running of interest.

Judge Wedoff: You would hold open the question of whether consent is required. Yes, you're right. Don't consent. Always make it findings of fact and conclusions of law, but that would be true now. There is no change because of *Stern* in that regard.

Mr. Levin: No, it just puts a spotlight on the issue.

Professor Harner: Dean Chemerinsky, let me follow up on your comment that you think the Court not only will, but almost has to take up the consent issue. For the benefit of the Roundtable, can you please explain why this issue is so important and why it may be viewed as chipping away at Article III constitutional authority?

Dean Chemerinksy: I think that Justice Breyer's dissent in *Stern v. Marshall* explains why the consent issue is so important. He said that if you don't allow bankruptcy courts to issue final judgments, then there are many matters that are going to have to, in his words, "ping pong" back and forth between the bankruptcy court and the district court. I think it's going to matter for the reasons that Judge Wedoff has just said in terms of calculation of interest. It's going to certainly matter in terms of the BAP because if the decision is from the district court, then it is not reviewable by the BAP. And obviously, if it's from the bankruptcy court, it is reviewable in the BAP.

As I also said, I think that this is much broader than just bankruptcy courts, it applies any time you have a non-Article III court deciding. Magistrate judges can hold civil jury trials with consent of the parties, and then issue a final judgment. Is that constitutional? The court in *Raddatz*[21] said yes, but I think there's a real tension between *Raddatz* and *Stern* if there are state law issues that are part of what is being tried before the magistrate judge. For all of these reasons and more, I think the Court is going to have to resolve the conflict among the circuits.

Mr. Levin: Especially because *Raddatz* wasn't as clear a statement on the issue as you have just described. It did hedge a little bit.

Dean Chemerinsky: Yes.

Professor Harner: When the Court does take up this issue, how do you think the Court will resolve it in a way that preserves not only the bankruptcy system, but also as you say the magistrate and other systems that rely on consent to allow non-Article III courts to conduct business?

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[21] United States v. Raddatz, 447 U.S. 667 (1980).

Dean Chemerinsky: Can I say I don't know? I long ago learned that he who attempts to live by the crystal ball has to learn to eat ground glass. Because *Stern v. Marshall* was a five-four decision, it's hard to predict. But let me explain why I think it's hard to predict. *Stern v. Marshall* was highly formalistic in holding that only Article III courts can issue a final judgment over state law claims. The Court's reasoning was formalistic, in that it really was a syllogism. The Court began with the major premise that only Article III courts can issue a final judgment in state law claims.

The Court as a minor premise said that the bankruptcy court issued a final judgment on a state law claim, and then said the bankruptcy court decision was therefore unconstitutional. The result was that the Texas Probate Court decision was regarded as a final judgment, and thus preclusive. It was formalistic in terms of its method. It was formalistic in the sense that the Court did not pay any attention to what the practical consequences would be. Justice Breyer's dissent was very functional in looking at the practical consequences of this. But these ramifications didn't matter to Chief Justice Roberts. In fact, Chief Justice Roberts explicitly said it didn't matter.

The Court in *Northern Pipeline* had been highly formalistic. Then, in the cases after *Northern Pipeline*, *Commodity Futures Trading Commission v. Schor*,[22] *Thomas v. Union Carbide*,[23] it shifted to a very functional approach much like Justice White's dissent from *Northern Pipeline*. If the Court follows its formalistic path from *Stern v. Marshall*, then I don't think consent can be sufficient because why should you allow a non-Article III court to be able to issue a final judgment if it isn't authorized by the Constitution? On the other hand, if the Court takes the functional approach of the dissent, then it would seem to me that of course consent would be sufficient. If the Court then continues to defy the majority for *Stern v. Marshall*, to follow the formalistic approach, the Court is going to rule that consent is not sufficient.

If one of the five in the majority in *Stern* join the four dissenters, then the Court is going to find that consent is sufficient. In predicting, it's worth looking at the transcript of the oral argument from *Arkison*. I think Chief Justice Roberts left no doubt that he is going to say that consent is insufficient. This to him is a structural constitutional problem that cannot be overcome by consent. I think Justice Scalia in his questions left no doubt that he is going to take the position that consent is insufficient. The one justice from the *Stern* majority who seemed to be very concerned about that and leaning towards the other side was Justice Alito. His questions indicated a willingness to take a much more functional approach here.

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[22] 478 U.S. 833 (1986).

[23] Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985).

Keep in mind, a majority of Ginsburg, Breyer, Alito, Sotomayor and Kagan, has never happened in a five-four decision. That makes it a hard prediction to say that Justice Alito is going to be the one. Obviously one or more justices from the *Stern* majority were struggling with this issue. That is why I think the Court seized on coming up with a very narrow resolution in *Arkison*, and ducking the consent issue. It's also what makes it very difficult to predict what the Supreme Court is going to do.

Mr. Levin: Erwin, do you think that Justice Alito was more sympathetic because, of all the justices there, he was the only one who has served as a district judge?

Dean Chemerinsky: Yes. I think certainly that experience gives him the perspective of what it would mean for a district judge, if bankruptcy courts had to send everything with *Stern* issues and reports and recommendations, if magistrate judges could no longer hold jury trials and issue final judgments with consent of the parties. We are all influenced by our experience, and I think that experience could be the reason why, at least in oral argument, he was the one from the *Stern* majority who seemed most concerned from a functional perspective.

Judge Wedoff: Justice Kennedy is a wild card here too. His opinion while on the Appellate Court, affirming the possibility of magistrate decisions on a final basis based on consent, is important.[24] I want to tell a war story if I can do it briefly. I was at counsel table when a partner of mine, Joan Gottschall, argued the *Raddatz* case on behalf of a criminal defendant who had an exclusionary rule issue. Let's assume it was a defendant who testified that he had not been given Miranda warnings and thereafter gave an incriminating statement, and that the arresting officers testified that they had given Miranda warnings, generating a pure question of credibility. This question was decided against the defendant on a preliminary basis by the magistrate judge, and *de novo* review in the district court was required by the statute. The district judge read the transcript and said that the magistrate judge was right.

Joan's argument in the Supreme Court was that questions of credibility, if they are going to be determined *de novo*, require the trier of fact to hear the witnesses. You cannot make determinations of credibility based on a cold record. But the Supreme Court rejected this argument in a five-four decision, holding the credibility determination could be made *de novo* based on a cold

[24] Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 542–43 (9th Cir. 1984) (noting Supreme Court's consideration of consent in constitutional analysis relating to Article III).

record. The reason why I want to tell the story is that, during the oral argument, Justice Stevens was the most vigorous proponent of our position in the tone of his questions directed at the Assistant Solicitor General.

He pointed out that listening to the witnesses was very important, that seeing their reaction, their nonverbal communication in response to questions, was essential to determining credibility. We left the oral argument not knowing what the outcome would be. In fact, Justice Marshall had seemed to question the validity of the argument we made, but we felt we had one vote. Again though, five-four was the ultimate decision against us, with Justice Stevens in the majority. Why did he not vote consistent with the tone of his questions? My conclusion was that in the end, practicality overruled formalism in his mind. There are so many exclusionary matters that were going to be presented in criminal cases that if the district judges had to hear each one of them, it would clog the system. I think that could be a determining factor in the ultimate decision of the Supreme Court.

Mr. Levin: We talk about practicality, but what troubles me about this whole discussion of not only on what you just said Judge Wedoff, but also on Dean Chemerinsky's reference to Justice Breyer's statement about ping-pong and practicality, is that there is very easy solution to the practicalities, which is not being considered because it's politically infeasible. The fact is, Congress could create enough Article III courts and enough Article III judgeships to handle the business of the federal judiciary, but they refuse to do so. That's what I meant by my comment earlier about enforcing Article III of the Constitution.

At some point, we don't have to get into all these nuanced fine distinctions, if Congress would just follow the Constitution. I know it's a pipe dream to put politics aside to do that. I think it is perhaps too late in the Republic to go back, but that is clearly the correct answer. I want to question one other thing that Dean Chemerinsky said, that the distinction between *Northern Pipeline* and then followed by *Schor* and *Thomas*, and that is, and this goes to the consent issue as well, the big difference between those two sets of cases is that *Schor* and *Thomas* came out of the executive branch. They were executive branch administrative agencies. *Northern Pipeline* and *Raddatz* and *Stern* all come out of the judiciary. If we are worried about separation of powers and structure, it's astonishing for me to read the Seventh Circuit's *Wellness* decision railing on and on about how Congress can steal away the power of the federal judiciary by the creation of bankruptcy judges, when they fail to note that any matter that gets before a bankruptcy judge is solely based on referral by the district judge, which can be revoked at any time in any case. I don't understand how that creates a structural issue whereas the *Thomas* and *Schor* cases and even going back to

Crowell v. Benson,[25] can possibly create a structural issue because there it is across branches.

Dean Chemerinsky: I think that's absolutely right. I think it's why there is a real tension between *Northern Pipeline* and *Stern* on the one hand, and *Thomas* and *Schor* on the other. My point was different in that I think the nature of the reasoning was very different in *Northern Pipeline* and *Stern* on the one hand, and *Thomas* and *Schor* on the other. In *Northern Pipeline* and in *Stern*, the plurality and the majority opinions respectively, were the epitome of formalistic reasoning; they rejected any functional considerations. It is Justice White in *Northern Pipeline* in dissent, it is Justice Breyer in *Stern v. Marshall* in dissent who say we have to focus on the practical functional considerations.

In *Thomas* and *Schor*, the Court is taking exactly the functional approach that it said it wasn't going to do in *Northern Pipeline*. You are right; it doesn't make any sense to use the formalistic approach when it's about giving things to an Article I court and use a functional approach when it's giving it to an administrative law judge. That to me heightens why there is a tension between these cases.

Professor Harner: Judge Wedoff, I actually would like to pick up on your war story and refer back to something Dean Chemerinsky observed about oral argument. I actually was struck by what I perceived as a lack of concern by some about the implications of determining consent not valid in these instances. Perhaps, as you discussed, some of the justices do not have experience sitting as a district court judge and do not appreciate the value to the system of the consent mechanism for federal magistrates and bankruptcy courts in performing their duties as adjuncts of the district court.

Certainly, the parties at oral argument were trying to make the case that you can't deem consent insufficient because it affects the magistrate system as well, and at least some of the justices did not seem concerned by that. Judge Wedoff, could you start us down the road of thinking just a little bit more about what it would mean if this consent issue does go back up to the Court, the formalistic approach prevails, and we find ourselves in a world where section 157(c)(2) consent does not work for *Stern* claims, which also likely means consent may not work in the magistrate system or in the arbitration context as well?

Judge Wedoff: I think that the likelihood of arbitration being thrown out as a potential mechanism for resolving inter-party disputes, even though they depend on state law, is very low. The Supreme Court has upheld the arbitration law repeatedly, and broadly interpreted it and applied it in contexts that appears

[25] 285 U.S. 22, 50 (1932).

to many people to be unfair. I think it would be very difficult to bring arbitration into the same category as a final judgment by a bankruptcy court, or a magistrate judge. Let me talk while answering your question first about the impact on bankruptcy because that's where I have personal experience.

I think there is a great difference between issuing a final judgment on a *Stern*-affected matter, and issuing proposed findings and conclusions. It's much more comfortable to issue an oral opinion on a routine preference matter or even a fraudulent transfer action that doesn't have a lot of complicated facts. A judge can hear the evidence, digest it sufficiently at the conclusion of the hearing, and then—maybe after a discussion with a law clerk—return to the bench, and give the ruling.

The concern about the fact-finding is eliminated by the presumption of correctness and the ability of the parties to order transcripts and make an argument to the district court with the likelihood that an argument based on the facts is not going to prevail. On the other hand, if what one is doing is proposing findings and conclusions, one wants to give the district court a written opinion detailing, by citations to the record, what the fact findings actually are, so that the district court can go through each of the detailed findings and make a determination as to whether it is really supported by the record. That would give the judge the background under *Raddatz* to make a determination as to whether what the bankruptcy court did was correct.

Seen this way, the burden on the bankruptcy court is greatly increased by a need for proposed findings of fact and conclusions of law because many of the matters that come before us potentially for trial are ones in which the *Stern*-effect would apply, again particularly with avoidance actions. That's a big concern on my part.

Now for magistrate judges, one of the most rewarding parts of the job is serving as the final decision maker on civil matters that they can hear by consent. If they can't hear the matters by consent, if all they can do is preside over a trial and make proposed findings of facts and conclusions of law, they would call them recommendations, they are deprived of the satisfaction that that final adjudication would provide. They also, if there is in fact a trial that only results in recommendations, are given more work than they might otherwise have. On both of those grounds, I think it matters a great deal whether we can enter a final judgment or not. Again my hope would be that practicality ultimately prevails.

Mr. Rao: Judge Wedoff, I find that on the practicality issue I think one of the concerns I have is that bankruptcy judges may more readily issue rulings in the alternative without any real analysis of whether the case involves a *Stern* claim, that in the alternative the ruling can be treated as a recommended finding.

If it is a district court appeal, would the district court handle the matter under the traditional appellate standards or the *de novo* review, and how will the parties deal with that uncertainty? In *Arkison* it was easy because it involved summary judgment and the review would be fundamentally not that much different. But if it's a multi-day trial, with lots of testimony, it will be important to know the method of review. And what about the procedure? Bankruptcy Rule 9033 governs section 157(c)(1) non-core proceedings[26] and of course there was a proposal to amend that Rule to cover core proceedings. But it was put on hold because of the *Arkison* case and may perhaps be revived. Judge Wedoff you could probably speak to that. But let's assume it does apply to a *Stern* claim that's dealt with under section 157(c)(1). If the bankruptcy judge gives one of these alternative judgments, will the losing party need to file within fourteen days both a notice of appeal and an objection to the specific proposed findings and conclusions?

Under Rule 9033(c) the bankruptcy court can grant an extension of time to file an objection to the findings and conclusions, but will such a request also extend the time to file a notice of appeal? Probably not. Under Rule 9033(d) the district judge can make a *de novo* review based on the record, or after taking additional evidence, if there has been an objection to specific factual findings.[27] It's similar to Civil Rule 72 for magistrate decisions.[28] So while a new hearing is not required, the district court is absolutely going to need to review the transcript of the testimony and could order that there should be additional testimony.

I'll probably come back to this later but with that uncertainty about additional costs, there could be concern particularly in consumer cases.

Judge Wedoff: I think a bankruptcy judge has to make a call one way or the other. Either the judge is going to say that this is a matter as to which I ought to issue proposed findings of fact and conclusions of law, even though there might be an argument that it could be a final judgment; or, the judge will issue, what is nominally a final judgment, with the caveat that if the law requires this to be merely proposed findings of fact or conclusions of law that the district court should so consider it. One way or the other it has to be recorded either as proposed findings of fact or conclusions of law or as a final judgment.

I don't think that removes the problem you noted for the losing party. The losing party has to determine whether it's going to be a notice of appeal or an

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[26] *See* FED. R. BANKR. P. 9033 (providing bankruptcy judge will file proposed findings of fact and conclusions of law in non-core proceedings).

[27] *See* FED. R. BANKR. P. 9033(d).

[28] FED. R. CIV. P. 72(b)(3) ("[D]istrict judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to . . . [and] may accept, reject, or modify the recommended disposition[.]").

objection to proposed findings. But again, I think that the losing party response will be consistent with the decision that the bankruptcy judge makes. If the bankruptcy judge calls it a final judgment—a notice of appeal. If the bankruptcy judge calls it proposed findings and conclusions—objections to the proposed findings and conclusions.

If there is a notice of appeal and the district court finds that it was improperly issued as a final judgment, then the district court can take the final judgment as proposed findings of fact and conclusions of law and take the appellate argument as an objection to those findings. I think either way the procedure is pretty clear for the parties.

Mr. Levin: Four things that the two of you just said: let me take them one at a time. First, Judge Wedoff, there might be a middle ground on consent, where a party might not be able to consent to a bankruptcy judge's final judgment but can consent to allow it to go up on the oral transcript rather than on written proposed findings and conclusions. We don't know. But it is something that bankruptcy judges might start asking the losing party—will you waive formal findings and allow this to go up on the transcript of my findings?

Second, what are district judges going to do? I think I'm going to give the district judges credit for reviewing the record on all these cases. But I think it's going to be the rare case where a district judge would say, "If I were taking this on clear error I would find no error but on *de novo* review I would come to a different conclusion." They are almost going to say, "Whichever way I look at this I affirm." Or they may reverse on legal issues, but on the factual issues, it's going to be the rare case.

Third, section 157(b)(3) requires the bankruptcy judge to make a determination of whether something is core or non-core.[29] If there is a structural issue within the system, then Congress's assignment of that job to the bankruptcy judge might not be sufficient because a court could say, "You cannot take away the determination of whether someone is entitled to an Article III court by giving it to a non-Article III judge to determine." Even though the bankruptcy court must determine it in each case as is shown in section 157(b)(3), bankruptcy judges might duck the issue, but of course why wouldn't they always say, "Well, I'll be safe; I'll call these proposed findings. That way, I don't have to worry how it comes out."

Finally, the fourth point is on the procedure for taking it up. As you know a judge can grant an extension of time to file an objection to proposed findings, but on a notice of appeal, there is a limit to how much extension can be granted.

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[29] *See* 28 U.S.C. § 157(b)(3) (2012) ("The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11.").

If a judge determines that the matter is non-core and grants a long extension, so that the losing party takes more time than the appeal period and then the district court determines ultimately that it was core, has the district court lost jurisdiction to hear the appeal because the appeal was not filed on time? That is something I think the rules may have to deal with as well.

Judge Wedoff: I think we're going back to something that we discussed at the very beginning—what the bankruptcy court calls the determination is going to count. Affirming the Ninth Circuit as it did in *Arkison* meant that the Supreme Court treated the bankruptcy judgment as a final judgment, potentially erroneous and it doesn't decide whether it was erroneous or not, but it holds that because a proper standard of review was given, even though there might have been error in the form of the bankruptcy court's determination, the determination stands.

The Ninth Circuit is affirmed. The bankruptcy court's judgment is affirmed. If the bankruptcy court enters what it purports to be a judgment, that's the way the matter is going to be treated and it would only be reversed if the judge had made some mistake that would otherwise cause it to be reversed. If the *de novo* review is given to the fact-findings, that would not be a ground for reversal.

Mr. Levin: I'm going to appeal that ruling that you just made to Dean Chemerinsky. I'm not sure I agree with it. I would be interested in his views or Mr. Rao's views on it.

Dean Chemerinsky: I agree with Judge Wedoff here. I think he's exactly right in terms of the effect.

Mr. Rao: I think the concern though, and I think we've already seen some decisions like this, is where bankruptcy courts have not really issued very clear judgments. It is sort of as I described earlier, a decision in the alternative in which the judge says, "I'm issuing a judgment, but it may well be just proposed findings and conclusions." I just wonder whether a party can take comfort with that kind of mixed or alternative ruling.

Judge Wedoff: One other thing that we might bring up right now and it might have been included in Michelle's question, what is the impact on BAPs? Let's assume that we are in a district that is covered by a BAP and we are operating under the current rules. For those who might not be familiar, the current rules require that the party taking an appeal from a bankruptcy judge's

decision is going to have to elect to have a district judge for the appeal rather than the Bankruptcy Appellate Panel.[30]

It is a lot like the jury trial right. If it's not claimed, if there is not a demand, then the default position is appeal to the BAP. Now, the other parties to the appeal also have the option to demand adjudication by the district court rather than a BAP, but again it's an affirmative decision on their part. If they take no action whatsoever, the matter goes to the Bankruptcy Appellate Panel. In effect, Bankruptcy Appellate Panels have their jurisdiction under implied consent. A failure to demand district court adjudication results in the appeal going to the BAP. Now what can the BAP effectively do?

Mr. Levin: First of all, do we all agree that BAPs can still handle appeals for matters that are clearly core proceedings?

Judge Wedoff: One would think so. If a bankruptcy judge can decide the matter in the first instance, the bankruptcy judge can decide an appeal as well, subject to Article III review.

Mr. Levin: All right, so we are only talking about the *Stern* or near *Stern* matters.

Judge Wedoff: Yes.

Mr. Levin: Okay. I'm sorry, go ahead.

Judge Wedoff: Okay, well then the question is, let's assume that all that we have on this appeal is implied consent for adjudication by the BAP. Does the fact that the BAP's decision would be appealable as a matter of right to the court of appeals and the circuit court could, in its discretion give *de novo* consideration of whatever determination was made by the BAP; does that cure the problem of a potential exercise of authority beyond what would be constitutionally permissible by the BAP?

Dean Chemerinsky: Isn't the prior problem that the BAP gets to review the bankruptcy court decision, but not the district court decision? If the effect of *Arkison* is that district courts are going to grant some form of at least on paper *de novo* review, then those decisions that otherwise go to the BAP can't go to the BAP anymore. What isn't present in your description is that there are certainly going to be cases that are mixtures of *Stern* and non-*Stern* issues. That is going to happen all the time. Then what happens when the district court has

[30] *See* FED. R. BANKR. P. 8001(e).

decided part of the case through *de novo* review and the bankruptcy court has decided the other part; what happens then to the BAP?

Judge Wedoff: Again, there are two ways of looking at it, I think. If what the BAP does is considered to be improper because the BAP is making determinations of fact that only an Article III judge ought to be able to make, I think the question is the same. Is the potential for *de novo* review, whether it's in a mixed case or not, by the court of appeals sufficient to cure any potential problem? And is the failure to take an appeal from the BAP's decision determinative of the finality of its decision?

Mr. Levin: It all comes down to the consent issue again, doesn't it?

Judge Wedoff: I think it does. I think what happens is the BAP survives if we can have implied consent, but again it doesn't completely because . . .

Mr. Levin: The BAP survives for core proceedings anyway.

Judge Wedoff: Yes, certainly for matters that are constitutionally core, BAP survives, but as Dean Chemerinsky said, there are a number of matters that are going to arise particularly in complicated cases that are at least partially constitutionally incapable of final adjudication by a bankruptcy judge. When that goes to a BAP, what happens? If consent is okay we have no problem. If implied consent is okay—and we haven't talked about the difference between implied and expressed, which I would like to do that at some point, but if implied consent is valid—we have no problem. The BAPs continue in their existence exactly the way they are right now.

Mr. Levin: But wait a minute. If the party below does not consent to the bankruptcy judge's issuing a final order and it's a *Stern* matter, the bankruptcy judge is going to issue proposed findings. How can you ever under the current statute or rules or constitutional rulings, take proposed findings to the BAP? So, I don't think that's an issue. The issue is going to come up, as you say, when there is implied consent below or express consent. Suppose there was express consent, so it's already on somebody's radar screen that this is a *Stern* matter, and the bankruptcy judge issues a final order. Then I think the path that the appeal will take will depend on the party who did consent below.

I think that will influence the next steps. I think the tough problem is going to be where somebody consents to the judgment below, fails to object to the BAP above and then at the circuit above the BAP says, "The BAP shouldn't have handled it because I didn't consent to the BAP." I think first of all that

person is going to be in a very awkward position before the circuit having consented to the bankruptcy judge's issuance of a final order and mistakenly consented to the BAP. I think it is an unsympathetic posture to be in; therefore, I think the way this mouse is going to get through the snake, it is going to get digested.

Judge Wedoff: You think that the implied consent to the BAP's determination will be upheld by the circuit court?

Mr. Levin: Where the party below has expressly consented to the bankruptcy judge's issuance of a final order.

Judge Wedoff: That is what we are talking about.

Mr. Levin: Yes.

Judge Wedoff: Practicality and also embarrassment on the part of the arguing party in the circuit court is going to overcome formalism. The formalistic approach to this would be if consent is invalid as a formal matter at the bankruptcy court level, it's got to be even more ineffective at the BAP level because it is not even express.

Mr. Levin: I am assuming that consent was valid at the bankruptcy level. Although, how does a party go before the Court of Appeals and say, "I consented to the bankruptcy judge's issuance of a final order but I had my fingers crossed behind my back while I was doing it." How does somebody say that?

Judge Wedoff: Again practicality is going to overcome the formal inability of any court to issue a final judgment without Article III status.

Dean Chemerinsky: To me what all of this highlights is why the Supreme Court has to deal with the consent issue because there is no way in which we are going to be able to know the BAP's authority without knowing whether consent is going to be efficient. That is what I think this discussion shows.

Mr. Levin: Do you think the Supreme Court cares that much about BAPs?

Professor Harner: If I can ask a related question here because I want to keep us moving but I think there are important points coming out of this terrific dialogue. Given Dean Chemerinsky's comment that the Supreme Court must

decide the consent issue at some point and Mr. Levin's comment on the perception of BAPs, is there a way the Supreme Court could uphold the consent statute in the magistrate system but not in the bankruptcy system, thereby mitigating at least some of the impact of a decision on consent? Then I also would like to talk some about "*Stern* claims" after *Arkison*.

Judge Wedoff: It would have to be a statutory basis, right? The constitutional issue is identical.

Dean Chemerinsky: Exactly. At the oral argument in *Arkison*, about half the time was spent discussing the magistrate judges. The justices were very aware that what they were dealing with were Article I courts and what can be given to non-Article III judges. I don't see how they can draw a distinction between magistrate judges who serve for eight years and bankruptcy judges who serve for fourteen years.

Mr. Levin: I want to go back on something I said a moment ago about how a litigant argues after he's given express consent that his consent should be disregarded. That has been the pattern, perhaps not express consent, but at least implied consent, on all of the appellate decisions on the *Stern* issue, including in *Arkison*. People didn't object, they saw *Stern* while they were on appeal, and said, "Oh, we now object." I don't know if courts will be so forgiving of that now where the matter is commenced after the *Stern* decision was issued. Any reactions on that?

Judge Wedoff: I agree. It creates an emotional lever for the party who has won below. If you can say to the court, "Here's my opponent who voluntarily, expressly consented to final judgment before a bankruptcy judge fully aware of the impact of the *Stern* decision which had been rendered earlier and now comes before this court to say that because they lost, they should get to do it all over again." That's a very powerful emotional lever and I think has the effect of giving more weight to the validity of consent.

Mr. Rao: I think that's especially true after *Arkison*. I am not so sure it was before, but I think courts will be much more sensitive to concerns about gamesmanship that would occur where people are raising things at the last moment for strategic advantage.

Mr. Levin: The Supreme Court slapped Marshall's hand a little bit in *Stern* on that issue but said nothing to Executive Benefits about changing position on appeal.

Professor Harner: That leads me to the follow up question actually that I was going to ask Mr. Rao. Much of this conversation turns on whether or not you have a *Stern* claim, including the BAP discussion we were just having, whether consent must be expressed or if it can be implied, and whether consent is even necessary. Mr. Levin talked some about how courts seem to be getting what a "*Stern* claim" is correct in most cases. Do you draw anything from the *Arkison* decision on this issue? The Court assumed, without deciding, that the fraudulent transfer claim at issue was a *Stern* claim. Even in the fraudulent transfer context, you could perhaps think about claims that may or may not be *Stern* claims. Do you think the Court will provide further guidance on this issue at some point?

Mr. Rao: *Stern* claims have come to be known as proceedings that are core under section 157(b), but may not as a constitutional matter be adjudicated as core proceedings. As Mr. Levin said, I think that the circuit courts have been getting this issue right but when you look at some of the specific examples of *Stern* claims, some have reached different conclusions. Did the Supreme Court shed any light on this and the consent issue—it did not. The specific claims in *Arkison* were asserted by a chapter 7 trustee to recover assets for the estate that had been fraudulently conveyed.[31] So the claims were state law claims but were also brought under section 544,[32] and the Ninth Circuit concluded based on *Stern* and dicta from the earlier *Granfinanciera*[33] opinion that the fraud claims were *Stern* claims.

The Court in *Arkison* initially simply referred to the Ninth Circuit holding and stated "[n]either party contests that conclusion."[34] Later in the opinion the Court stated, "we assume without deciding, that the fraudulent conveyance claims in this case are *Stern* claims."[35] Interestingly, the Court then went on to decide that the *Stern* claim in the case fit under section 157(c)(1), the solution that was provided in the decision.[36] Again, the Court said the claims were effectively not core in the *Stern* sense because that is what the Ninth Circuit decided and no party disputed it.

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[31] *See* Bellingham Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553, 557 (9th Cir. 2012), *aff'd sub nom.* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014).

[32] *See id.*; *see also* 11 U.S.C. § 544 (2012) (describing rights of trustee after commencement of a case).

[33] *See* Granfinanciera v. Norberg, 492 U.S. 33, 36 (1989) (holding when person who has not submitted claim against bankruptcy estate to jury trial is sued by trustee in bankruptcy to recover allegedly fraudulent monetary transfer, then person is entitled to jury title, notwithstanding 28 U.S.C. section 157(b)).

[34] Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2172 (2014).

[35] *Id.* at 2174.

[36] *See id.* (finding language of section 157(c)(1) encompassed trustee's claims).

The Court was careful to state that it was not deciding the issue as to whether the claims were in fact *Stern* claims. The part of the decision where the Court checks if the fraudulent conveyance claims fit under section 157(c)(1), I think is interesting. Even though one of the *Stern* claims in the case was brought under section 544 and that it arose under title 11, like a section 548 claim would as well, the Court found that the claims were related to a case under title 11 because, it asserted, the property should have been estate property that was improperly removed. The Court said that no one would really question this under any plausible reading of the statute and again, no party contended otherwise.

I am not mentioning this because of any jurisdictional concerns but to question whether the gap filling solution that the Court came up with works for *Stern* claims that arise under title 11, since section 157(c)(1) expressly applies to claims that are related to a case under title 11.[37] Given the practical approach the Court took in the case, it seems that the Court is saying that the "related to" nexus is so broad that it would include "arising under" claims, as if there is almost a sub-category of "related to" claims, so that effectively all *Stern* claims can be treated in the same way under section 157(c)(1).

I'm not sure we will get any further guidance from the Court on this issue or at least not soon, on exactly what are *Stern* claims. You can call it wishful thinking but I'm hopeful that the practical approach taken in *Arkison* will have a calming effect at least for the lower courts, that will prevent further expansion of the concept of *Stern* claims.

The original *Stern* decision did have some very narrowing language that some courts have seemed to ignore. The Court talked about how if the action stems from the bankruptcy itself, or if it's a counterclaim that is resolved in the claim adjudication process, it's not a *Stern* claim. The *Stern* Court kept saying several times that the result would have been different had the counterclaim in the *Stern* case been based on some right of recovery created by bankruptcy law.

Professor Harner: Other thoughts on those issues?

Judge Wedoff: To me, the most interesting statutory issue is section 502(d), which provides that for avoidance actions, if the defendant in the avoidance action has filed a proof of claim, the proof of claim cannot be allowed until any avoidance judgment has been paid.[38] What that does, and the Supreme Court has upheld this, is make the question of the avoidance action essential to the claims adjudication. Therefore, because claim adjudication is core constitutionally, the bankruptcy court can determine the avoidance action, even

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[37] *See* 28 U.S.C. § 157(c)(1) (2012).

[38] *See* 11 U.S.C. § 502(d) (2012) (explaining avoidance actions in context of bankruptcy disputes).

though if it's a fraudulent transfer at least it is covered by *Granfinanciera* and would otherwise require Article III adjudication. The interesting question is, could Congress cure the problem that actually arose in *Stern* simply by saying that unless the defendant in any action by the trustee has paid the claim of the estate that the creditor may not prevail on its proof of claim? In other words, make all counterclaims of the estate, such as avoidance actions, a basis for a defense to a claim. If that were done, then it seems to me that all claims of the estate against creditors who file proofs of claim would be core matters constitutionally.

Professor Harner: Other thoughts or responses? That certainly would be one way to clarify at least the *Stern* claims issue and give more certainty to parties and courts in this area. Judge Wedoff, you mentioned a potential statutory solution to help matters here. Are there things you think could or should be done in the bankruptcy rules? I know you mentioned earlier that some of the rule changes that may be pending were waiting a decision on the consent issue. Given the continued split on consent after *Arkison*, is that something you think can be addressed by the rules or do we need further clarification from the Court first?

Judge Wedoff: There is a range of actions that the Rules Committee can take. I'd actually be interested in what the other panelists think about this, but let me outline the range. Right now we have rules that are plainly inapplicable to a number of situations, particularly *Stern* matters because remember, the rules assumed the validity of the statute's definition of core. The rules require express consent only with respect to non-statutorily core matters.

When a *Stern* matter comes before the court, the rule, again if you're applying the statute, does not require an expression of consent or non-consent. One way of dealing with the problem that exists under the current rules is what we had proposed earlier, requiring an assertion of consent or non-consent as to all matters. That way there can be an expression of consent potentially as to a *Stern* matter, and if consent is valid, the bankruptcy court can go ahead and enter a final judgment on that matter.

With several circuits saying that consent is ineffective, we had to withdraw that proposal from the Supreme Court. We didn't want the Supreme Court to have to pass on the validity of consent in the context of a proposed rule before it passed on the validity of consent in *Arkison*. Of course it didn't rule in *Arkison* so we're in the same situation. One possibility is for the Bankruptcy Rules Committee to continue to advance that rule for consent to everything. The theory there would be that even in those circuits that find consent is invalid, at least the issue would be preserved for ultimate decision by the Supreme Court.

For circuits that consider consent to be effective like the Ninth Circuit in *Bellingham*, we have that expression of consent even in *Stern*-affected matters. That's one possibility.

Another possibility would be to strip out consent from the national rules entirely and allow consent to be a matter that is a subject of local rules, so that in the Ninth Circuit where consent is effective, local rules could be adopted requiring expressions of consent.

The third possibility is that the Rules Committee could adopt—if the Ninth Circuit is right and if implied consent is effective—rules providing for the same procedure in trial proceedings that they do now for BAP proceedings, namely a requirement for a demand of Article III adjudication before the bankruptcy court would be deprived of the power to issue a final judgment. Those are the range of options that the Bankruptcy Rules Committee has. Again I would appreciate any thoughts that the panelists have.

Dean Chemerinsky: Just two quick thoughts. One is something we touched on but we haven't talked about. Whether implied consent will be sufficient is really distinct from the question of whether consent will be sufficient because it's possible that the court could say it must be express consent; the implied consent that Judge Paez approved in *Bellingham* wouldn't be enough. Obviously if consent isn't sufficient, then implied consent wouldn't be sufficient. I don't think one can assume that implied consent is going to be enough even if the Court allows consent. I thought one thing the Court might have done in *Arkison* is say, "Well, consent is enough, but it's got to be a more express consent."

The other is to state the obvious. Your middle course is to say to leave this in a decentralized way. But that's just a holding pattern because that's just trying to reflect the current reality. As soon as the Supreme Court resolves the consent issue, then your second approach would have to replace a uniform rule.

Mr. Levin: Do you think the *Arkison* decision will have any influence on the Fifth, Sixth and Seventh Circuits' views on consent? Already Judge Easterbrook has tried to dial back *Wellness* a little bit.

Judge Wedoff: A lot.

Mr. Levin: Yeah, a lot but it's hard to do for one judge.

Judge Wedoff: It's just dicta.

Mr. Levin: Yeah, that's right but do you think the *Arkison* decision will have any effect on those three circuits' view of consent?

Dean Chemerinsky: I do not. Three circuits took the position that consent is not sufficient and there's nothing in the *Arkison* decision to call that into question. Judge Easterbrook has expressed his view both before *Wellness* and after *Wellness*. I remember being on a panel at the Seventh Circuit conference speculating that the Supreme Court might say consent is sufficient. Judge Easterbrook stood up there and told me I was just wrong, and of course consent would be sufficient. That's obviously his view, but that is not necessarily what the Seventh Circuit decided in *Wellness International*.

Judge Wedoff: It wouldn't be so much the *Arkison* decision that changes the Seventh Circuit, but the possibility of a different panel.

Mr. Levin: Yes, but Judge Wedoff, going back to your bankruptcy rules point; I think your middle ground is the best one. As I said at the very beginning, the consent issue is more likely to go up as a result of a mistake or omission by a party. If you require a statement in every case you are going to reduce the likelihood of mistakes.

Mr. Rao: Yes. I think there are also some practical steps that the Rules Committee can take without the resolution of the consent issue and that I hope are taken. Again it gets to this critical question about whether the parties can know upfront whether they're dealing with *Stern* issues. I do think Rule 7012 should be changed, similar to the core/non-core pleading requirement now, where basically the parties can plead or are required to plead early on in the case whether or not it is a *Stern* claim or whether the court can issue a final judgment.

Then even at the pre-trial stage, the rules should permit a party to ask the court for a determination about whether it's a *Stern* claim. Mr. Levin raised the issue that it's probably unlikely that the district court would seek new testimony. But again, if you are concerned about the cost of litigation you may want to have that determination about whether it's a *Stern* claim so that you might decide whether to seek withdrawal of the reference. Finally, as I mentioned earlier, amending Rule 9033 would involve a simple change that would make it applicable to core proceedings that are effectively *Stern* claims.

Judge Wedoff: There is one other question that I want to address, and that comes from what Erwin mentioned just a little while ago, that potential distinction between express and implied consent. Here's my question—what is

the constitutional basis for distinguishing between the two? If consent is acceptable for waiving the right to Article III adjudication, what would make that require express consent, whereas adjudication by a jury can be waived by implied consent?

Dean Chemerinsky: Here is the answer, though I don't believe it. I think the answer would be to say, "There is a distinction between subject matter jurisdiction which can't be gained by consent and the authority of a court to issue a final judgment, which can be gained by consent." That is of course what your court and other courts have tried to do in saying that consent would be sufficient. I think the Supreme Court could say then, in order to have a non-Article III court issue the judge's consent, it should have to be an express rather than implied consent. And of course in other contexts the Supreme Court has said that there has to be express rather than implied waiver. For example, the State cannot impliedly waive sovereign immunity—it has to be express.

Professor Harner: I think that it is a great point. Hopefully, the Court takes up the consent issue and we will have additional clarity. Mr. Rao, I want to go back to you for a moment. You were responding to some of the proposed rules that Judge Wedoff discussed and provided some insightful comments. Until those or other rules changes are implemented, what changes do you anticipate or are you already seeing in the consumer practice to respond both to *Stern* and more recently to the *Arkison* decisions?

Mr. Rao: I think in general the impact of *Stern* in consumer cases has not been probably as significant as some of the other cases because most of the claims are brought and resolved as part of the claims adjudication process. There are cases where it has arisen, such as when the debtor is trying to recover property that may have been conveyed, pre-petition as part of some scam to avoid foreclosure and there are section 548 and common law fraud claims. In these cases the Court's solution I think is welcomed. The overarching goal of litigation in consumer cases for the debtor and really even the other parties, is to limit the litigation cost, to get a judicial determination in the least costly manner. Uncertainty and delay will certainly undermine that goal and so that's why I think that this decision is very helpful and I think it will have a good impact at least in these consumer cases.

The changes I mentioned from the rules perspective, would I think help in bringing about more certainty, just to be able to get a clearer path as to both whether you are dealing with *Stern* claims and what you are likely to get in terms of a judgment, and the path for where the case will go in the situation where an appeal or a review is needed.

Professor Harner: Certainty and efficiency hold value in all cases but particularly in the bankruptcy cases we all deal with on a daily basis. Mr. Levin, are you seeing changes in the commercial practice in response to either *Stern* or *Arkison*, and how do you anticipate these cases being handled going forward?

Mr. Levin: I think the defendant's perspective in any matter is going to be, do not consent, argue that it's a *Stern* matter. At some point during the proceeding, I suppose the defendant can consent even though he didn't initially consent. That keeps options open. I think lawyers in the commercial cases, especially the very aggressive lawyers, are going to argue that everything is *Stern*. For them it's worth trying even though ultimately they are going to lose on most of them because as I said earlier I think the *Stern* category is narrow.

I think it's going to slow things down a little bit, especially in the early years of this, and gum up the works a little bit but ultimately I think Chief Justice Roberts was right, and it's not going to change things all that much. From a historical perspective what I find so interesting is that in 1978, we said one of the big problems facing the bankruptcy system is the continual litigation over the jurisdiction of the bankruptcy court and how much is wasted on that. Despite the best efforts of many people over many years, we are right back where we started.

Professor Harner: We seem to have come full circle. Before I ask for closing remarks, any other comments? We talked a lot about the practical implications of *Arkison* and vetted some very thoughtful comments just now. Judge Wedoff, I can't help but feel for you and your colleagues on the bench because it appears what this means practically is, at least in the near term, more work for our bankruptcy judges.

Judge Wedoff: I want to agree with you very strongly that this will mean more work for bankruptcy judges, and in particularly bankruptcy judges in the Seventh Circuit who had the reference withdrawn from matters that were covered by *Ortiz* and *Wellness*. It's likely that they will be resubmitted to the bankruptcy court for determination months after they were originally taken away. That's a concern. But I do believe that in the end, as the rest of the panel has agreed, things will stay more or less the way they have been operating. The biggest challenge is going to be for the Rules Committee to come back with the best way of expediting that process.

Professor Harner: This has been a very dynamic and robust discussion, and I hate to bring it to a close, but I think we are coming to the end of our time. If I could perhaps just ask each of you to give some closing thoughts on *Arkison* and what we should all continue to consider as we wait to see what the Court does next. Judge Wedoff, could you please start us off one more time?

Judge Wedoff: Again, for me, the major question is going to be what the Rules Committee does and I have to say that I found our discussion today very helpful. I think I will be able to bring some insights to the Committee's discussion.

Professor Harner: Terrific, Dean Chemerinsky?

Dean Chemerinsky: When I talk to my students about the Supreme Court I always say the most important thing they should remember is that the Supreme Court can do whatever it wants to do. Here you have got an issue that split the circuits: is consent sufficient? The Supreme Court granted certiorari on this question. The oral argument focused on whether consent is sufficient and then Supreme Court did not decide the question. We discussed four circuits, the Fifth, Sixth, Seventh and Ninth Circuits, but undoubtedly this issue is going to come up in the other circuits.

I think the split among the circuits is going to intensify. As I said earlier, I think the Court is going to have to decide the question. Four circuits have decided the question, but the other circuits are surely going to face it. They likely in many instances had cases they had been waiting on until the Supreme Court came down with *Arkison*. I think you are going to see the circuit split intensify and the pressure on the Supreme Court to resolve this issue grow.

Professor Harner: Terrific. Mr. Levin?

Mr. Levin: Nothing more than what I said just a moment ago about the effect on litigation.

Professor Harner: Okay and Mr. Rao?

Mr. Rao: Yes. I think Dean Chemerinsky is correct that this consent issue is sort of rising to a head and it does need to be resolved. I think that the practical approach that was taken in *Arkison*, I hope and I think it will have some calming effect on what might be perceived as, at least in some areas, an overreaction to the initial *Stern* decision. I am looking forward to that.

Professor Harner: I want to thank each of you again. The conversation was everything I expected and far beyond. I hope that it was helpful to each of you and to our listeners and our readers. This will conclude our Roundtable. Thank you so much.