BANKRUPTCY COURT JURISDICTION AFTER *EXECUTIVE BENEFITS INSURANCE AGENCY v. ARKISON*

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Bankruptcy law has been struggling for several years now with the so-called "*Stern* problem"—the jurisdictional cloud of doubt that has been cast by the Supreme Court's decision in *Stern v. Marshall*[1] over much of the work that bankruptcy courts have done routinely for decades. Since *Stern* was decided, bankruptcy courts and the litigants who appear before them cannot be confident that it is constitutional for non-Article III bankruptcy judges to adjudicate various matters over which there is clear statutory jurisdiction, such as avoidance actions against third party transferees who are not otherwise involved or participating in the bankruptcy case. It is even questionable whether consent by all parties to adjudication before a bankruptcy judge would solve potential jurisdictional defects in *Stern*-implicated matters.

Nevertheless, despite the long shadow that *Stern* has cast, bankruptcy courts around the country have continued to operate as they did before, if for no other reason than simply because "the show must go on." As temporary fixes (if not quite solutions) to *Stern*, bankruptcy courts have mainly been doing two things: (1) issuing, like magistrate judges do, proposed findings of fact and proposed conclusions of law while leaving the final decision for the district judge to make on appeal after *de novo* review; and (2) obtaining consent from the parties who appear in bankruptcy court to the bankruptcy court's jurisdiction, particularly in cases where *Stern* is raised or implicated.

Doing one or both of these has allowed bankruptcy courts to continue to function more or less as before—at least ab initio. But always lurking in the background is the risk that an appeal raising a *Stern* issue could overturn the work of the bankruptcy court below. Such was the situation, for instance, in *In*

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[1] 131 S. Ct. 2594 (2011).

re Bellingham Insurance Agency, Inc.,[2] a recent decision of the Ninth Circuit reviewing and ultimately affirming an award of summary judgment in favor of a bankruptcy estate in an avoidance action against third parties who, for the first time on appeal, had raised a *Stern* defense. While the bankruptcy court's work was affirmed by the Ninth Circuit in *Bellingham*, the parties there and in similar cases around the country have been forced to operate in the jurisdictional twilight zone created by *Stern* (even as to "core" claims specifically delegated to the bankruptcy courts by statute),[3] and the approach taken by the Ninth Circuit in *Bellingham* has not been uniformly embraced by other courts.[4]

Thus, when the Supreme Court granted certiorari in *Bellingham* (recaptioning the case under the name *Executive Benefits Insurance Agency v. Arkison*), there was great hope in the bankruptcy bar that *Stern*'s scope would be clarified and that the Court would address in particular the jurisdictional effects of the two practices mentioned above, proposed findings/conclusions and consent. Unfortunately, these hopes were not fully realized. For the Court's decision,[5] which affirmed the Ninth Circuit on the narrow ground that the district court had reviewed the bankruptcy court's summary judgment ruling *de novo*, addresses only the first issue and not the second.

We now know that results will be stable on appeal in *Stern*-implicated cases in which bankruptcy courts limit themselves (at least in the alternative) to issuing proposed findings and conclusions while preserving at least the possibility of *de novo* review for the district court. What we continue not to know, however, is whether consent can cure potential jurisdictional defects raised by *Stern*. We also do not know, therefore, whether the cumbersome procedure of obtaining district court review will be necessary in every case implicating *Stern* (or whether the bankruptcy court could simply hedge by characterizing its holding as proposed and non-final only if a *Stern* challenge to the bankruptcy court's jurisdiction is later raised on appeal). Finally, we still do not know whether *Stern* is preserved as an issue on appeal in cases where it has not first been raised as an objection in the bankruptcy court below.[6]

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[2] 702 F.3d 553 (9th Cir. 2012), *aff'd sub nom.* Executive Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014).

[3] The statutory list of core matters is codified at 28 U.S.C. § 157.

[4] Compare the result in *Bellingham*, for instance, with the contrary results in Waldman v. Stone, 698 F.3d 910 (6th Cir. 2012); *In re* Ortiz, 665 F.3d 906 (7th Cir. 2011); and Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013).

[5] Executive Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014) ("*Arkison*").

[6] While a court's lack of subject matter jurisdiction cannot necessarily be negated via consent of, or "waiver" by, the parties, a failure to object or otherwise raise the issue—in other words, a situation of what one might term forfeiture or procedural default, as distinct from an affirmative waiver—may nevertheless allow a final judgment of a court that lacked jurisdiction to remain in effect and protect it from being overturned either on direct appeal or by way of collateral attack.

So where do we go from here? What can and will bankruptcy courts do, and what should we expect them to do, in *Stern*-implicated matters after *Arkison*? What can we predict in *Arkison*'s wake about the future of bankruptcy practice and the future direction of the Court in the area of bankruptcy court jurisdiction? What, if anything, can, should, or will be done to tweak the national Bankruptcy Rules and/or the local rules of the bankruptcy and district courts in light of the Court's decision?

These and other, related questions were the subject of a recent "Roundtable" organized and convened by the editors of the *ABI Law Review* just days after *Arkison* was decided, and a lightly edited version of this discussion is published here. On the panel, we were fortunate to have some of the most outstanding leaders and thinkers in the bankruptcy field today, offering diverse perspectives from the bench, the bar, and academe.

Judge Eugene Wedoff of the Bankruptcy Court for the Northern District of Illinois is one of our most respected and prolific bankruptcy judges whose knowledge and experience from chairing the Advisory Committee on Bankruptcy Rules—which has been wrestling with and for the time being has tabled a proposed new rule regarding consent to bankruptcy court jurisdiction on *Stern*-related matters[7]—is especially relevant to the discussion here. A leader in the application of bankruptcy law to new areas, his thoughts on recent developments and predictions about the future are always noteworthy.[8]

Dean Erwin Chemerinsky from the University of California, Irvine, in addition to being one of the most successful, best known, and most innovative law deans, is also one of the greatest constitutional law scholars in the world today. And unlike many of his colleagues in the constitutional law field who regard bankruptcy law as an alien subject about which they are reluctant to comment, Dean Chemerinsky has not been afraid over the years to speak up—to educate and to enlighten the bankruptcy community—when bankruptcy and constitutional law appear to collide.[9] True to form, in the discussion here he does not disappoint.

Richard Levin, who heads the National Bankruptcy Conference and chairs the bankruptcy practice at Cravath, Swaine & Moore, has for a long time been one of the leading lights of the commercial bankruptcy bar whose exemplary

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[7] *See* Advisory Committee on Bankruptcy Rules at 7 (April 22-23, 2014), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Bankruptcy/2014-04-Bankruptcy-Agenda-Book.pdf (noting a decision taken at the behest of Judge Wedoff by the Committee on Rules of Practice and Procedure to table a proposal to amend the Bankruptcy Rules in light of *Stern*).

[8] See, for instance, his important early article after BAPCPA's passage. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005).

[9] *See* Samuel L. Bufford & Erwin Chemerinsky, *Constitutional Problems in the 2005 Bankruptcy Amendments*, 82 AM. BANKR. L.J. 1 (2008); Chemerinsky, *Formalism Without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183 (2012).

leadership, scholarship, policy work, and service have been a model for others in the profession to emulate.[10] No one is more creative with, or has a better handle on, cutting edge issues in the bankruptcy field; indeed, the comprehensive Cravath report on new developments that Mr. Levin puts out each quarter is a must read for those who wish to stay current on the latest trends in bankruptcy practice.[11] His participation here is therefore much appreciated, and the careful reader will take special note of the subtle and profound insights that he offers.

John Rao of the National Consumer Law Center is a leading practitioner in the consumer bankruptcy space who is a much sought after expert on consumer finance issues, a frequent author and speaker on bankruptcy topics,[12] and a contributing editor of the *Collier* treatise. His perspective on this panel is especially welcome, because the consumer law area raises its own set of unique *Stern* issues in addition to those that are more generally applicable.

Moderating the discussion is Professor Michelle Harner from the University of Maryland, whose experience as a bankruptcy restructuring partner at Jones Day and current service as Reporter to the ABI Commission now studying the reform of Chapter 11 supplement her distinguished record of bankruptcy scholarship (which includes works on the intersection between bankruptcy law and the Constitution)[13] and combine to qualify her uniquely to lead the discussion here.

We are grateful to the distinguished moderator and panel participants for their wonderful collective contribution to this issue. We thank and commend them for their efforts. And we look forward to the ongoing dialogue within the bankruptcy community that the conversation here on these difficult issues is sure to engender.

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[10] Mr. Levin's leadership and service date back to when he was one of the principal drafters of the 1978 Bankruptcy Code, and his scholarship is extremely well regarded. See in particular his important works on bankruptcy administration and bankruptcy appeals, which relate very much to the Roundtable subject here. Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963 (1993); Levin, *Bankruptcy Appeals*, 58 N.C. L. REV. 967 (1980).

[11] See for instance his most recent update, Richard B. Levin, *Recent Developments in Bankruptcy Law*, BANKR. UPDATE (Cravath, Swaine & Moore, New York, N.Y., July 2014), http://www.cravath.com/files/Uploads/Documents/Publications/3467869_1.pdf.

[12] *See, e.g.*, John Rao, *Testing the Limits of Statutory Construction Doctrines: Deconstructing the 2005 Bankruptcy Act*, 55 AM. U. L. REV. 1427 (2006); Rao, *A Fresh Look at Curing Mortgage Defaults in Chapter 13*, 27 AM. BANKR. INST. J. Feb. 2008, at 14.

[13] *See* William T. Bodoh & Michelle M. Morgan, *Inequality Among Creditors: The Unconstitutional Use of Successor Liability to Create a New Class of Priority Claimants*, 4 AM. BANKR. INST. L. REV. 325 (1996); Bodoh & Morgan, *Protective Orders in the Bankruptcy Court: The Congressional Mandate of Bankruptcy Code Section 107 and Its Constitutional Implications*, 24 HASTINGS CONST. L.Q. 67 (1996).