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A Survey of Cases Interpreting the Stern Decision, Part II

By Omar J. Alaniz – May 30, 2012

This article is the second in a multipart series that provides an overview of trends in interpreting Stern v. Marshall. Read Part I.

As of March 15, 2012, there were 311 cases that have discussed or cited to *Stern*. This article corresponds to a chart [PDF] that catalogues all cases that have meaningfully discussed *Stern* from September 1, 2011 through March 15, 2012. For their contributions to the chart, the author wishes to thank Eric Van Horn from Rochelle McCullough, L.L.P., Ryan Manns from Fulbright & Jaworski, L.L.P., Justin Audilet from Maida Law Firm, P.C., and Heather Panko from Stutzman, Bromberg, Esserman & Plifka, P.C.

Generally, the court's decisions during the period covered by this article, December 1, 2011 through March 15, 2012, interpreted *Stern* narrowly; but there are some notable exceptions in the fraudulent transfer area and, as discussed below, the Seventh Circuit's decision in *Ortiz*. Many of the cases during this period teed up the *Stern* issue in the context of motions to dismiss for lack of jurisdiction. Because courts have almost universally recognized that *Stern* was not about subject matter jurisdiction, they have been able to overrule those motions without taking affirmative positions on the tough questions, such as whether a bankruptcy court has the constitutional authority to enter a final order on avoidance actions. Thus, the tug-of-war between the expansive and narrow camp is far from over.

Subject Matter Jurisdiction

In Part I of this article series (17 (No 2) ABA Sect. Bankr. & Insolvency Lit. 2, Winter 2012), the author opined that it is "practically gauche" to say that *Stern* affected the subject matter jurisdiction of the bankruptcy court. The word "practically" is now unnecessary. The bankruptcy court's decision in *Blixseth* generated the controversy seven weeks after *Stern* was decided when it held that bankruptcy courts no longer have jurisdiction over fraudulent transfer actions and thus could not even submit proposed findings of fact and conclusions of law. *See Samson v. Blixseth (In re Blixseth)*, Adv No. 10–00088, 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011) (*Blixseth I*). But on a motion for reconsideration, the bankruptcy judge held that his initial ruling in *Blixseth I* on the subject matter jurisdiction point was "flawed." *See Samson v. Blixseth (In re Blixseth)*, 463 B.R. 896 (Bankr. D. Mont. 2012).

The following citation includes one case from within various circuits, holding that *Stern* did not affect the subject matter jurisdiction of the bankruptcy court: *Adelphia Recovery Trust v. FLP Grp., Inc. (In re Adelphia Commc'n Corp.)*, 11 Civ. 6847, 2012 WL 264180, at *5 n.3 (S.D.N.Y.

Jan. 30, 2012); *Burtch v. Huston (In re USDigital, Inc.)*, 461 B.R. 276, 278 (Bankr. D. Del. 2011); *Yellow Sign, Inc. v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.)*, --- B.R. ---, Adv. No. 11–02008, 2012 WL 112192, at *11 (Bankr. M.D.N.C. Jan. 13, 2012); *Farooqi v. Carroll (In re Carroll)*, 464 B.R. 293, 309 (Bankr. N.D. Tex. 2011); *Sharifeh v. Fox*, No. 11 C 8811, 2012 U.S. Dist. LEXIS 17478 (N.D. Ill. Feb. 10, 2012); *Badami v. Sears (In re AFY, Inc.)*, 461 B.R. 541 (B.A.P. 8th Cir. 2012); *RES-GA Four LLC v. Avalon Builders of GA LLC*, Case No. 5:10–cv–463, 2012 U.S. Dist. LEXIS 485 (M.D. Ga. Jan. 4, 2012).

Ortiz Goes Beyond _Stern_

Ortiz v. Aurora Health Care, Inc. (In re Ortiz), 665 F.3d 906 (7th Cir. 2011), is the first circuit court decision to thoroughly discuss *Stern*. Medical providers submitted proofs of claim that divulged various debtors' medical information, giving rise to a class action based on state law claims against the creditor. The bankruptcy court issued a judgment in the debtors' favor, but the Seventh Circuit ultimately determined that the bankruptcy court did not have constitutional authority to enter a final order on the claims under *Stern*.

Ortiz has not garnered much attention, but its implications are perhaps more significant after closer examination. The Seventh Circuit determined that the claim in *Ortiz* was an "arising in" claim because the facts giving rise to the debtors' claims arose in a title 11 case by virtue of the proof of claim process. *See* 665 F.3d at 911. But the Seventh Circuit determined that the claim involved "private rights," disputing interests "defined by state law," and the claimed right to relief did not flow from a federal statutory scheme. *See id*. at 914.

By ruling that the bankruptcy court did not have constitutional authority over this "arising in" claim, the Seventh Circuit has implicitly called into question the constitutionality of 28 U.S.C. section 157(b)(1). Under this statute, Congress allocated to the bankruptcy court the power to enter final orders on proceedings "arising under" a title 11 case and proceedings "arising in" a title 11 case. *Stern* involved a proceeding that was solely "related to" a title 11 case (i.e., it was not an "arising under" or "arising in" proceeding). Thus, but for the list in section 157(b)(2), the bankruptcy court only had authority to submit proposed findings of fact and conclusions of law on the tortious interference counterclaim absent the parties' consent. *See* 28 U.S.C. § 157(c). In other words, the constitutional hiccup rested with the precertified list of "core" proceedings in section 157(b)(2). Thus, one does not have to do violence to the balance of section 157 statute to reconcile *Stern* in many instances. *See USDigital, Inc.*, 461 B.R. at 292 ("[t]o expand the reach of [*Stern*] is to do violence to its plain meaning."). But *Ortiz* reaches beyond *Stern* and infiltrates section 157(b)(1). Whereas Congress could merely scratch out section 157(b)(2)(C) or somehow clarify it, if *Ortiz* is correct, Section 157(b)(1) must also be rewritten or clarified. *But see In re McClelland*, 460 B.R. 397 (Bankr. S.D.N.Y. 2011) (holding that bankruptcy court had constitutional authority to enter a final order on an "arising in" matter though the action was based on state law [i.e., removed state court action of negligence against a bankruptcy court-appointed professional]).

Fraudulent Transfer Actions

Courts continue to differ on whether a bankruptcy court may enter a final order in a fraudulent transfer action. Generally, the split between the courts can be divided into an expansive and narrow view. For additional analysis, see pages three through five in Part I. If a court does not take an affirmative position on the issue (i.e., merely denies a motion to dismiss), the decision is designated as "Neutral" in the corresponding chart.

Expansive View

Leading the charge for the expansive view were two Southern District of New York cases. *Adelphia*, 2012 WL 264180, and *Development Specialists, Inc. v. Orrick, Herrington & Suttcliffe*, Civ. No. 11–6337, 2011 WL 6780600 (S.D.N.Y. Dec. 23, 2011). Both cases heavily relied on *Granfinanciera* in determining that the fraudulent conveyance actions involved private rights and, as a consequence, Congress could not constitutionally delegate adjudication of those matters to the bankruptcy court. In *Development Specialists v. Orrick*, the district court noted that fraudulent transfer claims are created by state law (not under title 11), are routinely adjudicated outside the bankruptcy context, are akin to state law contract principles, and would augment the estate.

In *Levey v. Hanson's Widow & Construction, Inc. (In re Republic Windows & Doors, LLC)*, 460 B.R. 511 (Bankr. N.D. Ill. 2011), the bankruptcy court denied a motion to dismiss an adversary proceeding that included sections 544(b) and 548 actions for lack of subject matter jurisdiction. The court included language suggesting that *Stern* should be read narrowly, but this case truly falls in the expansive group. The bankruptcy court determined that because the avoidance actions, if successful, would augment the estate, the proceedings were noncore and fell within the court's "related to" jurisdiction. *See id*. at 516–18. But just because a matter falls under the court's "related to" jurisdiction does not mean that the proceeding cannot also fall under the court's "arising under" or "arising in" jurisdiction under 28 U.S.C. section 157(b)(1). The relevant analysis should be whether the proceeding falls *solely* under the bankruptcy court's "related to" jurisdiction—such as in *Stern*. Alternatively, one may argue that section 157(b)(1) is indeed also unconstitutional (as implied by *Ortiz*). But *Stern* was not about section 157(b)(1). *See* Part I, "Author's Note."

Heller Ehrman v. Arnold & Porter (In re Heller Ehrman LLP), 464 B.R. 348 (N.D. Cal. 2011), was another expansive view decision that was issued in this period, but the case was discussed on page four of Part I.

Narrow View

The bankruptcy court in *Menotee v. United States (In re Custom Contractors, LLC)*, 462 B.R. 901 (Bankr. S.D. Fla. 2011), disagreed with the notion that *Stern* and/or *Granfinanciera* hold that bankruptcy courts lack authority to enter final judgments in avoidance actions. The bankruptcy

court pointed out that the "sole issue in *Granfinanciera* was whether the Seventh Amendment conferred on petitioners a right to a jury trial in the face of Congress's decision to allow a non-Article III tribunal to adjudicate the claims against them." *See id*. at 908 (citing *In re Safety Harbor Resort and Spa*, 456 B.R. 703, 717 (Bankr. M.D. Fla 2011)).

The court reasoned that actions under sections 544(b) and 548 arise under the Bankruptcy Code and are not prosecuted by one of the debtor's creditors to avoid a transfer under state law, but by a bankruptcy trustee as the official representative of the bankruptcy estate to avoid transfers under the Bankruptcy Code. *See* 462 B.R. at 907. Moreover, while section 544 incorporates state law to provide the "rules of decision," the claim arises under federal bankruptcy law. *See id*. (citing *In re Universal Mkgt*., 459 B.R. 573 (Bankr. E.D. Pa. Nov. 15, 2011)); *see also Bohm v. Titus (In re Titus)*, --- B.R. ---, Adv. No. 10–2338, 2012 Bankr. LEXIS 785, at *101 (Bankr. W.D. Pa. Feb. 29, 2012) (bankruptcy court has constitutional authority to enter final decision on state law fraudulent transfer action brought under section 544(b)(1)); *Cardiello v. Arbogast (In re Arbogast)*, 466 B.R. 287 (Bankr. W.D. Pa. 2012) (same).

The bankruptcy court in *Burtch v. Seaport Capital, LLC, et. al., (In re Direct Response Media, Inc.)*, --- B.R. ---, Adv. No. 10–50855, 2012 WL 112503 (Bankr. D. Del. Jan. 12, 2012), provided a thorough discussion of the arguments supporting the expansive and narrow view. Ultimately, the court adopted *USDigital's* definition of core (i.e., whether the matter "invokes a substantive right provided by title 11 or if a matter by its nature could arise only in the context of a bankruptcy case." *See id*. at *11 (citing *USDigital*, 461 B.R. at 285). In other words, rather than rely on the "core" list in section 157(b)(2), the court analyzed whether the matter "arises under" title 11 or "arises in" a title 11 case. Under this definition, the bankruptcy court determined that it had constitutional authority to enter a final order on the fraudulent transfer and preference action. *Id*. at *11.

Still, there is some trepidation even within the narrow group. Though one district court implied that it doubted whether *Stern* affected the bankruptcy court's authority to enter final orders in an avoidance action adversary, the court nonetheless withdrew the reference to "avoid confusion and future collateral attacks on a bankruptcy court judgment." *Michaelson v. Golden Gate Private Equity, Inc. (In re Appleseed's Intermediate Holdings, LLC)*, Adv. No. 11–51847, 2011 U.S. Dist. LEXIS 144315 (D. Del. Dec. 14, 2011); *but cf. Field v. Trust Estate of Kepoikai (In re Maui Indus. Loan Fin. Co.)*, Civ. No. 11–00552, 2011 U.S. Dist. LEXIS 149589, at *33 (D. Haw. Dec. 29, 2011) (denying withdrawal of the reference on avoidance actions because "it would be an inefficient allocation of judicial resources.").

Preferences

The most extensive discussion of a bankruptcy court's authority to hear and determine preference matters post-*Stern* is in *West v. Freedom Medical, Inc. (In re Apex Long Term Acute Care)*, 465 B.R. 452 (Bankr. S.D. Tex. 2011). In *Apex*, the bankruptcy court held that the it has

constitutional authority to hear and determine preferences under its in rem jurisdiction. The bankruptcy court's *in rem* jurisdiction is essentially power to control and administer a res (property of the estate) (i.e., property *in custodia legis*).

The Supreme Court recently held that the bankruptcy court's authority "at its core" is premised on *in rem* jurisdiction. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006); *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004). In *Katz*, the Court held that a "critical feature[] of every bankruptcy proceeding [is] the exercise of exclusive jurisdiction over all of the debtor's property. . . ." *See id*. at 363–64. The bankruptcy court in *Apex* reasoned that "amounts preferentially transferred were always really part of the bankruptcy estate." *See Apex*, 465 B.R. at 463 (citing *Katz*, 546 U.S. at 371–72). By viewing preferential transfers this way, the bankruptcy court's authority to adjudicate the preference matter is not dependent on the defendant filing a proof of claim. (Of course, if the defendant had filed a proof of claim, the analysis becomes easier under *Katchen*. *See* Part I at *6.) A transfer is avoidable as a preferential transfer only if it was made on account of an antecedent debt. *See* 11 U.S.C. § 547(b). Accordingly, transfer recipients are "in this sense, treated as creditors of the estate even when they have not filed a proof of claim." *Apex*, 465 B.R. at 465; *but cf. Capmark Fin. Grp., Inc. v. Goldman Sachs Credit Partners L.P.*, Case No. 11 Civ. 7511, 2012 WL 698813, at *10 (S.D.N.Y. Mar. 5, 2012) (questioning whether a bankruptcy court can issue final orders in preference actions).

Submission of Proposing Findings of Fact and Conclusions of Law in the "Statutory Gap"
The issue of whether the bankruptcy court may submit proposed findings of fact and conclusions of law in matters "statutorily but not constitutionally core" received the most attention in this period. Some of the decisions with the most robust discussion of the issue include: *Republic Windows & Doors*, 460 B.R. 511; *In re Am. Hous. Found.*, Case No. 09–20232, 2012 Bankr. LEXIS 449 (Bankr. N.D. Tex. Feb. 10, 2012); *In re The Containership Co.*, 466 B.R. 219 (Bankr. S.D.N.Y. 2012); *Adelphia*, 2012 WL 264180, at *5–7; *Stettin v. Regent Cap. Partners, LLC (In re Rothstein, Rosenfeldt, Adler, P.A.)*, Case No. 11–62612, 2012 WL 882497 (S.D. Fla. Mar. 14, 2012).

The concept of the "statutory gap" is the genesis of the debate (to the extent one still exists). Section 157(c)(1) of title 28 supplies the authority of the bankruptcy court to issue proposed findings of fact and conclusions of law in noncore proceedings otherwise related to a title 11 case. The argument goes that because certain matters are deemed statutorily core but not constitutionally core (e.g., The counterclaim in *Stern*, Section 157(c)(1), does not supply the authority in those matters under the plain language of the statute). This argument was universally rejected by every court that addressed the matter in this period.

Blixseth I was the earliest post-*Stern* decision to determine that the bankruptcy court could no longer submit proposed findings on fact and conclusions of law on fraudulent transfer actions.

See Blixseth I at *12. This holding has been criticized by nearly every court discussing *Blixseth I*. *See* Part I at *4; *Rothstein*, 2012 WL 882497, at *3 (collecting cases); *RES-GA Four*, 2012 U.S. Dist. LEXIS 485, at *30 (same). Most importantly, the bankruptcy judge in *Blixseth I* has since held that its determination that the bankruptcy court did not have jurisdiction over fraudulent transfers action was "flawed." *See Blixseth*, 463 B.R. at 906.

The *In re American Housing Foundation* case provides a thorough discussion of why the perceived "statutory gap" does not prevent the bankruptcy court from issuing proposed findings of fact and conclusions of law under section 157(c)(1). *See* 2012 Bankr. LEXIS 449. Like the other cases addressing the issue, the bankruptcy court determined "it makes little sense" that the bankruptcy court could enter proposed findings and conclusions on "related to" matters and not statutorily core matters because by definition, the latter has a greater connection to the bankruptcy case. *See id*. at *30; *Blixseth v. Brown (In re Blixseth)*, --- F. Supp. 2d ---, Case No. 11-85-M-DWM, 2012 U.S. Dist. LEXIS 28318 (D. Mont. Mar. 5, 2012); *see also* Part I at *11.

Some courts address this issue in a prophylactic manner. Though a bankruptcy judge may believe it has constitutional authority to issue a final order on a particular matter, the bankruptcy court may suggest to the reviewing court that it should treat the bankruptcy court's decision as proposed findings of fact and conclusions of law if the reviewing court disagrees that the bankruptcy court had constitutional authority to hear and determine the matter. *See, e.g.*, *Arbogast*, 466 B.R. 287 (Section 544(b) action).

Other cases in this period addressing the statutory gap issue and concluding the bankruptcy court may issue proposed findings of fact an conclusions of law on statutorily core matters include: *Titus*, 2012 Bankr. LEXIS 785; *Southern Elec. Coil, LLC v. FirstMerit Bank, N.A.*, No. 11 C 6135, 2011 U.S. Dist. LEXIS 144832 (N.D. Ill. Dec. 16, 2011); *Maui*, 2011 U.S. Dist. LEXIS 149589, at *36; *In re Byce*, No. 1:11–CV–00378, 2011 U.S. Dist. LEXIS 144115 (D. Idaho Dec. 14, 2011); *Black, Davis & Shue Agency, Inc. v. Frontier Ins. Co. in Rehab. (In re Black, Davis & Shue Agency, Inc.)*, No. 1–11–ap–00160MDF, 2012 LEXIS 594 (Bankr. M.D. Pa. Feb. 2, 2012); *Development Specialists v. Orrick*, 2011 WL 6780600, at *3–4.

Consent

Some may believe that whether parties can consent to the bankruptcy court entering a final order on "related to" matters (or, stated another way, non-core matters) under 28 U.S.C. section 157(c)(2) is an open question. But the case law evinces little debate. *See* Part I at 9–10; *Titus)*, 2012 Bankr. LEXIS 785, at *102 (stating that *Stern* does not affect a party's ability to consent under section 157(c)(2)); *Credit Suisse Sec. (USA), LLC v. TMST, Inc. (In re TMST, Inc.)*, No. 09–00574, 2012 Bankr. LEXIS 620, n. 2 (Bankr. D. Md. Feb. 22, 2012) (same); *Paloian v. LaSalle Bank Nat'l A'ssn (In re Doctors Hospital of Hyde Park, Inc.)*, 463 B.R. 93 (Bankr. N.D. Ill. 2011) (same).

In *Technical Automation Services Corp. v. Liberty Surplus Insurance Corporation*, the Fifth Circuit Court of Appeals *sua sponte* requested that the parties brief *Stern's* impact on whether magistrate judges have the constitutional authority to enter a final judgment under the Federal Magistrates Act (28 U.S.C. § 636(c)) in cases involving state law counterclaims. *See* 673 F.3d 399 (5th Cir. 2012). The Fifth Circuit noted that nearly every circuit has determined that 28 U.S.C. section 636(c) is constitutional. *See id.*, 405 n.3. The Fifth Circuit ultimately held that it would continue to hold that federal magistrate judges have the constitutional authority to enter final judgments by consent on state law counterclaims until the Supreme Court or the Fifth Circuit *en banc* overrules its precedent. The panel explained that for a Supreme Court decision to change the circuit's law, it "must be more than merely illuminating with respect to the case before [the court]" and must "'unequivocally' overrule prior precedent." *See id*. (citing *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2005)).

A sub-issue is: What constitutes "consent"? On this issue, courts differ. In *Adelphia*, the defendants conceded that the fraudulent transfer actions (Sections 544(b) and 548) actions were "core" prior to *Stern*. *See* 2012 WL 264180. The parties had been in litigation since 2007. But the district court held that it would not read the defendants' pre-*Stern* conduct as implied consent to bankruptcy court adjudication. *See id.* at *5; *see also Tolliver v. Bank of Am.*, 464 B.R. 720, 734 (Bankr. E.D. Ky. 2012) (court "reluctant to imply the [p]laintiff's consent"). The bankruptcy court in *Custom Contractors* disagreed, holding that consent can be implied from a litigant's course of conduct. *See* 462 B.R. at 909; *see also* Part I at *10.

Perhaps *Stern* itself suggests that consent can be implied by conduct. The court agreed with Vickie that, given his "course of conduct," Pierce not only could but did consent to the bankruptcy court's resolution of his defamation claim (though no such consent was given for resolution of the tortious interference counterclaim). *See* 131 S. Ct. at 2607. The court noted that Pierce at no point argued that the bankruptcy court lacked authority to adjudicate the defamation claim. *See id*. at 2607–08. However, the defamation claim arose in Pierce's proof of claim. Arguably then, the question of whether Pierce consented to bankruptcy court adjudication of the defamation claim is purely academic. But the court has squarely addressed this issue with respect to the magistrate consent statute and determined that consent can be implied by conduct in litigation. *See Roell v. Withrow*, 538 U.S. 580 (2003) ("[T]he question is whether consent can be inferred from a party's conduct during litigation, and we hold that it can be.").

Federal Bankruptcy Issues

Stern does not appear to prevent bankruptcy courts from hearing and determining traditional bankruptcy-type contested matters. *See, e.g.*, *Sundale Ltd. v. Fla. Assoc. Cap. Enter., LLC*, Case No. 11–20635, 2012 U.S. Dist. LEXIS 17895 (S.D. Fla. Feb. 13, 2012) (entry of final judgment on extent, validity, and priority of liens); *In re The Great Atlantic & Pacific Tea Co., Inc.*, 2012 U.S. Dist. LEXIS 10806 (S.D.N.Y. Jan. 30, 2012) (ruling on automatic stay issue); *Police & Fire Ret. Sys. of the City of Detroit v. Ambac Fin. Grp., Inc. (In re Ambac Fin. Grp., Inc.)*, No. 11

Civ. 7529, 2011 WL 6844533 (S.D.N.Y. Dec. 29, 2011) (approval of settlement agreements under 9019); *In re Thalmann*, No. 11–36862, 2012 WL 864600 (Bankr. S.D. Tex. Mar. 13, 2012) (motion to dismiss Chapter 13 case and objection to proof of claim); *In re Carlew*, Case No. 11–37886, 2012 WL 826893 (Bankr. S.D. Tex. Mar. 9, 2012) (objection to exemption based on state homestead law); *In re Archdiocese of Milwaukee*, No. 11–20059, 2012 Bankr. LEXIS 708, 2012 WL 619190 (Bankr. E.D. Wis. Feb. 24, 2012) (allowance and disallowance claims); *TMST*, 2012 Bankr. LEXIS 620 (security interest in collateral); *In re Cottonwood Corners Phase V, LLC*, No. 11–11–12663 JA, 2012 Bankr. LEXIS 550 (Bankr. D.N.M. Feb. 17, 2012) (confirmation of a plan); *USDigital*, 461 B.R. at 278 (equitable subordination claim); *In re Hill*, Case No. 08–36367, 2011 Bankr. LEXIS 5186 (Bankr. S.D. Tex. Dec. 30, 2011); (objection to exemptions); *see also* Part I at *9.

State Law Issues

In re Carroll is particularly interesting. *See* 464 B.R. 293. The plaintiff filed an adversary proceeding against the debtor for money damages and to establish that the debt was nondischargeable. The debtor argued that because the plaintiff did not file a proof of claim the bankruptcy court lacked subject matter jurisdiction. However, the court determined that the adversary proceeding seeking liquidated damages constituted an informal proof of claim (though there were other problems with the jurisdiction argument). *See id*. at 33; *see also Badami v. Sears Cattle Co.*, Case No. 8:11CV288, 2012 WL 123056, at *1 (D. Neb. Jan. 17, 2012) (holding that a counterclaim against a bankruptcy estate is akin to filing a claim). The bankruptcy court then determined that adjudication of the plaintiff's claims was necessary to rule on dischargeability, and thus the bankruptcy court had authority to enter a monetary judgment against the debtor.

In *Byce*, the district court held that the bankruptcy court had constitutional authority to finally determine state law issues because those issues arose in the proof of claim that the creditor filed. *See* 2011 U.S. Dist. LEXIS 144115.

Counterclaims

Many issues regarding the bankruptcy court's ability to rule on state law matters arise in the counterclaim context. Courts uniformly employ the *Stern* test to determine whether the bankruptcy court has authority to adjudicate counterclaims to a creditor's proof of claim (i.e., whether the claim stems from the bankruptcy itself or whether the resolution of the claim would be necessarily resolvable by a ruling on the proof of claim). *See, e.g.*, *In re Divittorio*, 670 F.3d 273 (1st Cir. 2012); *Trimco-Display, LLC v. Logic Supply, Inc.*, No. 1:09–cv–106, 2012 WL 733879 (D. Vt. Mar. 6, 2012); *Berks Behavioral Health, LLC v. St. Joseph Reg'l Health Network (In re Berks Behavioral Health, LLC)*, 464 B.R. 684 (Bankr. E.D. Pa. 2012); *Tolliver*, 464 B.R. 720; *Freeway Foods*, 2012 Bankr. LEXIS 129.

For example, in *Gecker v. Flynn (In re Emerald Casino, Inc.)*, Case No. 02 B 22977, 2012 U.S. Dist. LEXIS, 2012 WL 280724 (N.D. Ill. Jan. 31, 2012), the trustee filed various counterclaims to the defendants' proofs of claim including counterclaims based on state law, section 502(d), equitable subordination, and disallowance. The district court determined that while some of the counterclaims would be necessarily resolvable by a ruling on the proof of claim, the bankruptcy court did not have constitutional authority to enter a final judgment on other state law counterclaims. *See id*. at *4; *see also Freeway Foods*, 2012 Bankr. LEXIS 129 (same).

In *Black, Davis & Shue Agency*, the bankruptcy court addressed in detail whether it had constitutional authority over eight counterclaims. *See* 2012 LEXIS 594. The court ultimately determined that it had constitutional authority to enter final orders on seven state law-based counterclaims including breach of contract, unjust enrichment, and negligence because the claims would necessarily be resolved in the process of deciding the defendant's claim. *See id*. at *45–60. But under the same test, the bankruptcy court determined it did not have constitutional authority to enter a final order on a defamation counterclaim. *See id*. at 59–60.

Jury Issues

A few cases in this period touched on jury issues. *Granfinanciera* specifically did not address the issue of whether it was constitutionally acceptable for a bankruptcy court to preside over a jury trial. *See Granfinanciera*, 492 U.S. at 50. The issue is that although section 157(e) statutorily allows the bankruptcy court to preside over jury trials with the parties' consent, section 157(c) provides that all bankruptcy rulings in noncore matters are reviewable by a district court. Arguably, then, the Reexamination Clause of the Seventh Amendment may be violated under the strictures of section 157. Accordingly, the bankruptcy court in *Geron v. Levine (In re Levine)*, No. 1:00–cv–9101, 2012 WL 310944 (S.D.N.Y. Feb. 1, 2012), withdrew the reference as to core and noncore proceedings.

The district court in *Neilson v. Entm't One, Ltd. (In re Death Row Records, Inc.)*, Case No. CV 12–1192, 2012 WL 1033350 (C.D. Cal. Mar. 8, 2012) held that *Stern* does not affect the parties' ability to consent to a non-Article III judge exercising Article III powers—including conducting a jury trial and entering final judgment. In *Death Row Records*, a trustee filed a complaint against the defendant for breach of contract and turnover. The defendant demanded a jury in 2009 but consented to have the jury trial conducted in the bankruptcy court. After the Supreme Court's ruling in *Stern*, the defendant argued that *Stern* prohibits a non-Article III court from conducting a jury trial over the state law claims. Given the defendant's explicit consent to a jury trial in the bankruptcy court long before, the district court held that the defendant could not now withdraw its consent. *See id*. at *5; *see also Badami v. Sears Cattle*, 2012 WL 123056, at *1, 3 (holding that the defendant's filing of a counterclaim and its failure to object in a timely manner to the bankruptcy court's proposed findings of fact and conclusions of law waived its demand for a new trial before a jury).

In *Rothstein*, the district court denied withdrawal of the reference over avoidance actions where the defendants had not filed proofs of claim and demanded a jury. *See* 2012 WL 882497. The district court allowed the bankruptcy court to hear all pretrial matters until the jury phase of the proceeding. Similarly, in *MPC Computers*, the bankruptcy court noted that where the defendant is entitled to a jury, the district courts will usually not withdraw the reference until the matter is ready for trial. *See Liquidating Tr. of MPC Liquidating Trust v. Granite Fin. Solutions, Inc. (In re MPC Comp., LLC)*, 465 B.R. 384, 394 (Bankr. D. Del. 2012) (citing cases).

Finally, in *Apex,* the bankruptcy judge addressed whether the bankruptcy court has constitutional authority to enter final orders in preference actions. *See* discussion *infra*. The bankruptcy judge noted that dicta in *Katchen*, *Granfinanciera*, and *Langenkamp* indicate that jury rights attach to preference actions against defendants that have not filed proofs of claim. But the bankruptcy judge concluded that *Katz* effectively negates this dicta because *Katz* held that preference actions are resolved through the exercise of a bankruptcy court's *in rem* jurisdiction. *See Apex*, 465 B.R. at 467 (citing *Katz*, 546 U.S. at 378).

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