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COMMENT

From Stem to *Stern*: Navigating Bankruptcy Practice after *Stern v. Marshall*

MICHELLE WRIGHT*

I. INTRODUCTION

Bankruptcy law has come a long way since its earliest iteration. No longer does it sanction selling debtors into slavery, physically giving creditors a pound of flesh of the debtor,¹ or treating bankrupt citizens like criminals.² While bankruptcy law is more civilized now, it is far from settled or stable.³ In fact, since its inception in 1800, American bankruptcy law has undergone major changes about every forty years.⁴

These changes stem from Congress and the Supreme Court of the United States' struggle to balance the Constitution's demand for impartial Article III judges and the efficiency and expertise of specialized Article I bankruptcy courts. Under the United States Constitution, Article III judges are granted life tenure and salary protection in order to insure they are fair and impartial.⁵ However, Article I bankruptcy judges do not have these tenure and salary protections. Instead, they are appointed for fourteen-year terms.⁶ One method of reconciling the need for Article I expertise and Article III protections has been through the public rights exception to adjudication by Article III courts. The public rights exception is the idea that there are matters involving public rights that Congress may assign to legislative courts for

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1. G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 *BUS. LAW* 499, 513-14 (2000) (explaining Roman bankruptcy customs, including allowing creditors to cut off the limbs of debtors).

2. *Id.* at 515 (noting that the first bankruptcy law in England categorized a debtor as an "offender" and was similar to a criminal statute).

3. *See infra* Part II.

4. *See infra* Part II.

5. U.S. Const. art III, § 1.

6. 28 U.S.C. § 152(a)(1) (2006).

adjudication.⁷ However, the Supreme Court's public rights exception jurisprudence has varied in definition and application.⁸

Another method of balancing these concerns grants the bankruptcy court "summary jurisdiction," which is jurisdiction over the property of the estate,⁹ while "plenary jurisdiction" over individual parties is reserved for Article III courts.¹⁰ Further, by continually changing the bankruptcy statutes, Congress has experimented with making the bankruptcy courts "adjuncts" of the district courts, so they are under the control of Article III judges.¹¹ Finally, Congress tried to solve the problem of Article I courts deciding Article III cases by defining claims as "core" or "non-core" to limit bankruptcy authority.¹² Core claims are matters stemming directly from the bankruptcy case or Title 11, the part of the United States Code that governs bankruptcy.¹³

Understanding this turbulent history of bankruptcy law is essential to understanding the future of the bankruptcy system. The Supreme Court of the United States' latest word on bankruptcy courts' authority, *Stern v. Marshall*, discusses the public rights exception, the summary-plenary divide, and bankruptcy courts as adjuncts of Article III courts.¹⁴ The case ultimately finds Congress' definition of "core" bankruptcy matters unconstitutional.¹⁵

In order to provide a foundation for understanding the Court's reasoning in *Stern*, Part II of this Comment briefly covers the history of bankruptcy in America. Section III explains how the Supreme Court of the United States' holding in *Stern v. Marshall*¹⁶ has affected bankruptcy courts' disposition of state law claims. Scholars' interpretations of *Stern* range from understanding it as a narrow holding that will change little in bankruptcy,¹⁷ to questioning whether it foreshadows the Court holding the entire bankruptcy system is

7. *Stern v. Marshall*, 131 S. Ct. 2594, 2610 (2011).

8. See *infra* Part II.G-H.

9. Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 AM. BANKR. L.J. 1, 23 (1998) [hereinafter Brubaker, *Nondebtor Releases*].

10. *Id.* at 23-24.

11. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (declaring the Bankruptcy Reform Act of 1978 unconstitutional and describing bankruptcy courts as "a non-Art. III adjunct"); see also *infra* Part II.G.

12. *Stern*, 131 S. Ct. at 2601-02, 2620.

13. *Id.* at 2605.

14. See generally *id.*

15. *Id.* at 2601.

16. *Id.* (holding that the Bankruptcy Court had the statutory authority, but lacked the constitutional authority, to rule on state law counterclaims).

17. See, e.g., Dan Schechter, *Statutory Power of Bankruptcy Courts to Hear and Determine Compulsory State-Law Counterclaims Against Non-Bankrupt Claimants Is Unconstitutional*, 2011 COM. FIN. NEWSL. 51, 51 (2011).

unconstitutional in a future case.¹⁸ Given the breadth of opinions that the decision supports, it is predictable that *Stern* has been interpreted differently by district and bankruptcy courts across the country. In order to aid practitioners, Part IV explains how bankruptcy courts are determining whether matters are core or non-core, when courts are finding consent, how courts are resolving state law claims, and rationalizing these decisions in light of *Stern*, and the historical background of bankruptcy law. Finally, in furtherance of the goal of helping practitioners navigate post-*Stern* waters, Part V concludes this Comment by summarizing jurisdictional splits between courts on these critical issues and the relevant historical arguments.

II. HISTORY OF BANKRUPTCY LAW

To fully understand the current bankruptcy system and the Court's reasoning in *Stern*, a practitioner must first understand the history of the bankruptcy system and how it has changed over the centuries. This Comment starts at the beginning of American bankruptcy history, and documents the major statutory changes to bankruptcy law and corresponding Supreme Court cases.

A. Origins of American Bankruptcy Law

A brief introduction to the English system of bankruptcy is important because American bankruptcy courts developed from the English system,¹⁹ and English history explains why the American founders created protections for Article III judges. Understanding the reasoning behind Article III protections illuminates the problems with adjudication by legislative Article I bankruptcy courts that lack these protections.

In the English bankruptcy system, commissioners could make judgments about creditors' claims, but they only had jurisdiction over the property in the debtor's estate, not property in the hands of third parties.²⁰ Therefore, the only way the trustee could make claims on property in the hands of third parties was to make a formal complaint in a court of law or equity.²¹ Jurisdic-

18. Adam Lewis et al., *Stern v. Marshall: A Jurisdictional Game Changer?*, J. BANKR. L. 483, 492 (2011).

19. Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, BANKR. L. LETTER, Aug. 2011, at 5. English bankruptcy law can be traced back to a 1542 statute allowing government officials to seize and sell off assets of some types of debtors, labeled as "offenders" in the act. Brunstad, *supra* note 1, at 515. Offenders could be sentenced to punishments as severe as death. *Id.* While the English system of bankruptcy started with a criminal statute, it evolved into a more complex property-based system, and was eventually administered by bankruptcy commissioners. Brubaker, *supra*, at 5.

20. Brubaker, *supra* note 19, at 5.

21. *Id.*

tion over property is the basis of “summary jurisdiction” and was adopted by the original American bankruptcy courts.²² Further, these English bankruptcy commissioners were supervised by the Lord Chancellor in Equity, who could be petitioned for review of the commissioners’ determinations, similar to how modern district courts may be petitioned to review bankruptcy court determinations.²³

The current controversy regarding the independence of judges also has roots in the English bankruptcy system. The injustices of the English kings who “made [j]udges dependent on [the king’s] [w]ill alone, for the tenure of their offices, and [in] the amount and payment of their salaries,”²⁴ led to the framers’ creation of position and salary protections for judges in Article III of the Constitution in order to maintain an independent judiciary.²⁵ Bankruptcy judges do not enjoy these protections because they are not part of the Article III judiciary.²⁶

B. *The Bankruptcy Act of 1800*

After the Constitution federalized the bankruptcy system, Congress passed the first national bankruptcy law.²⁷ The Bankruptcy Act of 1800 (Act of 1800) was spurred by the economic panic of 1797, which increased the number of debtors in America.²⁸ While the Act of 1800 incorporated some facets of the English bankruptcy system, there were differences.

The Act of 1800 was similar to the English system because the Act of 1800 allowed court officials to seize assets of a debtor and decide claims of creditors.²⁹ Further, while later changes to the American Bankruptcy Code abolished strict summary jurisdiction for bankruptcy courts, the bankruptcy courts established in 1800 were based on summary jurisdiction like their English predecessors.³⁰ “Summary jurisdiction” is jurisdiction over the property of the estate,³¹ while “plenary jurisdiction” is jurisdiction over individual parties.³² The Act of 1800 also allowed for parties to petition for review of

22. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982).

23. Brubaker, *supra* note 19, at 5.

24. *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (quoting THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)).

25. See U.S. CONST. art. III, § 1.

26. Brubaker, *supra* note 19, at 8.

27. Brunstad, *supra* note 1, at 516; see also Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

28. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995).

29. Brunstad, *supra* note 1, at 516-17.

30. See *id.* at 516.

31. Brubaker, *Nondebtor Releases*, *supra* note 9, at 23.

32. *Id.*

the commissioners' decisions by federal district courts.³³ The authority of federal district review is still alive and well today.³⁴

However, Americans were already starting to diverge from the English system; fraudulent bankruptcy was no longer punishable by death,³⁵ and the Act of 1800 exempted certain property from creditors and discharged some debts.³⁶ While revolutionary, the Act of 1800 was repealed in only three years; creditors objected that wealthy speculators were getting discharged too often, leaving creditors with no repayment, and agriculturists complained that merchants were favored as creditors.³⁷ And so began the shifting landscape of bankruptcy in America.

C. *The Bankruptcy Act of 1841*

After a period of time without a federal bankruptcy system, Congress again realized the importance of debtor relief and passed a new act.³⁸ The Bankruptcy Act of 1841 (Act of 1841) allowed voluntary bankruptcy for the first time, a change that has withstood the test of time.³⁹ Also, bankruptcy assignees replaced commissioners in adjudicating bankruptcy claims.⁴⁰ However, these bankruptcy assignees were not given Article III judicial protections; this problem remains the crux of bankruptcy courts' jurisdictional problems today.

The Act of 1841 also marks a period of waxing bankruptcy power. Justice Story broadly interpreted the Act of 1841 and stated that Congress had the power to enact broad authority to give bankruptcy courts enough jurisdiction to "begin, continue, and end, all such proceedings as might be necessary and proper . . . to accomplish the entire settlement and final distribution of the bankrupt's estate."⁴¹ Further, Justice Story declared bankruptcy jurisdiction exclusively federal and found in equity.⁴² By granting bankruptcy law exclusive federal jurisdiction, Justice Story hoped to produce uniform bankruptcy laws.⁴³

33. Brubaker, *supra* note 19, at 6.

34. 28 U.S.C. § 158(a) (2006).

35. Tabb, *supra* note 28, at 14.

36. Brunstad, *supra* note 1, at 517.

37. Tabb, *supra* note 28, at 15; *see also* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 (1803).

38. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (1841).

39. Tabb, *supra* note 28, at 17.

40. *Id.*

41. *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C.D. Me. 1843).

42. *Id.* at 500-01.

43. *Id.* at 500.

This broader definition of bankruptcy jurisdiction continued in the Supreme Court's decision in *Ex Parte Christy*,⁴⁴ where Justice Story interpreted the Act of 1841 as giving district courts jurisdiction over "all matters and proceedings in bankruptcy," including a list of enumerated cases where jurisdiction would be found, and jurisdiction in all cases and controversies in bankruptcy arising between creditors and the estate.⁴⁵ This decision extended bankruptcy jurisdiction to allow procedures to recover assets for the estate instead of just having jurisdiction over the assets already in the estate. This extension is now a part of our modern bankruptcy system.⁴⁶

Justice Story's interpretations of the Act of 1841 broadened the jurisdiction of bankruptcy courts and clarified the district court's jurisdiction over bankruptcy matters. Even today, district courts have jurisdiction over all bankruptcy matters,⁴⁷ and parties can appeal bankruptcy courts' decisions to a federal district court.⁴⁸ In the end, however, the Act of 1841 still had too many problems to survive for long, including lax standards for discharges that caused many creditors to forego repayment and exemptions that resulted in low dividends for creditors.⁴⁹ The Act was repealed in 1843.⁵⁰

D. The Bankruptcy Act of 1867

The nation existed without a federal bankruptcy statute until the Panic of 1857 and the economic effects of the Civil War convinced Congress to try again.⁵¹ The Bankruptcy Act of 1867⁵² (Act of 1867) had language similar to the Act of 1841⁵³ and also allowed for voluntary bankruptcy.⁵⁴ More aspects of our current bankruptcy system began to appear in the Act of 1867, including language that (1) allowed corporations to file for bankruptcy, (2) permit-

44. 44 U.S. 292 (1845). *Ex Parte Christy* is a case concerning two mortgages on the land of Mr. Daniel Walden assigned to William Christy in bankruptcy. *Id.* at 293. The bank initially foreclosed on the mortgages and seized the property. *Id.* A month later Walden filed a petition for bankruptcy, asked for an injunction to stay the sale of the property. *Id.* The district court denied the injunction and the property was sold. *Id.* at 294. Christy filed a petition claiming that the sale was void because the bankruptcy proceeding operated as a stay. *Id.*

45. *Id.* at 313.

46. Brubaker, *supra* note 19, at 6.

47. 28 U.S.C. § 1334 (2006).

48. 28 U.S.C. § 158(a).

49. Tabb, *supra* note 28, at 18.

50. Act of Mar. 3, 1843, ch. 82, 5 Stat. 614 (1843).

51. W. HOMER DRAKE, ET. AL., *Prologue: A Brief History of the Development of Modern Bankruptcy Law*, in CHAPTER 13 PRACTICE & PROCEDURE § 1:1 (2012).

52. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (1867).

53. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 763 (2000).

54. § 11, 14 Stat. at 521-22.

ted any person, not just merchants, to be subject to involuntary bankruptcy, and (3) permitted district courts to appoint “registers” to assist them with bankruptcy matters.⁵⁵ The registers replaced the bankruptcy commissioners and were able to adjudicate bankruptcy claims.⁵⁶ However, like their predecessors and eventual successors, bankruptcy registers were not Article III judges.

The Act of 1867 attempted to resolve a major complaint of the Act of 1841 by narrowing discharge relief.⁵⁷ However, the Act of 1867 negated some of its own solution by allowing debtors to choose between federal, or possibly more generous, state exemptions.⁵⁸ Again, complaints that the bankruptcy process was too expensive, the estate was eaten by administration fees,⁵⁹ the creditors were receiving small dividends, and the delays were unreasonable led to the failure of the Act.⁶⁰ The next bankruptcy act to be passed, and fail shortly thereafter, was the Bankruptcy Act of 1874.⁶¹

E. The Bankruptcy Act of 1898

In 1898, Congress finally passed a bankruptcy statute that lasted more than a few years.⁶² The Bankruptcy Act of 1898 (Act of 1898) borrowed some provisions from past bankruptcy acts, such as allowing voluntary bankruptcy and involuntary bankruptcy against corporations; however, the Act of 1898 had other substantive and procedural changes that moved bankruptcy law into the twentieth century.⁶³

The Act of 1898 was the first bankruptcy statute to abolish the need for creditor approval for discharges⁶⁴ and also protected debtors by setting up safeguards against malicious, involuntary bankruptcy petitions.⁶⁵ One of these safeguards was the right to a jury trial to determine the validity of a

55. Tabb, *supra* note 28, at 19.

56. *Id.*

57. *Id.* at 19-20.

58. *Id.* at 20.

59. David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 332 (1999).

60. Tabb, *supra* note 28, at 19.

61. The Bankruptcy Act of 1874 was a small step toward our current bankruptcy system in that it had a tool that prior Acts did not have; this Act gave debtors the power to propose payment plans to discharge debts. *Id.* at 21. The debtor could also retain the property while making these payments. *Id.* However, despite this large change, the Act of 1874 soon failed and was repealed in 1878. *Id.*

62. Act of July 1, 1898, ch. 541, 30 Stat. 544 (1898); Tabb, *supra* note 28, at 23.

63. Tabb, *supra* note 28, at 23-26.

64. *Id.* at 24.

65. Skeel, *supra* note 59, at 335.

petition for involuntary bankruptcy.⁶⁶ The 1898 Act also gave state courts sole jurisdiction over bringing preference and fraudulent conveyance claims.⁶⁷ The latter is important to note as it begins the complex history of preferences and fraudulent conveyances that is later referenced in *Stern* and is currently confusing bankruptcy court litigants.⁶⁸

The Act of 1898 allowed appointment of “referees” to conduct bankruptcy cases, but the district court could always withdraw the case from the referee⁶⁹ or later review the case.⁷⁰ This power of withdrawal and review by the district court codified Justice Story’s determination that the district court had jurisdiction over all bankruptcy matters.⁷¹ The referee had summary jurisdiction,⁷² which allowed him to hear claims over property in the estate, and, if the parties consented, disputes about property held by third parties.⁷³ Other bankruptcy-related matters were tried in a state or federal district court.⁷⁴

Also, Congress gave more thought to the process and procedure of bankruptcy when it gave the Supreme Court the power to proscribe procedural rules governing bankruptcy cases.⁷⁵ Preferential and fraudulent transfer claims again made an appearance as the trustees – the replacement for assignees – gained more jurisdiction and power to avoid the claims.⁷⁶ The hope of the Court was that referees and trustees would be able to oversee the process better and reduce the high administrative fees that had plagued the Act of 1867.⁷⁷ This reasoning, and the continued expansion of bankruptcy courts’ authority, represents the Court’s acknowledgment of the efficiency of specialized legislative courts. However, while the Act of 1898 became the founda-

66. Janine C. Ciallella, *Should Bankruptcy Judges Be Permitted to Conduct Jury Trials?*, 8 AM. BANKR. INST. L. REV. 175, 178-79 (2000). The right to jury trials in Article I bankruptcy courts was later questioned by the Supreme Court. *Granfinancier, S.A. v. Nordberg*, 492 U.S. 33 (1989).

67. Skeel, *supra* note 59, at 334-35.

68. *See infra* Part IV.

69. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982).

70. *Id.*

71. *See supra* notes 44-45 and accompanying text.

72. Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 531 (1998).

73. *Marathon*, 458 U.S. at 53.

74. Block-Lieb, *supra* note 72, at 532.

75. Tabb, *supra* note 28, at 25.

76. *Id.* at 26.

77. Skeel, *supra* note 59, at 334; *see also Katchen v. Landy*, 382 U.S. 323, 328 (1966) (looking at legislative history to find that the intent of the Act of 1898 was to make bankruptcy laws less expensive to administer).

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tion of American bankruptcy law for eighty years, it was amended and changed several times.⁷⁸

F. The Chandler Amendments of 1938

The Chandler Amendments of 1938 did not repeal the Act of 1898, but amended it to add more options.⁷⁹ These options included commercial reorganization, composition relief for agricultural debtors, railroad reorganization, municipal debt adjustment, and a wage earner reorganization provision.⁸⁰

As the options began to broaden, so too did the interpretation of the bankruptcy court's jurisdiction over matters traditionally thought reserved for plenary jurisdiction. In *Katchen v. Landy*, the Supreme Court allowed a bankruptcy court to decide a claim that would have otherwise been entitled to a jury trial.⁸¹ The Court held that this conversion of a legal claim into an equitable claim was necessary to prohibit the delay and expense of splitting the action into a bankruptcy claim and a jury trial.⁸²

G. The Bankruptcy Reform Act of 1978

Congress overhauled the bankruptcy laws again in 1978. The Bankruptcy Reform Act of 1978 (Reform Act of 1978) kept some of the reorganization procedures of the Chandler Amendments, but added many new changes.⁸³ One of the most important changes was the creation of bankruptcy courts separate from district courts.⁸⁴

The Reform Act of 1978 created a bankruptcy court for each federal district and gave the new bankruptcy court "all of the jurisdiction conferred by this section on the district courts."⁸⁵ Replacing the referee system, modern

78. Tabb, *supra* note 28, at 27.

79. Act of June 22, 1938, ch. 575, 52 Stat. 840 (1938) (repealed 1979); Brunstad, *supra* note 1, at 517.

80. *Id.* at 517-18.

81. *Katchen*, 382 U.S. at 336. The Court later interpreted its decision as reasoning that requiring two different suits to recover on a counterclaim would be a "meaningless gesture." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852 (1986) (citing *Katchen*, 382 U.S. at 334).

82. *Katchen*, 382 U.S. at 339.

83. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549; Brubaker, *supra* note 19, at 7-8.

84. Brubaker, *supra* note 19, at 8.

85. *Id.* (quoting § 241, 92 Stat. at 2668).

bankruptcy judges presided over these new courts,⁸⁶ which had exclusive jurisdiction over all cases arising under Title 11.⁸⁷

The Reform Act of 1978 was also the first legislation from Congress eliminating the distinction between summary and plenary jurisdiction and allowing bankruptcy judges more procedural options, such as jury trials, declaratory judgments, and writs of habeas corpus.⁸⁸ Currently some commentators think that this abolishment of the summary/plenary distinction may have been reversed by *Stern*.⁸⁹

These changes put the registers, turned referees, turned bankruptcy judges, on similar footing with Article III judges,⁹⁰ but without the protections afforded to Article III judges.⁹¹ Bankruptcy judges are appointed by the president for fourteen-year terms, can be removed,⁹² and their salaries can be adjusted.⁹³ Article III judges are appointed by the president,⁹⁴ hold their office for life (except for misconduct), and their salaries cannot be changed.⁹⁵

Yet, the Reform Act of 1978 did not last long.⁹⁶ In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁹⁷ the Supreme Court declared section 1471 of the Reform Act of 1978 unconstitutional.⁹⁸ The plurality opinion found that Congress had granted too much authority to non-Article III bankruptcy judges.⁹⁹ Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, considered the three exceptions under which Congress may create legislative courts: territorial courts, military tribunals, and

86. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982).

87. 28 U.S.C. § 1471 (Supp. III 1979), *invalidated by Marathon*, 458 U.S. 50; Block-Lieb, *supra* note 72, at 532.

88. *Marathon*, 458 U.S. at 54, 85.

89. *See, e.g.*, George W. Kunej, *Stern v. Marshall: A Likely Return to the Bankruptcy Act's Summary/Plenary Distinction in Article III Terms*, 21 NORTON J. BANKR. L. & PRAC. 1, 13 (2011).

90. Ciallella, *supra* note 66, at 180.

91. Brubaker, *supra* note 19, at 8.

92. Bankruptcy judges could be removed by the “judicial council of the circuit” for “incompetency, misconduct, neglect of duty or physical or mental disability.” *Marathon*, 458 U.S. at 53 (quoting Act of Nov. 6, 1978, Pub. L. No. 95-598, § 153(b), 92 Stat. 2549) (internal quotation marks omitted).

93. Brubaker, *supra* note 19, at 8.

94. U.S. CONST. art. II, § 2.

95. U.S. CONST. art. III, § 1.

96. Brubaker, *supra* note 19, at 8 (noting that the “jurisdictional design” of the Reform Act was declared unconstitutional by the Supreme Court in 1982).

97. 458 U.S. 50. *Marathon* was a case about a debtor in possession to recover damages from a third party for a breach of contract. Brubaker, *supra* note 19, at 8. Under the 1898 Act, the suit would have to be brought in a state or federal district court, and not under a referee, but under the 1978 Act a bankruptcy judge could decide the claim. *Id.*

98. *Marathon*, 458 U.S. at 87.

99. *Id.*

courts deciding public rights.¹⁰⁰ The plurality's focus was on the last exception, the one for public rights,¹⁰¹ which the Court admitted did not previously have a clear definition.¹⁰² This so-called "public rights exception" would make appearances in later Supreme Court cases regarding bankruptcy and eventually in *Stern v. Marshall*.¹⁰³

However, in *Marathon*, the plurality defined a public right as one that "must at a minimum arise 'between the government and others[,]'"¹⁰⁴ and decided that this bankruptcy claim did not fit the exception.¹⁰⁵ Further, Justice Brennan decided that the bankruptcy courts were not permissible adjuncts of the district courts,¹⁰⁶ and Congress could neither establish Article III courts under the bankruptcy clause nor allow Article I courts to decide Article III matters.¹⁰⁷ The lack of a valid exception, and the fact that under no previous act had a bankruptcy judge been able to adjudicate a final judgment in a state law claim,¹⁰⁸ led the plurality to declare that the bankruptcy laws gave too much power to Article I judges.¹⁰⁹ The Supreme Court thus declared that the Reform Act of 1978 was unconstitutional and began a debate about how to structure bankruptcy courts to stay true to the constitutional reservation of judicial power to Article III judges that continues today.¹¹⁰

The dissenting judges in *Marathon* argued that a balancing test should be used to weigh the constitutional policy reasons for Article III courts against the congressional authority to create Article I courts.¹¹¹ The dissent argued that bankruptcy matters are usually not politically charged, that there is a right of appeal to Article III courts, that bankruptcy courts significantly

100. *Id.* at 64-67.

101. *Id.* at 67 (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855)).

102. *Id.* at 69.

103. *See infra* Parts II.H, III.B.

104. *Marathon*, 458 U.S. at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). The *Marathon* Court's explanation of the three exceptions and when Congress may create Article I courts was, and still is, criticized for its absence of clarity. *See* Brubaker, *supra* note 19, at 9.

105. *Marathon*, 458 U.S. at 71. However, the Court did leave the door open that some bankruptcy proceedings may be public rights. *Id.*

106. *Id.* at 87.

107. 9 AM. JUR. 2d *Bankruptcy* § 829 (2011).

108. Brubaker, *supra* note 19, at 8.

109. *Marathon*, 458 U.S. at 87.

110. *Id.* The Court felt it was very important for cases to have Article III protection because, "[i]n sum, our Constitution unambiguously enunciates a fundamental principle – that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." *Id.* at 60.

111. *Id.* at 113 (White, J., dissenting). Justice White's dissenting opinion was joined by Chief Justice Burger and Justice Powell. *Id.* at 92.

lower the stress on Article III courts and expedite matters, and that turning bankruptcy judges into Article III judges would have disadvantages for the flexibility of the system.¹¹² The dissent further argued that the Reform Act of 1978 passed this balancing test and should be upheld.¹¹³ This efficiency and practicality argument would later be used in *Stern v. Marshall* and would again win votes only from a minority of the Court.¹¹⁴

H. Bankruptcy Reform Act Amendments of 1984

After the Reform Act of 1978, Congress passed the Reform Act Amendments of 1984 (Reform Act Amendments). These amendments were tested by substantial amounts of litigation that further shaped the future of bankruptcy law. This Part will briefly explain the Act itself and the subsequent litigation.

1. Reform Act Amendments

Congress failed to draft a new bankruptcy law during the Supreme Court's six month stay of the *Marathon* decision.¹¹⁵ Instead, Congress took two years to pass new laws designed to make the bankruptcy system constitutional.¹¹⁶ In the intervening time, an emergency measure was passed by the Judicial Conference to allow district courts to refer Title 11 cases to bankruptcy judges, but some district courts considered this an invalid measure under *Marathon* and did not follow it.¹¹⁷

While the lower courts were struggling with how to proceed without a valid bankruptcy act, Congress debated making the bankruptcy courts Article III courts,¹¹⁸ but ultimately tried to fix the unconstitutionality of the bankruptcy system by emphasizing that district courts had jurisdiction over bankruptcy cases and that district courts could refer these matters to bankruptcy judges.¹¹⁹ Congress also emphasized that district courts could not refer matters involving "non-core" or "related to" bankruptcy matters to bankruptcy

112. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3528 (3d ed.).

113. *Marathon*, 458 U.S. at 118.

114. *Stern v. Marshall*, 131 U.S. 2594, 2639 (2011) (Breyer, J., dissenting).

115. WRIGHT ET AL., *supra* note 112, § 3528.

116. Bankruptcy Amendments and Federal Judgeships Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified in scattered sections of 28 U.S.C.); Patrick Scott & Gary Robinson, *Supreme Court Addresses Limits on Bankruptcy Judges' Powers*, WESTLAW J. ASBESTOS, Aug. 5, 2011, at *2.

117. WRIGHT ET AL., *supra* note 112, § 3528.

118. Block-Lieb, *supra* note 72, at 529.

119. 28 U.S.C. § 157(a), (d) (2006), *invalidated by Stern v. Marshall*, 131 S. Ct. 2594 (2011); Scott & Robinson, *supra* note 116, at 2.

judges¹²⁰ unless the litigant consented to the jurisdiction¹²¹ or the finding was non-final and the district court reviewed the determination de novo.¹²² The Reform Act Amendments of 1984 enumerated what Congress considered “core” matters.¹²³ Core matters were essential to the bankruptcy process and were properly referred to bankruptcy judges. Determining whether Congress correctly defined core matters is central to today’s debate and an understanding of current bankruptcy court decisions.

2. Judicial Interpretation of the Reform Act Amendments

Cases decided shortly after the Reform Act Amendments limited the holding in *Marathon*¹²⁴ and were more flexible about giving authority to Article I courts.¹²⁵ This time period represented another waxing cycle of bankruptcy authority with Supreme Court of the United States cases giving more guidance to lower bankruptcy courts that were confused about their authority and what constituted core claims.¹²⁶ For example, *Thomas v. Union Carbide*

120. Scott & Robinson, *supra* note 116, at 2.

121. Block-Lieb, *supra* note 72, at 536 (noting that some courts required consent expressly laid out in the pleadings, and some courts found that consent could be implied from the parties’ conduct).

122. Scott & Robinson, *supra* note 116, at 2; *see also* Benjamin Rosenblum & Scott J. Friedman, *Stern v. Marshall – Shaking Bankruptcy Jurisdiction to Its Core?*, BUS. RESTRUCTURING REV., July/Aug. 2011, at 6, 7.

123. 28 U.S.C. § 157(b)(2) (2006). Core matters included matters of administration, exercising a trustee or debtor’s avoidance powers, disputes as to the validity or priority of liens, disputes about the use, sale, or lease of property, among others. 1 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE, § 4:68 (3d ed.). Further, there are “catch-all” provisions making “every matter concerning the administration of the estate” or “affecting the liquidation of assets of the estate” core proceedings. *Id.* (internal quotation marks omitted).

124. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) (“The Court’s most recent pronouncement on the meaning of Article III is *Northern Pipeline*. A divided Court was unable to agree on the precise scope and nature of Article III’s limitations. The Court’s holding in that case establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.”).

125. *See Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 840-41 (1986); *Thomas*, 473 U.S. at 584.

126. *See In re Castlerock Prods.*, 781 F.2d 159 (9th Cir. 1986) (declining to finally adjudicate a claim for fear of Article III problems); *In re Nanodata Computer Corp.*, 52 B.R. 334, 340-41 (Bankr. W.D. N.Y. 1985) (finding core proceeding broadly as any claim arising under Title 11 or in a case which arose under Title 11), *aff’d*, 74 B.R. 766 (W.D. N.Y. 1987); *In re Murchison*, 54 B.R. 721, 725 (Bankr. N.D. Tex. 1985) (holding that a claim must meet the requirements of core status and the § 157(b)(1) nexus requirements).

*Agricultural Products Co.*¹²⁷ considered arbitration of environmental claims by an Article I court.¹²⁸ The *Union Carbide* Court seemed to move toward adopting the dissent's view in *Marathon* – that a balancing test should be used to decide the constitutionality of Article I adjudication.¹²⁹ The majority in *Union Carbide* weighed the policy purposes of Article I courts with the need for the protections of the Article III courts and also considered the extent of the encroachment of separation of the branches of government.¹³⁰

In *Union Carbide*, the Court also changed its definition of a public right. It abandoned the “bright line test” that came with the “public rights/private rights dichotomy” approach to finding authorization for Article I courts and instead paid attention to “substance rather than doctrinaire reliance on formal categories.”¹³¹ The *Union Carbide* Court found that the balancing test weighed in favor of constitutionality.¹³²

*Commodity Futures Trading Commission v. Schor*¹³³ was not specifically about bankruptcy courts but is important to bankruptcy history because it followed *Union Carbide*'s approach of balancing an impartial Article III judge with the expertise of having a specialized Article I court.¹³⁴ In *Schor*, the Court found that Congress clearly intended the Commodity Futures Trading Commission (CFTC) to adjudicate counterclaims, and that this adjudication by the Commission was necessary for the purposes of the program, which were to reduce the expense and inefficiency of litigating the same issues in two forums.¹³⁵ The majority noted that the constitutionality of the non-Article III decision “must be assessed by reference to the purposes underlying the requirements of Article III,”¹³⁶ and cited *Union Carbide* for the proposition that attention should be paid to “substance rather than doctrinaire

127. 473 U.S. 568 (1985).

128. *Id.* at 571. *Thomas* involved an arbitration scheme set up under the Federal Insecticide, Fungicide and Rodenticide Act which required submission of certain data to the Environmental Protection Agency, which could be then used by other manufacturers if the later manufacturer agreed to pay the manufacturer that originally submitted the data. *Id.* at 571-75. If the second manufacturer did not pay for the shared data then the parties would be forced into binding arbitration with very limited Article III review. *Id.* at 573-75.

129. *Id.* at 583; see *supra* note 111 and accompanying text.

130. Block-Lieb, *supra* note 72, at 539.

131. *Thomas*, 473 U.S. at 585-87.

132. *Id.* at 593-94.

133. 478 U.S. 833 (1986). *Schor* concerned the Commodity Futures Trading Commission (CFTC) which could hear state law counterclaims in connection with the Commodity Exchange Act (CEA). *Id.* at 836-37. Congress' purpose in allowing this was to make the procedure “inexpensive and expeditious.” *Id.* at 837. After a proceeding by the CFTC in which Schor sued and Conti succeeded in its counterclaim, Schor challenged the authority of the CFTC to decide the counterclaim. *Id.* at 838.

134. Block-Lieb, *supra* note 72, at 538-39.

135. *Schor*, 478 U.S. at 841-44.

136. *Id.* at 847.

reliance on formal categories.”¹³⁷ The *Schor* Court found that if the parties consented, then the CFTC acted constitutionally because the right of an Article III court can be waived.¹³⁸ The majority found that while there was no evidence of express waiver, Schor impliedly waived the right when he filed his claim with the CFTC reparations commission.¹³⁹ This concept of consent to Article I adjudication is still debated today by bankruptcy courts trying to gain authority to issue final judgments in non-core matters.¹⁴⁰

Further, when considering whether the Article I court could hear and adjudicate the case, the Supreme Court in *Schor* considered other factors, including whether the claim is one normally vested only in Article III courts, the importance of the right, and the reason why Congress chose to give the adjudication to a non-Article III body.¹⁴¹ The Court noted the cost savings, expedited proceedings, and ability for decisions to be made by those with specific expertise in the subject as factors in favor of Article I court adjudication.¹⁴² Therefore, the *Schor* Court held that the CFTC’s adjudication was a valid exercise of Congressional authority.¹⁴³ The Court warned about adopting “formalistic and unbending rules” about Article III because they would “unduly constrict Congress’ ability” to take action.¹⁴⁴ This statement represented an acknowledgement that the efficiency and expertise of Article I bankruptcy courts could support their existence despite concerns about bankruptcy courts’ constitutional Article III deficiencies.

However, while the Supreme Court took a more liberal view of Article I authority immediately after the Reform Act Amendments, it did not entirely cease questioning the legitimacy of the bankruptcy system.¹⁴⁵ In *Granfinanciera v. Nordberg*, the Supreme Court decided that, while Congress had decided fraudulent conveyance actions to be “core” proceedings, the Seventh Amendment still applied to such claims.¹⁴⁶ The Court held that to decide whether a jury trial was available, a court needed to look at old English actions and determine if the claim was one of law or equity, with the former having the right of a jury.¹⁴⁷ The *Granfinanciera* Court found that under

137. *Id.* at 848 (quoting *Thomas*, 473 U.S. at 587).

138. *See id.*

139. *Id.* at 849.

140. *See infra* Part IV.B.

141. *Schor*, 478 U.S. at 851.

142. *Id.* at 855-56.

143. *Id.* at 841; Block-Lieb, *supra* note 72, at 538.

144. *Schor*, 478 U.S. at 851.

145. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). *Granfinanciera* involved a claim under Chapter 11 of the Bankruptcy Code for a fraudulent conveyance where a trial by jury was requested and denied by the bankruptcy judge because the bankruptcy judge understood core issues to be non-jury issues. *Id.* at 36-37.

146. *Id.* at 36 (citing 28 U.S.C. § 157(b)(2)(H) (1982)).

147. *Id.* at 42.

English law, fraudulent transfer claims were suits at law and were heard before juries.¹⁴⁸

Further, the Court noted that prior to the Reform Act of 1978, fraudulent conveyance claims were not decided by a bankruptcy trustee but were decided as a separate jury trial in a state or federal court.¹⁴⁹ This separate adjudication was the same type of traditional summary versus plenary reasoning that the Court relied on in *Marathon*.¹⁵⁰ The *Grandfinanciera* Court then emphasized the narrowness of its holding,¹⁵¹ and decided that Article I courts could not hold jury trials absent consent of the parties.¹⁵²

In so holding, the *Grandfinanciera* Court noted that its definition of a public right had (again) changed from *Marathon*,¹⁵³ and stated that a public right need not involve the government, but in order to have a public right, the government needs to have created a private right closely integrated with a public scheme.¹⁵⁴ Despite the new definition, the *Grandfinanciera* Court was still dubious of the claim that bankruptcy was a public right¹⁵⁵ and expressly stated in a footnote that it was not holding that restructuring of debtor-creditor relations was in fact a public right.¹⁵⁶

However, in the later case of *Langenkamp v. Culp*,¹⁵⁷ the Supreme Court held that creditors who submitted claims against the bankruptcy estate had no Seventh Amendment right to a jury trial when the bankruptcy trustee counter-claimed for preferential transfers.¹⁵⁸ Therefore, the Court noted a difference in whether the creditor is the first to file a claim against the estate or not; if the creditor files first and then the trustee files a preferential action, then the

148. *Id.* at 43.

149. *Id.* at 49-50.

150. See Brubaker, *supra* note 19, at 8.

151. *Granfinanciera*, 492 U.S. at 50 (specifying that it was not deciding if a bankruptcy court could conduct jury trials in a fraudulent conveyance suit against a person who did not consent by entering a claim against the estate, if Congress had the constitutional authority to allow Article I bankruptcy judges to preside over jury trials subject to review or withdrawal by the district court, or if the district court's ability to set aside factual findings of a bankruptcy court was constitutional as applied to jury findings).

152. *Id.*

153. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855)).

154. *Granfinanciera*, 492 U.S. at 54 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586 (1985)).

155. *Id.* at 55-56.

156. *Id.* at 56 n.11. This footnote is currently causing bankruptcy courts to doubt whether fraudulent transfers claims, the claim involved in *Grandfinanciera*, are within bankruptcy court's authority to enter a final judgment in.

157. 498 U.S. 42 (1990).

158. *Id.* at 44-45.

preferential action becomes “integral to the restructuring of the debtor-creditor relationship through the bankruptcy court’s *equity jurisdiction*.”¹⁵⁹

Further, dissenting justices in subsequent Supreme Court cases still questioned the authority of bankruptcy courts to enter orders like injunctions in non-core proceedings.¹⁶⁰ According to a special report by the National Bankruptcy Review Commission,¹⁶¹ doubt that bankruptcy courts fell within the public rights exception expressed in *Granfinanciera* by the majority, and opinions to the same effect expressed by dissenters in later Supreme Court opinions, caused lengthy litigation over whether bankruptcy courts had the authority to enter binding judgments.¹⁶² Engaging in some foreshadowing of the issue in *Stern*, the Bankruptcy Commission noted that *Granfinanciera*’s holding could mean that not all congressionally designated “core” proceedings actually fell under the jurisdiction of the Article I bankruptcy court.¹⁶³ Despite this doubt expressed by the Supreme Court and the Bankruptcy Commission, several courts of appeal ruled that the Reform Act Amendments were constitutional.¹⁶⁴

III. THIRTY YEARS AFTER *MARATHON*

On June 23, 2011, the Supreme Court of the United States changed the bankruptcy landscape once again in a case complicated enough to make Justice Roberts quote Dickens.¹⁶⁵ In *Stern v. Marshall*, the Court held that an

159. *Id.* at 44; see also Scott & Robinson, *supra* note 116, at 3 (summarizing *Langenkamp* and *Grandfinanciera* as meaning a creditor who files a proof of claim submits to the jurisdiction of a bankruptcy court for any counterclaims against the creditor).

160. See, e.g., *Celotex Corp. v. Edwards*, 514 U.S. 300, 322-23 (1995) (Stevens, J., dissenting).

161. The National Bankruptcy Review Commission is an independent commission established pursuant to the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, to investigate the bankruptcy system and submit a report. *NBRC Fact Sheet*, NAT’L BANKR. REV. COMMISSION (Aug. 12, 1997), <http://govinfo.library.unt.edu/nbrc/facts.html>. They ceased to exist by operation of law on November 19, 1997. NAT’L BANKR. REV. COMMISSION (Nov. 26, 1997), <http://govinfo.library.unt.edu/nbrc/>.

162. NAT’L BANKR. COMM’N, *BANKRUPTCY: THE NEXT TWENTY YEARS*, 734 (1997), <http://govinfo.library.unt.edu/nbrc/report/17bjuris.pdf>.

163. *Id.* at 735; NORTON, *supra* note 124, § 4:41.

164. 1 NORTON, *supra* note 123, § 4:41.

165. *Stern v. Marshall*, 131 S. Ct. 2594, 2600 (U.S. 2011) (“This ‘suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it; and, sadly, the original parties ‘have died out of it.’ A ‘long procession of [judges] has come in and gone out’ during that time, and still the suit ‘drags its weary length before the Court.’”).

Article I court could not issue a final order adjudicating a counterclaim for tortious interference, and in doing so declared 28 U.S.C section 157(b)(2)(C) unconstitutional.¹⁶⁶

A. Background

Stern v. Marshall has a long and complicated past. The case was born from a marriage between Vickie Lynn Marshall (also known as Anna Nicole Smith) and J. Howard Marshall II.¹⁶⁷ Vickie married eighty-nine-year-old oil tycoon Howard Marshall in 1994.¹⁶⁸ On July 13, 1994, E. Pierce Marshall was given power of attorney over Howard Marshall's estate, and made Howard Marshall's living trust irrevocable.¹⁶⁹ This change meant Vickie could no longer be named as a beneficiary, even though Howard Marshall had allegedly promised to leave half his estate to her.¹⁷⁰ Howard also signed a will that stated that all of his assets not already in the living trust would be transferred to his trust upon death.¹⁷¹ Vickie believed that Howard's son, E. Pierce Marshall, fraudulently induced Howard senior into making the trust irrevocable and filed a suit in a Texas probate court against Pierce Marshall.¹⁷² The suit was filed before Howard Marshall's death, because Howard could not change the trust; however, about five months after the suit was filed, Howard Marshall died.¹⁷³

Shortly after Howard's death, Vickie filed for bankruptcy relief in a California bankruptcy court because of an \$830,000 judgment against Vickie for sexual harassment of her child's nanny.¹⁷⁴ Pierce filed a claim for defamation in Vickie's bankruptcy case.¹⁷⁵ He also sought a declaration that the claim was non-dischargeable.¹⁷⁶ Vickie asserted a counterclaim in the bankruptcy case against Pierce for tortious interference in the fortune that Vickie

166. *Id.* at 2620.

167. *Id.* at 2600; Rosenblum & Friedman, *supra* note 122, at 1.

168. Rosenblum & Friedman, *supra* note 122, at 1.

169. *In re Marshall*, 392 F.3d 1118, 1122, 1125 n.5 (9th Cir. 2004), *rev'd and remanded sub nom.* *Marshall v. Marshall*, 547 U.S. 293 (2006).

170. *Id.* at 1122, 1129.

171. *In re Marshall*, 600 F.3d 1037, 1041-42 (9th Cir. 2010), *aff'd sub nom.* *Stern v. Marshall*, 131 S. Ct. 2594 (U.S. 2011); Rosenblum & Friedman, *supra* note 122, at 1.

172. *Stern*, 131 S. Ct. at 2601.

173. *In re Marshall*, 392 F.3d at 1124-25.

174. *Stern*, 131 S. Ct. at 2601; Charles Lane, *Anna Nicole Smith's Supreme Fight: Justices Hear Celebrity's Bid for Cut of Late Husband's Riches*, WASH. POST, Mar. 1, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/02/28/AR200022800142_pf.html.

175. *Stern*, 131 S. Ct. at 2601.

176. *Id.*

expected from Howard.¹⁷⁷ Vickie eventually won summary judgment on Pierce's defamation complaint, and a bankruptcy court judge found in favor of Vickie on the tortious interference claim and ordered Pierce to pay over \$400 million in damages.¹⁷⁸

After the bankruptcy court entered its judgment, Vickie nonsuited her claims against Pierce in the Texas probate case.¹⁷⁹ However, after a five-month jury trial, the Texas probate court found in favor of Pierce and held that the will and trust were valid.¹⁸⁰ Pierce then appealed the bankruptcy judgment to the California federal district court,¹⁸¹ which found that the bankruptcy counterclaim was not a core proceeding, despite the literal language of the statute.¹⁸² Accordingly, the district court held that the bankruptcy court's judgment was not final and the probate court was not entitled to preclusive effect.¹⁸³ Therefore, the district court independently reviewed the record and upheld the bankruptcy court's judgment for Vickie.¹⁸⁴

The Ninth Circuit reversed the district court and found that the court should not have decided a probate claim because of the "probate exception."¹⁸⁵ The probate exception is a doctrine that gives states sole jurisdiction over probate proceedings and forbids federal courts from exercising jurisdiction over probate cases or cases that would interfere with probate proceedings or take control over assets in the state's custody.¹⁸⁶ The Ninth Circuit found that Vickie's tort claim interfered with the Texas probate court's proceedings, that the district court did not have jurisdiction over it, and that the probate

177. *Id.*

178. *Id.* Vickie was awarded over \$400 million in compensatory damages and \$25 million in punitive damages. *Id.*; see also *In re Marshall*, 253 B.R. 550, 561 (Bankr. C.D. Cal. 2000), *adopted as modified*, 275 B.R. 5 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev'd and remanded sub nom. Marshall v. Marshall*, 547 U.S. 293 (2006).

179. *In re Marshall*, 600 F.3d 1037, 1046 (9th Cir. 2010), *aff'd sub nom. Stern v. Marshall*, 131 S. Ct. 2594 (2011).

180. *Id.* at 1047.

181. *Id.*

182. *Id.* at 1048.

183. *Id.*

184. *Stern v. Marshall*, 131 S. Ct. 2594, 2602 (2011); *In re Marshall*, 264 B.R. 609, 631 (C.D. Cal. 2001).

185. *In re Marshall*, 392 F.3d 1118, 1137 (9th Cir. 2004), *rev'd and remanded sub nom. Marshall v. Marshall*, 547 U.S. 293 (2006). The Ninth Circuit said a related proceeding "is whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Marshall*, 600 F.3d at 1055. Furthermore, "[a]n action is related to bankruptcy if the outcome could alter the debtor's right, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.*

186. *In re Marshall*, 392 F.3d at 1133.

court's ruling was binding on the district court.¹⁸⁷ The Ninth Circuit ordered the district court to vacate the bankruptcy court's judgment against Pierce because the federal bankruptcy court lacked jurisdiction over the probate matter.¹⁸⁸

In 2006, the Supreme Court of the United States reversed the Ninth Circuit's opinion on *Stern* and held that the "probate exception" did not govern the claim; therefore, the district court's judgment ordering Pierce to pay Vickie \$44.3 million was upheld.¹⁸⁹ The Supreme Court clarified that federal jurisdiction over probate matters in diversity cases is allowed unless the case concerns "divorce, alimony, and child custody decrees" or "the probate or annulment of a will and the administration of a decedent's estate."¹⁹⁰ Federal courts are prohibited from hearing the latter claims even if diversity jurisdiction exists.¹⁹¹ The Court noted that Vickie's claim was a diversity action and did not fall in one of the prohibited categories.¹⁹² Therefore, the Court determined that the district court had proper subject matter jurisdiction over the tortious interference claim.¹⁹³

On remand, the Ninth Circuit held that the bankruptcy court did not have core jurisdiction because while the claim met Congress' definition of core, it did not arise under Title 11; therefore, the bankruptcy court's decision was not a final judgment.¹⁹⁴ Because the bankruptcy court's decision was not a final judgment, the Texas probate court was the first final judgment and therefore had preclusive effect.¹⁹⁵ The case was appealed again, and the Supreme Court again granted certiorari on the issue of whether the bankruptcy court had the authority to enter a final judgment on the tortious interference claim.¹⁹⁶

B. Majority

This time the Supreme Court had to determine if the bankruptcy court could enter a final judgment on the counterclaim, and, if so, whether that judgment would be constitutional.¹⁹⁷ The Court first looked at the statute that defines "core" proceedings, 28 U.S.C. section 157(b)(2), which includes "counterclaims by the estate against persons filing claims against the es-

187. *Id.* at 1136.

188. *Id.* at 1137.

189. *Marshall*, 547 U.S. at 304, 314.

190. *Id.* at 308, 311.

191. *Id.* at 312.

192. *Id.*

193. *Id.* at 315.

194. *In re Marshall*, 600 F.3d 1037, 1060-61, *aff'd sub nom.* *Stern v. Marshall*, 131 S. Ct. 2594 (U.S. 2011).

195. *Id.*

196. *Stern v. Marshall*, 131 S. Ct. 63 (2010).

197. *Stern v. Marshall*, 131 S. Ct. 2594, 2600 (2011).

tate.”¹⁹⁸ The Court found that by its plain language the statute made the tortious interference counterclaim core, which meant that the bankruptcy court could enter a final judgment on the counterclaim.¹⁹⁹ However, Vickie’s victory did not last long because the Court went on to hold that the statute could not constitutionally allow bankruptcy courts to enter final judgments on counterclaims because doing so would infringe on the domain of Article III courts.²⁰⁰ The Court held that Congress could not constitutionally give legislative courts the power to finally adjudicate common law counterclaims which can be independently resolved in a state law action without ruling on the creditor’s proof of claim in the bankruptcy action.²⁰¹ In so doing, the Court waded into a two-century old debate on the constitutional authority of Article I bankruptcy judges.²⁰²

In striking down section 157(b)(2), the majority emphasized the importance of maintaining the separation of powers of the judicial and legislative branches and reserving judicial adjudication to Article III courts.²⁰³ The Court also recounted the injustice of king-controlled courts in England, which led to the creation of American constitutional protections for Article III judges.²⁰⁴ The majority stated that judges need “[c]lear heads . . . and honest hearts” which is achieved by the life tenure and salary protection of Article III judges.²⁰⁵ Accordingly, only judges protected from ruler-coercion by Article III may decide matters of common law and constitutional law.²⁰⁶

After this recitation of the historical importance of Article III protections, the Court discussed whether the convoluted public rights exception applied to this claim.²⁰⁷ The Court discussed the exception, as laid out in *Marathon*, *Union Carbide*, *Schor*, and *Grandfinanciera*.²⁰⁸ The *Stern* Court did not precisely verbalize a definition of “public rights,” which is central to the issue of whether Article I judges are allowed to adjudicate a claim.²⁰⁹ The Court instead compared Vickie’s claim to the previous definitions of the public rights exception and concluded that, while those definitions had been inconsistent, the common law tortious interference counterclaim did not fit within any of them.²¹⁰ The Court refused to expand the definition.²¹¹ The

198. *Id.* at 2063; see also 28 U.S.C. § 157(b)(2)(C) (2006).

199. *Stern*, 131 S. Ct. at 2605. The Court refused Pierce’s argument that there are core claims that do not arise under Title 11. *Id.*

200. *Id.* at 2608.

201. *Id.* at 2611.

202. *Id.* at 2611-12.

203. *Id.* at 2609.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 2609-10.

208. *Id.* at 2610-15.

209. *Id.* at 2615.

210. *Id.* at 2614.

Court also quickly dismissed the idea that bankruptcy courts were adjuncts of district courts.²¹² This idea was a theory that Congress tried in previous bankruptcy acts to achieve constitutionality by claiming that bankruptcy courts were merely acting on behalf of, and part of, Article III district courts.²¹³ The Court noted that district courts review the bankruptcy courts' judgments only under limited circumstances and give deference to the bankruptcy judges' findings of facts, thereby giving them broad powers and independence from the district courts.²¹⁴

The majority also held that Pierce clearly consented to the bankruptcy court's authority to hear his claim against Vickie for defamation because he did not object once to the court's jurisdiction during the entire litigation process.²¹⁵ However, the Court held that merely filing a proof of claim did not imply consent to adjudication by Article I judges for Vickie's claim for tortious interference against Pierce because,²¹⁶ unlike in *Katchen* and *Langenkamp*, resolving the counterclaim in Vickie's case was not necessary to resolving the bankruptcy claim.²¹⁷ The Court noted that the bankruptcy judge in the current case had to decide legal and factual issues separate from the bankruptcy proof of claim or the defamation claim.²¹⁸ During this discussion, the Court resurrected the specter of summary/plenary jurisdiction from its grave.²¹⁹ Finally, the Court also departed from *Schor* and *Union Carbide*'s method of weighing the efficiency of Article I adjudication while deciding whether the legislative court had authority to decide the case and forbade any further chipping away at the authority of the judicial branch.²²⁰ The Supreme Court realized that prohibiting Article I judges from deciding some cases would cause some inefficiency but declared that the integrity of the Constitution outweighed this concern.²²¹ The majority also stated that its holding was narrow and that it would have little effect on the bankruptcy system.²²² However, by striking part of the bankruptcy code as unconstitutional²²³ and failing

211. *See id.* at 2611.

212. *Id.*

213. *Id.*

214. *Id.* at 2610-11.

215. *Id.* at 2608.

216. *Id.* at 2611.

217. *Id.* at 2616 (citing *Langenkamp v. Culp*, 498 U.S. 42 (1990); *Katchen v. Landy*, 382 U.S. 323 (1966)).

218. *Id.* at 2617.

219. *See id.* at 2616-17.

220. *Id.* at 2620.

221. Specifically, the Court eloquently stated that “[i]t goes without saying that ‘the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.’” *Id.* at 2619 (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983)).

222. *Id.* at 2620.

223. *Id.*

to clearly define the limits of Article I authority, the Court did change bankruptcy litigation in the lower courts.

C. Dissent

The dissent in *Stern* followed the precedent of *Schor* and *Union Carbide* and argued that a pragmatic balancing approach be used to determine if the Article I court encroached on other branches of the government or was not impartial.²²⁴ The dissent favorably reiterated *Schor*'s factors for deciding whether Article I adjudication of a claim is appropriate and applied them to the instant case.²²⁵ The dissent also pointed to the majority's complicated explanation of public rights and used it as support that determination of the constitutionality of non-Article III adjudication should be "searching."²²⁶ It further argued that under *Langenkamp* and *Grandfinanciera*, Pierce Marshall should be held to have consented to the counterclaim by filing his proof of claim.²²⁷ Then, the dissent pointed out the practical disadvantages of broad Article III interpretation, including inefficiency, delays, and forum shopping, using hypotheticals.²²⁸ Further, it questioned whether the majority meant to re-question the validity of other Article I courts, like the CFTC in *Schor* through this decision.²²⁹ In the end, *Stern* left bankruptcy judges with more questions than answers and has caused delay, uncertainty, and added expense in bankruptcy cases.²³⁰

IV. THE WORLD AFTER *STERN*

In the fallout subsequent to the lengthy *Stern* opinion, many scholars have suggested outcomes as general as inefficiency to as specific as prohibitions against Article I judges adjudicating federal avoidance claims.²³¹ While there are very few issues that seem crystal clear in following the Supreme Court's opinion, there is one conclusion that bankruptcy judges agree on: *Stern* leaves many questions unanswered. This Comment strives to aid practitioners in navigating bankruptcy litigation post-*Stern*. Therefore, the subsequent sections illustrate how courts have decided if claims are core or non-core, detail how different jurisdictions need consent, and explain how courts

224. *Id.* at 2625-26 (Breyer, J., dissenting).

225. *Id.* at 2626.

226. *Id.* at 2625.

227. *See id.* at 2629.

228. *Id.* at 2630.

229. *Id.* at 2623.

230. *See supra* Part III.

231. Richard Lieb, *The Supreme Court, in Stern v. Marshall, by Applying Article III of the Constitution Further Limited the Statutory Authority of Bankruptcy Courts to Issue Final Orders*, 20 J. BANKR. L. & PRACT. 461 (2011).

have ruled with regard to authority to enter final judgments in a majority of common state law claims.

A. Categorizing Claims as Core or Non-core

One of the initial issues that bankruptcy courts must decide is whether a claim is “core” or “non-core.”²³² The majority of courts have held that in order for a proceeding to be core, it must be defined as core under 28 U.S.C. section 157, and the bankruptcy judge must also have authority under the Constitution to enter a final adjudication.²³³ The latter part of this test is where some courts look to *Stern* to decide if the claim is traditionally a state law claim and thus cannot be constitutionally adjudicated by an Article I court or if it fits the public rights exception and can be adjudicated.²³⁴ Other courts have emphasized the narrowness of *Stern*’s holding and have held that bankruptcy courts may still enter a final judgment on all other types of proceedings authorized under 28 U.S.C. section 157, except the specific type of state law counterclaim, tortious interference, found invalid in *Stern*.²³⁵

Once the bankruptcy judge has determined whether the claim is core or non-core, then the judge knows how to treat the claim. In a core matter that arises in or under Title 11 and may be constitutionally adjudicated, the bankruptcy judge may enter final orders, subject to appellate review by the district court.²³⁶ The vast majority of district courts have determined that if the matter is statutorily defined as core, but cannot be constitutionally decided by Article I courts, then the bankruptcy courts should treat the matter like non-core issues.²³⁷

232. See *Stern*, 131 S. Ct. at 6603-04.

233. Burtch v. Huston (*In re* USDigital, Inc.), 461 B.R. 276, 279 (Bankr. D. Del. 2011); *In re* Heller Ehrman LLP, No. 08-32514DM, 2011 WL 4542512, at *1 (Bankr. N.D. Cal. Sept. 28, 2011), *adopted* 464 B.R. 348 (N.D. Cal. 2011); *In re* Okwonna-Felix, No. 10-31663-H4-13, 2011 WL 3421561, at *4 (Bankr. S.D. Tex. Aug. 3, 2011).

234. See *Stern*, 131 S. Ct. at 2611.

235. See, e.g., Brook v. Ford Motor Credit Co. (*In re* Peacock), 455 B.R. 810, 812 (Bankr. M.D. Fla. 2011).

236. *In re* USDigital, Inc., 461 B.R. at 279; *In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 698-99 (Bankr. N.D. Ill. 2011).

237. See, e.g., RES-GA Four LLC v. Avalon Builders of GA LLC, No. 5:10-CV-463 MTT, 2012 WL 13544 (M.D. Ga. Jan. 4, 2012) (finding that bankruptcy courts have the ability to hear and submit proposed findings of fact in issues related to title 11 proceeding); Field v. Estate of Kapoika (*In re* Maui Indus. Loan Fin. Co.), No. 11-00552 LEK, 2011 WL 6934571, at *10 (D. Haw. Dec. 29, 2011) (holding that a bankruptcy court can still hear a non-constitutional core claim and give proposed findings of fact to the district court); Justmed, Inc. v. Byce (*In re* Byce), No. 1:11-CV-00378-BLW, 2011 WL 6210938, at *2 (D. Idaho Dec. 14, 2011); *In re* El-Atari, No. 1:11CV1090 LMD/IDD, 2011 WL 5828013, at *4 (E.D. Va. Nov. 18, 2011) (finding that the “majority of district courts have also concluded that the bankruptcy courts

Matters that are merely “related to” a bankruptcy proceeding are non-core matters.²³⁸ In non-core matters the bankruptcy judge may enter proposed findings of fact, but these findings are subject to de novo review by the district court.²³⁹ As opposed to treating unconstitutionally core claims as non-core, at least two courts have found that if a matter is statutorily core, but not constitutionally core, then the court cannot even hear the claim.²⁴⁰ In *In*

retain the power to hear but not decide state law claims”); *In re Extended Stay, Inc.*, 466 B.R. 188, 203 (S.D.N.Y. 2011) (holding bankruptcy courts may submit proposed findings of fact in unconstitutionally core claims); *City Bank v. Compass Bank*, No. EP-11-MC-372-KC, 2011 WL 5442092, at *6 (W.D. Tex. Nov. 9, 2011); *In re Mortg. Store, Inc.*, 464 B.R. 421, 427 (D. Haw. Oct. 5, 2011) (agreeing with *Paloian v. Am. Express Co. (In re Canopy Fin.)*, 464 B.R. 770 (N.D. Ill. 2011) that bankruptcy courts may hear and propose findings of fact for unconstitutionally core proceedings); *Picard v. Flinn Invs., LLC*, 463 B.R. 280, 288 (S.D.N.Y. 2011) (noting that even if the bankruptcy court cannot resolve fraudulent transfer claims, it may still recommend findings of fact and conclusions of law to Article III courts); *In re Canopy Fin.*, 464 B.R. at 774 (finding that *Stern* removed the unconstitutional core claims from the core category and relegated them to the related to category); *Kelley v. JPMorgan Chase & Co.*, 464 B.R. 854, 859 (D. Minn. 2011) (holding a bankruptcy court could hear, and propose findings of fact and conclusions of law to the district court, even if a fraudulent transfer claim was found to not be constitutionally core); *Paloian v. LaSalle Bank Nat’l Ass’n (In re Doctors Hosp. of Hyde Park, Inc.)*, 463 B.R. 93, 100 (Bankr. N.D. Ill. 2011) (holding that if a claim is not constitutionally core it falls within the “related-to” jurisdiction of bankruptcy judges); *Nation’s Captial Child & Family Dev., Inc. v. Marylyn Tree LLC (In re Nation’s Capital Child & Family Dev., Inc.)*, No. 09-00576, 2011 WL 6001086, at *1 (Bankr. D.D.C. Nov. 30, 2011); *Gugino v. Canyon Cnty. (In re Bujak)*, No. 10-03569-JDP, 2011 WL 5326038, at *4 (Bankr. D. Idaho Nov. 3, 2011); *Tabor v. Kelly (In re Davis)*, No. 05-15794-GWE, 2011 WL 5429095, at *15 (Bankr. W.D. Tenn. Oct. 5, 2011) (holding that a court may prepare proposed findings of fact for de novo review in unconstitutionally core claims).

238. 28 U.S.C. § 157(b)(3) (2006).

239. *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 463 (S.D.N.Y. 2011); *In re Canopy Fin., Inc.*, 464 B.R. at 772; *In re USDigital, Inc.*, 461 B.R. at 283; *Levey v. Hanson’s Window & Constr. Inc. (In re Republic Windows & Doors, LLC)*, 460 B.R. 511, 514 (Bankr. N.D. Ill. 2011); *Menotte v. United States (In re Custom Contractors, LLC)*, 462 B.R. 901, 905 (Bankr. S.D. Fla. 2011); *D & B Swine Farms, Inc. v. Murphy-Brown, LLC (In re D & B Swine Farms, Inc.)*, No. 09-02813-8-JRL, 2011 WL 6013218, at *2 (Bankr. E.D.N.C. Dec. 2, 2011); *Oxford Expositions, LLC v. Questex Media Grp. (In re Oxford Expositions, LLC)*, 466 B.R. 818, 828 (Bankr. N.D. Miss.); *Gecker v. Flynn (In re Emerald Casino, Inc.)*, 459 B.R. 298, 300 (Bankr. N.D. Ill.).

240. *Samson v. Blixseth (In re Blixseth)*, No. 09-60452-7, 2011 WL 3274042, at *11–12 (Bankr. D. Mont. Aug. 1, 2011), *order amended on denial of reconsideration* by 463 B.R. 896 (Bankr. D. Mont. 2012); *see also Palazzola v. City of Toledo (In re Palazzola)*, No. 09-37696, 2011 WL 3667624, at *6 (Bankr. N.D. Ohio Aug. 22, 2011) (holding that because the court had no authority to hear and determine the personal tort claim under the Constitution as it was a private right, and the claim is not a

re Blixseth, a Montana bankruptcy court held that while it was defined by statute as core, a fraudulent conveyance claim was a state law claim that did not fall within the public rights exception.²⁴¹ The court then held that the claim was a private right that must be decided by an Article III court, and the bankruptcy court could “in no case hear the claim.”²⁴² The court granted the parties time to move the claim to the district court.²⁴³ However, *Blixseth* has since been overruled and the decision labeled “flawed” because *Stern* did not deprive courts of the subject matter jurisdiction to at least hear the claim.²⁴⁴

B. Consent to Article I Adjudication

Consent is also an important issue after *Stern*. The vast majority of courts have held that parties may expressly or impliedly consent to final judgments in non-core matters²⁴⁵ by actions like expressly consenting on the record,²⁴⁶ consenting to final judgments on counterclaims by the bankruptcy court in pleadings,²⁴⁷ not arguing that the court has a lack of authority to enter

“related to” claim under 28 U.S.C. § 157(c)(1), then the court has no subject matter jurisdiction).

241. *In re Blixseth*, 2011 WL 3274042, at *11.

242. *Id.* at *12.

243. *Id.*

244. *Samson v. Blixseth (In re Blixseth)*, 463 B.R. 896, 906 (Bankr. D. Mont. 2012), *order amended on denial of reconsideration* by 463 B.R. 896 (Bankr. D. Mont. 2012); *see also In re Yellowstone Mountain Club, LLC*, 460 B.R. 254, 280 (Bankr. D. Mont. 2011) (holding “*Blixseth*’s standing objection to this Court’s subject matter jurisdiction is overruled”).

245. *Menotte v. United States (In re Custom Contractors, LLC)*, 462 B.R. 901, 908-09 (Bankr. S.D. Fla. 2011); *Hagan v. Classic Prod. Corp. (In re Wilderness Crossings, LLC)*, No. 09-14547, 2011 WL 5417098 (Bankr. W.D. Mich. Nov. 8, 2011); *Pro-Pac Inc. v. Chapes (In re Pro-Pac, Inc.)*, 456 B.R. 894, 902-03 (Bankr. E.D. Wis. 2011), *rev’d and remanded sub nom. WOW Logistics Co. v. Pro-Pac, Inc.*, No. 11-CV-1075-JPS, 2012 WL 3495391 (E.D. Wis. Aug. 14, 2012); *Oxford Expositions v. Questex Media Grp. (In re Oxford Expositions, LLC)*, 466 B.R. 818, 828 (Bankr. N.D. Miss. 2011); *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 705 (Bankr. M.D. Fla. 2011) (noting that judges may enter final judgments in non-core matters if the parties consent pursuant to § 157(c)(2) which the Supreme Court has not held as unconstitutional).

246. *Janis v. Wefald (In re Wefald)*, No. 10-08068-8-SWH, 2011 WL 6001134, at *1 (Bankr. E.D.N.C. Nov. 30, 2011); *Reinke v. N.W. Tr. Servs. Inc. (In re Reinke)*, No. 09-19609, 2011 WL 5079561, at *5 (Bankr. W.D. Wash. Oct. 26, 2011); *see Frontier Energy LLC v. Aurora Energy, Ltd. (In re Aurora Oil & Gas Corp.)*, 460 B.R. 470, 476 (Bankr. W.D. Mich. 2011).

247. *Mercury Cos. v. FNF Sec. Acquisition, Inc.*, 460 B.R. 778, 781-82 (D. Colo. 2011) (noting that the parties consented by admitting in the pleadings that the bankruptcy court had jurisdiction over the action, and if that was not enough the defendants consented by waiting nineteen months to challenge the authority of the court to enter orders and file counterclaims); *In re Olde Prairie Block Owner, LLC*, 457 B.R.

final judgments while making substantial arguments before the court,²⁴⁸ participating in extensive litigation without objecting to the bankruptcy court's authority to enter a final judgment,²⁴⁹ or even filing multiple pleadings without objecting to the court's authority.²⁵⁰ Some courts make it more difficult to consent to final judgments in non-core matters.²⁵¹ A Michigan bankruptcy court stated that it needed "a knowing waiver of [the party's] right to have an Article III judge, as opposed to [a bankruptcy judge], make the final decision. . . ."²⁵² Finally, a small minority of courts comment that it is unclear whether parties may consent to a final judgment in a non-core proceeding.²⁵³

In re Safety Harbor Resort and Spa discussed in detail the Supreme Court's jurisprudence concerning consent and held that *Stern* meant that filing a proof of claim was not enough to consent to a state law counterclaim unless the claim stemmed from the bankruptcy itself or would be resolved in the allowance process.²⁵⁴ However, the *In re Safety Harbor* court noted that

692, 700-02 (Bankr. N.D. Ill. 2011) (noting *Stern* did not alter the system of final adjudication by consent, and both parties expressly consented to final adjudication in their pleadings, and that consent cannot be withdrawn without good cause).

248. *Bayonne Med. Ctr. v. Bayonne/Omini Dev., LLC (In re Bayonne Med. Ctr.)*, No. 07-15195, 2011 WL 5900960, at *6 (Bankr. D. N.J. Nov. 1, 2011) (noting that consent to non-core matter was found after party plead consent, went through oral arguments opposing summary judgment, and only then tried to withdraw consent, and stating that "[t]he plaintiffs late-day tactical change of heart will not be permitted").

249. *Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (In re GB Herndon & Assocs.)*, 459 B.R. 148, 157-58 (Bankr. D.D.C. 2011) (finding consent where the parties went through proceedings and final judgment, and did not object to bankruptcy court's authority until final judgment was entered); *Brook v. Ford Motor Credit Co., LLC (In re Peacock)*, 455 B.R. 810, 813-14 (Bankr. M.D. Fla. 2011) (finding consent when bankruptcy court's authority was not challenged until trial was one week away).

250. *Henderson v. Cmty. Bank of Miss. (In re Evans)*, 464 B.R. 272, 277 n.3 (Bankr. S.D. Miss. 2011).

251. *See Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 471-72 (S.D.N.Y. 2011). "Consenting" in pleadings to final judgments by bankruptcy courts to non-core matters is not enough for actual consent. *Id.* at 471. Further, the court distinguished the instant case from other cases where the party participated in extensive litigation, lost at trial, or argued a substantial proceeding without raising the argument that the bankruptcy court did not have authority to make a final adjudication. *Id.* at 472. *See also Tabor v. Kelly (In re Davis)*, No. 05-15794-GWE, 2011 WL 5429095, at *13 (Bankr. W.D. Tenn. Oct. 5, 2011) (finding an involuntary petition is not consent to a final judgment on non-core proceedings); *Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 339-40 (Bankr. W.D. Mich. 2011).

252. *In re Teleservices Grp., Inc.*, 456 B.R. at 339.

253. *See Burtch v. Huston (In re USDigital, Inc.)*, 461 B.R. 276, 279 (Bankr. D. Del. 2011).

254. *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 713 (Bankr. M.D. Fla. 2011); *see also Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 913-14

the Supreme Court did not hold 28 U.S.C. section 157(c)(2) unconstitutional, which allows parties to consent to final judgments in non-core proceedings.²⁵⁵ The court also noted that the vast majority of circuit courts have upheld the constitutionality of the Federal Magistrate Statute, which allowed “parties to consent to an Article I judge entering final judgments.”²⁵⁶

Put another way by *Development Specialists, Inc.*, by filing a proof of claim the creditor consents only to matters that are necessary to resolve that claim, not to other matters such as state law counterclaims.²⁵⁷ Further, *Development Specialists, Inc.* reminds parties that consenting to jurisdiction, which every related-to claim would have, “is not the same as consenting to the entry of a final determination by a non-Article III tribunal[.]”²⁵⁸

Most courts believe that *Stern* should be read narrowly.²⁵⁹ However, some bankruptcy judges note that the *Stern* Court was inconsistent; the Court made statements supporting a broad interpretation while insisting it was writing a very narrow holding.²⁶⁰ Those courts that are unclear on *Stern*'s effect on their ability to enter a final judgment have withdrawn the matter from

(7th Cir. 2011) (following *Stern* and holding that a debtor's filing of a proof of claim did not mean the debtor consented to the creditor's state law counterclaim).

255. *In re Safety Harbor Resort & Spa*, 456 B.R. at 718.

256. *Id.*

257. *See Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 464 (S.D.N.Y. 2011).

258. *Id.* at 471.

259. *Justmed Inc. v. Byce (In re Byce)*, No. 1:11-CV-00378-BLW, 2011 WL 6210938, at *2 (D. Idaho Dec. 14, 2011) (commenting that *Stern* only applied to state law counterclaims that would not be finally resolved in the process of adjudicating the creditor's proof of claim); *Mercury Cos. v. FNF Sec. Acquisition, Inc.*, 460 B.R. 778, 783 (D. Colo. 2011) (finding that the only case covered by *Stern* is a counterclaim brought against a creditor that had filed a proof of claim against the bankruptcy estate); *Menotte v. United States (In re Custom Contractors, LLC)*, 462 B.R. 901, 906 (Bankr. S.D. Fla. 2011) (listing parts of the opinion that support that the opinion should be read narrowly); *Gugino v. Canyon Cnty. (In re Bujak)*, No. 10-03569-JDP, 2011 WL 5326038, at *1-2 (Bankr. D. Idaho Nov. 3, 2011) (choosing to see *Stern* as a narrow holding, and “discount[ing] those who argue the sky is falling”); *In re Heller Ehrman LLP*, No. 08-32514DM, 2011 WL 4542512, at *5 (Bankr. N.D. Cal. Sept. 28, 2011), *adopted*, 464 B.R. 348 (N.D. Cal. 2011) (finding *Stern* does not affect a bankruptcy court's authorization to enter final judgments in other core proceedings under 28 U.S.C. § 157(b)(2)); *Brook v. Ford Motor Credit Co., LLC (In re Peacock)*, 455 B.R. 810, 812 (Bankr. M.D. Fla. 2011); *In re Safety Harbor Resort & Spa*, 456 B.R. at 705 (stating that *Stern* merely held that in “one isolated instance” authority was exceeded by entering a final judgment on a counterclaim not necessarily resolved in ruling on the creditor's proof of claim).

260. *Turturici v. Nat'l Mortg. Servicing, LP*, No. CIV S-10-2853 KJM, 2011 WL 4480169, at *3 n.3 (E.D. Cal. Sept. 26, 2011); *Burtch v. Huston (In re USDigital, Inc.)*, 461 B.R. 276, 288-89 (Bankr. D. Del. 2011) (discussing parts of the opinion that could be read to support a broad reading).

bankruptcy courts to “conserve resources and avoid piecemeal litigation.”²⁶¹ Other courts ignore the Supreme Court’s express affirmations and interpret *Stern* broadly to mean that any bankruptcy issue that the court determines is a private right may not be adjudicated.²⁶² The latter interpretation is broad because it does not apply *Stern* to just counterclaims but also determines what fits the public right exception, an exception that the Supreme Court has not even clearly defined.²⁶³ However, almost all bankruptcy judges agree that *Stern* did not affect subject matter jurisdiction of the bankruptcy courts; that is, the bankruptcy courts still have the authority to hear claims that arise under Title 11 or are related to the bankruptcy proceedings, whether or not they can enter a final binding judgment on the claims.²⁶⁴

Finally, it is interesting to note that some bankruptcy judges read *Stern* as affecting them personally and have switched to “I” instead of “we” or “this court.”²⁶⁵ One bankruptcy judge even suggested that he was offended at the suggestion that he would be improperly influenced without Article III protections, though admitted that *Stern*’s reasoning was sound.²⁶⁶

261. *Michaelson v. Golden Gate Private Equity, Inc. (In re Appleseed’s Intermediate Holdings, LLC)*, No. 11-10160, 2011 WL 6293251, at *3-4 (D. Del. Dec. 15, 2011).

262. *Retired Partners of Coudert Bros. Trust v. Baker & Makenzie LLP (In re Coudert Bros.)*, No. 11-2785 CM, 2011 WL 5593147, at *6 (S.D.N.Y. Sept. 23, 2011) (interpreting *Stern* as holding claims that are private rights cannot be finally adjudicated by Article I legislative courts).

263. *See id.* at *4.

264. *See, e.g., In re Extended Stay, Inc.*, 466 B.R. 188, 200-01 (S.D.N.Y. 2011); *Levey v. Hanson’s Window & Constr. Inc. (In re Republic Windows & Doors, LLC)*, 460 B.R. 511, 515-16 (Bankr. N.D. Ill. 2011); *Goldstein v. Eby-Brown, Inc. (In re Universal Mktg., Inc.)*, 459 B.R. 573, 577 (Bankr. E.D. Pa. 2011) (noting that *Stern* does not affect the authority to hear certain claims, just whether the court can enter a final order or not); *Hagan v. Classics Prods. Corp. (In re Wilderness Crossings, LLC)*, No. 09-14547, 2011 WL 5417098, at *1 (Bankr. W.D. Mich. Nov. 8, 2011); *In re LLS Am., LLC*, No. 09-06194-PCW11, 2011 WL 4005447, at *2-3 (Bankr. E.D. Wash. Sept. 8, 2011).

265. *Menotte v. United States (In re Custom Contractors, LLC)*, 462 B.R. 901, 908 (Bankr. S.D. Fla. 2011); *BankUnited Fin. Corp. v. FDIC (In re BankUnited Fin. Corp.)*, 462 B.R. 885, 890 (Bankr. S.D. Fla. 2011); *In re BearingPoint, Inc.*, 453 B.R. 486, 488 (Bankr. S.D.N.Y. 2011).

266. *Meoli v. Huntington Nat’l Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 322 (Bankr. W.D. Mich. 2011) (“I may take umbrage at the suggestion that my independence as a decision-maker would ever be compromised by the threat of not being reappointed or having my compensation reduced. But there remains the appearance that I could be so influenced and that alone is enough.”). And later the judge noted “I typically write my opinions now in the third person in order to impress upon the reader that I am speaking on behalf of the court. However, [the party’s] motion calls into question whether I am acting on behalf of any court. Therefore, I have chosen the first person in this instance.” *Id.* at 320 n.1.

C. Breach of Contract Claims

Following *Stern*, bankruptcy courts cannot agree on how to treat claims for breach of contract. Overall, the resolution seems to be fact specific, dependent on whether the breach of contract claim is necessary to resolve the creditor's proof of claim.

The Court in *Stern* reasoned that Vickie's tortious interference claim could not be finally decided by the bankruptcy court because it was a state law counterclaim which had different legal and factual issues than the creditor's claim. Based on this reasoning, some courts have held that a state law counterclaim for breach of contract, which necessarily is resolved as part of the creditor's claim, may be constitutionally finally adjudicated by the bankruptcy judge.²⁶⁷ For example, when a proof of claim is filed for a lease and the state law claim is breach of the lease contract, then the state law claim is necessarily resolved with the bankruptcy case.²⁶⁸ This example is more clearly demonstrated by a Kentucky bankruptcy court, which held that *Stern* did not remove the authority to enter final judgments on breach of contract counterclaims.²⁶⁹ Instead, the Kentucky court read *Stern* as authorizing the court to look at each counterclaim on a case-by-case basis.²⁷⁰ The court finally held that because the creditor's claim was on a note and mortgage and the allegedly breached contract was the same note and mortgage, the counterclaim was necessarily resolved by determining the extent of the claim on the loan; thus, the bankruptcy court had the authority to enter a final judgment in the matter.²⁷¹

Conversely, other courts have expressly held that claims for breach of contract involved independent state law, were not constitutionally core, and

267. Black, Davis & Shue Agency, Inc. v. Frontier Ins. Co. in Rehab. (*In re* Black, Davis & Shue Agency, Inc.), 471 B.R. 381, 404-05 (Bankr. M.D. Pa. 2012); Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (*In re* GB Herndon & Assocs., Inc.), 459 B.R. 148, 165 (Bankr. D.D.C. 2011); Oxford Expositions v. Questex Media Grp. (*In re* Oxford Expositions, LLC), 466 B.R. 818, 830 (Bankr. N.D. Miss. 2011) (holding that deciding the breach of contract claim was necessary to determine damages and remedial relief, and was core under 28 U.S.C. § 157(b)(2)(A), (B), and (O)); *In re* B.C. Rogers Poultry, Inc., 455 B.R. 524, 548, 548 n.31 (Bankr. S.D. Miss. 2011).

268. Walter v. Freeway Foods, Inc. (*In re* Freeway Foods of Greensboro, Inc.), 449 B.R. 860, 875 (Bankr. M.D.N.C. 2011) (finding that a cause of action for breach of lease agreement would necessarily be resolved in the claims process, and so the claim could constitutionally be decided by the bankruptcy court).

269. Tolliver v. Bank of Am. (*In re* Tolliver), 464 B.R. 720, 734 (Bankr. E.D. Ky. 2012).

270. *Id.* at 733-34 (quoting *In re* Safety Harbor Resort & Spa, 456 B.R. 703, 715 (Bankr. M.D. Fla. 2011)).

271. *Id.* at 743.

should be treated as non-core.²⁷² One Texas bankruptcy court, without further discussion, simply held that a counterclaim for breach of contract could not be decided by the bankruptcy court in light of *Stern*.²⁷³ Further, a Minnesota bankruptcy court found that it could not even enter a grant of summary judgment on a state law counterclaim for breach of contract because the court did not have the constitutional authority to enter any dispositive order.²⁷⁴ Finally, an Illinois district court held that *Stern* “precludes [the bankruptcy judges’] entry of a final judgment on any state law counterclaim that would bring assets into the bankruptcy estate.”²⁷⁵ This very broad reading of *Stern* included disallowing entry of a final judgment on a state law breach of contract counterclaim.²⁷⁶

D. Breach of Fiduciary Duty

A claim for breach of fiduciary duty has also caused a split in the bankruptcy courts. Like breach of contract claims, bankruptcy courts largely seem to have decided whether the claim can be finally decided by a bankruptcy court by looking at whether the counterclaim is necessarily resolved with the debtor’s claim. However, while courts seem more evenly split on whether a breach of contract counterclaim is necessarily resolved with the debtor’s claim, more courts have found that a breach of fiduciary duty claim is not necessarily resolved by deciding the debtor’s underlying claim.

An Illinois bankruptcy court held that a counterclaim for breach of fiduciary duty required a determination of whether an extra-contractual fiduciary duty was owed to the debtor at all.²⁷⁷ The court found that, while this deter-

272. *Coudert Bros. v. Baker & Makenzie LLP (In re Coudert Bros.)*, No. 11-2785 CM, 2011 WL 5593147, at *7 (S.D.N.Y. Sept. 23, 2011) (holding that the state law breach of contract claim was a private right and could not be adjudicated by an Article I court); *Colony Beach & Tennis Club, Ltd. V. Colony Beach & Tennis Club Ass’n (In re Colony Beach & Tennis Club Ass’n)*, 456 B.R. 545, 551 (M.D. Fla. 2011) (classifying breaches of governing partnership documents as non-core even though they would seem to be defined as core under 28 U.S.C. § 157(b)(2) because they were state law claims that could exist outside of bankruptcy); *D & B Swine Farms, Inc. v. Murphy-Brown, LLC (In re D & B Swine Farms, Inc.)*, No. 09-02813-8-JRL, 2011 WL 6013218, at *2 (Bankr. E.D.N.C. Dec. 2, 2011) (holding that state law claims for post-petition breach of contract were originally held as core by the Court, but after *Stern* must be held as non-core).

273. *In re Mandel*, No. 10-40219, 2011 WL 4599969, at *14 (Bankr. E.D. Tex. Sept. 30, 2011).

274. *Stoebner v. PNY Techs. Corp. (In re Polaroid Corp.)*, 451 B.R. 493, 496-98 (Bankr. D. Minn. 2011).

275. *Emerald Casino v. Flynn (In re Emerald Casino, Inc.)*, 467 B.R. 128, 133 (N.D. Ill. 2012).

276. *Id.* at 132-33.

277. *In re Olde Prairie Block Owner, LLC*, 457 B.R. 692, 699 (Bankr. N.D. Ill. 2011).

mination may have some overlap with the proof of claim, it was like the state law counterclaim in *Stern*, in which the creditor's proof of claim was not necessarily resolved by deciding the debtor's original claim.²⁷⁸ Therefore, the Illinois court held that the breach of fiduciary duty claim was non-core, even though it fit within the definition of a core proceeding under 28 U.S.C. section 157(b)(2)(C).²⁷⁹ Further, a North Carolina bankruptcy court read *Stern* as having established a two-prong test for determining constitutional adjudication asking, (1) whether the action stems from the bankruptcy itself, and (2) whether the claim could necessarily be resolved in the allowance process.²⁸⁰ The court went on to hold that proofs of claim by the estate based on a breach of fiduciary duty could be seen as counterclaims, but the claims did not stem from the bankruptcy code and it would not be necessary to determine if a breach of fiduciary duty occurred in order to allow the proof of claim.²⁸¹

Other courts agree with this reasoning and have found that claims for breach of fiduciary duty cannot be finally adjudicated constitutionally by non-Article III courts.²⁸² One court avoided the constitutional question of whether a breach of fiduciary duty claim was constitutionally core by stating that it fell under the "related-to" jurisdiction of the court.²⁸³

Conversely, some courts disagree with the notion that breaches of fiduciary duty should be treated as non-core. A Texas bankruptcy court was presented with the issue of resolving a breach of fiduciary duty counterclaim against a creditor for stealing intellectual property from a company where both the debtor and creditor held officer positions.²⁸⁴ The court decided that, unlike other counterclaims in the suit, the counterclaim for breach of fiduci-

278. *Id.*

279. *Id.*

280. *Burns v. Dennis (In re Se. Materials, Inc.)*, 467 B.R. 337, 348 (Bankr. M.D.N.C. 2012).

281. *Id.* at 358.

282. *Dev. Specialists, Inc. v. Orrick, Herrington & Sutcliffe, LLP*, No. 11 CIV. 6337 CM, 2011 WL 6780600, at *2 (S.D.N.Y. Dec. 23, 2011) (holding that a breach of fiduciary duty claim was a private right that was not necessary to resolve in the proof of claim, and therefore was not constitutionally core); *Reed v. Linehan (In re Soporex, Inc.)*, 463 B.R. 344, 366 (Bankr. N.D. Tex. 2011); *Hill v. New Concept Energy, Inc. (In re Yazoo Pipeline Co.)*, 459 B.R. 636, 642 (Bankr. S.D. Tex. 2011) (holding that breach of fiduciary duty claim was state law in character and not necessarily resolved through the claims adjudication process); *McKinstry v. Sergeant (In re Black Diamond Mining Co., LLC)*, No. 11-07010, 2011 WL 4433624, at *6 (Bankr. E.D. Ky. Sept. 21, 2011) (noting that the plaintiff's claims probably are not defined as core under statute, but even if they were they are state law claims that are not necessarily resolved by ruling on the proof of claim, and thus cannot be treated as core).

283. *Samson v. Blixseth (In re Blixseth)*, No. 09-60452-7, 2011 WL 3274042, at *4 (Bankr. D. Mont. Aug. 1, 2011), *order amended on denial of reconsideration by* 463 B.R. 896 (Bankr. D. Mont. 2012).

284. *In re Mandel*, No. 10-40219, 2011 WL 4599969, at *17 (Bankr. E.D. Tex. Sept. 30, 2011).

ary duty had to be resolved in adjudicating the creditor's claim for breach of fiduciary duty against the debtor.²⁸⁵ Therefore, the court determined that it could enter a final judgment on the alleged thief's claim.²⁸⁶ Other courts have also found that breach of fiduciary duty claims that are necessarily resolved with the debtor's claim may be constitutionally decided by the bankruptcy court; these include a Delaware bankruptcy court which found that a breach of fiduciary duty was "integral to the bankruptcy case[,]";²⁸⁷ and a New York district court in the bankruptcy of the *Estate of Madoff*.²⁸⁸

E. Fraudulent Transfer

Previous Supreme Court cases dealing with fraudulent transfers like *Granfinanciera*, and *Stern*'s reference to those cases, have caused considerable debate over whether Article I courts have the authority to adjudicate fraudulent transfer claims.²⁸⁹ Unlike breach of contract counterclaims, where a court's determinations of authority tend to be fact specific, the confusion over whether a fraudulent transfer may be constitutionally adjudicated by an Article I court seems historically based.

Some courts have found that, despite being defined as core under 28 U.S.C. section 157, fraudulent transfers cannot be constitutionally decided by bankruptcy courts.²⁹⁰ These courts have reasoned that fraudulent transfers are not core because they are state law counterclaims covered by *Stern*, and

285. *Id.* at *14, 17.

286. *Id.*

287. *Miller v. Greenwich Capital Fin. Prods. Inc. (In re Am. Bus. Fin. Servs., Inc.)*, 457 B.R. 314, 319-20 (Bankr. D. Del. 2011).

288. *Picard v. Estate of Madoff*, 464 B.R. 578, 585 (S.D.N.Y. 2011) (deciding that it was too early in the case to tell if the claim would be resolved with the proof of claim).

289. The Ninth Circuit, on November 4, 2011, invited amicus curiae briefs on the issue. *Exec. Benefits Ins. Agency v. Arkson (In re Bellingham Ins. Agency, Inc.)*, 661 F.3d 476, 476 (9th Cir. 2011).

290. *McCarthy v. Wells Fargo Bank (In re El-Atari)*, No. 1:11CV1090 LMB/IDD, 2011 WL 5828013, at *3 (E.D. Va. Nov. 18, 2011) (finding fraudulent transfers are clearly related to cases under Title 11, so bankruptcy courts can hear, but not decide, fraudulent transfer claims); *City Bank v. Compass Bank*, No. EP-11-MC-372-KC, 2011 WL 5442092, at *4 (W.D. Tex. Nov. 9, 2011) (assuming, without deciding, that a fraudulent transfer claim was non-core); *Paloian v. Am. Express Co. (In re Canopy Fin., Inc.)*, 464 B.R. 770, 771, 773 (N.D. Ill. 2011) (applying the non-core status to both state and federal law fraudulent conveyance claims); *Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 338 (Bankr. W.D. Mich. 2011) (holding that a fraudulent transfer must be decided by an Article III court); *Levey v. Hanson's Window & Constr. Inc. (In re Republic Windows & Doors, LLC)*, 460 B.R. 511, 514 (Bankr. N.D. Ill. 2011) (holding that bankruptcy judges could submit findings of fact and conclusions of law to district court judges for *de novo* review even if the proceeding is non-core and the parties do not consent).

Granfinanciera held that fraudulent transfers are common law claims that are private, not public, rights.²⁹¹ Further, these courts reason that, while fraudulent transfers are not constitutionally core, they are related to the bankruptcy, because if the trustee prevailed she would bring money into the estate, affecting distribution to creditors.²⁹² Therefore, these courts reason a fraudulent transfer can be treated as non-core and adjudicated only with the consent of the parties.²⁹³

Other courts disagree, have found that fraudulent transfer claims are core, and have determined that bankruptcy judges can enter final judgments on the claims.²⁹⁴ These courts argue that a fraudulent conveyance claim can

291. *Dev. Specialists, Inc. v. Orrick, Herrington & Sutcliffe, LLP*, No. 11 Civ. 5337 CM, 2011 WL 6780600, at *3 (S.D.N.Y. Dec. 23, 2011) (holding that a fraudulent conveyance claim by party with trustee standing against a third party non-creditor of the estate are the same facts in *Granfinanciera*, and therefore the claim is not a public right that a non-Article III court may finally adjudicate.); *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP* 462 B.R. 457 (S.D.N.Y. 2011) (finding that fraudulent conveyance counterclaim was a private right according to *Granfinanciera*, independent of the bankruptcy proceedings, and not necessarily resolved in deciding proofs of claim against the estate.); *Coudert Bros. v. Baker & Makenzie LLP (In re Coudert Bros. LLP)*, No. 11-2785 CM, 2011 WL 5593147, at *8 (S.D.N.Y. Sept. 23, 2011) (noting that fraudulent conveyance claims are private rights under *Granfinanciera*, and so are not constitutionally decided by bankruptcy courts.); *In re Canopy Fin., Inc.*, 464 B.R. at 773 (stating *Stern* and *Granfinanciera* made it clear that fraudulent conveyance actions should be made by Article III courts as they are common law suits); *In re El-Atari*, 2011 WL 5828013, at *4; *Bayonne Med. Ctr. v. Bayonne/Omini Dev., LLC (In re Bayonne Med. Ctr.)*, No. 07-15195 MS, 2011 WL 5900960, at *4 (Bankr. D.N.J. Nov. 1, 2011) (finding a state law claim for the invalidity and/or unenforceability of a transfer to be non-core); *Tabor v. Kelly (In re Davis)*, No. 05-15794-GWE, 2011 WL 5429095, at *11 (Bankr. W.D. Tenn. Oct. 5, 2011) (holding that fraudulent conveyance claims under 11 U.S.C. § 548(a)(1)-(2) are really based in state law and not public rights under *Granfinanciera*, and so cannot be constitutionally determined by a non-Article III court); *Samson v. Blixseth (In re Blixseth)*, No. 09-60452-7, 2011 WL 3274042, at *11 (Bankr. D. Mont. Aug. 1, 2011), *order amended on denial of reconsideration* by 463 B.R. 896 (Bankr. D. Mont. 2012) (holding that fraudulent conveyance claims are private right claims that must be finally adjudicated by an Article III court, though after reconsideration the court decided that it could treat the claim as non-core and propose findings of fact to a district court).

292. *In re Republic Windows & Doors, LLC*, 460 B.R. at 514 (holding that bankruptcy judges could submit findings of fact and conclusions of law to district court judges for de novo review even if the proceeding is non-core and the parties do not consent).

293. *Id.*

294. *Field v. Estate of Kapoika (In re Maui Indus. Loan Fin. Co.)*, No. 11-00552 LEK-KSC, 2011 WL 6934571, at *9 (D. Haw. Dec. 29, 2011) (stating that fraudulent transfer claims “are core bankruptcy matters”); *In re Canopy Fin.*, 464 B.R. at 772 (N.D. Ill. 2011) (finding that fraudulent transfer claims under 28 U.S.C. § 157(b)(2)(F) “explicitly fall into the statute’s definition of core proceedings”);

exist only if the conveyor is insolvent or imminently insolvent, and so the claim is “inextricably tied to the bankruptcy scheme.”²⁹⁵ These courts continue that, unlike *Stern*’s counterclaim, which was not necessarily decided by adjudicating the underlying claim, a fraudulent conveyance claim is part of the process of deciding whether the creditor’s proof of claim should be allowed.²⁹⁶ Further, these courts argue that fraudulent transfer claims arise under sections 544(b) and 548 of the Bankruptcy Code or 28 U.S.C. section 157(b)(2)(H) and would not exist but for bankruptcy.²⁹⁷

However, some courts holding that a fraudulent conveyance claim may be adjudicated by an Article I court do caution that, even if fraudulent conveyance claims are non-core, the bankruptcy court may make proposed findings of fact to the district court.²⁹⁸ Another way a Colorado bankruptcy court

Richardson v. Checker Acquisition Corp. (*In re Checker Motors Corp.*), 463 B.R. 858, 860 (Bankr. W.D. Mich. 2012) (holding “tentatively” that it is constitutional for a bankruptcy court to enter final orders in a fraudulent transfer claim); Menotte v. United States (*In re Custom Contractors, LLC*), 462 B.R. 901, 905 (Bankr. S.D. Fla. 2011); Kirschner v. Agoglia (*In re Refco Inc.*), 461 B.R. 181, 187 (Bankr. S.D.N.Y. 2011) (noting a split in the bankruptcy courts on whether fraudulent conveyance claims are constitutionally core, and deciding that they are because, unlike the tortious interference claim in *Stern*, the fraudulent conveyance claims are based on federal statute); Liberty Mut. Ins. Co. v. Citron (*In re Citron*), No. 08-71442-AST, 2011 WL 4711942, at *2 (Bankr. E.D.N.Y. Oct. 6, 2011) (holding that *Stern* does not apply to the fraudulent conveyance claim because it is not a “plain-vanilla state law counterclaim”).

295. *In re Custom Contractors, LLC*, 462 B.R. at 907 (citing *Duck v. Munn* (*In re Mankin*), 823 F.2d 1296, 1307 n.4 (9th Cir.1987)); *Gugino v. Canyon Cnty.* (*In re Bujak*), No. 10-03569-JDP, 2011 WL 5326038, at *2 (Bankr. D. Idaho Nov. 3, 2011) (holding that the fraudulent transfer is not a state law claim and arises under the bankruptcy code, and so is core); *In re Heller Ehrman LLP*, No. 08-32514DM, 2011 WL 4542512, at *5 (Bankr. N.D. Cal. Sept. 28, 2011) (commenting that without bankruptcy the claim could not be asserted at all), *adopted*, 464 B.R. 348 (N.D. Cal. 2011); *Miller v. Greenwich Capital Fin. Prods. Inc.* (*In re Am. Bus. Fin. Servs., Inc.*), 457 B.R. 314, 319-20 (Bankr. D. Del. 2011) (finding that the federal and state law fraudulent transfer claims arose after the party filed bankruptcy and are integral to the bankruptcy case).

296. *See, e.g., In re Bujak*, 2011 WL 5326038, at *3.

297. *In re Extended Stay, Inc.*, 466 B.R. 188, 205 (S.D.N.Y. 2011); *In re Custom Contractors, LLC*, 462 B.R. at 907; *Goldstein v. Eby-Brown, Inc.* (*In re Universal Mktg., Inc.*), 459 B.R. 573, 576 (Bankr. E.D. Pa. 2011) (finding that the fraudulent transfer claim was brought under 11 U.S.C. § 544 and 28 U.S.C. § 157(b)(2)(H), not state law, and therefore is core because it comes from federal statutes); *In re Heller Ehrman LLP*, 2011 WL 4542512, at *4 (noting that fraudulent transfer actions are core and arise under sections 548 and 544(b) of the bankruptcy code along with section 157(b)(2)(H) of the United States Code).

298. *In re Custom Contractors, LLC*, 462 B.R. at 905; *In re Universal Mktg., Inc.*, 459 B.R. at 578-80 (disagreeing with *Blixseth* and holding that the claim could still be heard by the bankruptcy court even if it is not core); *In re Bujak*, 2011 WL 5326038,

dealt with the confusion regarding fraudulent transfer claims was to suggest that the parties formally consent to the court's adjudication of the claim, and if they would not consent, then they would be required to file briefs on the issue.²⁹⁹ In *Pickard v. Estate of Madoff*, a New York district court took a wait-and-see approach, stating that it was too early in the proceedings to determine whether fraudulent transfer claim would be resolved as part of deciding a creditor's proof of claim.³⁰⁰

While grappling with the Supreme Court's precedent in this area, some lower courts have commented that while the Supreme Court intended *Stern* to be read narrowly, it is still plausible that someday the Supreme Court may expand *Stern* to reach fraudulent conveyances.³⁰¹ Therefore, these bankruptcy judges currently refuse to extend *Stern* to fraudulent conveyances.

F. Misrepresentation, Negligence, and Tortious Interference

There is disagreement on whether misrepresentation claims can be constitutionally adjudicated. One court held that a counterclaim for misrepresentation was necessarily determined in deciding the creditor's claim, and therefore was core and a final judgment could be entered.³⁰² However, a New York district court held that a misrepresentation claim was a state law claim that was a private right and could not be adjudicated by bankruptcy courts.³⁰³

The majority of courts have held that negligence claims are state law claims that could not be constitutionally adjudicated by a non-Article III court. However, a New York bankruptcy court held that a state court claim³⁰⁴

at *4 (noting that the court would still have the power to hear the case and submit the findings to the district court to decide, even if the court was wrong about the claim being core); *Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 338 (Bankr. W.D. Mich. 2011) (believing that a final judgment could be entered with consent if a fraudulent conveyance claim was found to be unconstitutionally core).

299. *Rancher Energy Corp. v. Gas Rock Capital, LLC (In re Rancher Energy Corp.)*, No. 09-32943, 2011 WL 5320971, at *3 (Bankr. D. Colo. Nov. 2, 2011).

300. *Picard v. Estate of Madoff*, 464 B.R. 578, 585 (S.D.N.Y. 2011).

301. *In re Bujak*, 2011 WL 5326038, at *1-2; *In re Custom Contractors, LLC*, 462 B.R. at 905-06; *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 715 (Bankr. M.D. Fla. 2011).

302. *Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (In re GB Herndon & Assocs.)*, 459 B.R. 148, 165 (Bankr. D.D.C. 2011).

303. *Coudert Bros. v. Baker & Makenzie LLP (In re Coudert Bros. LLP)*, No. 11-2785 CM, 2011 WL 5593147, at *7 (S.D.N.Y. Sept. 23, 2011); *see also Meyers v. Textron Fin. Corp. (In re AIH Acquisitions, LLC)*, No. 09-42480-rfn7, 2011 WL 4000894, at *3 (N.D. Tex. Sept. 7, 2011).

304. *McCelland v. Grubb & Ellis Valuation & Advisory Grp. (In re McClelland)*, 460 B.R. 397, 404 (Bankr. S.D.N.Y. 2011). The court rejected the plaintiff's argument that the claim was a counterclaim, and therefore covered by *Stern*. *Id.* However, the court stated that even if the claim was seen as a counterclaim, it would not

could be core if it was sufficiently connected to the bankruptcy case.³⁰⁵ The court then held that claims of intentional misconduct and gross negligence were sufficiently connected to the bankruptcy case; thus, they were core claims and the court could enter final orders until trial.³⁰⁶

Other courts have held that a negligence counterclaim is a state law claim that would require findings not necessary to resolving the underlying proof of claim, and therefore are non-core under *Stern*, even though they would be considered core under 28 U.S.C. section 157(b)(2)(C).³⁰⁷ One Texas bankruptcy court decided that a legal malpractice claim could not be constitutionally decided by the bankruptcy court under *Stern* without further discussion.³⁰⁸

Tortious interference claims have not suffered much debate as they were the exact claim opined about in *Stern*. Courts have held that *Stern* governs counterclaims for tortious interference meaning the claims cannot be constitutionally decided by bankruptcy courts.³⁰⁹ Therefore, the claims are non-core even though they fit into the definition of core counterclaims under 28 U.S.C. section 157(b)(2)(C).³¹⁰ Many courts have held that parties may consent to bankruptcy judges entering final judgments in tortious interference claims.³¹¹

be covered by *Stern*'s ruling about counterclaims by the estate since it was a claim by the plaintiff suing in his individual capacity. *Id.*

305. *Id.*

306. *Id.* at 404, 407; *see also* Picard v. Estate of Madoff, 464 B.R. 578, 585-87 (S.D.N.Y. 2011) (holding that a negligence claim could be constitutionally decided by a bankruptcy court if it was resolved with the proof of claim, but deciding it was too early to tell if it would be resolved by the proof of claim or not).

307. McKinstry v. Sergent (*In re* Black Diamond Mining Co.), No. 08-70066, 2011 WL 4433624, at *6 (Bankr. E.D. Ky. Sept. 21, 2011) (holding that the negligence claim was probably not core under statute, but if it was then it was not constitutionally core because it was a state law claim not necessarily resolved in ruling on the proof of claim); Sw. Sports Ctr., Inc. v. Kleem (*In re* Sw. Sports Ctr., Inc.), No. 09-21982, 2011 WL 4002559, at *7 (Bankr. N.D. Ohio Sept. 6, 2011); *In re* Olde Prairie Block Owner, LLC, 457 B.R. 692, 699 (Bankr. N.D. Ill. 2011).

308. *In re* Mandel, No. 10-40219, 2011 WL 4599969, at *14 (Bankr. E.D. Tex. Sept. 30, 2011).

309. Coudert Bros. v. Baker & Makenzie LLP (*In re* Coudert Bros. LLP), No. 11-2785 CM, 2011 WL 5593147, at *6 (S.D.N.Y. Sept. 23, 2011) (holding that a tortious interference claim was found to be a private right in *Stern* and was unconstitutional for a bankruptcy court to finally adjudicate); *In re* Olde Prairie Block Owner, LLC, 457 B.R. at 699.

310. Dev. Specialists, Inc. v. Orrick, Herrington & Sutcliffe, LLP, No. 11 Civ. 5337 CM, 2011 WL 6780600, at *1-2 (S.D.N.Y. Dec. 23, 2011) (holding that a tortious interference claim was a private right that was not necessary to resolve in a proof of claim); Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (*In re* GB Herndon & Assocs., Inc.), 459 B.R. 148, 155 (Bankr. D.D.C. 2011); *In re* Olde Prairie Block Owner, 457 B.R. at 699.

311. *See, e.g., In re* GB Herndon & Assocs., 459 B.R. at 162; *In re* Olde Prairie Block Owner, LLC, 457 B.R. at 699.

However, one court held that a tortious interference counterclaim would necessarily be resolved in adjudicating the creditor's claim and therefore was core.³¹² The bankruptcy court held that it could enter a final judgment on the claim.³¹³

G. Preferential Transfers

Preferential transfers have also garnered some debate because of the claim's history in Supreme Court of the United States cases. Some courts have held that preferential transfers are core claims because they arise under title 11 and are classified as core by 28 U.S.C. section 157(b)(2)(F).³¹⁴ Also, the court in *In re Apex Long Term Acute Care-Katy, L.P.* documented in-depth the history of Supreme Court cases dealing with preferential transfers and determined that preferential transfers are public rights and may be finally adjudicated by bankruptcy courts.³¹⁵ Another court questioned the constitutionality of finally adjudicating several other claims in an adversary proceeding but did not question that the bankruptcy court could constitutionally enter a final order on the preference claim.³¹⁶

However, at least one court determined that while preferential transfers arise under bankruptcy law, they are private rights and thus cannot be finally adjudicated by a non-Article III court.³¹⁷ Another bankruptcy judge treated preferential transfers as unconstitutionally core, even though the action had origins in bankruptcy code instead of state law, and merely recommended that the district court enter a judgment.³¹⁸ This holding was born out of "an abundance of caution" though, and the judge "le[ft] open the possibility . . . that

312. See *In re GB Herndon & Assocs.*, 459 B.R. at 165.

313. *Id.*

314. *In re Extended Stay, Inc.*, 466 B.R. 188, 205 (S.D.N.Y. 2011); *Samson v. Blixseth (In re Blixseth)*, No. 09-60452-7, 2011 WL 3274042, at *11 (Bankr. D. Mont. Aug. 1, 2011), *order amended on denial of reconsideration* by 463 B.R. 896 (Bankr. D. Mont. 2012) (holding preferential transfers were core claims under the statute and constitution, and this holding was not affected by the later reconsideration).

315. *In re Apex Long Term Acute Care-Katy, LP*, 465 B.R. 452, 468 (Bankr. S.D. Tex. 2011).

316. *Rancher Energy Corp. v. Gas Rock Capital, LLC (In re Rancher Energy Corp.)*, No. 09-32943, 2011 WL 5320971, at *1-3 (Bankr. D. Colo. Nov. 2, 2011).

317. *Tabor v. Kelly (In re Davis)*, No. 05-15794-GWE, 2011 WL 5429095, at *12 (Bankr. W.D. Tenn. Oct. 5, 2011).

318. *Richardson v. BDSM Corp. (In re Tevilo Indus., Inc.)*, No. 09-07311, 2011 WL 4793343, at *2 (Bankr. W.D. Mich. Aug. 30, 2011), *adopted sub nom. Richardson v. BDSM Corp.*, No. 1:11-CV-916, 2011 WL 4434894 (W.D. Mich. Sept. 23, 2011).

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[the judge] may have the authority . . . to enter final judgment[s]” in preferential transfers in the future.³¹⁹

H. Unjust Enrichment

Courts are fairly evenly split on whether unjust enrichment claims are constitutionally adjudicated by bankruptcy courts. In some cases the plaintiffs have conceded that unjust enrichment is a core proceeding.³²⁰ In one case, the court acknowledged that it was possible that unjust enrichment is a core claim as it is necessary to resolve a proof of claim but did not decide because the parties had not briefed the issue.³²¹ A bankruptcy court in the Tenth Circuit held that *Stern* did not apply to an unjust enrichment claim because it was not a state law counterclaim brought under 28 U.S.C. section 157(b)(2)(C), and until the district court said otherwise, the bankruptcy court would read *Stern* very narrowly.³²² Yet another court held outright that an unjust enrichment claim was defined by statute as core and was also constitutionally core under *Stern*.³²³

A New York district court disagreed that unjust enrichment claims were core and found that unjust enrichment claims dealt with private rights that would not be resolved in ruling on the proof of claim; therefore, while they may be defined as core by statute, they cannot be constitutionally resolved by a non-Article III court under *Stern*'s holding.³²⁴ In other cases, the courts avoided the constitutional issue altogether and found that unjust enrichment was a non-core claim covered by “related-to” jurisdiction, because if the trustee prevails on the claim, money is brought into the estate and affects distribution.³²⁵

319. *Id.* at 1-2.

320. *See, e.g.*, Burtch v. Huston (*In re* USDigital, Inc.), 461 B.R. 276, 280 (Bankr. D. Del. 2011).

321. Corwin v. Gorilla Cos. (*In re* Gorilla Cos.), No. CV-10-1029-PHX-DGC, 2011 WL 4005403, at *2-3 (D. Ariz. Sept. 8, 2011).

322. Redmond v. Brad Noll & Assocs. (*In re* Brooke Corp.), No. 08-22786, 2011 WL 6752422, at *1-2 (Bankr. D. Kan. Dec. 16, 2011).

323. Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 183-86 (Bankr. S.D.N.Y. 2011).

324. Dev. Specialists, Inc. v. Orrick, Herrington & Sutcliffe, LLP, No. 11 Civ. 5337 CM, 2011 WL 6780600, at *1-2 (S.D.N.Y. Dec. 23, 2011).

325. Paloian v. Am. Express Co. (*In re* Canopy Fin., Inc.), 464 B.R. 770, 774-75 (N.D. Ill. 2011) (lumping an unjust enrichment claim in with fraudulent transfer claims that the court determined were statutorily core, but not constitutionally core, and therefore would be treated like non-core claims); Levey v. Hanson's Window & Constr., Inc. (*In re* Republic Windows & Doors, LLC), 460 B.R. 511, 514-16 (Bankr. N.D. Ill. 2011) (holding that bankruptcy judges could submit findings of fact and conclusions of law to district court judges for *de novo* review even if the proceeding is non-core and the parties do not consent); Bayonne Med. Ctr. v. Bayonne/Omini Dev., LLC (*In re* Bayonne Med. Ctr.), No. 07-15195 MS, 2011 WL 5900960 (Bankr. D.

One lucky court had an easy way out because both parties consented to entry of a final judgment on the unjust enrichment claim; therefore, the court held that it did not matter if the claim was core or non-core.³²⁶ A New York district court working on an estate bankruptcy also delayed a decision on whether unjust enrichment was constitutionally decided by the bankruptcy court and stated that it was too early in the proceedings to tell if the claim would be resolved with the proof of claim.³²⁷

V. CONCLUSION

Bankruptcy, like history, seems doomed to repeat itself. Like *Marathon* and *Granfinanciera*, bankruptcy litigants after *Stern* are awash with confusion over where to draw the constitutional line separating Article I and Article III courts. Further, *Stern* failed to clarify questions that have been troubling bankruptcy law for almost two centuries: what exactly is the public rights exception, should we use the summary/plenary jurisdiction system, and how can Congress constitutionally empower the bankruptcy system?

While *Stern* left many questions unanswered, the Supreme Court of the United States did shed some light on the next cycle of bankruptcy law. First, we know that the Roberts Court is departing from the balancing test espoused in *Schor* and *Union Carbide* for determining whether bankruptcy courts are constitutional. Instead of weighing risk of impartiality, cost savings, expertise, and generally looking at “substance rather than doctrinaire reliance on formal categories,”³²⁸ the current Court sternly forbade further chipping away of Article III authority. Further, we finally know once and for all – or for at least the next forty years – that Congress cannot escape constitutional problems with the bankruptcy system by calling bankruptcy courts “adjuncts” of the district courts. Finally, we have some hint that the *Stern* Court may be hesitant to take some commentator’s advice and declare the entire system unconstitutional based on the purported narrowness of its holding.

Moreover, lessons can be gleaned from the ways in which lower courts have dealt with claims post-*Stern*. First, parties must be aware of the potential for problems post-*Stern* and examine claims made by the debtor in the suit, looking for claims listed in this Comment, among others. If there is any question that a claim may not be constitutionally and finally decided by the bankruptcy court, parties should proceed with caution. In the majority of courts it is clear that after *Stern*, a party may specifically consent to the final

N.J. Nov. 1, 2011) (finding that an unjust enrichment claim was non-core because it did not arise under or in a title 11 case).

326. Pro-Pac Inc. v. Chapes (*In re* Pro-Pac, Inc.), 456 B.R. 894, 902-03 (Bankr. E.D. Wis. 2011), *rev’d and remanded sub nom.* WOW Logistics Co. v. Pro-Pac, Inc., 11-CV-1075-JPS, 2012 WL 3495391 (E.D. Wis. Aug. 14, 2012).

327. Picard v. Estate of Madoff, 464 B.R. 578, 585 (S.D.N.Y. 2011).

328. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 586-87 (1985).

adjudication of a core claim that would otherwise be unconstitutionally decided by a bankruptcy court. The real question is: what will be seen as consent by the bankruptcy court? As discussed, courts have different methods of finding consent, ranging from failure to allege a problem with the court's authority to requiring a knowing and express waiver.

If there is a question as to whether a claim can be constitutionally decided, for the majority of state law counterclaims, courts are taking a very fact specific approach. In most courts the first issues that a litigant should address are: (1) does the action stem from the bankruptcy itself and (2) would the claim necessarily be resolved in the allowance process?³²⁹ If the claim is a fraudulent or preferential transfer claim, then a practitioner can argue that the claim stems from the bankruptcy itself based upon statutory language and the narrowness of *Stern's* holding. Additionally, both fraudulent and preferential transfers implicate an argument based on the public rights doctrine due to *Granfinanciera*.³³⁰ If the public rights doctrine is implicated, litigation will be risky because the history of the public rights doctrine is unclear, and bankruptcy courts appear to define and apply the doctrine differently.

On the other hand, if a litigant is dealing with a traditional state law counterclaim, then the litigant should turn to the second question: would the claim necessarily be resolved in the allowance process? In order to determine whether the claim is necessarily resolved, the parties must look at the facts of their specific case. First, they should consider the elements that the creditor will have to prove in order to succeed in its claim. Then, they must examine the elements that the trustee or debtor will have to prove to succeed in its claim. If there is substantial overlap then the counterclaim probably must be necessarily resolved.³³¹

Of course, given the diversity of bankruptcy court opinions, including a few that still think that *Stern* limited subject matter jurisdiction, caution is advised in navigating bankruptcy waters post-*Stern*. However, while there may be rough waters ahead as individual bankruptcy courts deal with debtor claims against other parties for the first time post-*Stern*, district and appellate courts are already stepping in to give consistency to the court decisions. Further, the parties' ability to consent to final judgments by the bankruptcy courts, and the ability of the bankruptcy court to still hear the matters and submit proposed findings of facts to the district court, is likely to result in little more than extra caution in consenting in pleadings and large amounts of "rubber stamping" by district courts. Unless the Supreme Court disavows its

329. *Burns v. Dennis (In re Se. Materials, Inc.)*, 467 B.R. 337, 348 (Bankr. M.D.N.C. 2012).

330. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52-53 (1989).

331. For example, if a debtor's response to a proof of claim for breach of contract is to allege that the party filing the claim breached the contract first, and thus the debtor was relieved of performance under the contract, it is necessary to determine who breached first to resolve the proof of claim. *Cf. In re Mandel*, No. 10-40219, 2011 WL 4599969, at *17 (Bankr. E.D. Tex. Sept. 30, 2011).

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narrow holding in *Stern*, it is likely to be clear sailing ahead in bankruptcy, at least for the next forty years.