In Brief: Rising to the *Stern* Challenge

March/April 2012

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Putting it mildly, the U.S. Supreme Court's ruling last year in *Stern v. Marshall*, 132 S. Ct. 56 (2011), cast a wrench into the day-to-day operation of U.S. bankruptcy courts scrambling to deal with a deluge of challenges—strategic or otherwise—to the scope of their "core" jurisdiction to issue final orders and judgments on a wide range of disputes. In *Stern*, the Court ruled that, to the extent that 28 U.S.C. § 157(b)(2)(C) purports to confer core jurisdiction on a bankruptcy court to finally adjudicate a state-law counterclaim against a creditor that filed a proof of claim, section 157(b)(2)(C) is constitutionally invalid. The ruling has already spawned hundreds of requests for removal, abstention, and withdrawal of reference, in addition to burdening district courts with requested rulings on a greater volume of proposed findings of fact and conclusions of law in cases deemed to be outside a bankruptcy court's core jurisdiction.

In an effort to alleviate the mayhem wrought by *Stern*, the U.S. District Court for the Southern District of New York issued an Amended Standing Order of Reference on January 31, 2012 (the "Amended Order"). The Amended Order provides as follows:

> If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.

The Amended Order indicates that, in the view of the Southern District, *Stern* is not jurisdictional, but rather implicates the scope of bankruptcy courts' authority to issue final orders and judgments. It would also appear to discourage requests for reference withdrawal in favor of having disputes regarding final authority resolved by the district court after the underlying merits have already been litigated in the bankruptcy court.

At this juncture, the impact of the Amended Order is unclear, and it remains to be seen whether other districts will be guided by the Southern District in sorting out their own *Stern*-related problems. However, at least one Southern District judge has already cited to the Amended Order in denying a motion to withdraw the reference. *See Adelphia Recovery Trust v. FLP Group, Inc.*, 2012 WL 264180 (S.D.N.Y. Jan. 30, 2012) (Crotty, J.) (denying motion to withdraw reference with respect to adversary proceeding seeking avoidance of fraudulent transfers based on *Stern* and noting that, "[i]n accordance with [the new standing order], the Bankruptcy Court has the authority to issue proposed [findings] of fact and conclusions of law in this case").

Meanwhile, the Local Rules Committee for the U.S. Bankruptcy Court for the Southern District of New York recently proposed new Local Bankruptcy Rules in response to *Stern* that require litigants to state expressly whether or not they consent to entry of final judgments or orders by bankruptcy courts in core proceedings if the court is deemed to lack constitutional authority to enter a final judgment or order. The text of the proposed rules can be accessed at http://www.nysb.uscourts.gov/localrules2012.html (web site last visited on March 28, 2012). The proposed rules were posted for comment for a 30-day period that ended on March 22, 2012.