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CLIENT ALERT

Supreme Court Holds That Bankruptcy Courts May Issue Final Orders Based On Consent

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Nearly four years after its decision in *Stern v. Marshall* raised new doubts about the place of bankruptcy courts in our legal system, the Supreme Court has finally put those doubts to rest. This week, in *Wellness International Network, Ltd. v. Sharif*, No. 13-935, the Court held that even for claims that must otherwise be resolved by an Article III court, a bankruptcy court may still adjudicate the matter based on consent. This critical ruling restores predictability to bankruptcy-related proceedings and avoids overwhelming the federal district courts with disputes that are currently litigated before bankruptcy judges.

Wellness is the third in a series of decisions about the power of bankruptcy courts. In *Stern v. Marshall* (2011), the Court held that for at least one class of claims, Congress's grant of power to bankruptcy courts had gone too far. These "*Stern*" claims are designated as "core" by the Bankruptcy Code—and thus fall within the statutory power of the bankruptcy court—but they nonetheless implicate "private" rights, so they must be resolved by a federal district court under Article III. This decision raised serious questions about the finality of bankruptcy rulings, the process of resolving matters central to a bankruptcy, and the interplay between these arguments and doctrines like waiver and forfeiture.

Last year, in *Executive Benefits Insurance Agency v. Arkison* (In re Bellingham) (2014), the Court considered what, if anything, a bankruptcy court has the power to do with respect to *Stern* claims. It unanimously held that bankruptcy courts hearing such claims may make reports and recommendations to the district court for de novo review, just like magistrate judges do. But the Court did not address whether the parties can nonetheless *consent* to final adjudication by the bankruptcy court—or whether an objection to final adjudication by the bankruptcy court is the sort of objection that can be forfeited or waived.

Those remaining questions have now been resolved. Writing for the majority in *Wellness*, Justice Sotomayor wrote that the right to Article III adjudication is a personal right that may be waived or forfeited through consent. She explained, "Our precedents make clear that litigants may validly consent to adjudication by bankruptcy courts." Although the majority opinion recognizes the structural implications of Article III, it holds that "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process."

Applying factors established in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986), the majority held that consenting to bankruptcy-court adjudication of Stern claims does not implicate structural Article III concerns for three reasons. First, "'[s]eparation of powers concerns are diminished' when, as here, 'the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction' remains in place." Second, "like the CFTC in *Schor*, bankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts." Their ability to resolve such matters is linked to their "primary, and unchallenged, adjudicative function." Third and finally, "there is no indication that Congress gave bankruptcy courts the ability to decide Stern claims in an effort to aggrandize itself or humble the Judiciary."

Further, following its own case law relating to magistrate judges, the Court also held that the consent need not be explicit. As long as it is "knowing and voluntary," a waiver may be accomplished through "'actions rather than words.'" Recognizing the effect of an implied waiver serves to "check gamesmanship" by the parties.

Justice Alito concurred in the majority's principal holding but would not have addressed whether consent can be implied. In his view, there was no need to resolve that question, because the respondent had "forfeited any *Stern* objection by failing to present that argument properly in the courts below." Justice Alito affirmed that "*Stern* vindicates Article III, but that does not mean that Stern arguments are exempt from ordinary principles of appellate procedure."

Chief Justice Roberts dissented, along with Justices Scalia and Thomas. On the constitutional question, the Chief's dissent concluded that the majority had seriously misread *Stern*: "The constitutional analysis in *Stern*, spanning 22 pages, contained exactly one affirmative reference to the lack of consent." He also critiqued the majority for treating "consent as 'dispositive' in curing the structural separation of powers violation—precisely what *Schor* said consent could not do." (The majority responded with a footnote explaining that the consent did not cure the structural violation but instead prevented the violation from arising in the first place.) Justice Thomas also wrote separately to discuss the issue from a historical perspective, including a critique of the reasoning of Schor.

The *Wellness* decision ends an unsettling chapter for bankruptcy practitioners. By allowing final adjudication based on consent, the Court avoided a result that would have cast many bankruptcy adjudications into question and caused a paralyzing flood of matters into the federal district courts. Under *Wellness*, bankruptcy court adjudication is here to stay.

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