Understanding Wellness International Network, Ltd. v. Sharif: The Problems with Allowing Parties to Impliedly Consent to Bankruptcy Court Adjudication of Stern Claims

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UNDERSTANDING *WELLNESS INTERNATIONAL NETWORK, LTD. V. SHARIF*: THE PROBLEMS WITH ALLOWING PARTIES TO IMPLIEDLY CONSENT TO BANKRUPTCY COURT ADJUDICATION OF *STERN* CLAIMS

ABSTRACT

The 2011 Supreme Court case Stern v. Marshall defined which claims bankruptcy courts had the authority to adjudicate, but its complicated holding left lower courts perplexed. Specifically, the Stern decision created "Stern claims"—claims that bankruptcy courts have the statutory, but not the constitutional, authority to adjudicate. Subsequent cases, such as Executive Benefits Insurance Agency v. Arkison and Wellness International Network, Ltd. v. Sharif, have grappled with whether Stern claims should be treated as "core" claims, which bankruptcy courts can enter final judgments on, or "non-core" claims, which bankruptcy courts can only enter final judgments on if the litigating parties consent. The Supreme Court in Wellness held that parties could impliedly consent to Stern claim adjudication by bankruptcy courts, but the Court's test to determine implied consent is ambiguous and has caused further disagreement among lower courts. This Note analyzes the Court's interpretation of parties' implied consent to bankruptcy court adjudication of Stern claims in Wellness, explains why the interpretation is too broad, and offers solutions to narrow consent in these cases. Potential solutions include: (1) creating a narrower definition of Stern claims; (2) extending the holding of Executive Benefits and addressing consent; (3) amending Section 157 or Federal Bankruptcy Rule 7012(b) to include Stern claims; and (4) implementing the "balancing test" used in cases decided prior to Stern to determine whether bankruptcy courts have the authority to adjudicate certain claims.

INTRODUCTION

> 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."[1]

1. Stern v. Marshall, 564 U.S. 462, 468 (2011) (quoting CHARLES DICKENS, BLEAK HOUSE 4–5 (1891)).

This is how the U.S. Supreme Court opened its opinion in the 2011 case *Stern v. Marshall*.[2] For years, *Stern* defined which claims bankruptcy courts had the authority to adjudicate and, needless to say, its convoluted holding left many judges, attorneys, and litigants perplexed. Specifically, the *Stern* Court created what is now commonly referred to as "*Stern* claims"—claims that bankruptcy courts have the statutory, but not constitutional authority, to adjudicate.[3] Successor cases such as *Executive Benefits Insurance Agency v. Arkison*[4] and *Wellness International Network, Ltd. v. Sharif*[5] attempted to answer questions about *Stern* claims that the *Stern* Court left unanswered. These cases grappled with whether *Stern* claims should be treated like "core" claims—claims that bankruptcy courts can enter final judgments on—or "non-core" claims—claims that bankruptcy courts can only enter final judgments on if the litigating parties consent.[6] The *Wellness* Court ultimately held that parties could impliedly consent to *Stern* claim adjudication by bankruptcy courts, but the Supreme Court's test to determine implied consent is ambiguous and has caused disagreement among lower courts.[7]

This Note analyzes the *Wellness* Court's interpretation of parties' implied consent to bankruptcy court adjudication of *Stern* claims, explains why the interpretation is too broad, and offers solutions to narrow consent in these cases. Part I of this Note discusses the statutory and common law history of bankruptcy court authority prior to *Stern*, and the statutes that currently govern bankruptcy court authority. Part II first discusses *Stern*, the creation of *Stern* claims, and the problems the *Stern* Court caused by remaining silent on whether bankruptcy courts could adjudicate *Stern* claims. Part II then discusses *Executive Benefits*, the case decided prior to *Wellness*, which partly answered questions left unanswered by *Stern*, but still remained silent on whether parties could consent to bankruptcy court adjudication of *Stern* claims. Part III discusses the *Wellness* case and its overbroad view on allowing parties to impliedly consent to bankruptcy court authority for *Stern* claims, as well as the problems this holding creates. Part IV proposes and analyzes possible solutions to *Wellness'* interpretation of implied consent, including: (1) creating a narrower definition of *Stern* claims; (2) extending the holding of *Executive Benefits* and addressing consent; (3) amending Section 157[8] or Federal Bankruptcy Rule 7012(b)[9] to include *Stern* claims; and (4) implementing the "balancing test" used in cases decided prior to *Stern*

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2. *See generally id.*
3. *See id.* at 469.
4. *See generally* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014).
5. *See generally* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).
6. *See Exec. Benefits*, 134 S. Ct. at 2171–72.
7. *See generally Wellness*, 135 S. Ct. at 1947–48.
8. *See generally* Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 28 U.S.C. § 157 (2012)).
9. *See generally* FED. R. BANKR. P. 7012.

to determine whether bankruptcy courts have the authority to adjudicate certain claims.

I. HISTORY OF BANKRUPTCY COURT AUTHORITY

A. THE BANKRUPTCY ACT OF 1898, BANKRUPTCY REFORM ACT OF 1978, AND *NORTHERN PIPELINE*

The history of United States bankruptcy law is volatile, with many of the statutes promulgated in the early and mid 1800s being quickly repealed. The Bankruptcy Act of 1898 (1898 Act) was the first set of bankruptcy laws that remained in effect for an extended period of time, nearly eighty years.[10] The 1898 Act "marked the beginning of the era of permanent federal bankruptcy legislation" and addressed many procedural questions left unanswered by prior legislation.[11]

Originally, under the 1898 Act, federal district courts "sat as 'courts of bankruptcy,'" but the courts often assigned bankruptcy proceedings to bankruptcy "referees."[12] These referees were first paid on a fee basis, but in 1946 they began receiving salaried monetary compensation.[13] In 1973, the referees became known as "bankruptcy judges."[14] These bankruptcy judges exercised many of the same powers as the district court judges, but state courts also had concurrent jurisdiction over similar bankruptcy issues.[15] This jurisdictional overlap between state and federal judges led to frequent litigation and a demand for a more comprehensive outline of federal bankruptcy court authority.[16] Overall, the 1898 Act allowed bankruptcy judges to decide "traditional summary jurisdiction" matters over claims such as the distribution of the bankruptcy estate among creditors.[17] However, the bankruptcy judges, with the parties' consent, could also decide matters that invoked the district courts' "plenary jurisdiction."[18]

Although the 1898 Act remained intact for many years, Congress overhauled federal bankruptcy law and enacted the Bankruptcy Reform Act

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10. *See* Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 23 (1995).

11. *Id.* at 23, 25.

12. *Id.* at 25; *see also* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170 (2014).

13. *See* Tabb, *supra* note 10, at 25.

14. *Id.*

15. *See id.*

16. *See id.*

17. *Exec. Benefits*, 134 S. Ct. at 2170. "Summary jurisdiction" means that the courts generally had exclusive jurisdiction over these claims. *See* Tabb, *supra* note 10, at 25 n.167.

18. *Exec. Benefits*, 134 S. Ct. at 2170. "Plenary jurisdiction" means that, if the parties consented, bankruptcy courts could adjudicate certain claims, usually reserved for Article III courts. *See* Tabb, *supra* note 10, at 25 n.167; *see also* Joshua C. Gerber, Note, *"Why the Fuss?" Stern v. Marshall and the Supreme Court's Understanding of Bankruptcy Court Jurisdiction*, 78 BROOK. L. REV. 989, 998 (2013).

of 1978 (1978 Act).[19] The 1978 Act "strove to create a more unified jurisdictional framework" and removed the referee/bankruptcy judge system and the distinction between summary and plenary jurisdiction.[20] Instead, each judicial district established a bankruptcy court that was headed by bankruptcy judges.[21] The bankruptcy courts—like federal district courts—had the broad power to decide "all civil proceedings arising under Title 11 [of the Bankruptcy Code] or arising in or related to cases under Title 11."[22] The President, with the consent of the Senate, appointed bankruptcy judges to fourteen-year terms without salary guarantees, unlike federal judges, who receive life tenure and guaranteed non-diminishable salary.[23] Therefore, although the bankruptcy courts were given broad power and authority, Article III of the U.S. Constitution still did not protect bankruptcy judges.[24]

Article III of the Constitution outlines federal judges' powers and gives these judges the benefits of life tenure and non-diminishable pay; Article III does not define bankruptcy courts and bankruptcy judges' powers or benefits.[25] As a result, bankruptcy courts had similar powers to federal courts under the 1978 Act but were not afforded the same benefits under Article III.[26] The U.S. Supreme Court addressed the constitutionality of bankruptcy judges' authority under the 1978 Act in the landmark 1982 case *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[27]

In *Northern Pipeline*, the appellant, Northern Pipeline Construction Company (Northern), filed a petition for reorganization in the United States Bankruptcy Court for the District of Minnesota in January 1980.[28] In March of 1980, pursuant to the 1978 Act, Northern filed suit against the appellee, Marathon Pipe Line Company (Marathon), in the same bankruptcy court.[29] Northern sought damages for breaches of contract and warranty, and for misrepresentation, coercion, and duress.[30] Marathon countered that the 1978 Act "unconstitutionally conferred [Article III] judicial power upon judges

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19. *See* Bethany A. Corbin, *Losing at Dodge Ball: Understanding the Supreme Court's Implied Authorization of Consent in Executive Benefits Insurance Agency v. Arkison and Why Revision of 28 U.S.C. § 157(B) is Critical for Clarity*, 63 DRAKE L. REV. 109, 118 (2015).

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

21. *Id.*

22. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015) (citation omitted).

23. *See N. Pipeline*, 458 U.S. at 53.

24. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2171 (2014).

25. *See* U.S. CONST. art. III, § 1 (Article III of the Constitution vests judicial power of the United States "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behav[ior], and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.").

26. *See Exec. Benefits*, 134 S. Ct. at 2171.

27. *See generally N. Pipeline*, 458 U.S. at 57–58; *see also Wellness*, 135 S. Ct. at 1939.

28. *N. Pipeline*, 458 U.S. at 56.

29. *Id.*

30. *See id.*

who lacked life tenure and protection against salary diminution."[31] The Supreme Court held that there was "no doubt" that bankruptcy judges were not Article III judges, and therefore deemed certain sections of the 1978 Act unconstitutional.[32] The Court boldly stated:

> [Section 241(a) of] the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of '*the essential attributes of the judicial power*' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.[33]

The *Northern Pipeline* Court, with its strict holding, set the foundation for the current rules governing bankruptcy court authority.

B. THE BANKRUPTCY AMENDMENTS, THE FEDERAL JUDGESHIP ACT OF 1984, AND CURRENT BANKRUPTCY COURT AUTHORITY

Northern Pipeline stripped bankruptcy courts of their long-held powers, but Congress combatted this lost authority with the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act).[34] The 1984 Act, which remains in effect today, gives district courts "original jurisdiction over bankruptcy cases and related proceedings," but allows the district courts to refer these cases to bankruptcy courts.[35]

Claims referred to bankruptcy judges fall into two categories: "core" claims and "non-core" claims.[36] Core claims are "all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11. . . ."[37] The 1984 Act provides a non-exhaustive list of core claims, including "counterclaims by the estate against persons filing claims against the estate"[38] and "proceedings to determine, avoid, or recover fraudulent conveyances."[39] Most importantly, the 1984 Act allows bankruptcy judges to "hear and determine" core claims and order final judgments on them.[40]

Non-core claims are claims that are not core but are nevertheless "otherwise related to a case under [T]itle 11."[41] On non-core claims, bankruptcy judges can only "propose[] findings of fact and conclusions of

31. *Id.* at 56–57.
32. *Id.* at 61.
33. *Id.* at 87 (emphasis added).
34. *See generally* Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 28 U.S.C. § 157(b)(1) (2012)); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015).
35. *Wellness*, 135 S. Ct. at 1939.
36. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2171 (2014).
37. Federal Judgeship Act of 1984 §104(a); 28 U.S.C. § 157 (b)(1).
38. Federal Judgeship Act of 1984 §104(a); 28 U.S.C. § 157(b)(2)(C).
39. 28 U.S.C. § 157(b)(2)(H).
40. *Id.* § 157(b)(1).
41. *Id.* § 157(c)(1).

law to the district court."[42] However, parties can consent to bankruptcy courts having final judgment authority on non-core claims.[43] As such, bankruptcy judges can enter final judgments on core claims, and those judgments can be appealed to the district court. Bankruptcy judges cannot enter final judgments on non-core claims, unless the parties consent to bankruptcy court adjudication.[44]

The 1984 Act seemingly restored the authority of bankruptcy courts established by previous Acts.[45] However, differences arose among the courts between what constituted a core versus non-core claim. In some cases, courts applied a balancing test to determine whether or not a claim was a core or non-core matter. This balancing test included weighing the "policy purposes of [bankruptcy] courts with the need of protections of the Article III courts" and the possible "encroachment of separation of the branches of government."[46]

Only four years after Congress adopted the 1984 Act, the Supreme Court began to question bankruptcy court authority once again and the legitimacy of the 1984 Act's core and non-core distinction. In *Granfinanciera v. Nordberg*,[47] the Court held that "fraudulent conveyance" actions were considered core proceedings under the 1984 Act, but the "Seventh Amendment [right to a jury trial] still applied to such claims."[48] Conversely, in *Langenkamp v. Culp*,[49] the Court held that no Seventh Amendment right to a jury trial existed for creditors submitting claims against the bankruptcy estate when a "bankruptcy trustee counterclaimed for preferential transfers."[50] The line between core and non-core claims and the question of whether bankruptcy courts infringed on federal court authority remained unsettled, and these issues were arguably further complicated by the highly controversial decision in *Stern v. Marshall.*

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42. *Id.*
43. *See id.* § 157(c)(2).
44. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2171–72 (2014).
45. *See* Corbin, *supra* note 19, at 121. Like the 1898 Act, the 1984 Act establishes a summary-plenary-like divide between bankruptcy and federal district courts, where upon consent of the litigating parties, bankruptcy courts could have final adjudication over decisions usually reserved for the district courts. *See id.*
46. Michelle Wright, *From Stem to Stern: Navigating Bankruptcy Practice After Stern v. Marshall*, 77 MO. L. REV. 1159, 1172 (2012) (citing Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 583 (1985)); *see generally* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (using different factors to determine whether an Article III violation occurred).
47. *See generally* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 36 (1989).
48. Wright, *supra* note 46, at 1173 (citing *Granfinanciera*, 492 U.S. at 36–37).
49. *See generally* Langenkamp v. Culp, 498 U.S. 1043 (1991).
50. Wright, *supra* note 46, at 1174.

II. STERN AND EXECUTIVE BENEFITS

A. *STERN* FACTS, MAJORITY OPINION, AND DISSENT

1. The Facts

The 2011 Supreme Court decision in *Stern v. Marshall* diminished parts of the statutory authority vested in bankruptcy courts. As previously mentioned, the facts of this case are lengthy and detailed, but also subjectively controversial because of the petitioner's identity. Petitioner Vickie Lynn Marshall (Vickie), known to the public as model and actress Anna Nicole Smith, married J. Howard Marshall (J. Howard), an oil tycoon and one of the richest men in Texas, one year before his death.[51] J. Howard did not include Vickie in his will and before he died, Vickie filed suit in Texas state probate court against J. Howard's son, E. Pierce Marshall (Pierce),[52] alleging that Pierce "fraudulently induced J. Howard to sign a living trust that did not include" Vickie.[53] After J. Howard died, Vickie filed a bankruptcy petition in the U.S. Bankruptcy Court for the Central District of California.[54] First, Pierce filed a complaint in this bankruptcy proceeding, alleging that Vickie had defamed him, because she told the press that Pierce used fraud to gain his father's assets.[55] Then, Pierce filed a proof of claim for the defamation action, so he could recover potential damages from Vickie's bankruptcy estate.[56] Vickie counterclaimed for tortious interference, alleging that Pierce prevented J. Howard from "taking the legal steps necessary" to provide Vickie with J. Howard's assets.[57]

In November 1999, the bankruptcy court granted Vickie summary judgment on Pierce's defamation claim and later also granted Vickie's tortious interference counterclaim.[58] The court awarded her over $400 million in compensatory damages and $25 million in punitive damages.[59] Pierce appealed to the U.S. District Court for the Central District of California, arguing that Vickie's counterclaim was not a core proceeding under Section 157(b)(2)(C) ("counterclaims by the estate against persons filing claims against the estate")[60] and, therefore, the bankruptcy court did not have the power to enter final judgment.[61] The district court partially agreed with Pierce, stating that Vickie's counterclaim did in fact fall within

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51. *See* Stern v. Marshall, 564 U.S. 462, 468–69 (2011).
52. *See id.* at 470.
53. *Id.*
54. *See generally* Marshall v. Marshall, 547 U.S. 293, 300 (2006).
55. *See Stern*, 564 U.S. at 470.
56. *See id.*
57. *Id.*
58. *See id.*
59. *Id.* at 470–71.
60. 28 U.S.C. § 157(b)(2)(C) (2012).
61. *See Stern*, 564 U.S. at 471.

the statutory language of Section 157(b)(2)(C), but that it would be "unconstitutional to hold that any and all counterclaims are core."[62] At this time, the Texas state probate court had ruled in Pierce's favor, but the district court denied the state court's judgment, and decided the matter in Vickie's favor, awarding her compensatory and punitive damages each in the amount of $44,292,767.33.[63] The U.S. Court of Appeals for the Ninth Circuit reversed the district court, reasoning that a counterclaim under Section 157(b)(2)(C) is a core claim "only if the counterclaim is so closely related to [a creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself."[64] The Ninth Circuit held that Vickie's tortious interference counterclaim did not meet this test and reinstated the Texas state probate court's holding against Vickie.[65]

Vickie appealed to the U.S. Supreme Court, which held that the bankruptcy court had the statutory authority under Section 157(b)(2)(C) to enter judgment on Vickie's counterclaim, but that it did not have the constitutional authority to do so.[66]

2. The Majority Opinion

The opinion in *Stern*, written by Chief Justice Roberts, can be broken down into three main parts. First, the Court conceded that Vickie's tortious interference counterclaim against Pierce was "a 'core proceeding' under the plain text of Section 157(b)(2)(C)" and, therefore, the bankruptcy court had statutory authority to adjudicate the claim.[67] However, the Supreme Court, quoting the reasoning of *Northern Pipeline*, noted that Article III of the Constitution is "an inseparable element of the constitutional system of checks and balances"[68] that "imposes some basic limitations that the other branches may not transgress."[69] The Court noted that Article III permits judges to serve without term limits and restricts the other branches' ability to remove the judges or lessen their salaries, to ensure the "'[c]lear heads . . . and honest hearts' deemed 'essential to good judges.'"[70] The Court therefore concluded that Congress, by bestowing non-Article III judges with the statutory authority to adjudicate certain core bankruptcy claims, did in fact

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62. *See id.*
63. *See id.* at 472.
64. *Id.*
65. *See id.* at 472–73; *see also* Marshall v. Stern (*In re* Marshall), 600 F.3d 1037, 1047 (9th Cir. 2010) (stating that the "Texas probate court entered judgment in favor of Pierce Marshall on all claims").
66. *See Stern*, 564 U.S. at 469.
67. *Id.* at 475.
68. *Id.* at 482–83 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982)).
69. *Id.* at 483.
70. *Id.* at 484 (quoting JAMES WILSON, COLLECTED WORKS OF JAMES WILSON: VOLUME 1 363 (J. Andrews ed. 1896)).

unconstitutionally transgress limits imposed by Article III, as only Article III judges may preside over some core bankruptcy proceedings.[71]

While the Court wrote at length about the importance of Article III and the separation of powers, it held only "that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, [but] Article III of the Constitution does not."[72] The Court remained silent on whether Section 157(b) is unconstitutionally void and on how to proceed when claims arise that bankruptcy courts have statutory, but not constitutional authority to adjudicate.

Second, the Court rejected Vickie's argument that her tortious interference counterclaim was "a matter of public right" that could be adjudicated outside the limitations of Article III courts.[73] To be a matter of public right, or as the Court put it, to fall under the "public rights exception," a claim must be "integrally related to a particular federal government action," such as a claim derived "from a federal regulatory scheme" or a claim that needs to be resolved by "an expert government agency."[74] The Court concluded that Vickie's state law counterclaim did not fall within the public rights exception, because it did "not flow from a federal regulatory scheme."[75] Also, the "experts" at solving Vickie's state law counterclaim were not government agencies, but rather Article III courts.[76]

Third, the Supreme Court rejected Vickie's argument that the Bankruptcy Court had jurisdiction to hear her counterclaim because, under the 1984 Act, bankruptcy courts are "adjuncts" of district courts.[77] Citing *Northern Pipeline*, the Court stated that adjunct courts issue final judgments on narrow, specialized areas of law; however, bankruptcy courts had not been resolving specialized cases, but were overseeing broader claims *related* to bankruptcy law.[78] The Court thus quickly dismissed Vickie's contention, concluding that "a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed such an 'adjunct' of the court of appeals."[79]

3. The Dissent

Stern v. Marshall was a five-to-four decision, and the dissenting judges pointed out the problems with the *Stern* holding that would later reverberate throughout the lower courts for years. First, Justice Breyer expressed pragmatic concerns with the majority's opinion. "[T]he volume of

71. *See id.* at 485–87.
72. *Id.* at 482.
73. *Id.* at 488.
74. *Id.* at 490.
75. *Id.* at 493.
76. *Id.* at 494.
77. *Id.* at 500.
78. *See id.* (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 485 U.S. 50, 85 (1982)).
79. *Id.*

bankruptcy cases," he wrote, "is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases."[80] Bankruptcy court cases "constantly" involved state law claims like the one at issue in *Stern*; therefore, the majority failed to answer the question of whether federal district courts would have to review these cases and thus increase their caseload.[81] A concern also arose over whether the holding in *Stern* would have an impact outside the bankruptcy court system. For instance, if bankruptcy courts could not issue final judgments because the judges are not protected by Article III, then "what about other non-Article III judges, such as federal magistrate judges, and their ability to issue final judgments?"[82] The dissent addressed these concerns, mainly by relying on pre-*Stern* case law.[83] Specifically, the dissenting justices suggested the revival of the balancing test used in prior cases. Justice Breyer proposed a five factor-balancing test that would help determine whether bankruptcy courts encroached on Article III courts' authority. The five factors are: (1) the nature of the claim; (2) the nature of the tribunal; (3) Article III courts' control over the proceeding; (4) parties' consent; and (5) legislative purpose served by the grant of authority to a non-Article III tribunal where judges lack tenure and compensation protections.[84]

B. THE PROBLEMS WITH *STERN*

1. The Creation of the "*Stern* Claim" and the "*Stern* Gap"

Stern caused an outpouring of litigation, with courts disagreeing over what the case held. For instance, the Supreme Court in *Stern* clearly stated that its holding was "narrow;"[85] however, just a year after the case was decided, more than 506 decisions referenced the opinion.[86] The majority of lower courts followed the Supreme Court's opinion that the decision was narrow, and that bankruptcy courts were not completely divested of authority to adjudicate counterclaims.[87] Other courts broadly interpreted *Stern* as holding that any claim that "augment[s] the [bankruptcy] estate" can only be

80. *Id.* at 520 (Breyer, J., dissenting).

81. *See* Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 SUP. CT. REV. 183, 184 (2011).

82. *Id.*

83. *See generally Stern*, 564 U.S. at 505–21.

84. *Id.* at 513.

85. *See id.* at 502.

86. *See* Corbin, *supra* note 19, at 129.

87. *See id.* at 129–30 n.157–58. For instance, in *In re Salander O' Reilly Galleries*, *LLC*, a New York bankruptcy case, the Court explained that *Stern v. Marshall* was "replete with language emphasizing that the ruling should be limited to the unique circumstances of that case." *In re* Salander O'Reilly Galleries, 453 B.R. 106, 115 (Bankr. S.D.N.Y. 2011), *aff'd,* 475 B.R. 9 (S.D.N.Y. 2012).

heard by Article III judges.[88] Aside from the split in interpretation, the biggest problem with *Stern* was that it created "*Stern* claims." *Stern* claims are intermediary types of claims that are not classified as core or non-core, but as claims that bankruptcy courts have statutory, rather than constitutional authority to adjudicate.[89] An example of a *Stern* claim was Vickie's tortious interference counterclaim in *Stern v. Marshall*.[90] Although the bankruptcy court had the statutory authority under Section 157(b)(2)(C) to adjudicate the claim, this type of counterclaim is constitutionally reserved for Article III judges.[91] Further, *Stern* never supplied a list, non-exhaustive or otherwise, of *Stern* claims and did not address how bankruptcy or district courts should proceed when *Stern* claims are identified.[92]

Some lower courts also noted that *Stern* claims create a statutory "gap" in Section 157.[93] For instance, under Section 157(b), a bankruptcy court has final judgment authority on core claims, but not on *Stern* claims.[94] A bankruptcy court cannot propose findings of fact or conclusions of law on *Stern* claims either, as this procedure only applies to non-core claims. Therefore, bankruptcy courts have no statutory power to act on *Stern* claims, thus creating a gap in Section 157.[95]

2. No Ruling on Consent

Stern also did not address whether parties can consent to bankruptcy court adjudication of *Stern* claims.[96] The circuit courts split on the issue, with the Ninth Circuit holding that parties had statutory authority under Section 157(c)(2) to consent to bankruptcy court adjudication of *Stern* claims.[97] Others, such as the Fifth, Sixth, and Seventh Circuits, held that Section 157(c)(2) did not give parties the authority to consent to bankruptcy court judgment on these claims.[98]

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88. Corbin, *supra* note 19, at 130 n.162; *see generally* Burton v. Seaport Capital, LLC (*In re* Direct Response Media, Inc.), 466 B.R. 626, 639–44 (Bankr. D. Del. 2012) (discussing both the broad and narrow *Stern* interpretations).

89. *See Stern*, 564 U.S. at 469.

90. *See generally id.* at 482.

91. *See id.* "Although . . . . § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not." *Id.*

92. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2168 (2014).

93. *See id.* at 2172.

94. *See id.*

95. *See id.* at 2172–73.

96. *See* Corbin, *supra* note 19, at 131.

97. *Id.*

98. *Id.* at 132. In *Frazin v. Haynes & Boone, LLP*, the Fifth Circuit held that the parties could not consent to bankruptcy court adjudication of state law claims. Frazin v. Haynes & Boone, LLP (*In re* Frazin), 732 F.3d 313, 320–21 n.3 (5th Cir. 2013), *cert. denied,* 134 S. Ct. 1770 (2014). Also, when the Seventh Circuit first heard *Wellness International Network Ltd. v. Sharif*, it held that the parties could not consent to bankruptcy court adjudication. Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 771–73 (7th Cir. 2013), *cert. granted in part*, 134 S. Ct. 2901 (2014), *rev'd*, 135 S. Ct. 1932 (2015).

C. THE INITIAL MEDIATOR: *EXECUTIVE BENEFITS*

In 2014, the Supreme Court, in *Executive Benefits Insurance Agency v. Arkison*, attempted to solve the issues left unresolved by *Stern*. In *Executive Benefits*, Bellingham Insurance Agency, Inc. (BIA) filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington.[99] The respondent, Peter Arkison, was the bankruptcy trustee and filed a complaint in the same bankruptcy court against Executive Benefits Insurance Agency (EBIA), the petitioner, claiming the fraudulent conveyance of assets from BIA to EBIA.[100] The bankruptcy court ruled in favor of Arkison, and the district court affirmed.[101] While EBIA's appeal was pending, the Supreme Court handed down its ruling in *Stern* that some claims cannot be adjudicated by bankruptcy courts due to the lack of constitutional authority (i.e., *Stern* claims).[102] Because of *Stern*, EBIA moved to dismiss based on the bankruptcy court's lack of jurisdiction.[103] The Court of Appeals for the Ninth Circuit nonetheless affirmed the District Court's ruling in favor of Arkison.[104]

The Supreme Court held that Arkison's claim of fraudulent conveyance of assets was in fact a *Stern* claim.[105] The Court conceded that *Stern* claims seemingly created a "gap" in Section 157, but noted that this gap was remedied by a note following 28 U.S.C. Section 151. [106] This note contains a severability provision, which states that "if any provision of this Act. . . is held invalid, the remainder of this Act . . . is not affected thereby."[107] The Supreme Court reasoned that *Stern* claims "held invalid" the "application" of Section 157(b); in other words, *Stern* claims could not be treated as core claims.[108] However, by applying the severability provision, the rest of Section 157 is not affected. Therefore, the Court ruled that courts may apply Section 157(c) to *Stern* claims and treat them like non-core claims.[109] Overall, the Court held that bankruptcy courts did not have final judgment authority on *Stern* claims, just like they do not have final judgment authority on non-core claims. The Court remained silent on whether parties could consent to bankruptcy court adjudication of *Stern* claims.[110]

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99. *See generally* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2169 (2014).
100. *Id.*
101. *See id.*
102. *See id.*; *see generally* Stern v. Marshall, 564 U.S. 462, 482 (2011).
103. *See Exec. Benefits*, 134 S. Ct. at 2169.
104. *See id.*
105. *Id.* at 2174.
106. *Id.* at 2173.
107. *Id.* (quoting Federal Judgeship Act of 1984, Pub. L. No. 98-353, §104(a), 98 Stat. 333 (1984) (codified as amended at note following 28 U.S.C. § 151 (2012)).
108. *See id.*
109. *See id.*
110. *See generally id.* at 2172–75.

III. FINALLY ADDRESSING CONSENT: *WELLNESS*

A. *WELLNESS* FACTS AND HOLDING

In *Wellness International Network, Ltd. v. Sharif*, the Supreme Court finally clarified whether or not parties could consent to bankruptcy court adjudication of *Stern* claims. Similar to *Stern*, *Wellness* was "a decade-long saga spanning two circuits."[111] Petitioner Wellness International Network (Wellness), a manufacturer of health products, entered into a contract with the respondent, Richard Sharif.[112] Wellness and Sharif's subsequent troubled relationship prompted Sharif to sue Wellness in the U.S. District Court for the Northern District of Texas in 2005.[113] A default judgment was entered for Wellness because Sharif repeatedly ignored various "litigation obligations."[114] The district court eventually sanctioned Sharif and awarded more than $650,000 in attorneys' fees to Wellness.[115]

Sharif filed for Chapter 7 bankruptcy in the Bankruptcy Court for the Northern District of Illinois in February 2009 and listed Wellness as a creditor.[116] Wellness investigated Sharif's assets and discovered a 2002 loan application Sharif filed "listing more than $5 million in assets."[117] Sharif admitted he lied on the loan application and that the assets were actually owned by the Soad Wattar Living Trust, "an entity Sharif said he administered on behalf of his mother."[118] Wellness then filed an adversary complaint against Sharif in the bankruptcy court.[119] The first four counts of the complaint alleged that Sharif's debts should not be discharged because he "concealed property by claiming it was owned by the Trust."[120] In the fifth count of the complaint, Wellness sought a declaratory judgment stating that the Trust was "Sharif's alter ego" and that the Trust's assets should be included in his estate for bankruptcy proceedings.[121] Sharif agreed that the current proceeding against him was a "core proceeding" allowing the Bankruptcy Court to enter final judgment, subject to appeal.[122]

Once again, Sharif ignored his legal obligations and, in July 2010, the Bankruptcy Court entered a default and declaratory judgment against him.[123] Sharif appealed the Bankruptcy Court's decision to the District Court, just as

111. Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 754 (7th Cir. 2013).
112. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1940 (2015).
113. *See id.*
114. *Id.*
115. *Id.*
116. *See id.*
117. *Id.*
118. *Id.*
119. *See id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1941.
123. *See id.*

the Supreme Court handed down *Stern*.[124] Accordingly, Sharif filed a supplemental brief arguing that the Bankruptcy Court's order against him should be treated only as a recommendation.[125] The District Court denied the motion due to untimeliness.[126] However, upon further appeal, the Seventh Circuit ruled that Sharif's objection could not be waived, because count five of Wellness's adversary complaint—the "alter-ego" claim—was in fact a *Stern* claim.[127] Therefore, "the Bankruptcy Court lacked constitutional authority to enter final judgment [on] count [five]," and Sharif was entitled to Article III court adjudication.[128]

Ultimately, this case was appealed to the Supreme Court, which held that parties could consent to bankruptcy court authority of *Stern* claims and that "Article III is not violated when the parties . . . consent to adjudication by a bankruptcy judge."[129] The Court gave mainly pragmatic reasons for allowing consent, including that Article III courts still retain "supervisory authority" over bankruptcy courts.[130] The Court also questioned whether Sharif impliedly consented to bankruptcy court authority.[131] To answer this question, the Court relied heavily on precedent, particularly the 2003 Supreme Court decision in *Roell v. Withrow*.[132]

Roell held that litigants can consent to adjudication by a magistrate judge by "actions rather than words."[133] The Supreme Court did not want to supply a different rule for bankruptcy courts, and therefore applied *Roell's* implied consent standard, but added that the consent must be "knowing and voluntary."[134] The Court, again relying on *Roell*, held that consent is knowing and voluntary when "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator."[135] Sharif argued that consent to bankruptcy court adjudication must be express, but the Court disagreed.[136] Aside from citing *Roell*, the Supreme Court ruled that "[n]othing in the Constitution requires that consent to adjudication . . . be express . . . [n]or does . . . 28 U.S.C. § 157[] mandate express consent."[137]

124. *See id.*
125. *See id.*
126. *See id.*
127. *Id.* at 1941–42.
128. *Id.* at 1942.
129. *Id.* at 1939.
130. *Id.* at 1944, 1950 (Roberts, J., dissenting).
131. *See id.* at 1947–49.
132. *See id.*; *see generally* Roell v. Withrow, 538 U.S. 580 (2003).
133. *Wellness*, 135 S. Ct. at 1948 (citing *Roell*, 538 U.S. at 589–90).
134. *Id.*
135. *Id.* (quoting *Roell*, 538 U.S. at 588 n.5) (internal quotation marks omitted).
136. *See id.* at 1947.
137. *Id.*

B. PROBLEM WITH THE *WELLNESS* INTERPRETATION OF CONSENT

By allowing implied consent of bankruptcy court adjudication for *Stern* claims, the Supreme Court is undermining its pragmatic reasons for allowing consent in the first place. Some of the main policy reasons underscored by the Court for allowing implied consent were to increase "judicial efficiency"[138] and presumably lessen the caseload of the district courts. However, implied consent and the "knowing and voluntary test" are complicated and may burden the district courts with even more litigation.

For instance, in *Wellness*, the Court remanded the question of whether Sharif knowingly and voluntarily, and therefore impliedly, consented to bankruptcy court adjudication. The Court conceded that the knowing and voluntary test "would require a deeply factbound analysis" and that the Supreme Court, being "a court of review, not of first view" could provide only "little guidance to litigants or the lower courts."[139] The outcome of this holding is that the Supreme Court initially provides a bare-bones test for implied consent and further complicates the test by claiming that each case requires fact-intensive analysis. Also, as a time saver and for financial reasons, courts will likely rely on more "procedural rules requiring express consent . . . rather than . . . engaging in subjective, factually intensive inquiries concerning implied consent" like the Supreme Court suggests.[140]

The test is also inherently ambiguous. As previously stated, the consent test under *Wellness* contains two parts. First, to consent to bankruptcy court adjudication of *Stern* claims, the consent must be knowing and voluntary. Consent is knowing and voluntary when "the litigant or counsel was *made aware* of the need for consent and the right to refuse it, and still voluntarily . . . [tried] the case before a non-Article III adjudicator."[141] The Court does not distinguish between when a litigant has been *made aware* of his or her rights and when he or she was *actually aware* of those rights enough to consent.[142] This lack of distinction may lead to multiple interpretations by courts and attorneys.

C. THE PROBLEM SPREADS: THE MANY COURT INTERPRETATIONS OF CONSENT UNDER *WELLNESS*

Over 250 cases have cited *Wellness*, even though the ruling is less than two years old. As expected, courts interpret the consent standard in multiple ways. Some courts have applied the *Executive Benefits* ruling and ignored

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138. *Id.* at 1948.
139. *Id.* at 1949 (internal quotation marks omitted).
140. Richard K. Milin & Yitzhak Greenberg, *Wellness On Bankruptcy Court Jurisdiction: Practically Speaking, Silence Can Mean Consent*, NORTON BANKR. L. ADVISER, May 2015, at 7 (2015).
141. *Wellness*, 135 S. Ct. at 1948 (emphasis added) (internal quotation marks omitted) (quoting *Roell*, 538 U.S. at 588 n.5).
142. *See* Milin & Greenberg, *supra* note 140, at 7.

Wellness' consent test. For instance, *In re Renewable Energy Development Corp.*,[143] a Tenth Circuit case, involved state law claims as well as bankruptcy claims.[144] The parties brought their claims before a district court, but the court directed the claims to the bankruptcy court for adjudication, even though some of the claims were *Stern* claims.[145] On appeal, the Tenth Circuit acknowledged that the district court erred in directing the case to the bankruptcy court and also acknowledged that Article III courts cannot send *Stern* claims back to bankruptcy courts for adjudication without the consent of the parties.[146] However, instead of analyzing whether the parties' consent was "knowing and voluntary" as *Wellness* proposes, the Tenth Circuit applied the *Executive Benefits* holding instead, reasoning that the bankruptcy court could propose findings of fact but not enter final judgment on the *Stern* claims.[147]

Other courts only seem to look to the parties' express consent before allowing bankruptcy courts to adjudicate *Stern* claims. For example, in *In re TPG Troy, LLC*,[148] the bankruptcy court ruled that the creditors waived their right to a jury trial and to collect attorneys' fees, and, on appeal to the Second Circuit, the creditors argued that the bankruptcy court did not have the authority to rule that they waived this right.[149] The Second Circuit, relying on *Wellness*, analyzed whether the creditors knowingly and voluntarily consented to bankruptcy court adjudication by determining whether they were "made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator."[150] The Second Circuit held that the creditors did consent to bankruptcy court adjudication because they expressly said, during the Bankruptcy Court proceedings and on the record, "we would be content to consent to Your Honor determining the fees."[151]

Other courts have followed suit, and seem to require express consent by parties. For instance, *In re Waco Town Square Partners, LP*,[152] a Texas district court case, mentioned the *Wellness* knowing and voluntary consent test, but mainly looked for express consent, like in *In re TPG Troy, LLC*, to determine that the parties did not consent to bankruptcy court adjudication

143. *See generally In re* Renewable Energy Dev. Corp., 792 F.3d 1274 (10th Cir. 2015).
144. *See generally id.*
145. *See id.* at 1279.
146. *Id.*
147. *See id.* at 1283–84.
148. *See generally* Crest One Spa v. TPG Troy LLC (*In re* TPG Troy, LLC), 793 F.3d 228 (2d Cir. 2015).
149. *See id.* at 233.
150. *Id.* at 233 (quoting Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1948 (2015)).
151. *Id.*
152. *See generally In re* Waco Town Square Partners, LP, 536 B.R. 756 (S.D. Tex. 2015).

on a *Stern* claim.[153] As such, during the short time since the *Wellness* ruling, courts mention *Wellness* and implied consent, but in practice, seem to solely require express consent.

Lastly, courts are applying the *Wellness* consent standard beyond the scope of bankruptcy court adjudication. In cases such as *Bastidas v. Chappell*[154] and *Booker v. LaPaglia*,[155] the courts cite the *Wellness* consent test to determine whether non-Article III judges had authority to adjudicate certain criminal proceedings. In *Bastidas*, the Ninth Circuit, citing *Wellness*, held that a magistrate judge lacked authority to issue final judgment on part of a criminal case.[156] The Sixth Circuit stretched the *Wellness* consent ruling even further in *Booker*. There, the question arose as to whether a criminal case should be remanded or whether the Court of Appeals had final adjudication authority.[157] The Sixth Circuit held that just as the Supreme Court in *Wellness* decided it could not review and adjudicate the facts in the case, because a proper review required a fact-specific analysis usually reserved for lower courts, the Court of Appeals could not issue final judgment on the fact-specific issues in *Booker* and needed to remand the case.[158] However, the dissent did note that remanding the case was "an unfortunate consequence" that would result in a longer litigation process.[159] Overall, applying a test that the Supreme Court itself concedes provides "little guidance to litigants or the lower courts"[160] seems like a dangerous precedent to set for future claims, both inside and outside of bankruptcy court authority.

IV. POTENTIAL SOLUTIONS TO IMPLIED CONSENT

A. NARROW THE DEFINITION OF *STERN* CLAIMS

In *Wellness*, the Court majority took the position that the petitioner's "alter-ego" claim was a *Stern* claim, but the three dissenting justices did not.[161] This indicates that a more coherent definition of *Stern* claims needs to be applied to avoid confusion between bankruptcy and district court authority. One possibility is for courts to create a bright-line rule and define *Stern* claims as only those claims dealing with state law issues. Recently, bankruptcy courts seem to be avoiding adjudication of state law claims, as they are arguably the most easily discernible *Stern* claims that require Article

153. *Id.* at 762. The Court held that unlike in in *Troy* where the record indicated that the creditors expressly consented, consent was not expressly stated by the debtors in *Waco*. *In re Troy*, 793 F.3d at 233; *In re Waco,* 536 B.R. at 762.

154. *See generally* Bastidas v. Chappell, 791 F.3d 1155 (9th Cir. 2015).

155. *See generally* Booker v. LaPaglia, 617 Fed. App'x 520 (6th Cir. 2015).

156. *See Bastidas*, 791 F.3d at 1155, 1161, 1164.

157. *See Booker*, 617 Fed. App'x at 524–26.

158. *See id.*

159. *See id.* at 536 (Moore, J., dissenting).

160. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1949 (2015).

161. *See generally id.*; *see also* Milin & Greenberg, *supra* note 140, at 7.

III court adjudication.[162] However, reducing *Stern* claims to only state law claims may exclude other claims, like federal fraudulent transfer claims, that may require Article III court judgment.

In the *Wellness* dissent, Chief Justice Roberts analyzed old bankruptcy statutes in an attempt to determine what has historically constituted a *Stern* claim.[163] Looking at "America's first bankruptcy statute" Justice Roberts found that bankruptcy courts' "power to take into their possession, all the estate, real and personal, of every nature and description to which the debtor may be entitled, either in law or equity, in any manner whatsoever" is "peculiarly a bankruptcy power."[164] Looking to the 1898 Act, he found that bankruptcy court adjudicatory authority did not extend to situations where third parties make "substantial adverse claim[s]" over property in a debtor's possession.[165] Although looking to old statutes provides a solid foundation as to what may constitute a *Stern* claim, the task of looking at hundreds of years of bankruptcy law seems arduous.

Section 157(b)(2) provides a non-exhaustive list of sixteen examples of core proceedings to a bankruptcy case.[166] This list includes matters concerning the administration of the estate;[167] counterclaims by the estate against persons filing claims against the estate;[168] proceedings to determine, avoid, or recover fraudulent conveyances;[169] and determinations as to the dischargeability of particular debts.[170] As such, a solid starting point in defining *Stern* claims would be to go through the sixteen examples of core proceedings in Section 157(b)(2) and create examples of possible *Stern* or non-*Stern* claims. Cases such as *Executive Benefits* have already started determining some examples of *Stern* claims that were previously labeled solely as core claims under Section 157(b)(2).[171]

Providing initial examples of *Stern* claims using Section 157(b)(2) poses some additional problems. First, Congress, when enacting Section 157(b)(2), meant for all sixteen examples to be core proceedings; to identify any of the examples as *Stern* claims may undermine congressional intent. Also, creating examples of *Stern* claims by looking at Section 157(b)(2) may be arduous

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162. *See* Kevin M. Hembree, *How Bankruptcy Courts Are Dealing With 'Stern Claims,'* LAW360 (Apr. 22, 2015, 10:33 AM), http://www.law360.com/articles/646155/how-bankruptcy-courts-are-dealing-with-stern-claims.

163. *See Wellness*, 135 S. Ct. at 1952–53 (Roberts, J., dissenting).

164. *Id.* at 1952 (internal quotation marks omitted).

165. *See id.* at 1953 (internal quotation marks omitted).

166. 28 U.S.C. § 157(b)(2) (2012).

167. *Id.* § 157(b)(2)(A).

168. *Id.* § 157(b)(2)(C).

169. *Id.* § 157(b)(2)(H).

170. *Id.* § 157(b)(2)(I).

171. *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2172 (2014). In *Executive Benefits*, the Supreme Court determined that the fraudulent conveyance claim at issue in the case was most likely a *Stern* claim, even though recovery of fraudulent conveyances was listed as a core claim under Section 157(b)(2)(H). *See id.* at 2171–72.

and arbitrary, as a court will rely on the specific facts of a case in order to determine whether a claim that falls under Section 157(b)(2) is a *Stern* claim or not. For example, two distinct cases may contain "matters concerning the administration of the estate,"[172] but the "matters" may be completely different. In other words, depending on the facts, a "matter" in one case may constitute a *Stern* claim, while a "matter" in another case may not. In sum, attempting to create examples of *Stern* claims from this non-exhaustive list may present more problems than solutions.

B. EXTEND EXECUTIVE BENEFITS

As previously stated, *Executive Benefits* held that *Stern* claims may be treated as non-core claims and that bankruptcy courts, therefore, do not have the authority to adjudicate *Stern* claims treated like non-core claims.[173] *Executive Benefits* did not address whether parties could consent, explicitly or implicitly, to bankruptcy court adjudication of *Stern* claims, but it could have easily applied Federal Bankruptcy Rule 7012(b) to answer the consent question. In his concurring opinion in *Wellness*, Justice Alito mentions the use of Federal Bankruptcy Rule 7012(b) as evidence that express consent of the parties is required, because it states, "[i]n non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the *express consent* of the parties."[174] In other words, 7012(b) requires express consent of the parties to bankruptcy courts' final judgments in non-core proceedings.[175] Therefore, when a *Stern* claim is brought before a bankruptcy court, the court should treat the claim as a non-core proceeding and only allow the parties to expressly consent to bankruptcy court adjudication under 7012(b). This solution eliminates implied consent proposed in *Wellness*.

One problem with extending the holding of *Executive Benefits* to allow for bankruptcy court adjudication with express consent of the parties is that the case's treatment of some *Stern* claims as non-core claims is troublesome. Non-core matters are statutorily defined in Section 157(c)(1) as "not a core proceeding, but [a proceeding] that is otherwise related to a case under Title 11."[176] On the other hand, *Stern* claims are not mentioned in Section 157; rather, they are a product of case law. *Stern* claims are a constantly litigated issue; to haphazardly group them as non-core claims virtually erases the many court interpretations of the controversial claims.

172. *See* 28 U.S.C. § 157(b)(2)(A).
173. *See Exec. Benefits*, 134 S. Ct. at 2173.
174. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1949 (2015) (Alito, J., concurring) (quoting FED. R. BANKR. P. 7012(b)).
175. *See* FED. R. BANKR. P. 7012(b).
176. 28 U.S.C. § 157(c)(1).

C. AMEND SECTION 157

Another possible solution is to add a new rule to the Bankruptcy Code requiring parties to expressly consent to bankruptcy court authority over core claims. The rule would combine the consent provisions of Section 157(c)(2)[177] and the "express consent" language of Federal Bankruptcy Rule 7012(b).[178] As an alternative, a new rule could be added to explicitly address *Stern* claims and consent. For example, in her article, author Bethany A. Corbin suggests adding a new section to Section 157—157(b)(4)—that allows parties to consent to bankruptcy court adjudication of *Stern* claims:

> Notwithstanding the provisions of subsection (b)(1), the district court, with the consent of all the parties to a proceeding, may refer a core proceeding related to a bankruptcy case to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.[179]

This provision would bypass the issue of whether *Stern* claims are core or non-core, and allow bankruptcy courts to still have adjudicative authority.

Even though adding consent requirements for core matters would be a viable solution to bankruptcy court adjudication issues, amending bankruptcy laws poses a few problems. First, amending the Bankruptcy Code to allow parties to expressly consent to bankruptcy court adjudication of *Stern* claims (i.e. claims that bankruptcy courts cannot constitutionally adjudicate), allows parties to consent to constitutional violations. In other words, bankruptcy courts cannot adjudicate *Stern* claims because the courts' adjudication would violate Article III of the Constitution. However, if you allow parties to consent to bankruptcy court adjudication of *Stern* claims, the parties are inadvertently violating Article III. The Supreme Court acknowledged this conundrum in *Wellness*, but the justices could not agree on a solution that would allow parties to consent to bankruptcy court adjudication of *Stern* claims without overstepping constitutional boundaries.[180]

Second, amending statutes is a lengthy, slow process, and the fact that so many courts have differed on how to address *Stern* claims would likely make the process even slower.[181] Congress may be looking to the courts for more guidance on *Stern* claims before reforming Section 157. A more likely reason for Congress's slow response is that Congress does not want to attempt to amend the bankruptcy laws, because, historically, the Courts have always intervened.[182] For instance, just four years after Congress enacted the 1978

177. *See id.* § 157(c)(2).
178. FED. R. BANKR. P. 7012(b).
179. Corbin, *supra* note 19, at 145.
180. *See* Milin & Greenberg, *supra* note 140, at 5–6.
181. *See* Corbin, *supra* note 19, at 146.
182. *See id.*

Act, the Supreme Court in *Northern Pipeline* declared the 1978 Act unconstitutional.[183] *Stern* also declared parts of 1984 Act unconstitutional; however, the 1984 Act did fair better than the 1978 Act, going unchallenged for nearly twenty years.[184] Nevertheless, judging from history, Congress likely does not want to alter the bankruptcy laws because the courts frequently strike down such attempts as unconstitutional.

D. Using the Balancing Test from Prior Cases to Determine Bankruptcy Court Authority

The courts could revert to using the balancing test applied in previous cases to determine bankruptcy court authority. As previously mentioned, prior to *Stern v. Marshall*, courts used a balancing test to determine whether a claim was core or non-core. The factors of the balancing test, as expounded in cases such as *Commodity Futures Trading Commission v. Schor*,[185] included weighing the intent of Article I courts against protecting Article III courts, while also keeping in mind separation-of-powers principles.[186] In his *Stern* dissent, Justice Breyer mentioned the revival of this balancing test, and listed five factors the courts could use to determine whether bankruptcy courts had final judgment authority on certain claims.[187] These five factors are: (1) the nature of the adjudicated claim; (2) the type of non-Article III court adjudicating the claim; (3) the extent to which Article III courts usually exercise control over the proceeding; (4) *the presence or absence of the parties' consent*; and (5) the weighing of the legislative purpose of granting non-Article III judges similar powers to Article III judges.[188] By applying this balancing test approach, Justice Breyer, with Justices Ginsburg, Sotomayor and Kagan joining, concluded that the adjudicatory authority of the bankruptcy court in *Stern* was constitutional.[189]

A modern balancing test could include a combination of elements from previous cases and the *Stern* dissent. First, the court could determine whether or not "a congressional delegation of adjudicatory authority violates [the] separation-of-powers principles inherent in Article III."[190] Second, the court could consider several factors, including the five emphasized by the *Stern* dissent. Third, the court could determine whether a private or public right is at issue. If a private right is at issue, the court could implement a more in-

183. *See* Gerber, *supra* note 18, at 1000.
184. *See* Corbin, *supra* note 19, at 146.
185. *See generally* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).
186. *See id.* at 851.
187. *See* Stern v. Marshall, 564 U.S. 462, 510–13 (2011) (Breyer, J., dissenting).
188. *Id.* at 513 (emphasis added).
189. *See id.*
190. William C. Heuer, *Current State of Play: How to Analyze Authority of Bankruptcy Courts to Enter Final Orders and Judgments*, 24 NORTON J. BANKR. L. & PRAC. 1 (2015).

depth review of the factors. If a public right is at issue, the review could be "less stringent."[191]

Another separation-of-powers issue may arise if courts implement the balancing test. The balancing test allows Congress to create legislation that gives non-Article III judges Article III powers. The dissent in *Schor* hypothesizes that Congress could overstep its power, and "create[] a large number of non-article III tribunals . . . to subvert the integrity of the independent federal judiciary." [192] Also, the balancing test mentions consent, but it does not mention whether or not that consent should be express or implied.[193] As such, the balancing test could likely be difficult to implement because of separation-of-powers concerns and the incompleteness of the test's factors.

CONCLUSION

For years, courts struggled with whether parties could consent to bankruptcy court adjudication of *Stern* claims. The *Wellness* Court ruled that parties could impliedly consent to bankruptcy court adjudication of *Stern* claims, but the test the Court created is ambiguous and pragmatically difficult to administer. The judicial system would benefit from allowing parties to expressly consent to bankruptcy courts' final adjudication on *Stern* claims. This would help evenly distribute the caseload between bankruptcy courts and district courts, and would arguably lessen litigation in the future, due to a resulting lack of ambiguity.

To that end, this Note posits four possible approaches. The courts could provide examples of *Stern* claims using Section 157 to more easily discern what claims bankruptcy courts can or cannot adjudicate. Courts could also extend the holding of *Executive Benefits* to allow for parties to expressly consent to bankruptcy courts' adjudication of *Stern* claims. Additionally, Congress could amend Section 157 to allow parties to consent to bankruptcy court adjudication of *Stern* claims. Lastly, the courts could use the balancing test applied in previous cases to determine bankruptcy court authority. Overall, courts or the legislature could use these possible solutions to resolve the many complexities surrounding *Stern* claims.

Elizabeth Jackson[*]

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191. *Id.* at 10.

192. Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 121 (1988).

193. *See Stern*, 564 U.S. at 513. As previously stated, one of the five factors of the balancing test is "the presence or absence of consent." *Id.*

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