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# Bankruptcy Court Gives And Then Takes Away In Latest Stern-Related Ruling

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What are the limits of a bankruptcy court's authority to issue final orders and judgments? Does a bankruptcy court have authority under Article III of the U.S. Constitution to enter final orders in quintessential bankruptcy matters such as fraudulent transfer claims, or are the court's powers more constrained? While the Supreme Court's rulings in *Stern v. Marshall,* 546 U.S. 462 (2011), *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014) and *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015) laid a framework for answering these questions, confusion still exists.

In *Stern*, the Supreme Court created a class of claims, commonly referred to as "*Stern*" claims, that may not be adjudicated to final order or judgment by the bankruptcy court even though the Bankruptcy Code directs otherwise. A bankruptcy court that is faced with a *Stern* claim can only submit proposed findings of fact and conclusions of law to the district court which are reviewed *de novo*. Only the district court can enter final judgment on these claims. Thus, even though fraudulent transfer claims are *statutorily core* claims under 28 U.S.C. § 157(b)(2)(H) and the bankruptcy court is directed to enter final judgments on those claims under 28 U.S.C. § 157(b)(1), the question remains whether the bankruptcy court has the *constitutional authority* to do so.

On March 11, 2019, the U.S. Bankruptcy Court for the District Of Delaware held that the bankruptcy court has authority to enter final judgments adjudicating fraudulent transfer claims, even those brought by a successor to the debtor and against parties that did not file claims in the bankruptcy. This opinion stands in contrast with opinions issued by the Ninth Circuit Court of Appeals and district courts in the Southern District of New York, and is sure to lead to further litigation over the authority of a bankruptcy court to adjudicate such claims.

In Paragon Litigation Trust v. Noble Corporation, plc, the plaintiff, Paragon Litigation Trust (the "Trust"), was a litigation trust created under the terms of a confirmed plan. Prior to confirmation, the defendant, Noble Corporation plc ("Noble") had negotiated a settlement agreement with the debtor, which included broad releases in favor of Noble and affiliated parties. The settlement agreement was included in the terms of a prior plan, but the court denied confirmation of that plan. The plan that was ultimately confirmed did not include either the settlement agreement or the releases. The plan did, however, provide that the bankruptcy court retained jurisdiction to “adjudicate” claims by Paragon (and by extension the Trust) “to the fullest extent permitted by law.”

Post-confirmation, the Trust filed a multi-count complaint against Noble and other parties. Noble moved for an order determining that the bankruptcy court could only enter proposed findings of fact and conclusions of law with respect to all of the counts in the complaint, including the fraudulent transfer claims. Noble argued that although the fraudulent transfer claims were statutorily core matters (28 U.S.C. § 157(b)(2)(H)) they were *Stern* claims, meaning that the bankruptcy court did not have constitutional authority to enter a final judgment.

In response, the Trust argued that Noble had implicitly consented to the bankruptcy court’s entry of a final judgment on the fraudulent transfer claims. Implicit consent is found where the litigant or counsel was made aware of the need for consent and the right to refuse it, but still voluntarily appeared to try the case before the bankruptcy judge. The bankruptcy court rejected the Trust’s implicit consent argument. *First*, Noble’s entry into the settlement agreement with the debtor was an insufficient basis upon which to find implicit consent even though the settlement agreement would, by its terms, only become effective (a) upon entry of an order by the bankruptcy court approving the settlement agreement, and (b) upon the plan becoming effective. The court held that Noble’s requirement that the bankruptcy court approve the settlement did not constitute consent to the court’s later adjudication of issues that were included in, but were not necessarily the sole subject of, the settlement agreement. *Second*, Noble’s failure to object to the jurisdictional provisions in the plan which provided for the bankruptcy court’s “exclusive jurisdiction” over the claims against Noble “to the fullest extent permitted by law” did not constitute implicit consent since a party’s “failure to object to a plan provision providing for this Court’s continued jurisdiction does not constitute a waiver of a party’s right to have claims heard by an Article III tribunal.”

Since there was no consent, the bankruptcy court turned to the merits of the argument, *i.e.*, whether a bankruptcy court may enter final judgment on core fraudulent transfer claims brought against non-claimant defendants by a successor-in-interest to the debtor. Here is where the opinion diverges, and some might argue breaks new ground, in the discourse about the reach of *Stern*. The bankruptcy court noted that Noble was, in essence, asking the court to declare certain aspects of federal statutes enacted by Congress (28 U.S.C. §§ 157 & 158), which explicitly direct bankruptcy courts to enter final orders in core proceedings subject to appellate review by the district court or a bankruptcy appellate panel, unconstitutional. The bankruptcy court discussed the Supreme Court’s rulings in *Stern* and *Granfinanciera, S.A. v. Nordberg* , 492 U.S. 33 (1989) at length, and ultimately concluded that, while the language in those cases was perhaps sweeping, the holdings were in fact very narrow, and the Supreme Court never held sections 157 or 158 to be unconstitutional. Having wiggled out from the effects of those Supreme Court cases, the bankruptcy court relied on the presumption that federal statutes are constitutional unless and until they are held to be otherwise. Given the lack of controlling precedent from the Supreme Court or appellate courts ruling unequivocally that these statutory provisions are unconstitutional, the bankruptcy court held that it was bound to follow the express requirements of those statutes, and that it was indeed able to enter a final judgment on the Trust’s core fraudulent transfer claims brought against Noble.

What are the implications of *Paragon*? First, the court’s decision in *Paragon* limits the circumstances under which a party can be said to have implicitly consented to a bankruptcy court entering final orders on *Stern* claims. Entering into a settlement agreement that requires bankruptcy court approval, or participating in the plan negotiating process and not objecting to plan provisions providing for the court's retention of jurisdiction, are not sufficient bases to establish implied consent.  But, while the opinion "gives" in terms of restricting implied consent, it "takes away" in terms of holding that a bankruptcy court may enter final judgments in core fraudulent transfer claims, including those brought by successors to the debtor and those brought against defendants who did not file a proof of claim. This holding is a departure from how other cases have interpreted *Stern* and its progeny.  Thus, at least in the Third Circuit, defendants in fraudulent transfer claim cases may find themselves subject to a final judgment being entered by the bankruptcy court.



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