Supreme Court’s decision in Bellingham leaves key Stern v Marshall questions unanswered

As bankruptcy practitioners will recall, the Supreme Court held in Stern v. Marshall, 564 U.S., 131 S.Ct. 2594, 2620 (2011) that bankruptcy courts, as non-Article III courts, “lack[] the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim,” even though Congress had classified these types of proceedings as core – and thus authorized federal bankruptcy courts to hear and decide them.

After Stern, parties litigating state law claims in a bankruptcy court that seemed inclined to favor the opposing side argued that the bankruptcy court lacked jurisdiction to rule in their case, making litigation more expensive and time-consuming. Litigators and bankruptcy courts alike were left wondering what sort of claims really fall in the Stern category and whether parties can consent to jurisdiction and avoid the expense and delay involved in dealing with the uncertainty. Some courts decided there was a “statutory gap” leaving Stern claims in a no man’s land that bankruptcy courts could not touch.

Everyone assumed the Supreme Court was going to clarify these questions when it granted certiorari from the 9th Circuit’s decision in Executive Benefits Insurance Agency v. Arkinson (Bellingham), particularly since there is now a circuit split on the consent question. Unfortunately, the court punted on the first two questions, and resolved only the third, holding that Stern claims can be treated as non-core claims under 28 U.S.C. § 157(c). In other words, the bankruptcy court can submit proposed findings of fact and conclusions of law to the district court for de novo review.

This leaves parties in the 5th, 6th and 7th Circuits unable to avoid wrangling through consent, and parties in other Circuits, including the 9th, which permits consent, to wonder whether they will encounter problems down the line if they try to clear up confusion now by expressly consenting to bankruptcy court jurisdiction. It is also unclear whether such consent can be implied (from a party’s course of conduct or otherwise), if not expressly granted. Furthermore, what claims must be deemed Stern claims? Presumably the Supreme Court will take another stab at these questions in a few years. In the meantime, expense and delay seem inevitable.

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