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# Stern v. Marshall and the Case for Article III Bankruptcy Judges

In his December 2014 (and last) posting to the *Wall Street Journal's Bankruptcy Beat*, bankruptcy giant Harvey Miller was asked the one thing he would change about the United States Bankruptcy Code. Miller, who passed away in April 2015, replied *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Miller noted that in *Stern*, Chief Justice Roberts suggested that the decision was very narrow and would not cause any material changes in the administration of bankruptcy cases. In fact, uncertainty over the limits of bankruptcy court jurisdiction has proven to be a very costly specter which lurks in the background of almost every bankruptcy case.

In enacting the Bankruptcy Code in 1978, Congress intended the bankruptcy courts to hear all matters arising in or related to a bankruptcy case. However, the U.S. Supreme Court—first in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*., 458 U.S. 50 (1982) and then in *Stern*—reshaped and limited the Congressionally created jurisdictional landscape of federal bankruptcy cases. The Supreme Court in *Stern* instructed that under the United States Constitution, bankruptcy judges as Article I judges are unable to render decisions as courts of the United States. Only Article III judges, who have life tenure and irreducible salary, can do so.

Despite Justice Robert's prediction about the minimal impact of *Stern*, decisions confronting *Stern* issues are reported almost daily. Illustrative is E*mpire State Building Co. v. New York Skyline, Inc. (In re New York Skyline, Inc.)*, No. 14-2585-bk, 2015 WL 1782331 (2d Cir. Apr. 21, 2015). There, in a Summary Order, the Second Circuit addressed an appeal of the U.S. District Court vacating certain injunctions ordered by the bankruptcy court and remanding the case to the bankruptcy court. The issue involved a determination of the bankruptcy court's lack of authority to determine a non-core issue without the consent of all of the parties. Affirming the dissolution of the injunction, the court concluded by discussing how the district court's remand to the bankruptcy implicated *Stern*:

> The argument raises serious concerns about the proper construction of *Stern v. Marshall* and whether it (1) held 28 U.S.C. § 157(b)(2)(C) was unconstitutional on its face or as applied in that case; (2) limits bankruptcy courts' ability to treat core claims implicating Article III

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> powers as non-core claims, see *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2172-73, 189 L. Ed.2d 83 (2014); and (3) affected bankruptcy courts' power over non-core claims. *Id*. at *3.

These jurisdictional questions starkly highlight the uncertainty plaguing the bankruptcy system today. Justice Roberts characterized *Stern* as a narrow decision that would not change all that much. This characterization has been proven to be incorrect.

Miller suggested an obvious solution to permanently remedy the havoc wrought by *Stern*— make bankruptcy judges Article III judges. This was extensively debated but rejected for both economic and political reasons at the time of the Bankruptcy Code's enactment in 1978. The cyclical nature of financial distress caused Congress to be hesitant about creating a large compliment of life tenured judges. Given the historic pattern of economic boom and bust, the bankruptcy courts may periodically be underutilized. More importantly, giving then President Jimmy Carter the power to appoint 400 life-tenured judges was unacceptable to the Republicans in Congress. Instead, Congress devised a structure that legal scholars predicted (incorrectly as it turned out) would pass constitutional muster.

The periods of economic distress since 1978, and in particular the Great Recession, dispel any serious concerns about underutilized bankruptcy courts. However, the toxicity of the current political environment makes unimaginable the prospect of a president of either political party appointing 400 life-tenured judges who would be confirmed by a divided Congress. Harvey Miller correctly observed that *Stern* has and will continue to cause unnecessary cost and delays to the bankruptcy system. His solution to the *Stern* dilemma is practical and permanent... and unfortunately likely impossible given today's political reality.

If you have any questions on the topics discussed in this e-alert, please contact your Reinhart attorney or any member of Reinhart's Business Reorganization team.

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