Book Three in the *Stern* Jurisdiction Trilogy:
Wellness International v. Sharif

By Judge Michael G. Williamson

Last July I wrote an article for the Court Connection titled, "Book Two in the *Stern* Jurisdiction Trilogy: *Executive Benefits v. Arkison*."[1] I noted that the problem *Stern* created is it did not instruct us on how to deal with *Stern* claims which, while defined as core, cannot constitutionally be decided by bankruptcy courts. And because *Stern* claims also are not considered statutorily to be non-core, they arguably could not be decided by the non-core procedures in 28 U.S.C. § 157(c). In *Executive Benefits,* the Supreme Court closed this so-called gap by holding that *Stern* claims may be adjudicated as non-core within the meaning of § 157(c) based on the severability provision found in title 28.[2] This severability provision closes the gap created by *Stern* claims.

The article also set forth what *Executive Benefits* left for future consideration. Specifically, because the Supreme Court in *Executive Benefits* concluded that the district court did conduct a de novo review of the final judgment—which is all that *Stern* requires—the Court did not need to address whether from a constitutional perspective the petitioner could consent to the bankruptcy court's adjudication of a *Stern* claim. The Court reserved that question for another day. That day has now come with the Supreme Court's decision in *Wellness International v. Sharif.*[3]

In a 6-3 decision written by Justice Sotomayor in which Justices Kennedy, Ginsburg, Breyer, and Kagan joined and in which Justice Alito joined in part, the Supreme Court held in *Wellness International v. Sharif* that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.

The decision evidences a pragmatic approach to some thorny constitutional concerns, which if analyzed through the prism of "formalistic and unbending rules"[4] rather than "with an eye to the practical effect,"[5] could have had a devastating effect on not only practice in the bankruptcy courts but on the magistrate system and the regime for out-of-court consensual dispute resolution through arbitration.

This pragmatic approach is evidenced in the majority's discussion of its reasoning. As explained in the majority opinion, Congress has authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work. In fact, the number of magistrate and bankruptcy judgeships exceeds the number of circuit and district judgeships. "And it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt."[6]

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[1] http://www.flmb.uscourts.gov/newsletter/volume3_issue3.pdf.
[2] *Executive Benefits Ins. Agency v. Arkison,* 134 S. Ct. 2165, 2173 (2014).
[3] *Wellness Int'l Network, Ltd. v. Sharif*, 2015 WL 2456619 (May 26, 2015).
[4] *Wellness*, 2015 WL 2456619, at *9.
[5] *Id.*
[6] *Id.* at *3.

Given this pragmatic context, the Supreme Court then looked to long-standing precedents supporting the conclusion that litigants may validly consent to adjudication by bankruptcy courts. For example, in 1878, the Court in *Newcomb v. Wood*[7] recognized "[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it." Fast forward to the 1986 "foundational case" of *Commodity Futures Trading Commission v. Schor*,[8] in which the Court explains, "[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights"—such as the right to a jury—"that dictate the procedures by which civil and criminal matters must be tried."[9]

This precedent makes clear that 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 of these matters is unaffected. "In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences."[10] According to the majority, the lesson of *Schor* and the history that preceded it is plain: The entitlement to an Article III adjudicator is a personal right and thus ordinarily subject to waiver.

The majority admits that Article III also serves a structural purpose, barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other. But, the Court reasons, 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.

The Court then goes on to conclude that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts. After all, the Court acknowledges that bankruptcy judges, like magistrate judges, are appointed and subject to removal by Article III judges. Furthermore, bankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts. Their ability to resolve such matters is limited to a narrow class of common law claims as an incident to the bankruptcy courts' primary adjudicative function. Importantly, because the entire process takes place under the district court's total control and jurisdiction, there is no danger that use of the bankruptcy court involves a congressional attempt to transfer jurisdiction to non-Article III tribunals "for the purpose of emasculating constitutional courts."[11]

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[7] 97 U.S. 581, 583 (1878).
[8] 478 U.S. 833, 848-49 (1986).
[9] *Wellness*, 2015 WL 2456619, at *7 (quoting *Schor*, 478 U.S. at 848-49).
[10] *Schor*, 478 U.S. at 855.
[11] *Wellness*, 2015 WL 2456619, at *8 (quoting *Peretz v. U.S.*, 501 U.S. 923, 937 (1991) (internal quotation marks omitted)).

The Court notes that Congress could choose to rest the full share of the Judiciary's labor on the shoulders of Article III judges. But pragmatically, the Court notes that doing so would require a substantial increase in the number of district judgeships. Instead, Congress has "supplemented the capacity of district courts through the able assistance of bankruptcy judges."[12] And the Court concludes that so long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers.

Importantly, the majority points to the language in *Stern* that precludes the expansive reading of the decision urged by the minority. In this respect, the Court in *Stern* took pains to note that the question before it was a "'narrow' one" and that its answer did "not change all that much" about the division of labor between district courts and bankruptcy courts.[13] The Court admits that it would be an unfair characterization of *Stern* that the decision meant that bankruptcy judges could no longer exercise their long-standing authority to resolve claims submitted to them by consent. The Court then concludes that interpreting *Stern* to bar consensual adjudications by bankruptcy courts would meaningfully change the division of labor in our judicial system, contrary to *Stern's* explicit limitations.

Having held that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge, the Court then goes on to consider whether that consent must be express or whether it may be implied. It is noteworthy that, as Justice Alito noted in his partial concurrence, there was no need to decide the question of implied consent because the respondent had forfeited any *Stern* objection by failing to present that argument properly in the courts below.

Consistent with the practical tenor of *Wellness,* the Supreme Court nevertheless addressed this issue given its great importance to the bankruptcy legal community. In reaching the conclusion that implied consent is sufficient, the Court points out that nothing in the Constitution requires consent to adjudication by a bankruptcy court be express. In a similar vein, there is nothing in the relevant statute, 28 U. S. C. § 157, that mandates express consent; it states only that a bankruptcy court must obtain the consent—in the Court's words "consent *simpliciter*"—of all parties to the proceeding before hearing and determining a non-core claim.

And, the Court reasoned, a requirement of express consent would be in great tension with the Court's decision in *Roell v. Withrow*.[14] That case concerned the interpretation of 28 U.S.C. § 636(c), which authorizes magistrate judges to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," with "the consent of the parties." The Court concludes that the implied consent standard articulated in *Roell* supplies the appropriate rule for adjudications by bankruptcy courts under § 157. Applied in the bankruptcy context, that standard possesses the same pragmatic virtues—increasing judicial efficiency and checking gamesmanship—that motivated the Court's adoption of it for consent-based adjudications by magistrate judges.

[12] *Id.* at *10.
[13] *Stern v. Marshall*, 131 S. Ct. 2594, 2620, 2629 (2011).
[14] 538 U.S. 580 (2003).

The Court does, however, emphasize that a litigant's consent—whether express or implied—must still be knowing and voluntary. *Roell* makes clear that the key inquiry is whether "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.[15]

It appears that black clouds of jurisdictional uncertainty created by *Stern* and the courts that have interpreted *Stern* have now been cleared. Business returns to the days before *Stern* when few questioned the bankruptcy court's power to enter final judgments in both core matters and in matters in which the parties consent to jurisdiction as established in the statutory framework of 28 U.S.C. § 157. So this concludes the *Stern* Trilogy. Hopefully, there will be no sequel.

[15] *Wellness*, 2015 WL 2456619, at *12 (quoting *Roell*, 538 U.S. at 590).