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Supreme Court Hears Oral Arguments in Executive Benefits Case Testing the Scope of Stern

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February 5, 2014 - On January 14, 2014, the Supreme Court heard oral arguments in *Executive Benefits Insurance Agency v. Arkison*, which revisits the issue of constitutional limits on federal bankruptcy judges' power that the Supreme Court addressed two years ago in *Stern v. Marshall*. The petition for certiorari challenged a Ninth Circuit decision and presented two questions to the Supreme Court about which lower courts have disagreed in the wake of *Stern*: (i) whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III; and (ii) whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for *de novo* review by a district court in a "core" proceeding under 28 U.S.C. § 157(b).

Executive Benefits Insurance Agency had relied on *Stern* to argue before the Ninth Circuit that the bankruptcy court that ruled in favor of Arkison, as trustee for the estate of Bellingham Insurance Agency, lacked constitutional authority to enter a final judgment in a fraudulent conveyance action against a non-claimant to the bankruptcy estate. The Ninth Circuit agreed as to the fraudulent conveyance claims asserted by non-claimants, but also found that parties could waive their rights to an Article III hearing, which Executive Benefits had done by waiting until after briefing before the Ninth Circuit was complete to allege the Article III violation, thereby rendering the bankruptcy court's ruling binding. Further, the Ninth Circuit held that bankruptcy courts did have the power to submit findings of fact and conclusions of law in "core" proceedings even where they cannot enter a final judgment.

Executive Benefits argued to the Supreme Court that the Ninth Circuit's decision was wrong because (i) assigning the authority to enter final judgment on private claims to non-Article III judges violates the separation of powers upheld by the Supreme Court in *Stern* and that the consent of private parties cannot cure an Article III defect; (ii) even if consent could cure an Article III defect, that consent must be knowing and voluntary; and (iii) the

bankruptcy court lacked statutory authority to issue proposed findings of fact and conclusions of law in "core" proceedings.

In response, trustee Arkison emphasized the long history of consensual resolution of private rights in the judicial system, and noted that the Supreme Court has previously explained "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver." The trustee also compared bankruptcy judges to magistrate judges, thus suggesting that a ruling in favor of Executive Benefits could undercut the authority of magistrate judges in the judicial system. The trustee noted that, although Executive Benefits' consent to the bankruptcy court's jurisdiction was properly implied, the Supreme Court need not decide this factual question. Because an Article III district court conducted a full *de novo* review of the summary judgment order and entered its own judgment, Executive Benefits received the Article III consideration to which it was entitled. Finally, the trustee asserted that bankruptcy judges may issue proposed findings of fact and conclusions of law on "*Stern* claims" if the parties do not consent to final judgment in bankruptcy court.

The U.S. Solicitor General's office also argued as amicus in support of the trustee. Both parties garnered support from numerous other amici, including seven states as well as Irving Picard, as trustee for the Securities Investor Protection Act (SIPA) liquidation of the Madoff estate, all joining in support of the trustee.

Early interpretation of the arguments suggests that a majority of the Supreme Court was likely not persuaded that the parties' consent should control the parameters of bankruptcy judges' power in cases like *Executive Benefits*.

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