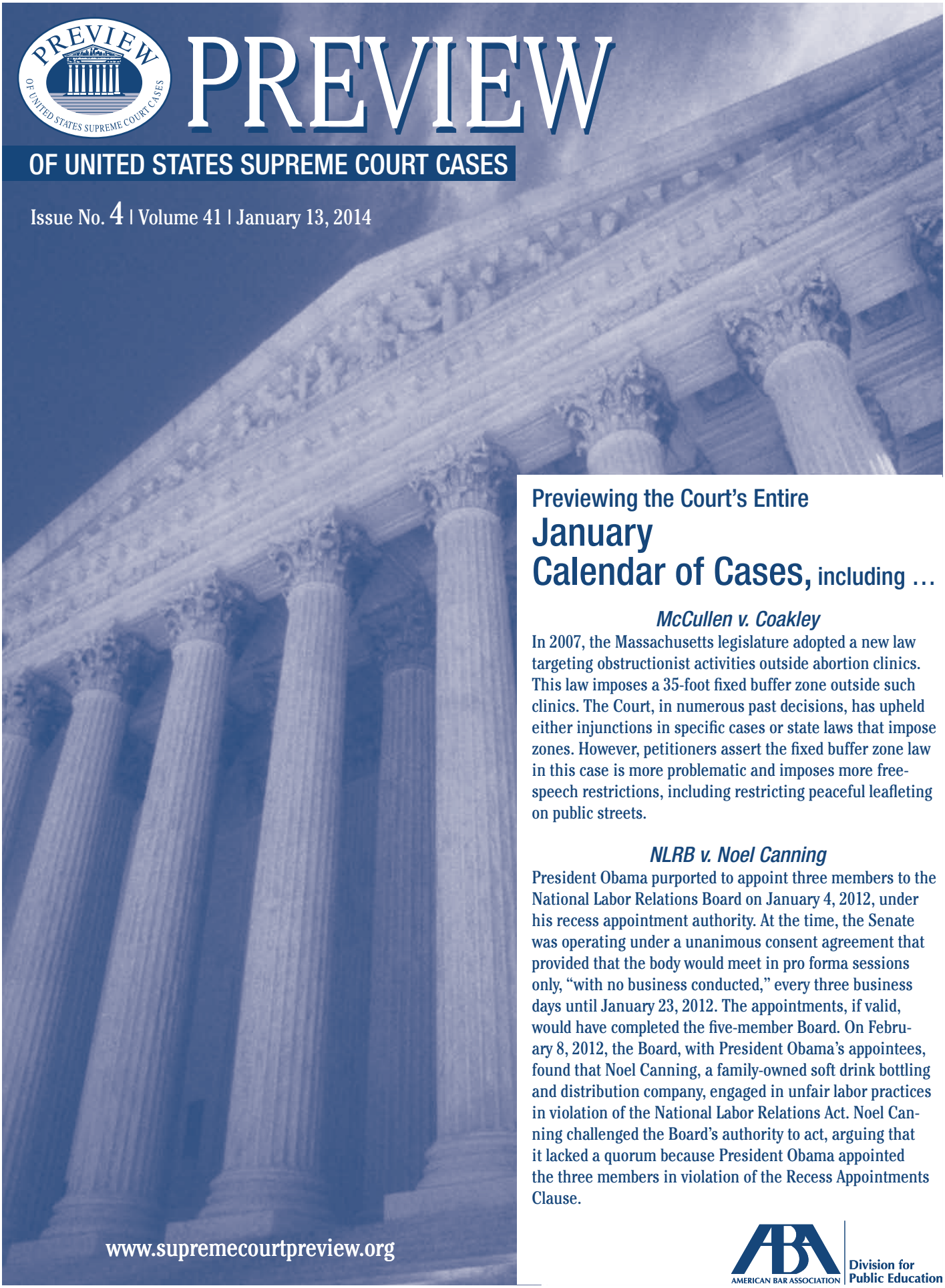

# PREVIEW

## OF UNITED STATES SUPREME COURT CASES

Issue No. 4 | Volume 41 | January 13, 2014

### Previewing the Court's Entire

## January Calendar of Cases, including …

### *McCullen v. Coakley*

In 2007, the Massachusetts legislature adopted a new law targeting obstructionist activities outside abortion clinics. This law imposes a 35-foot fixed buffer zone outside such clinics. The Court, in numerous past decisions, has upheld either injunctions in specific cases or state laws that impose zones. However, petitioners assert the fixed buffer zone law in this case is more problematic and imposes more free-speech restrictions, including restricting peaceful leafleting on public streets.

### *NLRB v. Noel Canning*

President Obama purported to appoint three members to the National Labor Relations Board on January 4, 2012, under his recess appointment authority. At the time, the Senate was operating under a unanimous consent agreement that provided that the body would meet in pro forma sessions only, "with no business conducted," every three business days until January 23, 2012. The appointments, if valid, would have completed the five-member Board. On February 8, 2012, the Board, with President Obama's appointees, found that Noel Canning, a family-owned soft drink bottling and distribution company, engaged in unfair labor practices in violation of the National Labor Relations Act. Noel Canning challenged the Board's authority to act, arguing that it lacked a quorum because President Obama appointed the three members in violation of the Recess Appointments Clause.

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# U.S. SUPREME COURT January 2014 CALENDAR

| MONDAY | TUESDAY | WEDNESDAY |
|---|---|---|
| **JANUARY 13** | **JANUARY 14** | **JANUARY 15** |
| *NLRB v. Noel Canning* | *Executive Benefits Insurance Agency v. Arkison* | *McCullen v. Coakley* |
| *Law v. Siegel* | *Brandt Revocable Trust v. United States* | *United States v. Castleman* |
| | *United States v. Quality Stores, Inc.* | |
| **JANUARY 20** | **JANUARY 21** | **JANUARY 22** |
| *Legal Holiday* | *Harris v. Quinn* | *Paroline v. United States* |
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- all the merits and amicus briefs for the January cases.

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# Limitations on the Authority of Bankruptcy Courts: Waiver by Implied Party Consent and Recommendations in Lieu of Final Orders

## CASE AT A GLANCE

A trustee in bankruptcy sued a third party to recover money for creditors of a defunct insurance company. The constitutional authority of the bankruptcy courts to administer such cases has long been in dispute, but the defendant ambiguously acquiesced in the bankruptcy court's pretrial proceedings. On appeal, the defendant asserted for the first time that the bankruptcy court lacked constitutional authority to enter judgment against it. While agreeing that the bankruptcy court generally lacks such authority, the Ninth Circuit Court of Appeals found that the defendant had impliedly consented to the entry of judgment by the bankruptcy court. Moreover, even if unauthorized, the bankruptcy court's ruling could be viewed as a recommendation to the district court, which clearly had authority and which thoroughly reviewed and confirmed the ruling. This case is the next, hotly anticipated step in the Supreme Court's charting of the constitutional and statutory boundaries of the authority of the bankruptcy courts, with profound implications for the efficient operation of the bankruptcy system.

***Executive Benefits Insurance Agency v. Arkison***
**Docket No. 12-1200**

**Argument Date: January 14, 2014**
**From: The Ninth Circuit**

by Jason J. Kilborn
The John Marshall Law School, Chicago, IL

## ISSUES

Can parties impliedly consent to the entry of judgment by a bankruptcy court otherwise lacking constitutional authority over their case?

Can a bankruptcy court propose recommended rulings when it lacks constitutional authority to enter a final order, though the governing statute fails to provide explicitly for such situations?

## FACTS

Bellingham Insurance Agency (Bellingham) filed a liquidation bankruptcy case under chapter 7. Bellingham was bankrupt largely because its primary operator, Nicholas Paleveda, an attorney, had orchestrated the transfer of hundreds of thousands of dollars from Bellingham to a company newly formed by him, Executive Benefits Insurance Agency (EBIA). Paleveda did this in the wake of an adverse arbitration ruling against Bellingham and himself. The arbitration award creditors sued in state court, alleging that the monetary transfers to EBIA were both actually and constructively fraudulent, impoverishing Bellingham simply to avoid the inevitable seizure of its assets by these creditors. In addition, they asserted that EBIA was nothing more than Bellingham's "alter ego," a mere continuation of the former business, created by Paleveda just days after the entry of the arbitration award, so EBIA should bear "successor liability" for Bellingham's debts to these creditors, also.

After Paleveda initiated Bellingham's chapter 7 bankruptcy case, Peter Arkison was appointed trustee-in-bankruptcy for Bellingham's chapter 7 estate. One of Arkison's primary jobs was to locate potential sources of value for Bellingham's creditors, so he initiated his own "adversary proceeding" before the bankruptcy court against EBIA, paralleling the earlier state court case by the arbitration creditors. Now for the benefit of all of the creditors of Bellingham's estate, Arkison sought to recover the large monetary transfers from Bellingham to EBIA, either because they were "fraudulent conveyances" or because EBIA was a "mere successor" of Bellingham, liable for its debts.

The rules of bankruptcy procedure for "adversary proceedings" contain an arcane but important peculiarity of particular relevance to this case. In light of long-standing uncertainties about the constitutional authority of bankruptcy courts, explained below, the Federal Rules of Bankruptcy Procedure require a defendant like EBIA to indicate whether it agrees that the case is within the scope of the bankruptcy court's constitutional authority, and if not, whether the party nonetheless consents to the bankruptcy court's ultimate entry of final judgment in the case. While EBIA denied that the case was within the bankruptcy court's authority, it neglected to indicate its consent (or lack thereof) to entry of a final judgment by the bankruptcy court.

Instead, EBIA demanded a jury trial and indicated that it did not consent to the bankruptcy court's conducting such a trial, as the

Seventh Amendment entitled EBIA to a jury trial before the district court. When the bankruptcy court nonetheless scheduled the case for trial, EBIA moved to have the trial date vacated in light of its opposition to a trial conducted by the bankruptcy court rather than the district court. The bankruptcy court vacated the trial date and referred the motion to the district court, which then requested a status update on the case's readiness for trial. Counsel for the other parties in the action signed a status report indicating that trial was not imminent; rather, settlement negotiations and a summary judgment motion were expected in the bankruptcy court in short order. Though EBIA's counsel refused to sign the status report, it did not object as the report was submitted to the district court, which put off EBIA's motion, and pretrial proceedings continued in the bankruptcy court.

After Paleveda failed to identify any evidence of facts that might counter the trustee's causes of action, the bankruptcy court concluded that there was no genuine dispute of material fact for a jury to resolve. As the purely legal predicate was met for a finding in the trustee's favor, the bankruptcy court issued a final order of summary judgment against EBIA. It found EBIA liable for the return of nearly $375,000 to Bellingham's bankruptcy estate.

EBIA appealed this order to the district court. Because this was a ruling on legal arguments only, the district court conducted a complete, "de novo" review, just as if the motion for summary judgment had been lodged initially in the district court. After a thorough review of the parties' legal arguments, the district court agreed with the bankruptcy court that there was no genuine dispute of material fact and the trustee was entitled to judgment as a matter of law.

After EBIA lodged its appeal in the Ninth Circuit and had filed its brief, it made a new argument for the first time: The Supreme Court had just issued its opinion in *Stern v. Marshall,* 131 S. Ct. 2594 (2011), holding that bankruptcy courts lack constitutional authority to enter final judgments in certain cases by trustees seeking to recover value from noncreditor third parties. EBIA applied this ruling to its case, asserting that the bankruptcy court lacked constitutional authority to enter final summary judgment against EBIA, and therefore the bankruptcy court's order must be reversed.

The Ninth Circuit agreed that bankruptcy courts lack constitutional authority to render final judgments in fraudulent conveyance cases such as this one after *Stern,* but it nonetheless affirmed the bankruptcy court's judgment on two alternative grounds.

First, even if the bankruptcy court lacked constitutional authority to render a final judgment, the Ninth Circuit held that the bankruptcy court's ruling could be regarded as a proposal for conclusions of law by the district court, which clearly does have constitutional authority to enter judgment against EBIA. Though the governing statute authorizes bankruptcy courts only to "hear and determine" cases like this one, 28 U.S.C. § 157(c)(1), the Ninth Circuit reviewed the objective of this statute and concluded that "the power to 'hear and determine' a proceeding surely encompasses the power to hear the proceedings and submit proposed findings of fact and conclusions of law to the district court." In other words, the greater power to "hear and determine" must be interpreted to include "the more modest power to submit findings of fact and recommendations of law to the district courts." This becomes clear upon consideration of Congress's desire to vest the bankruptcy courts with "as much adjudicatory power as the Constitution will bear."

Second, the Ninth Circuit established that parties may waive objections to the lack of constitutional authority of a bankruptcy court, and EBIA had done just this by impliedly consenting to the bankruptcy court's entry of summary judgment. Quoting the Supreme Court's discussion in *CFTC v. Schor,* 478 U.S. 833 (1986), the Ninth Circuit pointed out that the constitutional protection at issue here "serves to protect primarily personal, rather than structural, interests," so the parties may waive their personal right to "an impartial and independent federal adjudication."

EBIA had not expressly consented to the bankruptcy court's entry of judgment, but the Ninth Circuit concluded that "EBIA's conduct bore considerable indicia of consent." EBIA failed to object to the joint status report on further proceedings in the bankruptcy court, and it did not pursue a hearing on its motion in the district court. And when it appealed the bankruptcy court's summary judgment order, EBIA did not object on the grounds that the bankruptcy court lacked constitutional authority to enter such an order; indeed, EBIA first raised that contention midway through proceedings in the next stage of its appeal, before the Ninth Circuit. Though the Supreme Court's final word on the issue in *Stern* came out only in mid-2011, the notion of infirmities in the constitutional authority of bankruptcy courts had been the center of a long debate that was or should have been well known to litigants like EBIA. "Because EBIA waited so long to object, and in light of its litigation tactics," the Ninth Circuit resolved, "we have little difficulty concluding that EBIA impliedly consented to the bankruptcy court's jurisdiction."

## CASE ANALYSIS

This case is the latest installment of a dispute that has raged since Congress reformed the U.S. bankruptcy system in 1978. The issues in this case lie at the periphery of that dispute, but to understand this case, a bit of background is necessary.

To bring all disputes related to bankruptcy cases before one centralized forum, Congress in 1978 established a new system of bankruptcy courts as "adjuncts" to the district court in each federal district. These new bankruptcy courts had expanded jurisdiction over all disputes arising in the context of a bankruptcy case, including state law disputes with third parties whose only relationship with federal law or a bankruptcy case was being sued by a bankruptcy trustee to bring value into a bankruptcy estate. Unlike "regular" federal judges, however, the judges of these new bankruptcy courts would be appointed by the president for a limited term of years.

Shortly after the implementation of this new structure, a third-party defendant in a state law contract dispute challenged the constitutionality of its being haled before an "adjunct" bankruptcy court rather than a full-fledged federal district court. It observed that, under Article III of the U.S. Constitution, the judicial power of the United States is to be exercised only by courts with judges protected from political influence by life tenure and a salary that cannot be reduced. These new bankruptcy judges enjoyed no such protections, so assigning them the power to enter final, federal judgments violated Article III of the Constitution. Ultimately, the Supreme Court agreed, holding the new bankruptcy jurisdiction structure unconstitutional

in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982).

Congress could have fixed this problem simply by giving bankruptcy judges the same Article III protections as district judges, but for largely political reasons, it did not. Instead, Congress essentially adopted by statute the emergency fix implemented by the courts of appeals in response to the *Northern Pipeline* case. It reassigned responsibility for appointing bankruptcy judges to the courts of appeals, and it vested all authority over bankruptcy-related disputes to the Article III district courts, who were then invited to refer these matters to their related bankruptcy court "units," with two levels of authority.

As to matters at the "core" of bankruptcy adjudication (such as claims administration, collection of value into the estate, and distribution of that value among creditors), the bankruptcy courts had the power to "hear and determine" disputes. 28 U.S.C. § 157(b). The district courts would sit as courts of first appeal on such cases, with a second round of appeal going to the courts of appeals. For matters like the one in the *Northern Pipeline* case, in contrast, involving "non-core" disputes related to a bankruptcy case only by virtue of the identity of the trustee-plaintiff, Congress adopted an analogue to the magistrate system: the bankruptcy court "units" would be limited to assisting the district courts by conducting preparatory proceedings and making proposed findings of fact and conclusions of law. 28 U.S.C. § 157(c). On these "non-core" matters, only the Article III district courts would have the power to enter final judgments.

Academics and other observers immediately began to question the efficacy of this supposed fix. It remained unclear on what solid, constitutional basis non-Article III courts were empowered to enter final judgment on any issue, core or not. But in the absence of further challenges making their way to the Supreme Court, the system continued to function relatively smoothly.

This all changed with the Supreme Court's blockbuster ruling in *Stern v. Marshall*. In that case, Pierce Marshall had submitted a claim for defamation in the bankruptcy case of Vickie Lynn Marshall (a.k.a. Anna Nicole Smith). Vickie responded by counterclaiming against Pierce for tortious interference with an expected $400 million inheritance from her late husband. While Pierce confirmed that he was "happy to litigate [his defamation] claim" in the bankruptcy court, he immediately and repeatedly asserted that the bankruptcy court lacked authority to enter a final judgment on Vickie's counterclaim.

The Supreme Court agreed, echoing the ruling of three decades earlier in *Northern Pipeline*. Even though Vickie's counterclaim was within the statutory "core" bankruptcy jurisdiction, the bankruptcy court lacked constitutional authority to exercise the Article III judicial power of the United States in entering a final judgment on such a claim. Unless Vickie's counterclaim would be "completely resolved in the bankruptcy process of allowing or disallowing" Pierce's claims, Vickie's claim required an exercise of the Article III judicial power. And since Pierce's claims had been resolved in Vickie's favor by summary judgment several months earlier, all that remained was the simple exercise of judicial authority by the non-Article III bankruptcy court over Vickie's claim. The Court held that the Constitution forbids this.

Now in *Arkison,* the two most important practical responses to *Stern* are taken up: Accepting that bankruptcy courts lack constitutional authority to enter final judgments in cases like this, can the litigants nonetheless consent to entry of judgment by the bankruptcy court, or is this a structural protection issue that cannot be waived by individual parties? And if the parties are unwilling or unable to waive the constitutional defect, can the bankruptcy courts treat these "core" matters as if they were "non-core" and submit proposed findings of fact and conclusions of law to the district courts, despite the fact that the bankruptcy jurisdiction statute does not provide for cases like this, that are "core but unconstitutional under *Stern*"? This case has been closely followed by the bankruptcy community, as the implications of a "no" response to each of these questions would be far-reaching and extraordinarily disruptive.

*Consent*

EBIA seizes on and extrapolates from the rhetoric of *Stern* in the light of selected passages from *CFTC v. Schor*. EBIA recalls a passage from *Schor* in which the Court warned that "[t]o the extent that this structural principle [of separation of powers protections in Article III] is implicated in a given case, the parties cannot by consent cure the constitutional difficulty" because "the limitations [of Article III] serve institutional interests that the parties cannot be expected to protect." EBIA posits that *Stern* "conclusively established that [the "core" bankruptcy jurisdiction statute] violates the structural, separation-of-powers component of Article III," because the *Stern* Court characterized the bankruptcy courts' exercise of the judicial power of the United States as a separation-of-powers issue. This implicates not simply a violation of individual rights, but broader, structural concerns related to the relationship among Congress, the president, and the courts. As the Court warned in *Schor,* no individual litigant could be allowed to consent to such a violation of the separation of powers.

Arkison rejects EBIA's position as "a profound misreading of *Stern*" and further contends that "EBIA misreads *Schor* and misunderstands the separation of powers doctrine." EBIA's selective, out-of-context quotations from *Schor* and *Stern* misrepresent the governing principles. Not every transgression of Article III implicates profound, structural concerns relating to the separation of powers, Arkison asserts. Rather, as *Schor* established, Article III's protections are "primarily personal, and hence waivable." Only in some, but certainly not all, cases might an Article III violation implicate nonwaivable structural separation-of-powers concerns. EBIA's quotation from *Schor* was preceded by crucial context, a discussion of the kinds of circumstances that would trigger such concerns: "congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts." This is the kind of *structural* problem to which the separation of powers doctrine might respond, the *Schor* Court explained, "preventing the encroachment or aggrandizement of one branch at the expense of the other."

This case, and the bankruptcy jurisdiction scheme in general, presents no such concerns, Arkison submits. The constitutional district courts are not "emasculated" by the bankruptcy courts, as the latter operate only by reference of matters from the district courts, entirely

under the district courts' control, and subject to the district courts' review. And, according to Arkison, there is no "encroachment or aggrandizement" of the legislative or executive branch at the expense of the judicial branch here. Bankruptcy judges are appointed by panels of Article III appellate judges, and they operate only by reference of matters from Article III district courts. "Wholly intra-Article III regimes [like the bankruptcy court structure] thus do not even implicate *Schor*'s encroachment concerns," Arkison reasons.

Indeed, given the explicit parallel between the magistrate system and the bankruptcy court system, Arkison relies heavily on recent Supreme Court precedent approving of the consensual exercise of judicial power by non-Article III magistrates. The Court long ago established that, in magistrates' conduct of voir dire and exercise of other aspects of federal judicial power, "no such structural [separation-of-powers] protections are implicated." *Peretz v. U.S.,* 501 U.S. 923 (1991). More recently, the Court approved a magistrate judge's entry of final judgment with implied party consent, even when a procedural rule called for express, written consent. *Roell v. Withrow,* 538 U.S. 580 (2003). The parallel between *Roell* and this case is striking, and Arkison observes that "EBIA offers no argument to overrule *Roell*." While EBIA characterizes *Roell* as a simple statutory interpretation case, the constitutional Article III separation-of-powers implications of that case and a long line of other Supreme Court precedents are inescapable (and the Court in *Roell,* citing *Schor,* noted that the statute at issue was "meant to preserve … [the] right to insist on trial before an Article III judge"). Arkison and amici identify a parade of cases spanning from the 1800s to the present where the Court has countenanced consensual adjudication by non-Article III tribunals.

Even if consent is effective to waive Article III concerns, EBIA further contends that such consent should be at least explicit if not express. The Ninth Circuit's construction of implied consent in this case, EBIA argues, both misconstrues the meaning of EBIA's actions and renders the protections of Article III so easily waivable as to jeopardize the protections at issue. Rather than consenting to the bankruptcy court's authority to render judgment, EBIA explains that it was simply accepting what was the conclusive jurisprudence in the Ninth Circuit at the time; i.e., that even if bankruptcy courts could not hold jury trials, they were authorized to conduct pretrial proceedings, including the summary judgment hearing that ended in the judgment against EBIA. Objection would have been fruitless, EBIA argues, because it was already clear under governing Ninth Circuit precedent that the bankruptcy court was indeed authorized to do what it was doing. Only after the Supreme Court handed down its decision in *Stern* was the previous Ninth Circuit position reasonably assailable.

Arkison responds to EBIA's claimed lack of consent with unveiled derision, declaring "there is no serious argument that EBIA did not consent to proceeding in bankruptcy court on summary judgment." Arkison seizes on EBIA's denial that the fraudulent conveyance action in this case was a "core" matter; that is, EBIA was both aware of and, indeed, advanced the argument that the statute empowering bankruptcy courts to enter final judgments on fraudulent conveyance claims could not apply as written. For 30 years since *Northern Pipeline,* litigants like EBIA have been on clear notice that the jurisdictional scheme in bankruptcy is subject to constitutional concern, and they have had an obligation to object if they cared to challenge a bankruptcy court's exercise of authority over their cases. The defendant in *Stern* immediately and repeatedly voiced his objection to the bankruptcy court's entering judgment on the "core" counterclaim against him, despite the very same governing Ninth Circuit precedent. EBIA's choice not to oppose objectionable Ninth Circuit precedent was just that—a litigation strategy choice.

Not only that, EBIA ignored a clear procedural rule that called for EBIA to provide express consent—or to expressly withhold such consent—for the bankruptcy court to adjudicate its case. In light of *Northern Pipeline,* Bankruptcy Rule 7012 has long required litigants like EBIA to indicate whether they consent to the bankruptcy court's entry of final judgment on matters where "core" jurisdiction is denied, and EBIA remained silent in the face of this rule. If it had truly objected to the bankruptcy court's authority, it had an explicit obligation to withhold consent, and it did not. Finally, Arkison notes, knowing that the other parties were presenting a status report to the district court asking for a deferral of consideration of EBIA's jury trial motion and signaling impending summary judgment proceedings, EBIA again voiced no objection.

Arkison repeatedly characterizes EBIA's behavior here as "sandbagging" by furtively abiding an intent to object if the summary judgment ruling went against EBIA, but acquiescing in the bankruptcy court's proceedings so long as there was hope that the ruling would go in EBIA's favor. The Supreme Court has a long history of warning litigants against such "sandbagging" behavior, including ominous comments in *Stern* on the "particularly severe" consequences of litigant sandbagging exactly like this. A quote from *Stern* could apply in parallel fashion to this case: "If [EBIA] believed that the Bankruptcy Court lacked the authority to decide [the fraudulent conveyance] claim …, then [it] should have said so—and said so promptly."

*Recommendations in Lieu of Rulings*

Finally, if the Court finds that EBIA's consent was not effective to empower the bankruptcy court to render judgment, the district court conducted a thorough, ground-up review of the bankruptcy court's summary judgment ruling, with no deference to the lower court's findings or reasoning. If the district court could treat the bankruptcy court's judgment as a mere recommendation rather than a ruling, EBIA's appeal might still be rejected.

EBIA advocates a strict, textualist approach to the bankruptcy jurisdiction statute. It points out that the language of the statute provides for two and only two types of bankruptcy-related matters: "core" and "non-core." Only for "non-core" matters are bankruptcy courts allowed to submit "proposed findings of fact and conclusions of law." 28 U.S.C. § 157(c)(1). For "core" matters, like the fraudulent conveyance case involved here, the statute gives the bankruptcy courts authority to "hear and determine" such proceedings. 28 U.S.C. § 157(b)(1). The statute simply does not provide for matters that are "core" but for which the bankruptcy courts lack constitutional authority in light of *Stern* to "determine" such matters by entering final judgment.

Congress did not structure the statute bearing in mind the notion of "core but unconstitutional" matters, such as the one at issue here, so the statute offers no clear answer to the question at hand. It is

unclear, EBIA asserts, what Congress would do if it were prompted to fix this problem. It would be improper for the Court to fill this statutory gap by attempting to guess what Congress would prefer. Invoking a phrase that appears often in Supreme Court jurisprudence, EBIA admonishes, "[t]he task of filling that 'gap'—or crafting a constitutional alternative to the existing partially unconstitutional framework—belongs to Congress, not the courts."

Arkison contends that the supposed statutory gap arises from an overly restrictive view of the statute, an approach that "has been roundly rejected and subjected to withering academic treatment." The only logical way to respond to *Stern*'s prohibition of entry of final judgment on "core" matters is to do what most all district courts have been doing since *Stern;* that is, treat "core but unconstitutional" matters as "non-core." This is exactly the approach taken by Congress in crafting the bankruptcy jurisdiction statute: put any and all matters of constitutional concern in a category where an Article III district court will render final judgment, but keep the bankruptcy courts on the front lines of all proceedings "related to" a bankruptcy case by allowing them to submit proposed rulings to the district courts.

Setting aside logic and expediency, however, Arkison eliminates the problem by reading the statute as not creating a gap at all. For "non-core" matters, the statute directs that the bankruptcy court "shall" submit proposed rulings to the district court. 28 U.S.C. § 157(c)(1). With respect to "core" matters, in contrast, the statute uses not limiting, but empowering language: The bankruptcy court "may" hear and determine core matters "and may enter appropriate orders and judgments." 28 U.S.C. § 157(b)(1). Bankruptcy courts are not required to enter final judgments in core matters, Arkison reasons, but they "may" do so. And if the court "may hear and determine" a matter, in addition to "may enter appropriate orders and judgments," then to avoid reading a redundancy into the statute, the bankruptcy court might well "hear and determine" a matter without rendering "appropriate orders and judgments"; rather, it might simply propose rulings to the district court for entry of a final order. Arkison concludes that "a contrary holding would be absurd."

## SIGNIFICANCE

After *Stern,* this is the most hotly anticipated and closely monitored bankruptcy case in recent memory. The esteemed American College of Bankruptcy notes in its amicus brief that it "is filing its first-ever amicus brief in this case because the referral of *Stern* claims to bankruptcy judges with litigant consent is essential to the effective and efficient administration of bankruptcy cases." It warns that a ruling barring litigant consent to bankruptcy court jurisdiction "will throw the bankruptcy system into disarray, as well as cast doubt on the constitutionality of the magistrate system and other well-established schemes for consensual referrals to non-Article III adjudicators." The district courts are already significantly overburdened with other matters, so requiring them to administer all "core but unconstitutional" matters would impose a very significant burden and likely very serious delays in a system where time is especially of the essence.

On the other hand, defendants like EBIA are already entitled to demand that their cases be tried by jury before a district court. Defendants are already commonly employing scorched-earth defense tactics such as demanding that an Article III district court conduct a jury trial and enter any final orders in the case. It is an open empirical question whether consent would commonly be forthcoming in cases where defendants can withhold consent, and one suspects that savvy defendants will *not* cooperate in making the cases against them more "efficient and effective." Had EBIA proceeded as Pierce Marshall did in *Stern* and insisted upon the district court's resolving the claims against it, the same sort of disruption that the American College of Bankruptcy warns against would have occurred and will continue to occur until Congress fixes the constitutional problem with non-Article III bankruptcy judges. EBIA itself suggests repeatedly that Congress could simply confer Article III status on bankruptcy judges, though political deadlock will doubtless prevent this from happening.

The greatest potential for pernicious consequences here lies in the second, seemingly innocuous question of whether the statute allows bankruptcy courts to issue recommended rulings in cases like these for district court confirmation. Savvy defendants will continue to insist upon the inefficient bifurcation of their cases between the bankruptcy and district courts as a litigation tactic—increase cost and inefficiency for bankruptcy trustees, and settlement will come much more swiftly and much more cheaply. But as EBIA's case illustrates, the ill effects of this tactic can be mitigated by at least allowing the bankruptcy court to conduct preliminary proceedings, up to and including the preparation of a recommended summary judgment order (obviating the inefficiency of a trial). If the district court need only review the ground already prepared by the bankruptcy court, inefficiency can be vastly reduced.

If the Court reads the bankruptcy jurisdiction statute as restrictively as EBIA does, however, this will all but bring to a halt the orderly administration of "core but unconstitutional" disputes in bankruptcy cases. The district courts simply do not have the resources to address in the first instance all of the issues that arise in cases like EBIA's fraudulent conveyance dispute. Such actions are extremely common and numerous, quite complex, and aggressively litigated, often by sophisticated counsel. Without the assistance of the bankruptcy courts, the district courts will be practically unable to administer the avalanche of these cases with anything resembling timeliness. This will inevitably lead to lost opportunities for recovery of value, like the $375,000 fraudulently conveyed to EBIA in Bellingham's case, and smaller recoveries for the creditors who depend on the bankruptcy system to protect their collective interests. Ultimately, the very purpose of the bankruptcy system would be undermined, and again, we can hardly anticipate an effective response from Congress to fix the problem.

The Court in *Stern* attempted to assuage the concerns of the bankruptcy community by assuring that its decision was "narrow" and did not "meaningfully change[] the division of labor in the current statute" between bankruptcy and district courts. The Court has the opportunity in this case either to confirm its assurances by accepting the lower courts' current, pragmatic solution to the *Stern* problem, or to reintroduce the kind of mass chaos that followed its *Northern Pipeline* decision three decades ago. This case has enormous systemic significance.