By Douglas N. Candeub

New Rules Amendments Would Excise Mention of Core or Noncore

Like a slow train coming around the bend,[1] last year's *Stern v. Marshall*[2] ruling—the U.S. Supreme Court's long-awaited scrutiny of Congress's 1984 fix to the part of the Bankruptcy Reform Act of 1978 that the Court held unconstitutional in *Marathon Pipe Line*[3]—has shaken the ground of bankruptcy litigation. To be sure, the level of disruption caused by *Stern v. Marshall* has been—and remains—a subject of great debate, with the "narrow" camp and the "broad" camp staking out their competing views. But the evidence of a widespread impact from *Stern* is unmistakable. Now a set of revisions to the Federal Rules of Bankruptcy Procedure is being proposed in an effort to remedy a fissure exploded by *Stern*.

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Section 157 and the Core/Noncore Distinction

The starting point for the remedying the fissure is § 157 of the Judicial Code, the principal statutory provision governing bankruptcy court authority in relation to the district court.[4] Congress enacted it in response to the Supreme Court's determination in *Marathon* that Congress's broad grant of adjudicatory authority to the bankruptcy courts exceeded what Article III permits. In the 1984 Amendments, Congress attempted to describe the set of matters over which bankruptcy courts would have full adjudicatory authority, labeling them "core proceedings."[5]

Unfortunately, Congress did not describe this group of matters very well. Core proceedings are defined indirectly in the statute in two ways. First, in § 157(b)(1), Congress indicated, without directly stating, that for a proceeding to be "core," it must have either arisen *under* the Bankruptcy Code or arisen *in* a bankruptcy case.[6]

Second, in § 157(b)(2), Congress provided a nonexhaustive list of 15 different types of matters that constitute "core proceedings." Two of the items on this list—subsections (A) and (O)—are broad and somewhat vague, and have been referred to as "catch-all" provisions.[7] But the broad catch-alls have been subjected to a judicial gloss that has effectively limited them to matters that fall within Article III's limits.[8] As *Stern* showed, some of the more definite items on the § 157(b)(2) list are the most problematic because they are not as readily subject to a limiting interpretation.

Stern v. Marshall in a Nutshell

In *Stern*, the first level of the dispute was statutory construction: whether Vickie Marshall's counterclaim against Pierce Marshall had to be treated as a "core proceeding" under § 157(b)(2). The Court declined to add a judicial gloss to § 157(b) that could limit the treatment of counterclaims in the manner that the courts had handled the catch-all provisions. Instead, the Court ruled that the plain text compelled characterizing the counterclaim as a "core proceeding," thus forcing the constitutional question.[9]

The Court ruled too that neither the filing of Pierce Marshall's complaint nor of his proof of claim constituted consent to having the bankruptcy court render final judgment on Vickie Marshall's counterclaim.[10] That conclusion altered prior assumptions about the effect of filing a proof of claim. The Court then held that it was a violation of Article III of the Constitution for the bankruptcy court—a court whose judges lack life tenure and protected salaries—to exercise full adjudicatory authority over Vickie Marshall's state law counterclaim against Pierce Marshall.[11]

Stern's Effect on the Core/Noncore Distinction

Since *Stern v. Marshall*, bankruptcy courts and district courts have seen a relative flood of motions arguing that the bankruptcy court lacks authority to

1 *See* B. Dylan, "Slow Train" (1979) ("[M]an's...laws are outdated, they don't apply no more/you can't rely no more.").
2 131 S.Ct. 2594 (2011).
3 *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The Court's judgment was reflected in a plurality opinion by Justice William Brennan and an opinion concurring in the judgment by Justice William Rehnquist.
4 28 U.S.C. § 157. It was contained in the Bankruptcy Amendments and Federal Judgeship Act of 1984.
5 28 U.S.C. § 157(b). The term "core" was based on a phrase used in the plurality opinion in *Marathon* in discussing the "public rights doctrine," a doctrine that until then had remained in quiet obscurity for decades. 458 U.S. at 71.
6 28 U.S.C. § 157(b)(1). Cf. 28 U.S.C. § 157(c)(1) (if proceeding is only "otherwise related to a case under title 11," then it is noncore). A clause in the mandatory abstention provision in § 1334, with similar language about claims "related to" a bankruptcy case, "but not arising under title 11 or arising in a case under title 11," is consistently construed as referring to a noncore matter. 28 U.S.C. § 1334(c)(2). *See, e.g., Stoe v. Flaherty*, 436 F.3d 209, 213 (3d Cir. 2006).
7 28 U.S.C. § 157(b)(2)(A) and (O). *See, e.g., In re Castlerock Properties*, 781 F.2d 159, 161 (9th Cir. 1986) (describing (A) and (O) as catch-alls).
8 *See, e.g., In re Wood*, 825 F.2d 90 (5th Cir. 1987). To keep § 157 from running afoul of Article III, courts widely followed Judge Wisdom's judicial gloss on "core" determinations in *Wood*, whereby a claim can only be deemed core if (1) it invokes a substantive right provided by title 11 or (2) if it is a proceeding that *by its nature could arise only* in the context of a bankruptcy case. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1144-45 (6th Cir. 1991); *Beard v. Braunstein*, 914 F.2d 434, 444 (3d Cir. 1990); *Wood*, 825 F.2d at 97.
9 131 S.Ct. at 2605.
10 *Id.* at 2614.
11 *Id.* at 2616-20.

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