FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared using a 14-point, proportionally spaced font and that, based on word processing software, this brief contains 6,889 words.

/s/ Sarang V. Damle
Attorney for the United States

CERTIFICATE OF SERVICE

I certify that on January 19, 2012, I served the foregoing Brief for the United States as amicus curiae by electronically filing the brief with the Court. As all counsel of record are registered with the Court's Electronic Case Filing System, the electronic filing of this brief constitutes service upon them.

/s/ Sarang V. Damle
Attorney for the United States

Exhibit 9

Case No. 11-35162

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: BELLINGHAM INSURANCE AGENCY, INC., Debtor

EXECUTIVE BENEFITS INSURANCE AGENCY,

Appellant,

v.

PETER H. ARKINSON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,

Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 2:10-cv-00929, Adversary Proceeding No. 08-1132

BRIEF OF *AMICUS CURIAE* MARCIA M. TINGLEY IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS[1]

Amicus curiae Marcia Tingley is one of thousands of named defendants in a set of fraudulent conveyance actions arising out of the *Tribune Newspapers* bankruptcies. In one those actions, a bankruptcy creditors committee has sued almost all public shareholders of the Tribune Companies, many of whom did no more than receive cash-out consideration when the Tribune was taken over in a leveraged buyout. That suit is pending in bankruptcy court. Ms. Tingley is individually named as a defendant in that action, although she was never a creditor of the Tribune Companies. She inherited Tribune Company stock from her father, a long-time *Tribune Newspapers* employee.

Additionally, the bankruptcy court has permitted bond trustees who are creditors of the Tribune Companies to bring fraudulent conveyance actions in over thirty states, all of which are now pending in federal district courts. Ms. Tingley has been named in one of those lawsuits (in the District of Massachusetts), where the plaintiff bond trustees have purported to make Ms. Tingley an involuntary defendant class representative.

Accordingly, Ms. Tingley has an interest in seeing that the law regarding whether, and to what extent, fraudulent conveyance actions can be heard by

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae and her counsel made a monetary contribution intended to fund the preparation or submission of this brief.

bankruptcy courts is developed properly. She submits this brief in response to this Court's Order inviting the views of amicus curiae.

SUMMARY OF ARGUMENT

In *Stern v. Marshall*, the Supreme Court made clear that a bankruptcy court's exercise of authority must comport with both statutory and constitutional grants of authority. In particular, the Court held that entry of final judgment on a cause of action designated as "core" by the Judicial Code may nevertheless violate Article III. Rather than relying on a proceeding's statutory label as "core" or "non-core," a court must independently analyze the requirements of Article III in every case to ensure that, in addition to statutory authority, bankruptcy courts have constitutional authority to act.

This Court's request for further briefing identifies two of the most significant questions that have arisen in *Stern*'s wake: Whether an action to avoid a fraudulent conveyance is one that a bankruptcy court can finally determine? And what authority do bankruptcy courts retain in "core" proceedings in which they may no longer enter final judgments? Amicus submits that, under the logic of *Stern*, bankruptcy courts lack constitutional authority to enter final judgment on a cause of action for fraudulent conveyance, at least where affirmative recovery is demanded from a non-creditor. Moreover, because the authority to issue proposed findings of fact and conclusions of law is confined by statute to non-core

proceedings, and fraudulent conveyance actions are clearly designated as "core" proceedings, the bankruptcy courts lack statutory authority to submit a report and recommendation to the district court in lieu of entering a final judgment.

Stern holds that bankruptcy courts may not enter final judgment on matters of private right. The Supreme Court has twice recognized that a fraudulent conveyance action, like the state law counterclaim at issue in *Stern*, is a matter of private right. The entry of final judgment on a fraudulent conveyance action against a non-creditor is therefore an exercise of judicial power subject to Article III and cannot be performed by bankruptcy judges.

Even where a fraudulent conveyance action is brought in response to a creditor's proof of claim, the bankruptcy courts' authority to award affirmative relief against the creditor is limited. Because the bankruptcy court below entered final judgment on a fraudulent conveyance action against a non-creditor, the judgment below must be vacated and this Court need not consider when, if ever, the bankruptcy courts may in effect rule on a fraudulent conveyance action via a ruling in a claim allowance process.

Where a bankruptcy court lacks constitutional authority to enter final judgment on a so-called "core" proceeding, it also lacks statutory authority to submit a report and recommendation. The bankruptcy courts' statutory authority to submit a report and recommendation is expressly limited to non-core

proceedings. Contrary to the suggestion of some amici, the principle of "severability" does not permit the Court to redesignate a fraudulent conveyance action as a non-core proceeding. A bankruptcy court's inability to enter final judgment in a core proceeding does not render the proceeding non-core. That result could be obtained only through rewriting the statute. Nor does the authority to "hear" a core proceeding include the authority to issue a statutory report and recommendation. Because fraudulent conveyance actions are plainly designated as "core" by statute, bankruptcy courts lack statutory authority to submit a report and recommendation with respect to such actions in lieu of entering a final judgment.

Finally, permitting bankruptcy judges to conduct, and submit a report and recommendation on, the final hearing on the merits would raise additional constitutional concerns. Because the question can be resolved on narrow statutory grounds, however, this Court need not address the constitutionality of the report-and-recommendation scheme with respect to final evidentiary merits hearings.

ARGUMENT

I. Article III Precludes Bankruptcy Courts From Entering Final Judgment On Causes Of Action For Fraudulent Conveyance At Least Against Non-Creditors

A cause of action by one private individual against another, historically resolved by judicial officers, is a matter of private right. Entering final judgment on a private right is an exercise of "judicial power" reserved for Article III courts.

The Supreme Court has identified fraudulent conveyance actions as private rights. Where, as here, such an action is asserted against a non-creditor, the entry of final judgment by a bankruptcy court violates Article III.

A. Article III Protection Attaches to Private Rights of Action Resembling Those Traditionally Heard by Judicial Officers

1. *Stern v. Marshall* holds that entering final judgment on causes of action historically existing independent of legislative grace or any agency regulatory regime is an exercise of "judicial power" committed to Article III courts

In *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the Supreme Court drew a clear distinction between matters of "public right" subject to determination by non-Article III courts, and matters of "private right" that must be decided by Article III judges. Public rights originally included only certain cases "arising 'between the Government and persons subject to its authority.'" *Id.* at 2612 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). Where the federal government waives its right to sovereign immunity, or similarly delegates to a non-Article III court "'matters that historically could have been determined exclusively by'" the Legislative or Executive Branches, it creates rights of action "that can be pursued only by grace of" those branches. *Id.* at 2612, 2614 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion)). Congress may, therefore, assign the adjudication of such matters to non-Article III courts. *Id.* at 2612.

Although several cases extended the public rights doctrine beyond suits to which the government is a party, *Stern* confirmed that the exception remains narrow. Where the government is not a party, *Stern* explained, the Supreme Court has "limit[ed] the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." *Id.* at 2613. Certain matters adjudicated by administrative agencies have thus been treated as public rights. *Id.* at 2613-14 (discussing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986)). But "it is still the case," *Stern* declared, "that what makes a right 'public' rather than private is that the right is integrally related to a particular federal government action." *Id.* at 2613.

Matters of private right, by contrast, involve "'the liability of one individual to another under the law as defined,'" *id.* at 2612 (quoting *Crowell*, 285 U.S. at 51), and include suits "made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *id.* at 2609 (internal quotation marks omitted). In *Stern*, the Court held that a common law counterclaim was a private right. *See id.* at 2614-15.

Full Article III protection attaches to private rights, as their resolution requires the exercise of "judicial power" reserved to judges who enjoy tenure

during good behavior and salary protection. Unlike public rights, "Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Id.* at 2612 (internal quotation marks omitted). In *Stern*, the Court declared that "entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime" – *i.e.*, entry of judgment on a private right – is "the most prototypical exercise of judicial power." *Id.* at 2615. The Court thus held that, by entering final judgment on a common law counterclaim, the bankruptcy court exercised the judicial power of the United States in violation of Article III. *Id.* at 2620.

2. Article III applies even if a cause of action is properly characterized as a "core" bankruptcy proceeding by statute

The Judicial Code vests the bankruptcy courts with authority to "hear and determine" certain proceedings designated as "core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1)-(2). In non-core proceedings, the bankruptcy court's authority is limited to submitting proposed findings of fact and conclusions of law to the district court, which retains ultimate authority to decided the matter. *Id.* § 157(c).

The statute's division of authority between the bankruptcy courts and the district courts is a direct consequence of the Supreme Court's decision in *Northern*

Pipeline, which held unconstitutional the Bankruptcy Act of 1978. 458 U.S. at 87 (plurality opinion); *id.* at 92 (Rehnquist, J., concurring in judgment). The *Northern Pipeline* plurality distinguished between the "restructuring of the debtor-creditor relations, which is *at the core* of the federal bankruptcy power," and adjudicating private right actions that merely seek to augment the bankruptcy estate. *Id.* at 71 (plurality opinion) (emphasis added). Congress responded by revising the Judicial Code to permit bankruptcy courts to enter final judgments only in "core" proceedings as defined by the statute. *See* 28 U.S.C. § 157(b); *Stern*, 131 S. Ct. at 2610.

In *Stern*, the Court for the first time held that entry of a final judgment in a "core" proceeding nevertheless violated Article III. 131 S. Ct. at 2608. The Court held that the common law counterclaim at issue was "core" under 28 U.S.C. § 157(b)(2)(C), and that the bankruptcy court had statutory authority to enter final judgment on that counterclaim. *Id.* By exercising that statutory authority, however, the bankruptcy court violated Article III of the Constitution. *Id. Stern* thus demonstrates that, in revising bankruptcy courts' authority, Congress failed to cure all of the constitutional deficiencies identified in *Northern Pipeline*.

B. A Cause of Action for Fraudulent Conveyance Is a "Private Right" Entitled to the Full Protections of Article III

The Supreme Court has recognized that a cause of action for fraudulent conveyance is a matter of private right. After *Stern*, it is clear that entering final

judgment on such an action – at least where it is not resolved in ruling on a creditor's proof of claim – is an exercise of judicial power committed to Article III courts. Because the bankruptcy court, and not an Article III court, entered judgment on the trustee's fraudulent conveyance action, the judgment below must be vacated.[2]

This Court's decision in *In re Mankin*, 823 F.2d 1296 (9th Cir. 1987), which held that the bankruptcy courts have authority to decide fraudulent conveyance actions, has been overruled by the Supreme Court's intervening decisions in *Stern* and *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989). In *Mankin*, this Court concluded that Article III was satisfied because "the rationale underlying the public rights doctrine has at least some applicability" to fraudulent conveyance proceedings, *id.* at 1307-08, and, "to the extent that the right at issue here might not be considered a congressionally created public right," the appointment of

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[2] The trustee brought claims for fraudulent conveyance under 11 U.S.C. §§ 548(a) and 544. Although the trustee also asserted fraudulent preference claims under 11 U.S.C. § 547, he did not seek, and the bankruptcy court did not grant, summary judgment on those claims. *See* Pl.'s Mem. in Supp. of Mot. for Summ. J. at 13, Adversary No. 08-1132 (Bankr. W.D. Wash. Mar. 17, 2010); Appellant's Excerpts of Record 28-29.

The trustee's state law claim for successor liability cannot provide an independent basis for upholding the bankruptcy court's entry of final judgment. Even before *Stern*, courts routinely held that such claims are not "core." *See, e.g.*, *In re Freeway Foods of Greensboro, Inc.*, 449 B.R. 860, 876 (Bankr. M.D.N.C. 2011); *In re H. King & Assocs.*, 295 B.R. 246, 259 (Bankr. N.D. Ill. 2003).

bankruptcy judges by Article III judges was sufficient to "ensure[] compliance with Article III." *Id.* at 1309-10.

The Supreme Court has since rejected each prong of *Mankin*'s reasoning. The Supreme Court has held that bankruptcy courts may enter final judgment only on matters of public right, *see* Section I.A.1, *supra*, and further concluded that fraudulent conveyance actions are matters of private right. Finally, the Court has made clear that the appointment and supervision of bankruptcy judges by Article III courts does not satisfy the demands of Article III. Because *Mankin* cannot be reconciled with the Supreme Court's intervening decisions in *Stern* and *Granfinanciera*, this Court should reject *Mankin* as having been effectively overruled. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

1. The Supreme Court's decisions in *Stern* and *Granfinanciera* establish that fraudulent conveyance actions are matters of "private right"

The Supreme Court has already concluded, in both *Stern* and *Granfinanciera*, that a fraudulent conveyance action is a private right. Moreover, both decisions recognized that, as a private right, such an action can be determined only by Article III courts.

Although the question in *Granfinanciera* was whether a Seventh Amendment right to a jury trial attaches to fraudulent conveyance actions, the Court relied on the same distinction between public and private rights that it

applies in its Article III jurisprudence. *See* 492 U.S. at 53. The Court observed that "[t]here can be little doubt that fraudulent conveyance actions by bankruptcy trustees ... are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56. The Court thus concluded that "a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private right rather than a public right as we have used those terms in our Article III decisions." *Id.* at 55.

In *Stern*, the Court relied on *Granfinanciera*'s analysis to conclude that a state law counterclaim was a matter of private right. In doing so, the Court likened the counterclaim to the fraudulent conveyance claim at issue in *Granfinanciera*, observing that neither fell "within any of the varied formulations of the public rights exception in this Court's cases." *Stern*, 131 S. Ct. at 2614. In fact, *Stern* construed *Granfinanciera* as having already decided that full Article III protection attaches to fraudulent conveyance actions: "Our conclusion [in *Granfinanciera*] was that ... Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court." *Id.* at 2614 n.7.

2. The relationship between bankruptcy judges and Article III courts does not permit bankruptcy judges to enter final judgment on all fraudulent conveyance actions

Stern squarely rejected the argument that bankruptcy judges act as mere adjuncts of Article III courts when entering final judgments on matters of private right. Rather, by entering such final judgments, a bankruptcy court "exercises the essential attributes of judicial power." *Stern*, 131 S. Ct. at 2618. As a result, "a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed such an 'adjunct' of the court of appeals." *Id.* at 2619.[3]

Stern similarly rejected the argument, endorsed by this Court in *Mankin*, that the appointment of bankruptcy judges by Article III judges is somehow sufficient to satisfy the requirements of Article III. *See Mankin*, 823 F.2d at 1309 (finding "significant" that Congress placed "control over the employment of bankruptcy judges exclusively in the hands of Article III judges"). Instead, *Stern* unequivocally declared that "[i]t does not affect our analysis that … bankruptcy judges under the current Act are appointed by the Article III courts, rather than the President." 131 S. Ct. at 2619. When bankruptcy judges exercise the judicial

[3] It makes no difference that the bankruptcy court's order granting summary judgment was reviewed *de novo* rather than under a more deferential standard applicable to factual findings. By entering a final, binding judgment, "subject to review only if a party chooses to appeal," the bankruptcy court exercised "the essential attributes of judicial power that are reserved to Article III courts." *Stern*, 131 S. Ct. at 2619 (brackets omitted).

power reserved to Article III courts, "it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remains." *Id.*

C. Even Where a Defendant Has Filed a Creditor's Proof of Claim, Bankruptcy Courts May Lack Authority to Award Affirmative Relief

The defendant in this case is a non-creditor that did not file a proof of claim against the bankruptcy estate. Accordingly, this Court need not decide potentially difficult questions concerning the bankruptcy courts' authority in fraudulent conveyance actions against a creditor who has asserted a proof of claim, or the effect of *Stern* and *Granfinanciera* on § 502(d) of the Bankruptcy Code.[4] It remains uncertain the extent to which a bankruptcy court may, under the guise of merely disallowing a proof of claim, effectively award affirmative relief against a creditor in a fraudulent conveyance action because of the preclusive effect of the claim allowance ruling.

The Supreme Court has provided little guidance on this question. In *Stern*, the Court observed that, despite some overlap between the creditor's counterclaim and the debtor's proof of claim, "there was never any reason to believe that the process of adjudicating [the] proof of claim would *necessarily resolve* [the]

[4] Section 502(d) requires bankruptcy courts to disallow *any* proof of claim by a creditor that received a fraudulent transfer until the amount of the fraudulent transfer is repaid. *See* 11 U.S.C. § 502(d).

counterclaim." *Id.* at 2617 (emphasis added). The Court thus held that the bankruptcy court's authority to decide the proof of claim did not include authority to resolve the counterclaim. *Id.* at 2620. Although the Supreme Court's preference decisions have approved of awards of affirmative relief against a creditor in some circumstances, those decisions, as the Court emphasized in *Stern*, "'intimated no opinion concerning whether'" the bankruptcy referee could decide "'a demand by the bankruptcy trustee for affirmative relief, all of the substantial factual and legal bases for which had not been disposed of in passing on objections to the creditor's proof of claim.'" *Id.* 2616-17 (brackets omitted) (quoting *Katchen v. Landy*, 382 U.S. 323, 333 n.9 (1966)).

In sum, even where a defendant files a proof of claim, the bankruptcy court's authority to consider a fraudulent conveyance claim may be limited. Congress certainly could not, for example, enact a statute that eviscerates *Stern* by incorporating adjudication of the bankruptcy estate's affirmative causes of action into the process of allowing or disallowing creditors' claims. In all events, because the defendant here was a non-creditor, the bankruptcy court plainly lacked authority to enter judgment on the trustee's fraudulent conveyance claim. This Court can (and should) specifically reserve resolution of more difficult questions.

II. Bankruptcy Courts Lack Statutory Authority To Propose Findings Of Fact And Conclusions Of Law In Lieu Of Entering Final Judgment In "Core" Proceedings

Because fraudulent conveyance actions are designated as "core" proceedings, bankruptcy courts have statutory authority to enter final judgments in such proceedings, but, for the reasons just explained, Article III prohibits bankruptcy courts from exercising that statutory authority in most cases. That constitutional limitation does not, however, eliminate Congress's designation of fraudulent conveyance actions as "core" proceedings. Because bankruptcy courts lack *statutory authority* to propose findings of fact and conclusions of law in actions denominated as "core" by statute, a bankruptcy court may not issue a report and recommendation in lieu of entering final judgment in a fraudulent conveyance action.

A. The Judicial Code Is Unambiguous and Does Not Permit the Use of Report and Recommendation in Proceedings that Are Denominated as "Core"

The bankruptcy courts' authority to propose findings of fact and conclusions of law – that is, to issue a report and recommendation to the district court – is confined by statute to actions that are "not a core proceeding." 28 U.S.C. § 157(c)(1). Notwithstanding that, after *Stern*, bankruptcy courts will often lack constitutional authority to enter final judgments on fraudulent conveyance actions, Congress has clearly denominated such actions as "core" proceedings. *Id.*

§ 157(b)(2)(H). Accordingly, as the Seventh Circuit – the only court of appeals to address the question – recently concluded, where a bankruptcy court can no longer decide a "core" proceeding after *Stern*, the statute does not permit the bankruptcy judge to issue a report and recommendation in lieu of entering final judgment. *See In re Ortiz*, Nos. 10-3465, 10-3466, 2011 WL 6880651, at *7 (7th Cir. Dec. 30, 2011) (refusing to construe final judgments as proposed findings of fact and conclusions of law because "the debtors' claims qualify as core proceedings and therefore do not fit under § 157(c)(1)").

The bankruptcy courts' statutory authority is governed by 28 U.S.C. § 157, which provides:

> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 ... and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to –
>
> ....
>
> (H) proceedings to determine, avoid, or recover fraudulent conveyances;
>
> ....
>
> (c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge

> after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

28 U.S.C. § 157. The statute clearly distinguishes between core and non-core proceedings, and a particular cause of action must fall within one category or the other. No claim may be in both categories. *See Stern*, 131 S. Ct. at 2605 (holding that "core" proceedings cannot also be "related to" proceedings).

The bankruptcy courts' authority to act in each category of proceeding is clearly delineated by statute. Bankruptcy courts may "hear and determine" and enter "appropriate orders and judgments" in core proceedings. 28 U.S.C. § 157(b)(1). In "a proceeding that is not a core proceeding," by contrast, bankruptcy courts are authorized to issue a report and recommendation, acting much like magistrate judges. *Id.* § 157(c). District courts are required to consider any such report and recommendation and review *de novo* matters to which a party objects. *Id.*

In *Stern*, the Supreme Court held that that 28 U.S.C. § 157(b) is unconstitutional as applied in certain circumstances to causes of action designated as "core" by statute. Bankruptcy courts may thus no longer "determine" (enter final judgment on) such actions without the parties' consent. *Stern* did not address, however, what authority bankruptcy courts retain over those "core" proceedings that they can no longer "determine."

Certain amici urge that the Supreme Court, in dicta, implicitly endorsed the view that bankruptcy courts may issue reports and recommendations in "core" proceedings that the courts lack constitutional authority to determine. *See* Br. of Professor S. Todd Brown et al. as *Amici Curiae* at 24 (Jan. 13, 2012); Br. of G. Eric Brunstad, Jr. as *Amicus Curiae* at 27 (Jan. 3, 2012). But these amici read too much into the Court's mere acknowledgement that the respondent had "not argued that the bankruptcy courts are barred from 'hearing' all counterclaims or proposing findings of fact and conclusions of law on those matters." *Stern*, 131 S. Ct. at 2620 (some internal quotation marks omitted). In fact, the question was not even relevant in *Stern* because of the case's peculiar procedural posture. Once it was determined that the bankruptcy court lacked authority to enter final judgment, a separate final judgment of a Texas state court acquired preclusive effect in any further bankruptcy proceedings, thus rendering moot the question whether the bankruptcy court might have exercised authority short of determining the case. *See id.* at 2602.

While *Stern* does not answer the question, the Supreme Court has, in other cases, provided substantial guidance that makes clear this Court may not rewrite the statute to designate fraudulent conveyance actions as non-core. "[W]hen confronting a constitutional flaw in a statute" courts should "limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320,

328 (2006). Courts should not "nullify more of a legislature's work than is necessary." *Id.* at 329. Furthermore, although legislative intent should guide the inquiry, courts are not "free to rewrite the statutory scheme in order to approximate what [they] think Congress might have wanted had it known that [a particular provision] was beyond its authority." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996); *see Ayotte*, 546 U.S. at 329 ("[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements, even as we strive to salvage it." (brackets and internal quotation marks omitted)). To the extent a provision is unaffected by the constitutional infirmity, it must be sustained unless it is evident that Congress would have preferred that the entire law be stricken. *See Ayotte*, 546 U.S. at 330 ("After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?").

Applied to the Judicial Code's bankruptcy provisions, the foregoing principles require holding only that bankruptcy courts may no longer "determine" and enter final judgments in certain "core" proceedings where doing so would violate Article III. A bankruptcy court may thus no longer "determine" this fraudulent conveyance action without the consent of the parties. Notably, however, the action remains designated as "core" under the statute. Congress did

not violate Article III by selecting that label. And as a core proceeding, it is excluded from the category of case in which the bankruptcy court may issue a report and recommendation. *See* 28 U.S.C. § 157(c)(1) (report and recommendation authorized in proceeding "that is not a core proceeding").

For that reason, the Seventh Circuit recently concluded that a bankruptcy court's final orders could not be construed as reports and recommendations. In *In re Ortiz*, the court of appeals held that state law counterclaims were "core" proceedings under 28 U.S.C. § 157 that the bankruptcy court nevertheless lacked authority to decide after *Stern*. 2011 WL 6880651, at *4. To determine its own appellate jurisdiction, the court then considered, among other possibilities, whether the bankruptcy court's final "orders should be considered ... proposed findings of fact and conclusions of law under 28 U.S.C. § 157(c)(1)." *Id.* at *3. The Seventh Circuit concluded that they could not. "For the bankruptcy judge's orders to function as proposed findings of fact or conclusions of law," the court explained, "we would have to hold that the debtors' complaints were 'not a core proceeding' but are 'otherwise related to a case under title 11.'" *Id.* at *7. Yet, as the court of appeals had "just concluded, the debtors' claims qualify as core proceedings and therefore do not fit under § 157(c)(1)." *Id.* Like the Seventh Circuit, this Court should adhere to the straightforward language of § 157.

Until Congress revisits § 157 in light of *Stern*, it is inappropriate for courts to attempt to rewrite the statute. Significantly, even after *Stern*, the subparagraph designating fraudulent conveyance actions as "core," is not a dead letter. *See* 28 U.S.C. § 157(b)(2)(H). Although the bankruptcy court may no longer finally "determine" fraudulent conveyance actions or enter "judgments" absent the parties' consent, it may still "hear" the case and "enter appropriate orders." *See* § 157(b)(1). The "core" designation thus empowers the bankruptcy court to enter pretrial orders on discovery issues and resolve other non-dispositive matters. There is no constitutional obstacle to bankruptcy judges exercising such authority, as demonstrated by similar provisions in the Federal Magistrates Act. *See* 28 U.S.C. § 636(b)(1)(A) (authorizing magistrate judges to "hear and determine" non-dispositive pretrial matters and permitting reconsideration by district court only "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law"); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1414-15 (9th Cir. 1991) (rejecting Article III challenge to magistrate judges' authority to hear and determine discovery matters). Because § 157(b)(2)(H) retains significance after *Stern*, the court cannot excise the provision; Congress's designation of fraudulent conveyance actions among enumerated "core" proceedings remains effective.

For this Court to remove fraudulent conveyance actions from the list of enumerated "core" proceedings merely because bankruptcy courts lack authority to

finally "determine" them over the parties' objection would impermissibly nullify more of the statute than is necessary. *See Ayotte*, 546 U.S. at 329. Several bankruptcy and district courts that have purported to remove fraudulent conveyance actions from "core" proceedings have done so in an impermissible attempt to effectuate their best guess of what Congress would have intended. *See In re Refco*, No. 05-60006, 2011 WL 5974532, at *9-10 (Bankr. S.D.N.Y. Nov. 30, 2011); *In re Mortgage Store, Inc.*, No. 11-00439, 2011 WL 5056990, at *6 (D. Haw. Oct. 5, 2011); *see also* Br. of G. Eric Brunstad, Jr. at 27-28 (arguing same). Although recognizing that "the Judicial Code and Bankruptcy Rules do not specifically contemplate bankruptcy courts issuing proposed finding of fact and conclusions of law in core matters," those courts take the view that Congress would have intended that offending actions be "removed" altogether from "core jurisdiction." *See Refco*, 2011 WL 5974532, at *9-10.[5]

[5] *Refco* and several amici, *see* Br. of S. Todd Brown et al. at 24; Br. of G. Eric Brunstad, Jr. at 27-28, also rely on dicta from *Stern* in which the Supreme Court observed that it did "not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute." 131 S. Ct. at 2620. Considered in context, it is apparent that the Court was referring to *removing the authority* of bankruptcy courts to "determine" certain "core" matters, not removing a category of cases from one subsection of the statute and placing it within another. Not surprisingly, the Court elsewhere in its opinion declared unequivocally that "Vickie's counterclaim against Pierce for tortious interference is a 'core proceeding' under the plain text of [the statute]." *Id.* at 2604.

While legislative intent is relevant to the determination whether to strike down an *entire statute* or only that part that must be excised in order to prevent its unconstitutional application, *see Ayotte*, 546 U.S. at 330, courts may not rewrite a statute in an effort to make it read the way Congress would have written it had it known that some application of the statute would be found invalid. *See id.* at 330; *Seminole Tribe*, 517 U.S. at 76. Congress has every ability to alter the bankruptcy courts' statutory authority (subject to constitutional constraints), and it is not the place of the courts to revise the statute to achieve a result that Congress might have wanted but for which it did not provide. *See Ayotte*, 546 U.S. at 329-30.

Nor can the statute be read to somehow confer, as a lesser-included-power, the authority to issue reports and recommendations in core proceedings. Although bankruptcy courts might retain authority to "hear" core proceedings, that power does not include the authority to issue the sort of report and recommendation contemplated by 28 U.S.C. § 157(c)(1). If it did, the second sentence of § 157(c)(1) would be superfluous, as there would be no need to grant bankruptcy courts authority to both hear, *and* issue reports and recommendations in, non-core proceedings. *See* 28 U.S.C. § 157(c)(1). Furthermore, unlike the mere opinions or musings of a bankruptcy judge, a statutory report and recommendation carries important legal consequences. The district court is required to consider a report and recommendation, and it reviews *de novo* only those portions to which a party

objects. *Id.* Issuing a report and recommendation thus requires a specific grant of authority that is not inherent in the power to "hear" a proceeding. In sum, there simply is no statutory authority for bankruptcy judges to issue a reports and recommendations in core proceedings.

Bankruptcy courts could nevertheless retain important authority in fraudulent conveyance actions. Where the parties consent, the bankruptcy court retains authority to "hear and determine" the proceeding. *See* 28 U.S.C. § 157(c)(2). Even where the bankruptcy court cannot enter final judgment, it might still enter appropriate orders on non-dispositive pretrial matters if this Court so construes § 157(b). And, if Congress so chooses, it may amend the statute to confer bankruptcy judges in core proceedings with the same authority exercised by magistrate judges. It is not, however, within the power of this Court to amend the statute itself, as some lower courts have done.

B. This Court Need Not Address the Constitutional Questions that Would Arise from an Expansive Report-and-Recommendation Scheme

Because bankruptcy judges lack statutory authority to issue a report and recommendation in lieu of entering final judgment in a core proceeding, this Court need not, and should not, address the constitutional questions that may arise in connection with such a practice. The text of the statute is unambiguous, and this Court need not resort to the canon of constitutional avoidance to conclude that

bankruptcy courts lack authority to issue a report and recommendation in connection with a core proceeding. *See Stern*, 131 S. Ct. at 2605. Nevertheless, the serious constitutional questions that would arise from an expansive report-and-recommendation scheme lend further support to this conclusion.

Congress may, within limits, authorize the appointment of subordinate officers to assist federal district courts with decisionmaking in civil and criminal cases that otherwise require an Article III tribunal. The Supreme Court has set forth boundaries for use of non-Article III judges, specifically with respect to magistrate judges.

Most notably, in *United States v. Raddatz*, 447 U.S. 667 (1980), the Court concluded that magistrate judges without Article III protections can conduct evidentiary hearings on the voluntariness of confessions and issue proposed findings of fact and a recommendation. In *Raddatz*, the Court reviewed the Federal Magistrates Act, which grants magistrate judges authority to "hear and determine" certain pretrial matters, such as in discovery disputes, and authority to propose "findings of fact and recommendations for the disposition" in other "dispositive" pretrial matters, including suppression hearings. *Id.* at 673; 28 U.S.C. § 636(b)(1). And we can presume that Congress may constitutionally empower bankruptcy judges to act to the same extent as magistrates.

Notably, however, the Federal Magistrates Act does not authorize a magistrate judge to conduct the final merits evidentiary hearing – a jury or non-jury trial – in a civil action and issue proposed findings and a recommendation unless the parties consent. *See* 28 U.S.C. § 636(c) (magistrates may preside over final merits hearing only with consent of the parties). Indeed, *Raddatz* suggests that considerations of due process may impose some outer boundaries on the constitutionality of a report-and-recommendation scheme. *See* 447 U.S. at 681 n.7. In *Raddatz*, the magistrate found a criminal defendant's confession voluntary based on live testimony and credibility determinations by the magistrate. *Id.* at 669-72. The magistrate thus recommended denial of the defendant's motion to suppress. *Id.* at 671. The district court, without taking further evidence or hearing live testimony, adopted the magistrate's findings and recommendation. *Id.* at 672. Although the Supreme Court concluded that this procedure neither deprived the defendant of due process of law nor violated Article III, it observed that it could give rise to "serious questions" in other circumstances. *Id.* at 681 n.7. Specifically, the Court noted that more difficult questions would arise if a magistrate made credibility determinations that the district court then *rejected* without a live rehearing of the witnesses. *Id.*[6] Furthermore, in upholding the procedure permitted by the Federal Magistrates Act, the Court specifically

[6] Because the district court in *Raddatz* adopted the credibility findings of the magistrate, the Court did not reach this issue. *See id.*

observed that the magistrate was not conducting the final merits hearing on guilt or innocence. *Id.* at 678-79.

Raddatz leaves unresolved the question how far Congress may go in assigning a non-Article III tribunal responsibility over a final merits hearing. Section 157 of the Judicial Code does purport to give bankruptcy judges just such authority. *See* 28 U.S.C. § 157(c). Although § 157 in many ways parallels the Federal Magistrates Act, it also specifically empowers bankruptcy judges to use the report-and-recommendation scheme at *all phases* of a civil action, including the final trial on the merits in civil actions brought by a bankruptcy trustee. *See id.*[7] It enables bankruptcy judges to do so even in simple common law actions against non-creditor defendants with no connection to the bankruptcy estate other than as defendants. In assigning bankruptcy judges this authority, Congress may have assumed that bankruptcy judges' role in overseeing the broader bankruptcy process provided a basis for giving bankruptcy courts greater latitude than magistrate judges. But *Stern* makes clear that even suits seeking to augment the bankruptcy estate are subject to constitutional limits on Congress's authority to assign them to bankruptcy judges. *Stern*, 131 S. Ct. 2615.

[7] Any action brought by the trustee will seek to enlarge the estate and, therefore, they are all at least "related-to" actions. *See In re Am. Hardwoods, Inc.*, 885 F.2d 621, 623 (9th Cir. 1989) (describing scope of "related-to" jurisdiction).

The breadth of the potential use of the report-and-recommendation procedure by bankruptcy judges thus raises significant constitutional concerns following *Stern*. Although *Stern* did not address the issue directly, together with the Court's earlier decisions, *Stern* at least raises serious questions about the constitutionality of bankruptcy courts offering reports and recommendations following a final evidentiary hearing on the merits.

Notably, in many cases governed by *Stern*, the bankruptcy judge would never have the opportunity to issue a report and recommendation in connection with a final hearing. Following *Granfinanciera*, a defendant in such cases has a right to a jury trial. *See* 492 U.S. at 36. If the defendant invokes that right, and does not consent to jury trial in the bankruptcy court, the district court will conduct the entire merits hearing in any event. *In re Cinematronics*, 916 F.2d 1444, 1451 (9th Cir. 1990) ("[B]ankruptcy courts cannot conduct jury trials on noncore matters, where the parties have not consented.").

The additional circumstances in which the bankruptcy courts' constitutional authority to issue reports and recommendations is in doubt are therefore narrow, but not therefore unimportant. The authority of bankruptcy judges to issue a report and recommendation after a final hearing on the merits would arise only in either (i) a non-jury action (an action historically lying in equity) or (ii) a case in which the defendant prefers a bench trial and thus waives his jury right. The question,

then, is whether a defendant who is entitled to a final judgment by an Article III judge is always therefore entitled to a merits hearing in front an Article III judge or only if there is a jury? Put differently, absent a jury right, may Congress grant report-and-recommendation power as to the final merits hearings to a non-Article-III judge?

The concern evident in *Raddatz* suggests that the answer may well be no. Where the bankruptcy estate seeks affirmative recovery from a defendant, the scope of Article III's protection should not depend on other factors such as jury availability and desirability. Whether a case would have been tried before a jury in 1789 does not affect whether the presiding judge must enjoy Article III protections. Article III, unlike the Seventh Amendment, draws no distinction between actions sounding in law and in equity. *See Stern*, 131 S. Ct. at 2609 ("Congress may not withdraw from judicial cognizance any matter which from its nature, is the subject of a suit at the common law, *or in equity*, or admiralty." (emphasis added) (internal quotation marks omitted)).

In sum, to the extent that bankruptcy judges are authorized to propose findings of fact and conclusions of law on matters over which magistrate judges exercise similar authority, the Constitution presents no obstacle, so long as Congress, and not the courts, rewrite the statute to confer such authority. But to the extent that bankruptcy judges have the additional authority to issue a report and

recommendation after a final hearing on the merits, serious constitutional questions could arise. Because this case does not involve a final hearing on the merits, and because it should be resolved on narrower statutory grounds, this Court need not, and should not, decide all of the circumstances in which the report-and-recommendation procedure is constitutionally permitted.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment below and remand this matter for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 19, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type style.

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Dated: January 19, 2012

Exhibit 10

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: RULEMAKING RESPONSES TO *STERN V. MARSHALL*

DATE: MARCH 15, 2012

The Rules Committee has received a number of suggestions to amend the Bankruptcy Rules in response to *Stern v. Marshall*. 131 S. Ct. 2594 (2011). Each suggestion addresses the possibility that *Stern* has destabilized the previous meaning of core and non-core proceedings in bankruptcy. Before *Stern*, a proceeding was treated by the Bankruptcy Rules as either core or non-core and, if core, the bankruptcy judge was empowered to hear and finally determine it. After *Stern*, courts have confronted the argument that some proceedings may be deemed core—as provided by 28 U.S.C. § 157(b)—and nevertheless fall beyond a bankruptcy judge's power to enter final judgment. The mischief these suggestions seek to avoid is that a party might allege (or agree) that a proceeding is "core" as a statutory matter but later assert that the proceeding is not "core" as a constitutional matter. Each suggestion attempts to address this problem by altering portions of the Bankruptcy Rules that rely on the core/non-core distinction.

The suggestions adopt different approaches to the issue. The first suggestion (11-BK-I), from Judge Eric P. Kimball (Bankr. S.D. Fla.), would require the parties in an adversary proceeding to state whether each consents to entry of final rulings by a bankruptcy judge, without regard to whether a proceeding is alleged to be core or non-core. This suggestion essentially adheres to the current approach of the Bankruptcy Rules—that parties affirmatively consent to the exercise of final adjudicatory power by a bankruptcy judge in circumstances

where that power is otherwise limited by Article III—but seeks to remove the ambiguity *Stern* has generated about the terms "core" and "non-core." The second suggestion (11-BK-K), jointly submitted by Judges A. Benjamin Goldgar, Carol A Doyle, and Bruce W. Black (Bankr. N.D. Ill.), would instead flip the default rule and require a party to demand entry of final rulings by a district judge. Failure to make a timely demand would waive or forfeit a party's right to final judgment in an Article III forum.

In addition to these suggestions, a third suggestion (11-BK-L), submitted by Arthur J. Gonzalez (Bankr. S.D.N.Y.), informs the Advisory Committee of a *Stern*-related revision to the standing order referring cases and proceedings to the bankruptcy court that was recently adopted by the District Court for the Southern District of New York.

The Subcommittee discussed these suggestions during its December 20, 2011, and March 8, 2012, conference calls. Members of the Subcommittee were initially inclined to delay any proposed rulemaking in order to await further developments in the case law after *Stern*. After further deliberation, however, the Subcommittee concluded that certain portions of the Bankruptcy Rules have been rendered ambiguous by *Stern*, and that this ambiguity has already generated a sufficient risk of confusion to justify prompt rulemaking. The Subcommittee therefore proposes rule amendments for the Advisory Committee's consideration.

The Subcommittee endorses the approach taken by Judge Kimball's suggestion—that is, amendments targeted at the ambiguity created by the use of "core" and "non-core" in the Bankruptcy Rules. The Subcommittee favors this approach because it accomplishes the goal of clarifying the rules with the least disruption to the current system of bankruptcy adjudication. Unlike Judge Kimball's suggestion, however, the Subcommittee's proposal would not retain the terms core and non-core in the amended rules. The Subcommittee would also amend Rules 9027

and 9033 in addition to Rules 7008 and 7012 as suggested by Judge Kimball. Accordingly, the Subcommittee recommends that (i) Rules 7008, 7012, 9027, and 9033 be amended as set forth at the end of this memorandum, and (ii) the Advisory Committee take no further action on the suggestion by Judges Goldgar, Doyle, and Black.

The Suggestions

1. Judge Kimball's suggestion

Judge Kimball suggests amending Rules 7008 and 7012, which make reference to whether a proceeding is core or non-core. Rule 7008 of the Bankruptcy Rules provides that Rule 8 of the Federal Rules of Civil Procedure, which governs pleading in civil actions, applies in adversary proceedings. In addition, Rule 7008 requires a pleading to "contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge." Similarly, Rule 7012 provides that Rule 12(b)-(i) of the Civil Rules, governing pre-answer motions, applies in adversary proceedings. Rule 7012 requires any responsive pleading to contain an admission or denial of an allegation that a proceeding is core or non-core and, only if the proceeding is non-core, a statement as to whether the party does or does not consent to entry of final rulings by the bankruptcy judge. The rule also provides that final orders or judgments shall not be entered in non-core proceedings without "the express consent of the parties."

Judge Kimball's suggestion would amend these rules to require a party to state whether or not it consents to entry of final orders or judgment by the bankruptcy court, regardless of whether the proceeding is alleged to be core or non-core. His suggestion would also make clear that, if all parties do not consent to entry of final rulings, and the bankruptcy judge concludes

that it may not enter final rulings without that consent, the bankruptcy judge must submit proposed findings of fact and conclusions of law in accordance with § 157(c) and Rule 9033. If amended pursuant to Judge Kimball's suggestion, Rule 7008(a) would read as follows:

Rule 7008. General Rules of Pleading

(a) Applicability of Rule 8 F.R.Civ.P.

Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or noncore and, ~~if non-core~~ without regard to whether the proceeding is alleged to be core or non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

Rule 12 would read as follows:

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

* * * * *

(b) Applicability of Rule 12(b)-(i) F.R.Civ.P.

Rule 12(b)-(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. ~~If the response is that the proceeding is non-core~~ Without regard to whether the proceeding is alleged to be core or non-core, ~~it~~ the responsive pleading shall

include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings and in other proceedings where the bankruptcy court has determined that the bankruptcy court may not enter final orders or judgments absent consent of the parties, final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties. In non-core proceedings and in proceedings where the bankruptcy court has determined that the bankruptcy court may not enter final orders or judgments absent consent of the parties, and in which not all necessary parties have consented, the bankruptcy court shall submit proposed findings of fact and conclusions of law to the district court consistent with 28 U.S.C. § 157(c) and Rule 9033.

As Judge Kimball explains in commentary accompanying his suggestion, these changes are meant to clarify three issues after *Stern*. First, his suggested amendments would capture proceedings defined as "core" in 28 U.S.C. § 157(b) but that lie beyond the power of a bankruptcy judge to enter final orders and judgments after *Stern*. Parties would be required to state whether or not they consent to entry of final rulings by a bankruptcy judge in those proceedings. Second, Judge Kimball intends these changes to apply to the treatment of personal injury or wrongful death tort claims under 28 U.S.C. § 157(b)(5). Although § 157(b)(5) states that those claims "shall be tried" in the district court, the Supreme Court concluded that a party may consent (by waiver or forfeiture) to their resolution by a bankruptcy judge. *See Stern*, 131 S. Ct. at 2606-07 (2011) ("[W]e agree with Vickie that § 157(b)(5) is not jurisdictional, and that Pierce consented to the Bankruptcy Court's resolution of his defamation claim."). His proposed revisions are intended to be broad enough to address consent to final rulings by bankruptcy

courts on personal injury or wrongful death tort claims. Third, the suggested changes would explicitly provide for the filing of proposed findings of fact and conclusions of law in any proceeding in which the bankruptcy judge is not empowered to enter final orders or judgment, regardless of the proceeding's denomination as core or non-core. Currently, Rule 9033(a) provides that bankruptcy courts shall file proposed findings of fact and conclusions of law in "*non-core proceedings* heard pursuant to 28 U.S.C. § 157(c)(1)" (emphasis added). The rule does not explicitly contemplate the filing of proposed findings of fact and conclusions of law in matters defined as core that cannot, consistent with *Stern*, be subject to the entry of final rulings by the bankruptcy court. Judge Kimball's suggested amendment to Rule 7012(b) would explicitly require a bankruptcy judge to treat any proceeding in which the judge may not enter final rulings as a proceeding under § 157(c)(1) and Rule 9033.

2. The Goldgar, Doyle, and Black Suggestion

Like Judge Kimball, Judges Goldgar, Doyle, and Black seek to address potential ambiguities in the treatment of core and non-core proceedings after *Stern*. They seek to do so, however, by creating a "negative notice" form of consent to full adjudication in bankruptcy court. Under their suggestion, parties would need to demand judgment by the district court in any proceeding in which the bankruptcy judge is not empowered, absent consent, to enter final rulings. In addition to amending Rules 7008 and 9033, this suggestion would extensively revise Rule 9027 to require a demand for final judgment in the district court at the time a proceeding is removed under 28 U.S.C. § 1452 on the basis of bankruptcy jurisdiction.

This suggestion would reduce the scope of Rule 7008 and add a new Rule 7008.1. In Rule 7008, it would delete the required allegations regarding core and non-core jurisdiction in a pleading. Rule 7008(a) would thus read:

Rule 7008. General Rules of Pleading

(a) Applicability of Rule 8 F.R.Civ.P.

Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. ~~In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or noncore and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.~~

The treatment of adjudication by a bankruptcy court or district court would be addressed instead in new Rule 7008.1:

Rule 7008.1 Right to Judgment by the District Court

(a) Right Preserved.

In any adversary proceeding filed in the bankruptcy court, the right to judgment by the district court established by Article III of the Constitution is preserved to the parties.

(b) Demand.

To demand judgment by the District Court on any claim in an adversary proceeding—

(1) a plaintiff, or a defendant filing a counterclaim, must state the demand in the allegation of jurisdiction required by Rule 7008 in the initial pleading asserting the claim; and

(2) any answering party must state the demand in the initial answer to the pleading asserting the claim.

Any pleading that includes a demand for judgment by the district court must note the demand in the caption.

(c) Waiver; withdrawal.

A party waives judgment by the district court unless a demand is made as specified in paragraph (b). A demand by a plaintiff or defendant filing a counterclaim may be withdrawn only if the other parties consent.

(d) Objection to a demand.

Any party may, by motion, object to a demand for judgment by the district court on any claim on the ground

(1) that the claim is not one as to which there is a right to judgment by the district court under Article III of the Constitution, or

(2) that the election was not made as specified in paragraph (b).

The bankruptcy court may also raise an objection independently. The bankruptcy court may determine, after notice and hearing, that the demand is not effective.

Rule 9027(a) and (e) would be amended to read:

Rule 9027. Removal

(a) Notice of removal

(1) Where filed; form and content

A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove~~, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings~~.

* * * * *

(4) To demand judgment by the district court on any claim sought to be removed, the notice must state the demand in the text and in the heading. The party filing the notice waives judgment by the district court unless the demand is made. The party filing the notice may withdraw a demand only with the consent of all other parties to the removed claim or cause of action.

* * * * *

(e) Procedure after removal

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge may issue all necessary orders and process to bring before it all proper parties whether

served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(3) ~~Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.~~ To demand judgment by the district court on any claim or cause of action sought to be removed, any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, must file a demand for such judgment. The demand must be signed pursuant to Rule 9011 and must be filed not later than 14 days after the filing of the

notice of removal. Any party who files a demand pursuant to this paragraph must mail a copy to every other party to the removed claim or cause of action. A party waives judgment by the district court unless such a demand is made.

(4) Objection to a demand.

Any party to the removed claim or cause of action may, by motion, object to a demand for judgment by the district court on any claim on the ground that the claim is not one as to which there is a right to judgment by the district court under Article III of the Constitution, or that the demand was not made as this rule requires. The bankruptcy court may also raise an objection independently. The bankruptcy court may determine, after notice and hearing, that the demand is not effective.

Finally, the suggestion would amend the first sentence of Rule 9033(a) to delete the word "non-core" and change the word "shall" to "must." As revised, the rule would read:

Rule 9033. Review of Proposed Findings of Fact and Conclusions of Law in Non-Core Proceedings

(a) Service.

In ~~non-core~~ proceedings heard pursuant to 28 U.S.C. § 157(c)(1), the bankruptcy judge ~~shall~~ must file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

3. The Southern District of New York's Amended Standing Order of Reference

Judge Gonzalez's suggestion alerts the Advisory Committee to the Southern District of New York's amended Standing Order of Reference. When Article III bars entry of a final order or judgment by a bankruptcy judge, the amended order provides explicitly that (i) the bankruptcy judge shall submit proposed findings of fact and conclusions of law, and (ii) the district court may treat any order of a bankruptcy judge as proposed findings of fact and conclusions of law if the district court determines that the bankruptcy judge could not have entered a final order in keeping with Article III.[1] The amended standing order is intended to address proceedings deemed core as a statutory matter that cannot be treated as core as a constitutional matter under *Stern*. Although Judge Gonzalez recognizes that proceedings of this kind might simply be considered non-core and treated accordingly, he explains that the amended order is meant to "close the gap" if a court were to find that there is no authority for a bankruptcy judge to issue proposed findings of fact and conclusions of law in *Stern*-barred proceedings. The amended standing order was adopted by the district court on January 31. The District of Delaware adopted an identically worded amended standing order on February 29.

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[1] The full standing order reads:

> Pursuant to 28 U.S.C. Section 157(a) any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 are referred to the bankruptcy judges for this district.
>
> If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.

Discussion

These suggestions presented two basic questions for the Subcommittee. The first was whether any changes to the Bankruptcy Rules in response to *Stern* should be made at this time. The second was whether, if responsive rulemaking is now appropriate, it should take the form of the more limited approach offered by Judge Kimball or the more comprehensive approach suggested by Judges Goldgar, Doyle, and Black.

1. Is There a Need for Responsive Rulemaking Now?

a. Reasons to Delay Rulemaking

The Bankruptcy Rules and the Judicial Code contemplate a binary division between core and non-core proceedings—core proceedings may be fully adjudicated by a bankruptcy judge, while non-core proceedings may not be fully adjudicated without the consent of the parties.[2] But *Stern* could be read as creating a third category of proceeding—core as a statutory matter but beyond the power of a bankruptcy judge to adjudicate fully as a constitutional matter. Amending the Bankruptcy Rules in response to *Stern* could be justified based on that reading of the case.

Nevertheless, most courts have applied *Stern* cautiously to avoid conflicting interpretations of the meaning of core proceedings. For example, some litigants have made the argument that if a proceeding is considered core under § 157(b) but is beyond the power of a bankruptcy judge to enter final rulings under *Stern*, then the bankruptcy judge is also not

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[2] *See, e.g.*, Fed. R. Bankr. P. 7008 advisory committee's note:

> Proceedings before a bankruptcy judge are either core or non-core. 28 U.S.C. § 157. A bankruptcy judge may enter a final order or judgment in a core proceeding. In a non-core proceeding, absent consent of the parties, the bankruptcy judge may not enter a final order or judgment but may only submit proposed findings of fact and conclusions of law to the district judge who will enter the final order or judgment. 28 U.S.C. § 157(c)(1).

empowered to file proposed findings of fact and conclusions of law. Section 157(c) and the Bankruptcy Rules, the argument goes, contemplate the filing of proposed findings of fact and conclusions of law only when a proceeding is non-core. At the time of the Subcommittee's initial discussion of these suggestions, only one court had found that contention persuasive. *See In re Blixseth*, 2011 WL 3274042, at *10-12 (Bankr. D. Mont. Aug. 1, 2011). Every other court had rejected it. *See, e.g., In re El-Atari*, 2011 WL 5828013, at *4-5 (E.D. Va. Nov. 18, 2011); *In re Mortgage Store, Inc.*, 2011 WL 5056990, at *5-6 (D. Hawaii Oct. 5, 2011); *In re Canopy Fin., Inc.*, 2011 WL 3911082, at *4-5 (N.D. Ill. Sept. 1, 2011). With the exception of *Blixseth*, the bankruptcy and district courts appeared content to treat a proceeding that cannot be fully adjudicated by a bankruptcy judge without consent as "non-core" regardless of its denomination in the Judicial Code. That is in keeping with how the Supreme Court described its approach in *Stern*—"the removal of counterclaims such as [the estate's] from core bankruptcy jurisdiction" and not the creation of a third category of proceedings.[3] 131 S. Ct. at 2620.

b. Reasons for Prompt Rulemaking

The Seventh Circuit's decision in *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011), however, indicated to the Subcommittee that there was sufficient cause for concern to justify a rulemaking response. In *Ortiz*, two groups of debtors launched class action adversary complaints against a

[3] The Supreme Court's judgment in *Stern* itself would make little sense if a bankruptcy judge lacked the power to file proposed findings of fact and conclusions of law when a proceeding described as "core" in § 157(b) could not be fully adjudicated by the bankruptcy judge in keeping with Article III. The bankruptcy judge in *Stern* believed the estate's counterclaim was a core proceeding and entered an order purporting to be a final judgment; the district court disagreed and treated the ruling as proposed findings of fact and conclusions of law. The Supreme Court did not suggest that the district court's treatment was improper.

health care provider, Aurora.[4] Aurora had filed proofs of claim in thousands of bankruptcy cases in Wisconsin, and the debtors alleged that the proofs of claim improperly disclosed confidential medical information in violation of Wisconsin law. The bankruptcy court concluded that the class actions were core proceedings and, on the merits, entered summary judgment in favor of the defendant. When the debtors appealed, all parties joined in a motion to certify direct appeals to the Seventh Circuit. *Stern* was decided after the court of appeals took the direct appeals, which prompted the court to order supplemental briefing on *Stern*'s impact on appellate jurisdiction in the cases. Although the Seventh Circuit agreed that the debtors' claims were core proceedings under 28 U.S.C. § 157(b)(2)(C), the court ultimately read *Stern* to bar the bankruptcy court from entering final judgments on the debtors' state law claims. Without a final judgment below, the court dismissed the direct appeals for want of appellate jurisdiction.

The decision in *Ortiz* warrants attention, not so much for its square holding but for some of the language in the opinion. Particularly noteworthy is its discussion of the question whether the bankruptcy judge's decision could be considered an interlocutory order from which a discretionary direct appeal could be permitted under 28 U.S.C. § 158(a)(3) and (d).[5] The court observed:

> For the bankruptcy judge's orders to function as proposed findings of fact or conclusions of law under 28 U.S.C. § 157(c)(1), we would have to hold that the debtors' complaints were "not a core proceeding" but are "otherwise related to a

[4] One class action was filed originally in bankruptcy court, but the other was filed in state court and removed to bankruptcy court by Aurora.

[5] Section 158(d)(2)(A) permits a court of appeals to exercise jurisdiction over appeals described in the first sentence of § 158(a). Section 158(a)'s first sentence, in turn, includes appeals from "final judgments, orders, and decrees" of bankruptcy courts and "with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title."

> case under title 11." *Id.* As we just concluded, the debtors' claims qualify as core proceedings and therefore do not fit under § 157(c)(1).

This language could be read to find that there is a no-man's land in the adjudication of *Stern*-barred claims. In other words, a bankruptcy court's decision in a proceeding deemed core as a statutory matter could not be treated as a final judgment if doing so would violate Article III under *Stern*, but it also could not be treated as proposed findings of fact and conclusions of law, because § 157(c)(1) speaks of the submission of proposed findings of fact and conclusions of law in "a proceeding that is not a core proceeding."

It is not at all clear that this was the court of appeals's intended meaning. First, the opinion goes on to state that "[t]he direct appeal provision in 28 U.S.C. § 158(d)(2)(A) also does not authorize us to review on direct appeal a bankruptcy judge's proposed findings of fact and conclusions of law." If so, then it was irrelevant whether or not the bankruptcy judge's decision could be treated as proposed findings of fact and conclusions of law. A direct appeal could not be permitted either way, and the court's discussion of § 157(c)(1) was arguably dicta. Second, the odd posture of the case—a direct appeal from a bankruptcy judge's decision, with debtors opposing the bankruptcy judge's exercise of power and the defendant creditor supporting it—should give pause before overreading *Ortiz*. Third, since *Ortiz*, the decision already has been cited in six opinions available on Westlaw, but none of those decisions reads the case as prohibiting a bankruptcy judge from entering proposed findings of fact and conclusions of law in *Stern*-barred proceedings. Indeed, the District Court for the District of Montana cites *Ortiz* approvingly while explicitly rejecting the reasoning of the only bankruptcy court decision to take that view of § 157(c)(1). *See Blixseth v. Brown*, 2012 WL 691598 at *7-8 (D. Mont., March 5, 2012) (finding that "*Stern* does not bar the Bankruptcy Court from issuing proposed findings of fact and conclusions of law" and disapproving of *In re Blixseth*, 2011 WL 3274042 (Bankr. D.

Mont. Aug. 1, 2011)). In doing so, the Montana district court did not suggest that the Seventh Circuit's decision had supported the bankruptcy court's reasoning.

c. Other Considerations

The Subcommittee weighed two other considerations in deciding whether rulemaking was necessary. The first was Judge Gonzalez's suggestion. On the one hand, if every district adopted a similar standing order, perhaps no rulemaking response by the Advisory Committee would be necessary. That two influential districts have approved a *Stern*-related amendment to their standing order of reference could encourage other districts to do so. The standing order would serve to answer the ambiguity in the treatment of core and non-core proceedings after *Stern*. On the other hand, the felt necessity to amend standing orders of reference strongly suggests that there is sufficient concern about a possible gap in the treatment of core and non-core proceedings to warrant responsive rulemaking. Rather than await piecemeal attempts to fill that gap in each judicial district, a more uniform response would be preferable.

Second, the ambiguity in the terms core and non-core places pressure on the treatment of consent in bankruptcy litigation. If a litigant agrees that a proceeding is core and later asserts that the allegation related to the statutory definition of the term and not its constitutional significance, a court is then presented with the question whether the litigant consented to final adjudication. After *Stern*, some courts have accepted objections to final adjudication by a bankruptcy judge that would otherwise appear to be untimely. *See In re Development Specialists, Inc.*, 2011 WL 5244463, at *11-13 (S.D.N.Y. Nov. 2, 2011) (finding no consent even though the objecting parties had previously admitted the bankruptcy court's jurisdiction and had requested that the bankruptcy court enter judgment in their favor). Other courts have been much less receptive to untimely objections to a bankruptcy judge's authority to enter final rulings. *See,*

e.g., *Mercury Companies, Inc. v. FNF Sec. Acquisition, Inc.*, 2011 WL 5127613 (D. Colo. Oct. 31, 2011) (rejecting defendants' objection to the authority of the bankruptcy court to enter final rulings in a fraudulent conveyance action when the defendants had litigated, without objection, before the bankruptcy judge for nineteen months). The Subcommittee believes that removing ambiguity from the rules with respect to the treatment of core and non-core proceedings would also serve to clarify the issue of consent.

2. *What Is the Appropriate Form of Rulemaking?*

Moving to the question of the appropriate form of rulemaking, the Subcommittee preferred the more limited approach of Judge Kimball's suggestion. That approach has the virtue of creating the least disturbance in the current Bankruptcy Rules. The Subcommittee also believed, however, that it would make sense to include all the rules touching on the bankruptcy court's authority to enter final adjudications—Rules 7008, 7012, 9027, and 9033. The Subcommittee considered as an alternative a strictly minimalist approach that would make no amendment other than to Rule 9033, which treats proposed findings of fact and conclusions of law. That rule could be amended to state that any proceeding in which the bankruptcy judge does not have constitutional authority to enter final rulings is treated as a non-core proceeding. The Subcommittee concluded that it would be better to amend the rules wherever the terms core and non-core are used, because those terms are likely to generate confusion even if Rule 9033 is clarified.

The Subcommittee found value in the more comprehensive approach offered in the joint suggestion of Judges Goldgar, Doyle, and Black. It would likely decrease the risk of disputes over party consent by requiring a demand for final adjudication in the district court. A party

failing to make such a demand would be found to consent, by waiver or forfeiture, to final adjudication in the bankruptcy court. This "negative notice" form of consent would reduce gamesmanship by parties seeking to challenge the authority of a bankruptcy judge as a late-inning litigation tactic. The *Development Specialists* case is a cautionary example of this potential under the current rules. The objecting litigants had agreed that the bankruptcy court had "jurisdiction" and later sought entry of judgment by the bankruptcy court in their favor. The district court nevertheless found that their statements did not amount to clear, affirmative consent to final adjudication in the bankruptcy court. 2011 WL 5244463, at *11-13.

On the other hand, moving towards a negative notice form of consent to final adjudication in the bankruptcy court would be a significant departure from the consent provisions currently in the rules. The Advisory Committee designed the consent structure of the rules to require affirmative consent. *See* Rule 7008 advisory committee's note ("Failure to include the statement of consent does not constitute consent. Only express consent in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding."). Arguably, affirmative consent better protects the rights of litigants, recognized in *Stern*, to have their disputes finally adjudicated in an Article III forum.

Finally, the Subcommittee took into consideration the Fifth Circuit's recent decision in an important post-*Stern* appeal that was pending at the time of the Advisory Committee's fall meeting. In August, the court of appeals ordered supplemental briefing on the question whether Article III is violated when a magistrate judge enters final judgment on a state law claim. *Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp.* --- F.3d ---, 2012 WL 688520 at *1 (5th Cir., March 05, 2012). Although not a bankruptcy case, *Technical Automation Services Corp.* is

significant, because the parties had consented to final adjudication by the magistrate. A decision by the Fifth Circuit to the effect that *Stern* makes consent irrelevant when determining a non-Article III judge's power would have had an impact in bankruptcy as well.

In its decision, the Fifth Circuit instead reaffirmed the ability of parties to consent to final adjudication by a non-Article III judge. The court's reasoning rests on prior circuit precedent upholding the constitutionality of the Federal Magistrate's Act, which permits a magistrate to enter final judgments in civil cases with the parties' consent. Because *Stern* did not "unequivocally" overturn that prior precedent, the court of appeals adhered to its pre-*Stern* view of the role of consent. *Tech. Automation Servs. Corp.*, 2012 WL 688520 at *5. The court did not engage, however, in a detailed first-principles discussion of the place of consent in non-Article III adjudication. Nor did the court indicate how it would resolve the consent issue in a case involving a bankruptcy judge. Rather, the court took note of *Stern*'s description of its holding as narrow, and declined to extend that holding to the case. Nevertheless, the Fifth Circuit's opinion offers a rebuttal to those who believe that *Stern* undermined the place of litigant consent in bankruptcy adjudication.

3. The Subcommittee's Preferred Form of Rulemaking

In light of these developments, the Subcommittee operated on the following principles. First, the consent of litigants remains a valid basis for a bankruptcy judge to hear and finally determine a proceeding that would otherwise lie beyond the judge's adjudicatory power in light of Article III. Second, there is sufficient concern about the treatment of those proceedings deemed core as a statutory matter, but over which bankruptcy judges cannot exercise final adjudicatory power after *Stern*, that some form of clarifying rulemaking is appropriate. Third,

amendments to the Bankruptcy Rules that could achieve the desired clarity with the least disruption should be favored.

The Subcommittee would excise the terms core and non-core from the amended rules. Instead, the amended rules should simply require a statement as to whether a litigant does or does not consent to entry of final orders or judgments by the bankruptcy judge. If all litigants do not consent, the bankruptcy court would be required to decide whether it may nevertheless finally adjudicate the proceeding. The amended rules would also clarify that a bankruptcy court may issue proposed findings of fact and conclusions of law in any proceeding in which the bankruptcy court has determined that it may not enter final orders or judgments without consent of the parties, and all necessary parties have not consented.

RULE 7008. GENERAL RULES OF PLEADING

(a) APPLICABILITY OF RULE 8 F.R. CIV. P.

Rule 8 F.R. Civ. P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement ~~that the proceeding is core or noncore and, if non-core~~ that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

COMMITTEE NOTE

Subdivision (a) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy judge. Some proceedings may satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), but remain beyond the constitutional power of a bankruptcy judge to adjudicate finally without the consent of the litigants. The amended rule therefore calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading.

RULE 7012. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

* * * * *

(b) APPLICABILITY OF RULE 12(B)-(I) F.R.CIV.P.

Rule 12(b)-(i) F.R. Civ. P. applies in adversary proceedings. A responsive pleading ~~shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core it~~ shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In ~~non-core~~ proceedings in which the bankruptcy court has determined that it may not enter final orders or judgments without the consent of all the parties, the bankruptcy court shall issue proposed findings of fact and conclusions of law pursuant to Rule 9033~~, final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties~~.

COMMITTEE NOTE

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy judge. Some proceedings may satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), but remain beyond the constitutional power of a bankruptcy judge to adjudicate finally without the consent of the litigants. The amended rule therefore calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). If the bankruptcy court determines that it may not enter final orders or judgment without the parties' consent, and all parties have not consented, then Rule 9033 applies. Under those circumstances, the bankruptcy court must issue proposed findings of fact and conclusions of law.

RULE 9027. REMOVAL

(a) NOTICE OF REMOVAL

(1) *Where filed; form and content*

A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action ~~the proceeding is core or non-core and, if non-core, that~~ the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.

* * * * *

(e) PROCEDURE AFTER REMOVAL

* * * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement ~~admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state~~ that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

COMMITTEE NOTE

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy judge. Some proceedings may satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), but remain beyond the constitutional power of a bankruptcy judge to adjudicate finally without the consent of the litigants. The amended rule therefore calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b).

RULE 9033. REVIEW OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ~~IN NON-CORE PROCEEDINGS~~

(a) SERVICE.

~~In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1)~~In a proceeding in which the bankruptcy court has determined that it may not enter final orders or judgments without consent of the parties, and all necessary parties have not consented, the bankruptcy judge shall file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

COMMITTEE NOTE

Subdivision (a) is amended to clarify that a bankruptcy judge must issue proposed findings of fact and conclusions of law whenever the bankruptcy judge may not enter final orders or judgment without the consent of the parties, and the parties have not consented. To avoid ambiguity, the amendment removes the former language limiting this provision to non-core proceedings. Some proceedings may satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), but remain beyond the constitutional power of a bankruptcy judge to adjudicate finally without the consent of the litigants. A bankruptcy judge must issue proposed findings of fact and conclusions of law in those proceedings.

Exhibit 11

ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Phoenix, AZ
March 29-30, 2012

She said the biggest problem with respect to committee formation was getting creditors to serve at all, and the new guidelines address that, but they will also reveal proxy votes and should address the concerns raised in *United Building Products.*

In response to a question from the Chair, Ms. Eitel said the EOUST does not think any amendments to the Bankruptcy Rules are needed to address the *United Building Products* situation, and that Bankruptcy Rule 2014 is sufficiently broad to do its job. **After further discussion, the Committee decided to take no action on Judge Waldrep's suggestion at this time.**

11. Oral Report of the Subcommittee on Technology and Cross Border Insolvency.

No report.

Discussion Items

12. Oral report on the impact of the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Assistant Reporter gave a brief overview of *Stern* and then explained that there appear to be two immediate practical considerations. He said that in light of some of the language in *Stern* there was concern about whether parties can consent to entry of a final judgment by a bankruptcy judge in matters that are not "constitutionally" core matters. In his opinion, consent is still valid in part because the court made a point of demonstrating that there was no consent with respect to the issue before it, the counterclaim. On the other hand, the court found that consent to final judgment on the proof of claim itself was explicit, and it had no concerns with bankruptcy judge entering a final judgment on that matter. In addition, the Court made clear that its ruling was a narrow one. The Assistant Reporter said the consent issue is a concern to many commentors, however, and a panel of the Fifth Circuit is already seeking briefing on whether *Stern* upsets long-standing case law that consent to a final judgment by a magistrate judge is valid.

A second issue raised by *Stern* is how best to deal with the apparent statutory gap that now exists in 28 U.S.C. § 157. Although *Stern*-like counterclaims were found to be "core" in sense of the statute, the Court made clear that the bankruptcy court could not enter a final judgment on that matter constitutionally, at least not without the consent of the parties. Section 157 has no guidance, however, on a bankruptcy court's power to decide a matter that is core under the statute, but is not core under the Constitution. The Assistant Reporter said it makes sense to treat the *Stern*-like matters as if they are non-core but otherwise related to the bankruptcy case under Section 157(c), such that the bankruptcy judge can enter a final judgment if consent is given by both parties; otherwise, the court can enter a report and recommendation.

The Assistant Reporter said he did not think there was anything the Committee could do at this point but see how courts interpret the opinion. **A motion to take no action at this time, and**

to monitor case law, passed without opposition.

13. Oral report on the change in how the IRS allocates internet services in its "National Standards and Local Standards," which are used by debtors to complete Official Forms 22A and 22C.

The Chair said that effective October 3, 2011, the IRS will remove internet service expenses from its "Other Necessary Expense" category, and incorporate that expense into its Local Standards for Housing and Utilities. He said the change will affect Official Forms 22A and 22C. Both forms currently direct the debtor to deduct as an expense the actual amount paid for telecommunication services, including "internet service." OF 22A, Line 32; OF 22C, Line 37. Because of the IRS change, the forms will double count internet expenses if any are reported on telecommunication lines of the forms.

Mr. Redmiles gave members some background information about how the IRS change came about and why the notice to the EOUST and the Committee was too short to revise the forms this year. Members agreed that any needed revisions to the forms would be technical and would not require publication, so that once revised they could go into effect in December 2012. **The Chair asked the Consumer Subcommittee to suggest changes for December 1, 2012 that the Committee could consider at its spring meeting.**

14. Suggestion 11-BK-C by Wendell J. Sherk to amend Official Forms 22A and 22C to allow debtors with a below-median income to file shortened versions of the forms.

The Chair said that the FMP had incorporated the suggestion into its proposed drafts of 22A and 22C, which the Committee will consider at its spring meeting.

15. Suggestion 11-BK-D by Sabrina L. McKinney to amend Official Form B10 to provide a space for designating the amount of a general unsecured claim.

Afer the meeing the suggestion was referred to the Consumer and Forms Subcommittees, along with a suggestion by Mr. Kilpatrick that B10 also address leases and executory contracts.

16. Suggestion 11-BK-E by Judge A. Thomas Small to amend Rules 7016 and 8001 to permit parties to agree that their appellate options will be limited to no more than one appeal or to no appeal at all.

Some members expressed concerns about how knowledge of the waiver might affect the bankruptcy judge's consideration. **Referred to the Appellate Rules Subcommittee.**

17. Suggestion 11-BK-F by Chief Judge Peter W. Bowie to amend Rules 7012, 7004(e), and

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

STERN V. MARSHALL

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in "non-core" proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is "core" or "non-core" and, if "non-core," whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term "core" now is ambiguous. As a result of *Stern v. Marshall,* he suggested, there are now statutory "core" proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional "core" proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a "core" proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall,* some statutory "core" proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in "a matter that is not a core proceeding," refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not "core" under the Constitution.

If § 157(c) refers only to matters that are not "core" under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as "core" matters. And for some of these statutory "core" matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.