Memorandum of the Bankruptcy Litigation Committee of the Commercial And Federal Litigation Section concerning the proposed American Bar Association resolution relating to Stern v. Marshall, 564 U.S. 2, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011).

July 10, 2012

The American Bar Association has proposed a resolution that provides as follows:

> RESOLVED, That the American Bar Association supports the authority of United States Bankruptcy Judges to hear, determine, and enter final orders and judgments in all core proceedings within the meaning of 28 U.S.C. § 157(b) upon the express consent of all the parties to the proceeding, as being consistent with and not violative of Article III of the United States Constitution.

While a review of the proposed resolution appears to provide little more than a recitation of the existing state of the law as stated in Stern v. Marshall, 564 U.S. 2, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), the Committee is advised that there are other considerations for having a policy on place at the American Bar Association, should the need arise for the filing of an amicus brief in an appropriate case. Accordingly, while the need for a resolution stating the newly settled principles of law is not evidenced by the legal considerations stated in the accompanying supporting memorandum, there appear to be other considerations not reflected in the memorandum that recommend its adoption.

Congress, in Stern v. Marshall, was held to have exceed its constitutional authority conferring statutory authority upon the bankruptcy courts to resolve counterclaims by a bankruptcy estate against a non-debtor, pursuant to 28 U.S.C. § 157(b)(2)(C), without any further qualification,[1] 131 S. Ct. at 2608; 180 L. Ed. 2d at 493. The proposed resolution, restates that portion of the reasoning of the Court, which provided that parties can always consent to the adjudication of their issues by non-Article III judges. Id. 131 S. Ct. at 2607; 180 L. Ed. 2d at 492. The resolution also reflects the authority of the district courts to allow bankruptcy judges to enter final orders with the consent of the parties in non-core proceedings, as contained in 28 U.S.C. §157(c)(2). That section provides:

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[1] 28 U.S.C. § 157(b)(2)(C) provides, as follows:

> (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, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
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> (2) Core proceedings include, but are not limited to
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> . . .
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> (C) counterclaims by the estate against persons filing claims against the estate;

(Lexis 2012).

> Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. §157 (Lexis 2012). The proposed resolution would seem to suggest dispensing with the formality of asking a district judge to refer a non-core matter to the bankruptcy court for "final" determination of the merits, with the parties consent. This makes practical sense in the context of the administration of complex bankruptcy cases that have many moving parts, thus removing one more hoop through which parties must jump in order to achieve a final disposition of a non-core proceeding that may be intricately involved with the disposition of an overall bankruptcy case administration, of which the non-core proceeding is merely one essential but discrete part.

It is noted that the Supreme Court did not rule out the existence of jurisdiction of all counterclaims by the estate against non-debtors, merely those counterclaims which were not so intricately intertwined with the resolution of core proceedings such that the disposition of the core matter did not essentially resolve the non-core counterclaim as well. See Id. 131 S. Ct. at 2616-18; 180 L. Ed. 2d at 502-04. The disposition of the issue of whether the resolution of a core matter resolves the counterclaim is one left, ultimately, to the determination of the court before whom the matter is pending, either in the first instance by the bankruptcy court, or on appeal to the district court, as the case may be. The United States District Court for the Southern District of New York seems to have recently made this observation when, last February, it amended the general order of reference pursuant to which cases filed in the Southern District are referred to the bankruptcy court. The order provides, in pertinent part, as follows:

> 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

See, Amended Standing Order of Reference, M10-468, file February 2, 2012, at 12 Misc. 00032 (copy attached). The United States Court of Appeals for the Second Circuit seems to have recently reaffirmed the narrow scope of the holding in Stern v. Marshall, when it observed in, In re Quigley Co., 2012 U.S. App. LEXIS 7167 (2d Cir. Apr. 10, 2012), that the holding in Stern v. Marshall was "narrow." Certainly, if parties consent to the disposition of non-core proceedings by a non-Article III judge, the requirements for the determination referenced above by any court

is obviated, and the result is a more efficient administration of a bankruptcy case in which the non-core matter is present.

It appears from comments received by Judge Stong, a member of our Committee who is familiar with the proceedings of the ABA House of Delegates, as a past member and substitute member as recently as this last February, that the ABA anticipates the possibility of a need for the filing of an amicus brief in an appropriate matter in the future, as this issue is further refined and developed in the frequently evolving practice of bankruptcy litigation. Accordingly, the adoption of a policy by the ABA in this regard may facilitate its ability to participate in a meaningful way for the proper development of the jurisprudence in this area. I am advised that this proposed memorandum has not yet been adopted by the ABA, but that upon adoption, it will become ABA policy.

Judge Stong has also been intricately involved with the development of the policy enunciated by the proposed resolution by the National Conference of Bankruptcy Judges (NCBJ), which has approved the resolution. Other jurisdictions, including Massachusetts and Delaware, are also considering this resolution. For the foregoing reasons, it would be appropriate for the Section to approve the resolution, subject to any further comments that the Executive Committee might have on this matter.

Douglas T. Tabachnik,
Committee Chair
Bankruptcy Litigation Committee
Commercial and Federal Litigation Section
New York State Bar Association

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

12 MISC 00032

In the Matter of:

Standing Order of Reference
Re: Title 11

AMENDED
STANDING ORDER
OF REFERENCE

M10-468

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.

SO ORDERED.

Loretta A. Preska
Chief Judge

Dated: New York, New York
January 31, 2012