

**PROPOSED AMENDMENTS TO 28 U.S.C. §§ 157 AND  
158 IN RESPONSE TO *STERN v. MARSHALL*, 131 S. Ct.  
2594 (2011)**

Approved by the National Bankruptcy Conference  
2012 Annual Meeting  
November 9, 2012

**Proposed Amendments to Title 28 Relating to Stern v. Marshall**

**§157. Procedures**

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(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,~~ orders and decrees, subject to review under section 158 of this title.

(2) Core proceedings are proceedings arising under title 11 or arising in a case under title 11, except any proceeding in which, by reason of Article III, section 1 of the Constitution, a bankruptcy judge lacks authority, assuming the absence of consent of all the parties to the proceeding, to enter a final judgment, order, or decree, and, subject to such limitation, include, but are not limited to—

- (A) matters concerning the administration of the estate;
- (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
- (C) counterclaims by the estate against persons filing claims against the estate;
- (D) orders in respect to obtaining credit;
- (E) orders to turn over property of the estate;
- (F) proceedings to determine, avoid, or recover preferences;
- (G) motions to terminate, annul, or modify the automatic stay;
- (H) proceedings to determine, avoid, or recover fraudulent conveyances;
- (I) determinations as to the dischargeability of particular debts;
- (J) objections to discharges;
- (K) determinations of the validity, extent, or priority of liens;
- (L) confirmations of plans;
- (M) orders approving the use or lease of property, including the use of cash collateral;
- (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
- (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; ~~and~~
- (P) recognition of foreign proceedings and other matters under chapter 15 of title 11; and
- (Q) proceedings to subordinate claims against the estate.

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(c)(1) A bankruptcy judge may hear a proceeding referred under subsection (a) of this section 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~~ judgment, order, or decree, 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.

(2) 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, with the consent of all the parties to the proceeding, may to hear and determine a proceeding referred under subsection (a) of this section that is not a core proceeding and may to enter appropriate orders and judgments, orders, and decrees,~~ subject to review under section 158 of this title.

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### §158. Appeals

- (a)(1) The district courts of the United States shall have jurisdiction to hear appeals
- (A) from final judgments, orders, and decrees;
  - (B) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
  - (C) 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.

(2) The district court shall treat a bankruptcy judge's judgment, order, or decree on appeal under subsection (a)(1) as proposed findings of fact and conclusions of law, subject to review under section 157(c)(1) of this title, if the judgment, order or decree determined, without consent of all of the parties to the proceeding, a proceeding that is not a core proceeding.

(3) An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

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(b) (7) If a panel of the bankruptcy appellate panel service hearing an appeal under this subsection determines that the bankruptcy judge, by reason of Article III, section 1, of the Constitution, lacked authority to enter the judgment, order, or decree that is the subject of the appeal, the panel shall order the appeal transferred to the district court for the district in which the appeal originated.

## Comments on Proposed Amendments to 28 U.S.C. §§ 157 and 158

Overall the proposal attempts to do several things. Of most significance are the following:

- respond to the holding of *Stern v. Marshall*, 131 S. Ct. 2594 (2011), by limiting the scope of core proceedings to matters that the bankruptcy court has constitutional authority to hear and determine;
- recognize the possibility that other proceedings the statute lists as core may be found to come within the *Stern* rationale, but without taking the position that *Stern* necessarily extends beyond its holding;
- incorporate so-called *Stern*-like claims within the procedures for the handling of non-core proceedings;
- provide a procedure for treating a judgment as proposed findings of fact and conclusions of law if the district court on appeal decides the bankruptcy court erroneously treated a proceeding as core; and
- require the transfer of an appeal from a bankruptcy appellate panel (“BAP”) to the appropriate district court if the BAP determines that the bankruptcy court lacked constitutional authority to enter the judgment, order, or decree that is the subject of the appeal.

The amended § 157 would create only two categories of proceedings: core (the definition of which excludes proceedings requiring Art. III determination) and every other proceeding referred by the district court to the bankruptcy court. This change would preclude the existence of a category of proceedings that are statutorily core, but constitutionally non-core.

Here are the specifics of the proposed amendments:

### **§ 157. Procedures**

**(b)(1)** – The language “arising under title 11, or arising in a case under title 11,” would be deleted from this paragraph and added to paragraph (2). Consistent with the Court’s holding in *Stern*, 131 S. Ct. at 2604-05, this change would provide that all core proceedings either arise under title 11 or arise in a case under title 11. It would thereby make clear that the authority conferred in (b)(1) is not limited to a subset of core proceedings. The phrase “orders and judgments” would be changed to “judgments, orders, and decrees” to conform to the language used in 28 U.S.C. § 158(a).

**(b)(2)** – In addition to the change discussed above, this paragraph would provide a definition of “core proceedings” that takes account of the *Stern* holding and eliminates confusion about the meaning of “core.” Under the current statute, a proceeding might be designated as core, but under *Stern* the bankruptcy court might nevertheless lack constitutional authority to hear and determine it. Under the proposed amendment, such a proceeding would not be core, even if it falls within one of the subparagraphs of (b)(2). By excluding from the definition of “core proceedings” any proceeding as to which the bankruptcy court may not enter a final judgment, assuming the absence of consent by all of the parties, the provision would necessarily conform to

Article III, section 1 of the Constitution. Additional amendments of the provision would therefore not be required if *Stern* were later held to apply to any proceedings other than certain counterclaims by the estate against persons filing claims against the estate.

**(b)(2)(C)** – This provision was the subject of the *Stern* decision. Because of the proposed limiting definition of core proceedings in subsection (b)(2), no amendment of this provision is required. Under *Stern* some counterclaims by the estate against persons filing claims against the estate are properly classified as core. Counterclaims that come within the scope of the *Stern* holding, however, would be excluded from the classification as core because the bankruptcy court would lack authority under Art. III, section 1 of the Constitution to enter a final judgment.

**(b)(2)(Q)** – This provision would add proceedings to subordinate claims against the estate to the list of core proceedings. Unrelated to the *Stern* decision, this amendment would reflect the current treatment of subordination proceedings by the courts.

**(c)(1)** – Proceedings that a bankruptcy judge may hear but not determine would be described as proceedings that are referred by the district court but are not core proceedings. By eliminating the reference to proceedings that are “related to a case under title 11,” this change would allow the bankruptcy court to hear and submit proposed findings of fact and conclusions of law in any proceeding for which it lacked constitutional authority to enter a final judgment—even if the proceeding arose under title 11 or arose in a case under title 11.

**(c)(2)** – The revision of this paragraph would delete the redundant authorization for referral of proceedings by the district court (subdivision (a) having already conferred that authority) and would apply to all proceedings that are not core, not just to “related to” proceedings. It also would make clear that parties may indicate in the bankruptcy court whether they consent to the entry of a judgment by the bankruptcy judge and that they do not have to consent prior to the district court’s referral to the bankruptcy court.

## **§ 158. Appeals**

**(a)** – The subsection would be divided into paragraphs to add clarity. In what would be subsection (a)(1), redundant language would be deleted.

Proposed paragraph (2) would be added to require a district court to treat a bankruptcy judge’s judgment, order, or decree as proposed findings of fact and conclusions of law if the district court decided that the proceeding was not one that could be determined by the bankruptcy judge.

**(b)(7)** – This paragraph would be added to require the transfer of an appeal from a BAP to a district court if the BAP determines that Art. III adjudication is required. Once transferred, the appeal could then be treated according to the provisions of subsection (a)(2).