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Business Litigation Note

Not all Bankruptcy "Core" Proceedings are Created Equal: A Limitation on State Law Lender Liability Claims in Bankruptcy Court After *Stern v. Marshall*

The scenario has become all too familiar in recent years: a borrower defaults on a loan and, when the lender pursues the loan collateral through foreclosure or other proceedings, the borrower files for bankruptcy protection. More often than not, when the lender appears in bankruptcy court to pursue its interest in the collateral, the borrower counterattacks with a host of state law lender liability claims.

The recent opinion of the United States Supreme Court (the "*Court*") in *Stern v. Marshall* ("*Stern*"), Case No. 10-179, 2011 WL 2472792 (U.S. June 23, 2011), may temper a borrower's enthusiasm to pursue such claims. In *Stern*, the Court restricted a bankruptcy court's jurisdiction to enter final judgments regarding claims arising under state law rather than the Bankruptcy Code. The Court held that a bankruptcy court, as a non-Article III court, lacks the constitutional authority to decide a state law claim brought by a debtor against a creditor, even if the matter is part of the "core" statutory jurisdiction of the bankruptcy court. This decision limits the reach of bankruptcy court jurisdiction and may require state law claims to be decided in a non-bankruptcy forum, even if they are central to a debtor's bankruptcy case.

The dispute in *Stern* arose out of litigation between Ms. Vickie Lynn Marshall ("Ms. Marshall"), also known as Anna Nicole Smith and Mr. Pierce Marshall ("*Mr. Marshall*"), the son of her former husband. After her husband's death, Ms. Marshall filed for bankruptcy protection, and Mr. Marshall filed suit against her bankruptcy estate for defamation. Ms. Marshall counterclaimed for tortious interference with an expected gift from her late husband. The bankruptcy court rendered a final judgment on the counterclaim in Ms. Marshall's favor. Mr. Marshall appealed the decision.

On appeal, the Court questioned whether the bankruptcy court had both the constitutional and statutory authority to render a final judgment on the state law counterclaim. In the absence of either type of authority, the bankruptcy court would be unable to render a final judgment. Rather, it would only be permitted to offer suggested findings of fact and conclusions of law to the federal district court, which would then have the authority to review the matter *de novo* if any party objected. *See* 28 U.S.C. §157(c).

To determine whether bankruptcy courts have the requisite statutory authority, the Court reviewed 28 U.S.C. §157(b), which provides in pertinent part:

> (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.
>
> (2) Core proceedings include, but are not limited to . . . .
>
> (c) Counterclaims by the estate against persons filing claims against the estate. . . .

See 28 U.S.C. § 157(b)(2)(C) (emphasis supplied). Unanimously, the Court concluded that the state law tortious interference claim fell squarely within the statutory definition of a core proceeding because it was a counterclaim to the defamation claim and recognized that this finding would often end the jurisdictional inquiry:

> In past cases, we have suggested that a proceeding's "core" status alone authorizes a bankruptcy judge, as a statutory matter, to enter final judgment in the proceeding. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (explaining that Congress had designated certain actions as "core proceedings," which bankruptcy judges may adjudicate and in which they may issue final judgments. . . .)

Stern, 2011 WL 2472792, at *9.

The Court declined to end the analysis at this point, but went on to examine the bankruptcy court's constitutional authority as a non-Article III court and, in a five-to-four ruling, held that the bankruptcy court lacked the constitutional authority to decide the state law counterclaim.

This ruling can be a powerful tool in a lender's arsenal. Borrowers often attempt to assert a bevy of state law counterclaims in bankruptcy court, such as fraud, negligent misrepresentation, bad faith, promissory estoppel and duress and breach of contract, in attempts to forestall a lender's pursuit of the loan collateral. Such claims will now call for heightened judicial scrutiny and make it more difficult for borrowers to obtain judgment on state law lender liability claims.

Recent Case Law Trends Show That Tweets and Posts May be Discoverable

With the use of social media becoming the norm, information placed on social networking sites such as Facebook, YouTube, Twitter and foursquare is increasingly becoming fair game for discovery in litigation. Users of these sites may tweet or post detailed minute-by-minute status updates, without considering the implications of their posts. Despite privacy settings, judges have permitted such relevant evidence to be used at trial.

In *Equal Employment Opportunity Comm'n v. Simply Storage Mgmt*., LLC, 270 F.R.D. 430 (S.D. Ind. May 11, 2010), a Title VII sexual harassment suit, a United States District Court allowed the production of social networking site content that related to allegations of severe emotional distress. Recognizing that the scope of discovery into social media sites "[would] require the application of basic discovery principles in a novel context," *id*. at 434, the court's challenge was to "define appropriately broad limits . . . on the discovery ability of social communications." *Id*. at 434. The court ultimately held that the production of relevant portions of the content on the employees' social networking site was appropriate, despite the content being designated as "private" on their accounts. *Id*. at 434-35.

Similarly, the district court in *Offenback v. L.M. Bowman, Inc*., 2011 WL 2491371 (M.D. Pa. June 22, 2011), recently conducted an in camera review of the plaintiff's Facebook and MySpace accounts after being provided with log-in information. The court reviewed the plaintiff's Facebook account, including "a thorough review of Plaintiff's 'Profile' postings, photographs, and other information." *Id*. at *2.

State courts have also recently held that posts on social media sites are discoverable. In *Romano v. Steelcase, Inc*., 907 N.Y.S. 2d 650 (2010), the New York Supreme Court considered whether the plaintiff had to turn over to defendants information from her Facebook and MySpace accounts, despite strict privacy settings. Ordering the plaintiff to relinquish access to her entire Facebook and MySpace pages, the court noted that "when plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings." *Id*. at 657. Similarly, a Pennsylvania court recently held that a person who voluntarily posts pictures and information on Facebook and MySpace does not have a reasonable expectation of privacy in the posts to prevent production of the information, even if the person designates that accounts be viewed only by friends. *Zimmerman v. Weis Markets, Inc*., 2011 WL 2065410 (Pa. Com. Pl. May 19, 2011).

All in all, organizations and their employees must understand the evolving legal implications of social media. They should expect that opponents in litigation will be able to gain access to the content on their social networks and should adopt social media policies accordingly.

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