

**Commercial Law and Bankruptcy Section**  
**Tip of the Month**  
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*Stern v. Marshall, Much Ado About Nothing*

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In the recent 5-4 decision, *Stern v. Marshall*, No. 10-179, slip op. (U.S. June 23, 2011), the Supreme Court of the United States, in a limited fashion, addresses the jurisdictional concepts, core and non-core, and leaves us with no substantive change on how to employ these concepts in practice.

In summary, the debtor allegedly had her lawyers inform the press prepetition that a creditor had fraudulently obtained control of his father's estate. When the debtor then filed a bankruptcy, the creditor filed a proof of claim, asserting defamation as the basis for liability. The debtor in turn asserted truth as a defense and filed a counterclaim asserting that the creditor tortuously interfered with her expectation to receive a gift from the probate estate.

While the Court determined that the bankruptcy court had *statutory* authority to address the counterclaim, the Court also determined that "designating all counterclaims as 'core' proceedings raises serious constitutional concerns." The Court noted that "the plain text of § 157(b)(2)(C) [did not] leave[] any room for the canon of avoidance", allowing no room to construe this statute "so as 'to avoid serious doubt of [its] constitutionality.'" "We would have to rewrite the statute, not interpret it, to bypass the constitutional issue § 157(b)(2)(C) presents." *Id.* at 17 (internal citations omitted). The Court also held that § 157(b)(5) (dealing with adjudication of personal injury torts) was not jurisdictional, but rather an indication of venue, which could be waived. At the end of the day, while the Court determined that the bankruptcy court had statutory authority to address the counterclaim under § 157(b)(2)(C), Article III of the Constitution precludes the bankruptcy court's final resolution of the counterclaim, as noted in the 1982 *Marathon* decision.

So, where does that leave the practitioner dealing with compulsory counterclaims of the estate, and those defending against such claims? As noted by the Court, "our decision today does not change all that much":

As described above, the current bankruptcy system also requires the district court to review de novo and enter final judgments on any matters that are 'related to' the bankruptcy proceedings, § 157(c)(1), and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, §157(d). [The creditor in this case] has not argued that the bankruptcy courts 'are barred from 'hearing' all counterclaims' or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that 'finally decide[s]' them. We do not think the removal of counterclaims such as [the debtor's in this case] from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a 'narrow' one. *Id.* at 43 (internal citations omitted).

Aside from the constitutional concerns expressed in the decision, in practical application the Court considers its own decision to be *Much Ado About Nothing*, for the humble practitioner.