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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	EC-11-1427-PaDMk
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SHAWN DEITZ,)	Bk. No.	08-13589
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Debtor.)	Adv. No.	08-01217
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SHAWN DEITZ,)		
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Appellant,)		
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v.)	O P I N I O N	
)		
WAYNE FORD and PATRICIA FORD,)		
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Appellees.)		
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Argued and Submitted on March 22, 2012
at Sacramento, California

Filed - April 23, 2012

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Hon. Richard T. Ford, Bankruptcy Judge, Presiding

Appearances: Alexander B. Wathen argued for Appellant Shawn
Deitz. Thomas H. Armstrong argued for Appellees
Wayne Ford and Patricia Ford.

Before: PAPPAS, DUNN and MARKELL, Bankruptcy Judges.

1 PAPPAS, Bankruptcy Judge:

2

3 Chapter 7¹ debtor Shawn Deitz ("Deitz") appeals the
4 bankruptcy court's judgment awarding damages to creditors Wayne
5 ("Ford") and Patricia Ford (together, the "Fords"), and declaring
6 the debt represented by the judgment excepted from discharge under
7 § 523(a)(2)(A), (a)(4), and (a)(6). We AFFIRM.

8

FACTS

9 Deitz was a sometime general building contractor in the
10 Fresno area. Mr. Ford had served in the U.S. Army, where he was
11 injured; he is disabled and has not worked since that injury.
12 Mrs. Ford is a registered nurse.

13 In late August or September 2006, the Fords met Deitz at the
14 Applegate Project housing development, where Deitz was building
15 new homes. The Fords informed Deitz that they were planning to
16 build a handicap-assisted home. They all toured the house Deitz
17 had under construction, and further discussed the Fords' building
18 plans.

19 Over the next two months, the parties had several more
20 meetings. During their conversations, Deitz represented to the
21 Fords that he could build a new house to the specifications
22 required by the Americans with Disabilities Act ("ADA") and which
23 would comply with Veterans Administration ("VA") standards for
24 providing financial support for the homeowners. Deitz told the
25 Fords that he had previously worked on construction projects

26

27 ¹ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 meeting the ADA and VA standards. Deitz also represented on
2 several occasions to the Fords that he was a former Marine, and
3 thus a fellow veteran with Mr. Ford; that his mother was a nurse,
4 as was Mrs. Ford; and that he had worked as a pharmacy technician
5 at the VA Hospital where Ford had been treated. Perhaps most
6 importantly, both of the Fords would later testify that Deitz
7 represented that he was a licensed general contractor in good
8 standing with the State of California.

9 Deitz gave the Fords a proposal bid to build their home on
10 September 25, 2006. It offered to build a 4,170 square foot house
11 with additional improvements, for a total of 7,050 square feet.
12 Deitz proposed to build the house for the total price of
13 \$444,105.00 (\$106.50 per square foot). The Fords agreed, and a
14 final contract was entered into by the parties incorporating
15 substantially the same terms. The contract bears Deitz' signature
16 directly above what is shown as his state contractor's license
17 number. However, it is not disputed that on the date that the
18 contract was signed by the Fords, November 7, 2006, Deitz' license
19 was not in good standing, and had been suspended. Indeed, the
20 license was not reinstated by the state until January 3, 2007.²

21 During the period of construction and up through trial of
22 this action, the Fords paid Deitz a total of \$511,800.00 to build
23 the home. Deitz admitted that he failed to complete the

24
25 ² The parties appear to agree that at some point before
26 signing of the contract, Deitz informed the Fords that his license
27 was suspended, but that, he told them, the suspension would be
28 lifted before the contract was signed. It is uncontroverted that
Deitz' license was suspended at the time of the contract signing
and would not be reinstated until the following month. It is also
uncontroverted that Deitz' license was suspended again several
times, and was ultimately revoked, during construction.

1 construction. According to the expert testimony of John Thompson
2 ("Thompson"), a former senior investigator with the California
3 Contractors' State License Board, the house was approximately 65
4 percent completed. Additionally, the Fords testified that they
5 made repeated demands to Deitz that he provide them an accounting
6 and itemization, supported by receipts and invoices, to show how
7 he had disbursed the monies he had been paid for the construction.
8 The bankruptcy court would ultimately determine that Deitz never
9 gave the Fords an appropriate accounting, but instead, that Deitz
10 had "simply submitted asserted [construction cost] overages
11 without proof, and unsigned change orders."

12 Deitz filed a chapter 7 bankruptcy petition on June 20, 2008.
13 His schedules list the Fords as creditors holding a claim in an
14 unknown amount.

15 The Fords commenced an adversary proceeding against Deitz on
16 September 9, 2008. The complaint alleged that their claims for
17 damages against Deitz arising from the construction of the house
18 should be excepted from discharge under § 523(a)(2)(A), (a)(4) and
19 (a)(6). As to the § 523(a)(2)(A) claim, the Fords alleged that
20 Deitz knowingly made intentional material misrepresentations to
21 them with the intent to deceive the Fords, upon which they
22 justifiably relied in retaining Deitz, and that the Fords suffered
23 damages as a result of Deitz' fraud. As to § 523(a)(4), the Fords
24 alleged that through fraud, trick and device, with a preconceived
25 design and intent, Deitz misappropriated monies from the Fords.
26 And as to § 523(a)(6), the Fords alleged that Deitz' actions were
27 willful, malicious, and the proximate cause of the Fords'
28 financial damages.

1 Deitz, who represented himself in the bankruptcy case and
2 adversary proceeding,³ filed an answer to the complaint denying
3 all allegations.

4 Before a trial could be held, the Fresno County District
5 Attorney filed a criminal complaint against Deitz on March 23,
6 2009. People v. Deitz, case no. F07-9086 (Superior Court Fresno
7 County). Four of the counts in that complaint alleged that Deitz
8 was guilty of grand theft of personal property in connection with
9 building contract transactions with the Fords and three other
10 parties on their respective properties. Deitz was found not
11 guilty of those four counts by a jury on October 25, 2010.
12 However, Deitz was convicted on a fifth count for the crime of
13 Contracting Without License in violation of CAL. BUS. & PROF. CODE
14 § 7028.⁴

15 After several continuances to allow the criminal proceeding
16 to be completed, the trial in the adversary proceeding took place
17 on April 4, 5 and 11, 2011. Although the Fords submitted a
18 pretrial brief, Deitz did not, yet the bankruptcy court took note
19 of a pretrial statement made by Deitz that he never intended to
20

21
22 ³ Deitz appeared pro se in both the bankruptcy and adversary
23 proceeding, but has been represented by counsel in the criminal
24 proceeding and in this appeal.

25 ⁴ 7028. Contracting without license; first conviction;
26 second, third, and subsequent convictions; limitation of actions;
27 restitution

28 (a) It is a misdemeanor for a person to engage in the business or
act in the capacity of a contractor within this state without
having a license therefor, unless the person is particularly
exempted from the provisions of this chapter.
CAL. BUS. & PROF. CODE § 7028 (2012).

1 defraud or willfully injure the Fords. At the trial, over 500
2 pages of documentary evidence were admitted, and the bankruptcy
3 court heard testimony from five witnesses (the Fords, Deitz,
4 Thompson, and Terry Freeman, a representative of a supplier of
5 doors to the Fords' project). As reported later in its findings
6 of fact, the court evaluated the credibility of each witness.

7 At the close of trial, the bankruptcy court took the issues
8 under advisement; it entered its formal Findings of Fact and
9 Conclusions of Law on July 28, 2011. In addition to making over
10 sixty separate, detailed findings of fact, the court listed forty
11 conclusions of law in support of its decision that Deitz' debt to
12 the Fords was nondischargeable under § 523(a)(2), (4) and (6).

13 As to Fords' § 523(a)(2)(A) fraud claim, the bankruptcy court
14 found and concluded that Deitz knowingly made false
15 representations to the Fords that he was a licensed contractor in
16 October-November 2006 when he contracted with them, and that he
17 misrepresented that he would complete the construction of the home
18 according to ADA, VA and local building code standards. The court
19 found that these misrepresentations were false, intentional, and
20 made to deceive the Fords into entering into the building
21 contract. Finally, the court found that the Fords justifiably
22 relied on Deitz' misrepresentations, and that the Fords' money
23 damages established via the evidence were proximately caused by
24 these intentional misrepresentations.

25 As to the § 523(a)(4) claim, the bankruptcy court found that
26 the evidence established that Deitz was given significant funds by
27 the Fords, and that Deitz took possession of those funds for a
28 particular purpose (i.e., to construct the Fords' home). The

1 court found that Deitz failed to use those funds to build and
2 complete the home, and that Deitz' conduct amounted to fraud.
3 Consequently, the court concluded that Deitz had committed
4 embezzlement as contemplated by § 523(a)(4).

5 As to the § 523(a)(6) claim, the court concluded that Deitz
6 fraudulently induced the Fords to enter into the building contract
7 at a time when he knew he was not licensed as a contractor. Deitz
8 further deceived the Fords into making progress payments on the
9 project with continued misrepresentations about the status of
10 work, and that he did so with the intent to obtain substantial
11 funds from the Fords, and that the financial injuries the Fords
12 suffered were foreseeable. As a result, the bankruptcy court
13 concluded that Deitz' actions constituted a willful and malicious
14 injury to the Fords for purposes of § 523(a)(6).

15 On July 28, 2011, the bankruptcy court entered a money
16 judgment in favor of the Fords and against Deitz in the amount of
17 \$386,092.76 and ordered that the judgment was excepted from
18 discharge in Deitz' bankruptcy case pursuant to § 523(a)(2)(A),
19 (a)(4) and (a)(6).

20 Deitz filed a timely appeal on August 5, 2011.

21 **JURISDICTION**

22 The bankruptcy court had subject matter jurisdiction over
23 this action under 28 U.S.C. § 1334(b), something which Deitz
24 apparently concedes. In addition, there is no dispute that this
25 action was a core proceeding under 28 U.S.C. § 157(b)(2)(I). In
26 this appeal, however, Deitz challenges the constitutional
27 authority of the bankruptcy court to enter a final judgment
28 against him in the adversary proceeding, relying upon the Supreme

1 Court's recent decision in Stern v. Marshall, ___ U.S. ___, 131
2 S.Ct. 2594 (2011). We discuss this contention below. Finally,
3 the Panel has jurisdiction over this appeal under 28 U.S.C. § 158.

4 **ISSUES**

5 Whether the bankruptcy court had the constitutional authority
6 to enter a final judgment determining the amount of the Fords'
7 claims against Deitz, and the dischargeability of those claims.

8 Whether the bankruptcy court erred in ruling that Deitz' debt
9 to the Fords was nondischargeable under § 523(a)(2), (4) and (6).

10 **STANDARD OF REVIEW**

11 We review the constitutionality of a federal statute de novo.
12 United States v. Vongxay, 594 F.3d 1111, 1114 (9th Cir. 2010),
13 cert. denied, 131 S. Ct. 294 (2010).

14 Whether a claim is excepted from discharge under § 523(a)
15 presents mixed issues of law and fact and is reviewed de novo.
16 Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002).

17 De novo means review is independent, with no deference given
18 to the trial court's conclusion. Barclay v. Mackenzie (In re AFI
19 Holding, Inc.), 525 F.3d 700, 702 (9th Cir. 2008).

20 **DISCUSSION**

21 **I. The bankruptcy court had the constitutional authority to**
22 **enter a final judgment against Deitz.**

23 In 28 U.S.C. § 1334(b), Congress granted nonexclusive subject
24 matter jurisdiction to the district court over "all civil
25 proceedings arising under title 11, or arising in or related to
26 cases under title 11." Congress also authorized each district
27 court to refer such proceedings to a bankruptcy judge. 28 U.S.C.

28

1 § 157(a).⁵ The bankruptcy court, in turn, may hear and determine
2 such proceedings, 28 U.S.C. § 157(b)(1), and if the particular
3 action involves a "core proceeding" as defined in 28 U.S.C.
4 § 157(b)(2), it may enter "appropriate orders and judgments
5 subject to [appellate] review under section 158 of [title 11]."

6 Here, the Fords' adversary complaint sought a determination
7 that their claims against Deitz were excepted from his discharge
8 in bankruptcy under several subsections of § 523(a). Clearly,
9 then, because such claims arose under the Bankruptcy Code, subject
10 matter jurisdiction existed in the district court, and by its
11 referral, in the bankruptcy court, as well.

12 Moreover, "determinations as to the dischargeability of
13 particular debts . . ." are expressly included in the statutory
14 list of core proceedings. 28 U.S.C. § 157(b)(2)(I). As a result,
15 Congress has provided that the bankruptcy court may enter a final
16 judgment on exception to discharge claims, subject only to
17 appellate review. 28 U.S.C. § 157(b)(2)(I). Indeed, the
18 bankruptcy court, via the reference from the district court, has
19 the exclusive authority to determine the dischargeability of debts
20 under § 523(a)(2), (4) and (6). See § 523(c) (the debtor shall be
21 discharged from a debt of the kind specified in § 523(a)(2), (4)
22 and (6) unless, after notice and a hearing, "the [bankruptcy]
23 court determines such debt to be excepted from discharge . . .
24 ."); Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 869-70 (9th
25 Cir. 2005).

26
27 ⁵ The district court in the Eastern District of California
28 has indeed referred such proceedings to the bankruptcy court.
See E.D. Cal. General Order 161 (July 10, 1984).

1 Deitz does not dispute the bankruptcy court's subject matter
2 jurisdiction over this action, nor that the adversary proceeding
3 was a core proceeding. Instead, Deitz argues that, under Stern,
4 the bankruptcy court's entry of a final judgment in this case was
5 an unconstitutional act. We disagree.

6 In Stern, the Supreme Court held that, as an Article I court,
7 a bankruptcy court "lacked the constitutional authority to enter a
8 final judgment on a state law counterclaim that is not resolved in
9 the process of ruling on a creditor's proof of claim" in a
10 bankruptcy case. Stern, 131 S.Ct. at 2620. Put another way,
11 though 28 U.S.C. § 157(b)(2)(C) authorized the bankruptcy court to
12 decide the merits of the bankruptcy estate's counterclaim against
13 a creditor, such an exercise of judicial power by an Article I
14 bankruptcy judge violated the Constitution, because "Congress may
15 not bypass Article III simply because a proceeding may have some
16 bearing on a bankruptcy case; the question is whether the action
17 at issue stems from the bankruptcy itself or would necessarily be
18 resolved in the claims allowance process." Id. at 2618.

19 But the Stern decision addressed the constitutionality of a
20 particular subsection of 28 U.S.C. § 157(b)(2) (i.e.,
21 "counterclaims by the estate against persons filing claims against
22 the estate"), and only then, under the particular facts of that
23 case. In Stern, Chief Justice Roberts made it clear that any
24 constitutional bar to the exercise of judicial power by a
25 bankruptcy court erected by that decision was a very limited one:

26 We conclude today that Congress, in one isolated
27 respect, exceeded that limitation in the Bankruptcy Act
28 of 1984. The Bankruptcy Court below lacked the
constitutional authority to enter a final judgment on a
state law counterclaim that is not resolved in the

1 process of ruling on a creditor's proof of claim.
2 Stern, 131 S.Ct. at 2620. Indeed, in describing the impact of its
3 decision, the majority predicts that the Court's opinion in Stern
4 should have few "practical consequences," and that the majority
5 did "not think that the removal of [such] counterclaims . . . from
6 core bankruptcy jurisdiction meaningfully changes the division of
7 labor in the current statute" 131 S.Ct. at 2619-20.

8 Though by its own edict Stern is a narrow decision,
9 restricted in impact to only certain types of core proceedings,
10 Deitz relies upon Stern to launch a frontal attack on the
11 bankruptcy courts' authority to enter a final judgment in a
12 prototypical bankruptcy context, a dischargeability action. In
13 this appeal, Deitz asks the Panel to reverse the judgments of the
14 bankruptcy court concluding that the Fords' claims against Deitz
15 are excepted from discharge under § 523(a)(2)(A), (4) and (6). In
16 Deitz' view, the three exception to discharge claims advanced in
17 the Fords' adversary complaint were, at bottom, simply disputes
18 between private parties about a common law fraud claim and their
19 dischargeability in bankruptcy. Although Deitz provides a
20 creative spin on the "public versus private rights" analysis in
21 Stern, reduced to its essence, his position is that the bankruptcy
22 court's judgment entered in this case was a violation of Article
23 III of the Constitution. Deitz Op. Br. at 16, 20. He argues,

24 In this case Appellant argues that Stern v. Marshall
25 makes the judgment in this case unconstitutional as a
26 violation of the life tenure and salary anti-diminution
27 provisions of Article III. A non-Article III judge
28 cannot litigate dischargeability and issue a common law
fraud judgment which means entering a final judgment
because . . . a final judgment requires a judge
appointed under Article III.

1 Deitz Op. Br. at 17.

2 Deitz has not cited even a single post-Stern decision
3 supporting his broad statement that only Article III judges may
4 enter final judgments in core dischargeability actions.⁶ Even in
5 the few cases we have located suggesting an expansive
6 interpretation of Stern, the courts generally limit their concerns
7 to those actions in bankruptcy courts that seek to augment the
8 bankruptcy estate at the expense of third parties, primarily
9 fraudulent conveyance avoidance actions, because those legal
10 actions seek through a money judgment to take the defendant's
11 property and that adjudication can only be made by a member of the
12 independent Article III judiciary. See e.g., Meoli v. Huntingdon
13 Nat'l Bank (In re Teleservices Group, Inc.), 456 B.R. 318, 323
14 n.59 (Bankr. W.D. Mich. 2011) (holding that the bankruptcy court
15 could not adjudicate the debtor's fraudulent conveyance proceeding
16 against a bank because "only an Article III judge can enter a
17 judgment associated with the estate's recovery of contract and
18 tort claims to augment the estate. . . if the relief sought by the
19 estate included the involuntary recovery of property from a third
20 party"); In re Canopy Financial, Inc., 2011 WL 3911082 (Bankr.
21 N.D. Ill. Sept. 1, 2011) (holding that the bankruptcy court could
22 not adjudicate through final orders a fraudulent conveyance

23
24 ⁶ The only authorities Deitz cites are pre-Stern cases and
25 reports going back over 20 years. Deitz gives extended attention
26 to the Report of the National Bankruptcy Review Commission, NBRC
27 § 4.11(B) & (C) (1997), that advocated a transition from the
28 current system to an all-Article III bankruptcy system. Although
that report did call into question the constitutionality of the
current bankruptcy courts, it also presented arguments in favor of
the current courts. In any event, its proposals were never
adopted, so we question how useful this information is to our
analysis of Stern v. Marshall.

1 action); In re Blixseth, 2011 WL 3274042 (Bankr. D. Mont. Aug. 1,
2 2011) (pursuant to Stern v. Marshall, giving parties fourteen days
3 in which to request that the district court withdraw the reference
4 to the bankruptcy court of such action, or the court would dismiss
5 the fraudulent conveyance claims for lack of subject matter
6 jurisdiction), but see Samson v. Blixseth (In re Blixseth), 463
7 B.R. 896 (Bankr. D. Mont. 2012) (modifying prior holding).

8 In contrast to the decisions of these courts, a significant
9 majority of decisions rendered since Stern follow Chief Justice
10 Robert's admonition that the decision be applied narrowly. See
11 Burtch v. Seaport Capital, LLC (In re Direct Response Media,
12 Inc.), 2012 WL 112503 * 10 (Bankr. D. Del. 2012) ("The Court
13 adopts the Narrow Interpretation and holds that Stern only removed
14 a non-Article III court's authority to finally adjudicate one type
15 of core matter, a debtor's state law counterclaim asserted under
16 § 157(b) (2) (C). By extension, the Court concludes that Stern does
17 not remove the bankruptcy courts' authority to enter final
18 judgments on other core matters[.]"); Spanish Palms Mktg. LLC v.
19 Kingston (In re Kingston), 2012 Bankr. LEXIS 755 at *8 (Bankr. D.
20 Idaho Feb. 27, 2012) ("The Supreme Court's recent decision in
21 Stern v. Marshall . . . does not prohibit a bankruptcy court from
22 entering a final judgment resolving issues under the Bankruptcy
23 Code, which would be completely resolved in the bankruptcy
24 process, or that flow from a federal statutory scheme. See 131
25 S.Ct. at 2611-15. Plaintiffs' exception-to-discharge claims are
26 premised solely on provisions of the Code, will be completely
27 resolved in the bankruptcy process, and the Court has
28 constitutional authority to issue a final judgment in regards to

1 those claims."); In re Ambac Fin. Grp., Inc., 457 B.R. 299, 308
2 (Bankr. S.D.N.Y. 2011) ("Stern v. Marshall has become the mantra
3 of every litigant who, for strategic or tactical reasons, would
4 rather litigate somewhere other than the bankruptcy court."); In
5 re Salander O'Reilly Galleries, 453 B.R. 106, 115-16 (Bankr.
6 S.D.N.Y. 2011) (Stern "should be limited to the unique
7 circumstances of that case" and "does not remove from the
8 bankruptcy court its jurisdiction over matters directly related to
9 the estate that can be finally decided in connection with
10 restructuring debtor and creditor relations"); In re Heller Ehrman
11 LLP, 2011 WL 4542512, at *1 (Bankr. N.D. Cal. 2011) ("Withdrawal
12 of the reference at this time would amount to an unnecessary
13 extension of the narrow holding in Stern, would be an inefficient
14 use of judicial resources by overburdening the district court and
15 foregoing the services of a bankruptcy court ready, willing and
16 able to do its job and would distort the traditional way to
17 challenge and decide the constitutionality of a federal
18 statute."); In re Safety Harbor Resort and Spa, 456 B.R. 703, 714
19 (Bankr. M.D. Fla. 2011) (holding that Stern does not preclude
20 bankruptcy courts from adjudicating core claims, but rather that
21 it is a "narrow" holding that Congress exceeded the limits of
22 Article III in "one isolated respect"); In re Olde Prairie Block
23 Owner, LLC, 457 B.R. 692, 698 (Bankr. N.D. Ill. 2011) (Stern has a
24 "narrow effect"); In re Am. Bus. Fin. Servs., Inc., 457 B.R. 314,
25 (Bankr. D. Del. 2011) (holding that bankruptcy courts have the
26 authority to decide matters "directly and conclusively related to
27 the bankruptcy" and granting summary judgment to defendants on
28 avoidance and state law claims brought by trustee) (citations

1 omitted).

2 Based on our review of the case law, we conclude, as one
3 bankruptcy court explained, "there can be little doubt that [a
4 bankruptcy court], as an Article I tribunal, has the
5 constitutional authority to hear and finally determine what claims
6 are non-dischargeable in a bankruptcy case." Farooqui v. Carroll
7 (In re Carroll), 464 B.R. 293, 312 (Bankr. N.D. Tex. 2011). As
8 the Farooqui court explained,

9 Determining the scope of the debtor's discharge is a
10 fundamental part of the bankruptcy process. As noted by
11 the court in Sanders v. Muhs (In re Muhs), 2011 Bankr.
12 LEXIS 3032, 2011 WL 3421546 (Bankr. S.D. Tex Aug. 2,
13 2011), "[t]he Bankruptcy Code is a public scheme for
14 restructuring debtor-creditor relations, necessarily
15 including the 'exercise of exclusive jurisdiction over
16 all of the debtor's property, the equitable distribution
17 of that property among the debtor's creditors, and the
18 ultimate discharge that gives the debtor a 'fresh start'
19 by releasing him, her, or it from further liability for
20 old debts.'" 2011 Bankr. LEXIS 3032, [WL] at *1 (citing
21 Central Va. Cmty. College v. Katz, 546 U.S. 356, 363-64,
22 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006)). Congress
23 clearly envisioned that bankruptcy courts would hear and
24 determine all core proceedings, 28 U.S.C. § 157(b)(1),
25 which include, as relevant here, "determinations as to
26 the dischargeability of particular debts." 28 U.S.C.
27 § 157(b)(2)(I). The Supreme Court has never held that
28 bankruptcy courts are without constitutional authority
to hear and finally determine whether a debt is
dischargeable in bankruptcy. In fact, the Supreme
Court's decision in Stern clearly implied that
bankruptcy courts have such authority when it concluded
that bankruptcy courts had the constitutional authority
to decide even state law counterclaims to filed proofs
of claim if the counterclaim would necessarily be
decided through the claims allowance process. Stern,
131 S. Ct. at 2618.

24 Id.

25 Deitz not only challenges the constitutional authority of the
26 bankruptcy court to enter final judgments on discharge claims, he
27 also argues that the bankruptcy court is without the
28 constitutional power to liquidate the amount of such claims.

1 Again, this contention lacks support in the case law. In
2 contrast, at least four decisions specifically address, in light
3 of Stern, the authority of the bankruptcy court to liquidate a
4 creditor's state law claim, and to enter a final money judgment,
5 in actions to determine nondischargeability under § 523(a).

6 In In re Ueberroth, a bankruptcy court believed that, in view
7 of Stern, it did not have authority to enter a monetary judgment
8 with a nondischargeability judgment, and submitted a report and
9 recommendation to the district court so it could do so. Mich. St.
10 Univ. Fed. Credit Union v. Ueberroth (In re Ueberroth), 2011
11 Bankr. LEXIS 5136 (Bankr. W.D. Mich. Dec. 19, 2011). Within a
12 matter of days, the district court held that, "[W]hile the Court
13 acknowledges the uncertainty Stern created regarding the
14 constitutional authority of bankruptcy courts to enter final
15 judgment in certain proceedings, the Court does not believe Stern
16 affects the Bankruptcy Court's authority to enter a default
17 judgment in this action." The district court considered the
18 unnecessary report and recommendation of the bankruptcy court to
19 be harmless error and simply entered judgments in accordance with
20 that report as a matter of judicial economy. Mich. St. Univ. Fed.
21 Credit Union v. Ueberroth (In re Ueberroth), 2012 U.S Dist. LEXIS
22 12 at * 1 (W.D. Mich. January 3, 2012).

23 The Farooqui case, discussed above, analyzed the issue under
24 the public rights exception: "[A] right closely integrated into a
25 public regulatory scheme may be resolved by a non-Article III
26 tribunal." Farooqui, 464 B.R. at 312 (quoting Thomas v. Union
27 Carbide Agricultural Prods. Co., 473 U.S. 568, 593 (1985)). The
28 Farooqui court then reasoned that liquidating state law claims is

1 "closely integrated" into the bankruptcy code because the court
2 has to determine the claim before it can logically determine that
3 it is nondischargeable. Id.

4 In Dragisic v. Boricich (In re Boricich), 464 B.R. 335, 336-
5 37 (Bankr. N.D. Ill. 2011), the bankruptcy court noted that
6 adjudications of the dischargeability of debts have usually been
7 accompanied by entry of a final money judgment in favor of a
8 prevailing creditor under applicable Seventh Circuit authority,
9 N.I.S. Corp. v. Hallahan (In re Hallahan), 936 F.2d 1496, 1508
10 (7th Cir. 1991). However, the court felt it should reexamine this
11 principle in light of Stern. Finding no reason to change its
12 practice, the court reasoned that,

13 this action contrasts with Stern in being an action
14 directly under and defined by the Bankruptcy Code to
15 determine nondischargeability rather than being
16 independent of bankruptcy law. . . . Stern left intact
17 the authority of a bankruptcy judge to fully adjudge a
18 creditor's claim. In this case, the claim was an
19 adversary proceeding against debtor to bar
20 dischargeability of a debt due to Plaintiff. Therefore,
21 the authority to enter a final dollar judgment as part
22 of the adjudication of nondischargeability, as
23 recognized in Hallahan, was not impaired by Stern.
24 Quite clearly it was necessary here to determine the
25 amount of debt in order to determine the debt that is
26 nondischargeable. Therefore, under the clear exception
27 recognized by Stern, final judgment is authorized
28 because such resolution is required to resolve the
creditor's claim.

22 In re Boricich, 464 B.R. at 337.

23 And in In re Soo Bin Kim, 2011 WL 2708985 (Bankr. W.D. Tex.
24 July 11, 2011), the bankruptcy court held that the bankruptcy
25 court had the power to enter a final judgment concerning an
26 exception to discharge as well as to liquidate the underlying
27 claim. In response to the debtor's arguments that Stern bars the
28 court's authority, the bankruptcy court observed that "the

1 [debtor] over reads that case and its application to this
2 proceeding. Even if the [debtor] were right, however, the court
3 would be compelled to follow existing Fifth Circuit precedent as
4 set out in In re Morrison, 555 F.3d 473, 478-79 (5th Cir. 2009)."
5 Id. at * 2 n.2.

6 The holdings in Boricich and Kim are particularly relevant in
7 this appeal. Both of those cases relied on the existing precedent
8 of their courts of appeals. Indeed, the In re Soo Bin Kim case
9 held that, even if Stern did overturn the Fifth Circuit precedent
10 in In re Morrison, the bankruptcy court was required to follow the
11 circuit precedent until that court of appeals overturned its
12 earlier precedent.

13 The Ninth Circuit has also expressly held, pre-Stern, that a
14 bankruptcy court may enter a monetary judgment on a disputed state
15 law fraud claim in the course of determining that the debt is
16 nondischargeable. Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015
17 (9th Cir. 1997). The facts in Kennedy are remarkably similar to
18 those in this case. There, the debtor was a real estate developer
19 who made representations to the buyers of a home that he had
20 relevant construction experience, had a high quality of
21 workmanship, and even made the same representation as Deitz in
22 this appeal that the resulting home would be a "showplace." Id.
23 at 1016. Kennedy sold a house to the buyers but within the year
24 the buyers filed suit in state court alleging fraud. Kennedy
25 filed a bankruptcy petition under Chapter 7, and the buyers
26 brought an adversary proceeding seeking a determination that
27 Kennedy owed a nondischargeable debt to them for fraud in the sale
28 of the home. After a two-day trial, the bankruptcy court

1 determined that the plaintiff suffered \$100,000 in damages as a
2 result of the developer's fraud and it was nondischargeable under
3 § 523(a)(2)(A). Id. at 1017.

4 On appeal, Kennedy argued that the bankruptcy court had no
5 jurisdiction to enter judgment on the fraud because it was a state
6 law cause of action. The Ninth Circuit held that the bankruptcy
7 court could liquidate the debt and enter a final judgment in
8 conjunction with determining that the debt was excepted from
9 discharge under § 523(a). Id. at 1018. The Ninth Circuit noted
10 that its decision was consistent with all its sister circuits that
11 had considered the matter at that time. Porges v. Gruntal & Co.
12 (In re Porges), 44 F.3d 159, 163-65 (2d Cir. 1995); Atassi v.
13 McLaren (In re McLaren), 990 F.2d 850, 853-54 (6th Cir. 1993),
14 reaff'd, Longo v. McLaren (In re McLaren), 3 F.3d 958, 965-66.
15 (6th Cir. 1993); In re Hallahan, 936 F.2d at 1507-1508; Vickers v.
16 Home Indem. Co., Inc., 546 F.2d 1149, 1151 (5th Cir. 1977).⁷ The
17 court was "particularly persuaded by the analysis of one
18 bankruptcy judge" which it quoted:

19 If it is acknowledged as beyond question that a
20 complaint to determine dischargeability of a debt is
21 exclusively within the equitable jurisdiction of the
22 bankruptcy court, then it must follow that the
23 bankruptcy court may also render a money judgment in an
24 amount certain without the assistance of a jury. This is
25 true not merely because equitable jurisdiction attaches
26 to the entire cause of action but more importantly
27 because it is impossible to separate the determination
28 of dischargeability function from the function of fixing
the amount of the non-dischargeable debt.

26 ⁷ In Johnson v. Riebesell (In re Riebesell), the Tenth
27 Circuit joined with the Kennedy court and the other circuits in
28 concluding that the bankruptcy court may enter a monetary judgment
as part of a dischargeability proceeding. 586 F.3d 782, 793 (10th
Cir. 2009).

1 Id. at 1017-18 (quoting In re Devitt, 126 B.R. 212, 215 (Bankr. D.
2 Md. 1991)). The Ninth Circuit held: "We conclude, in conformity
3 with all of the circuits which have considered the matter, that
4 the bankruptcy court acted within its jurisdiction in entering a
5 monetary judgment against Kennedy in conjunction with a finding
6 that the debt was non-dischargeable." In re Kennedy, 108 F.3d at
7 1018. The Court of Appeals reaffirmed this position in In re
8 Sasson, 424 F.3d at 870.

9 In this appeal, Deitz would have the Panel ignore this
10 binding precedent on the grounds that it is inconsistent with his
11 interpretation of Stern – in other words, that Stern overturns
12 this circuit's authority that the bankruptcy court may enter final
13 judgments on both nondischargeability and liquidation of debt. We
14 decline that invitation.

15 The Panel, like all courts of this circuit, must adhere to
16 the holdings in published opinions of the Court of Appeals unless
17 those opinions are overturned by the Supreme Court. United States
18 v. Martinez-Rodriguez, 472 F.3d 1087, 1093 (9th Cir. 2007). Of
19 course, the critical question for the Panel is how to determine if
20 a Supreme Court decision does in fact overturn the circuit
21 precedent. After all, the Ninth Circuit has also taught us that
22 "overturning a long-standing precedent is never to be done
23 lightly[.]" United States v. Heredia, 483 F.3d 913, 918 (9th Cir.
24 2007).

25 The Ninth Circuit has given us the necessary guidance on that
26 question. In Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003)
27 (en banc), the court considered the question of the scope of the
28 absolute immunity of family-service social workers where its

1 existing precedent appeared inconsistent with a later Supreme
2 Court decision. Id. at 900. In Gammie, a three-judge panel had
3 decided it was bound by the earlier circuit opinion. The court
4 convened an en banc panel to “clarify our law concerning the
5 sometimes very difficult question of when a three-judge panel may
6 reexamine normally controlling circuit precedent in the face of an
7 intervening United States Supreme Court decision.” Id. at 892.
8 After reviewing the long history of the relationship between
9 circuit panel decisions and Supreme Court decisions, the Ninth
10 Circuit concluded,

11 We hold that in circumstances like those presented here,
12 where the reasoning or theory of our prior circuit
13 authority is clearly irreconcilable with the reasoning
14 or theory of intervening higher authority, a three-judge
panel should consider itself bound by the later and
controlling authority, and should reject the prior
circuit opinion as having been effectively overruled.”

15 Id. at 893 (emphasis added). The circuit went on to advise that,
16 “[i]n future cases of such clear irreconcilability, a three-judge
17 panel of this court and district courts should consider themselves
18 bound by the intervening higher authority and reject the prior
19 opinion of this court as having been effectively overruled.” Id.
20 at 900.⁸ By extending this rule to the district courts, we infer
21 that the Court of Appeals would intend that the Panel apply the
22 clearly irreconcilable rule before rejecting an existing circuit
23 opinion.

24
25 ⁸ The “clearly irreconcilable” rule is still good law, as
26 indicated by recent three-judge circuit panel rulings applying it
27 before affirming or rejecting existing precedents. See, e.g.,
28 United States v. Ayala-Nicanor, 659 F.3d 744, 748 (9th Cir. 2011);
Perfect 10, Inc. v. Google, Inc., 653 F.3d 976, 980 (9th Cir.
2011); Greensprings Baptist Christian Fellowship Tr. v. Cilley,
629 F.3d 1064, 1068 (9th Cir. 2010); Atl. Nat’l Tr. LLC v. Mt.
Hawley Ins. Co., 621 F.3d 931, 940 (9th Cir. 2010).

1 Given the ample authorities that counsel against a broad
2 interpretation of Stern, we decline to conclude that Kennedy is
3 “clearly irreconcilable” with the Supreme Court’s decision. On
4 the contrary, the analysis in Stern, and its expressly limited
5 application to specific types of otherwise core proceedings (i.e.,
6 state law counterclaims by the estate against third parties),
7 leads us to conclude that Stern is altogether reconcilable with
8 Kennedy’s endorsement of the bankruptcy court’s authority to enter
9 final judgments in actions to determine dischargeability and for
10 liquidation of a creditor’s claim. There are no state common law
11 actions involved in this case, nor any third parties involved.
12 Exception to discharge claims arise solely under title 11 and
13 could not exist outside the federal bankruptcy system. Simply
14 put, exceptions to discharge and liquidations of related claims
15 are examples of the bankruptcy courts doing what they are supposed
16 to do.

17 For all these reasons, we conclude that the holding in Stern
18 is not clearly irreconcilable with the existing precedent in
19 Kennedy that a bankruptcy court may liquidate a debt and enter a
20 final judgment in conjunction with finding the debt
21 nondischargeable. Consequently, we consider ourselves bound by
22 the decision in Kennedy until the Court of Appeals indicates
23 Kennedy is no longer good law.

24 We hold that, even after Stern, the bankruptcy court had the
25 constitutional authority to enter a final judgment determining
26 both the amount of Fords’ damage claims against Deitz, and
27 determining that those claims were excepted from discharge.

28

1 **II. The bankruptcy court did not err in concluding that**
2 **the debt owed by Deitz to the Fords was nondischargeable**
3 **under § 523(a) (2) (A), (a) (4) and (a) (6).**

4 A. § 523(a) (2) (A)

5 To prevail on a claim under section 523(a) (2) (A), a creditor
6 must demonstrate five elements: (1) misrepresentation, fraudulent
7 omission or deceptive conduct by the debtor; (2) knowledge of the
8 falsity or deceptiveness of his statement or conduct; (3) an
9 intent to deceive; (4) justifiable reliance by the creditor on
10 the debtor's statement or conduct; and (5) damage to the creditor
11 proximately caused by its reliance on the debtor's statement or
12 conduct. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 35 (9th
13 Cir. BAP 2009) (citing Turtle Rock Meadows Homeowners Ass'n v.
14 Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)). "The
15 creditor bears the burden of proof to establish all five of these
16 elements by a preponderance of the evidence." Weinberg, 410 B.R.
17 at 35 (citing Slyman, 234 F.3d at 1085).

18 In the statement of issues in his opening brief, Deitz
19 challenges the bankruptcy court's factual findings about the
20 intent and justifiable reliance prongs of § 523(a) (2) (A).
21 However, Deitz did not present arguments regarding the justifiable
22 reliance prong in his briefs.

23 The bankruptcy court found that "[Deitz'] misrepresentations
24 were intentional and designed specifically to deceive and induce
25 [the Fords] for the sole purpose of being retained to build
26 Plaintiff's home and profit thereby." In making this finding, the
27 bankruptcy court had heard testimony that, based upon his
28 statements to them, the Fords believed that Deitz had resolved any
problems with his contractors license before they entered into the

1 building contract with him. That a contractor was properly
2 licensed was important to the Fords because it was a condition for
3 their receipt of funds from the VA. The court clearly found that
4 Deitz was not licensed at the time of executing the contract.
5 Additionally, the evidence showed that Deitz' contractor license
6 had been suspended six times, and was finally revoked, during his
7 construction of the Fords' house. The court had testimonial
8 evidence from Ford and Thompson, as well as documentary evidence,
9 that Deitz had made misrepresentations regarding his license and
10 skills to several other parties by which he had induced them to
11 enter into construction contracts that, like the Ford case, had
12 failed. Evidence of the habit of a person, or of a routine or
13 practice, is relevant to prove that the conduct of a person on a
14 particular occasion was in conformity with their habit or routine
15 practice. FED. R. EVID. 406. The bankruptcy court also determined
16 that Deitz misrepresented to the Fords that he would complete the
17 construction of the home according to ADA, VA and county
18 standards.

19 In this appeal, Deitz does not deny that he was not licensed
20 at the time of signing the contract, or that he suffered numerous
21 suspensions and ultimate revocation of the license during the
22 period of constructing the Fords' home.

23 Intent to defraud in the context of a dischargeability
24 proceeding is a question of fact. In re Kennedy, 108 F.3d at
25 1018. The bankruptcy court's factual findings are reviewed for
26 clear error. In re Ashley, 903 F.2d 599, 602 (9th Cir. 1990).
27 And, because the bankruptcy court's factual findings were based in
28 part on its assessment of the credibility of witnesses, those

1 findings are entitled to deference from the Panel. Rule 8013.

2 Based upon the testimony of the witnesses and documentary
3 evidence, the bankruptcy court properly determined that Deitz
4 acted with the intent to deceive the Fords, and with the intent to
5 keep money that should otherwise have been used in the
6 construction. We therefore conclude that the bankruptcy court did
7 not clearly err in finding that Deitz' misrepresentations to the
8 Fords were made with the requisite intent to deceive them for
9 purposes of § 523(a)(2)(A).

10 As to justifiable reliance, the bankruptcy court found that
11 Deitz intended to gain the trust of the Fords by highlighting his
12 military career, the common nursing occupation of Mrs. Ford and
13 Deitz' mother, and Deitz' experience as a tech at the VA medical
14 facility where Ford had been treated.

15 Whether the Fords justifiably relied on Deitz'
16 misrepresentations is a question of fact. Eugene Parks Law Corp.
17 Defined Benefit Pension Plan v. Kirsh (In re Kirsh), 973 F.2d
18 1454, 1456 (9th Cir. 1992). As noted above, the bankruptcy
19 court's factual findings are reviewed for clear error. In re
20 Ashley, 903 F.2d at 602. Given the evidentiary record, and
21 affording due deference to the bankruptcy judge's evaluation of
22 the credibility of witnesses, we conclude that the bankruptcy
23 court did not clearly err in determining that the Fords
24 justifiably relied on the misrepresentations of Deitz.

25 Because Deitz has not challenged the Fords' proof on the
26 other three elements for an exception to discharge under
27 § 523(a)(2)(A), and in light of the bankruptcy court's extensive
28 findings and conclusions regarding those prongs in its decision,

1 we conclude that the bankruptcy court did not err in determining
2 that Deitz' debt to the Fords was excepted from discharge under
3 § 523(a) (2) (A) .

4 B. § 523(a) (4) and (6)

5 In his opening brief, Deitz failed to discuss the other two
6 statutory bases relied upon by the bankruptcy court in holding
7 that his debt to the Fords was excepted from discharge –
8 § 523(a) (4) and (6). In recent decisions, the Ninth Circuit has
9 reaffirmed its long-standing instruction that, "An appellate court
10 reviews only issues which are argued specifically and distinctly
11 in a party's opening brief." Cruz v. Int'l Collection Corp.,
12 ___ F.3d ___, 2012 WL 742337 (9th Cir. March 8, 2012); Christian
13 Legal Soc'y Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 485 (9th
14 Cir. 2010) (same); Brownfield v. City of Yakima, 612 F.3d 1140,
15 1149 n.4 (9th Cir. 2010) (same).

16 After the Fords noted Deitz' failure to argue the latter two
17 discharge issues in their responsive brief, Deitz in his reply
18 brief asserted that intent was lacking under § 523(a) (2) (A) ,
19 intent is an element under all three discharge exceptions, and
20 therefore disproving fraudulent intent under § 523(a) (2) (A)
21 suffices as a defense to all three exception to discharge claims.
22 However, Deitz presented no authority or reasoned analysis to
23 support this assertion.

24 Even had it been timely presented in his opening brief (which
25 it was not), Deitz' conclusory statement does not meet minimum
26 acceptable standards for arguing an issue "specifically and
27 distinctly." Deitz' challenges to the bankruptcy court's findings
28 and conclusions concerning the § 523(a) (4) and (6) claims have

1 been waived.

2 **CONCLUSION**

3 We AFFIRM the judgment of the bankruptcy court fixing the
4 amount of Fords' damages and determining that Deitz' debt to the
5 Fords is excepted from discharge under §523(a)(2)(A), (a)(4) and
6 (a)(6).

7
8 Markell, Bankruptcy Judge, concurring:

9
10 I join in the opinion. I fully agree that Kennedy and Sasson
11 control this case's outcome. I write this concurrence, however,
12 to note how Stern v. Marshall, 131 S.Ct. 2594 (2011), may have
13 reshaped the jurisdictional landscape in nondischargeability
14 actions.

15 Both Kennedy and Sasson were written well before Stern. When
16 viewed in light of Stern, this case highlights some potential
17 jurisdictional flaws in Kennedy and Sasson, as well as some of the
18 challenges Stern presents when allocating decision making
19 authority between district courts and bankruptcy courts.

20 **Congress's Power to Provide a Discharge**

21 Initially, it is beyond doubt that Congress has the power to
22 provide for a discharge in bankruptcy. U.S. CONST. art. 1, § 8,
23 cl. 4.¹ As Congress has plenary power to regulate the bankruptcy
24

25 ¹ One of the most enduring definitions of Congress's power
26 under the Bankruptcy Clause is that the power:

27 extends to all cases where the law causes to be
28 distributed, the property of the debtor among his
creditors: this is its least limit. Its greatest, is a

(continued...)

1 discharge - a legislative status in an area unknown to the common
2 law - Congress can generally delegate the implementation of the
3 discharge to non-Article III judges.² Put another way, since
4 there is no common law or other nonstatutory right to the
5 discharge of a debt, it is within Congress's power to determine
6 how to dispense and bestow the benefit.

7 **Court's Subject Matter Jurisdiction Over the Discharge**

8 An essential element of such power is the subject matter
9 jurisdiction to implement it, and the subject matter jurisdiction
10 to determine nondischargeability is provided by § 1334(b) of title
11 28. Section 1334(b) grants subject matter jurisdiction to the
12 District Courts over matters which "arise in," "arise under," or

13
14
15 ¹(...continued)
16 discharge of the debtor from his contracts. And all
17 intermediate legislation, affecting substance and form,
but tending to further the great end of the
subject-distribution and discharge-are in the competency
and discretion of Congress.

18 In re Klein, 42 U.S. (1 How.) 277, 281 (1843) (Catron, J., sitting
19 as circuit justice; case reported in a note to Nelson v. Carland,
42 U.S. (1 How.) 265 (1843), inserted therein "as being of general
20 interest") (emphasis supplied). Klein was indicated as the source
21 of one of the "oft-quoted" definitions of the bankruptcy power in
Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 588
n.18 (1935).

22 ² Although Congress cannot "withdraw from [Art. III]
23 judicial cognizance any matter which, from its nature, is the
subject of a suit at the common law, or in equity, or admiralty,"
24 Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272,
284 (1856), the discharge was not such a "matter." See Hanover
25 Nat. Bank v. Moyses, 186 U.S. 181, 188 (1902) ("The subject of
26 'bankruptcies' includes the power to discharge the debtor from his
contracts and legal liabilities, as well as to distribute his
27 property. The grant to Congress involves the power to impair the
obligation of contracts, and this the states were forbidden to
do."). Cf. Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518, 524
28 (1933) ("[T]he discharge of a bankrupt from his debts constitutes
the very essence of the Bankruptcy Law . . .").

1 are "related to" a bankruptcy. Nondischargeability matters, such
2 as the one here, were unknown at common law, and thus can only
3 "arise under" the Bankruptcy Code.

4 Section 157(a) of title 28 allows the District Courts to
5 refer discharge matters to the bankruptcy courts, and
6 § 157(b) (2) (I) then classifies the exercise of the power referred
7 as a core determination which Article I bankruptcy courts can
8 "hear and determine" and enter final judgments. As reflected in
9 the legislative history, "[b]y a grant of jurisdiction over all
10 proceedings arising under title 11, the bankruptcy courts will be
11 able to hear any matter under which a claim is made under a
12 provision of title 11." H.R. REP. No. 95-595, at 445 (1977), as
13 reprinted in 1978 U.S.C.C.A.N. 5963, 6401.

14 **Entering Money Judgments Against the Debtor**

15 The analysis is somewhat different, however, when analyzing
16 the ability to hear and determine the underlying nonbankruptcy
17 claims themselves, and to finalize that determination with the
18 entry of an enforceable money judgment. Both subject matter
19 jurisdiction and the constitutional power to decide the matter are
20 implicated.

21 Subject Matter Jurisdiction to Enter a Money Judgment Against 22 a Debtor

23 First, subject matter jurisdiction. Unlike
24 nondischargeability determinations, claims for money damages do
25 not "arise in" or "arise under" the Bankruptcy Code. They exist
26 independent of the bankruptcy process. They are claims against
27 the debtor, not against the estate. As a consequence, at least
28 with respect to § 1334, the only remaining ground for subject

1 matter jurisdiction is that such claims are "related to" the
2 bankruptcy. See Ralph Brubaker, On the Nature of Federal
3 Bankruptcy Jurisdiction: a General Statutory and Constitutional
4 Theory, 41 WM. & MARY L. REV. 743, 914-15 (2000).

5 The Ninth Circuit applies the so-called Pacor test to
6 determine "related to" jurisdiction. If the determination at
7 issue, in any conceivable way, could affect the bankruptcy estate,
8 then such jurisdiction exists. Vacation Village, Inc. v. Clark
9 County, Nev., 497 F.3d 902, 911 (9th Cir. 2007) (citing Pacor Inc.
10 v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)), for the proposition
11 that "where the cause of action is between third parties, the test
12 for 'whether a civil proceeding is related to bankruptcy is
13 whether the outcome of that proceeding could conceivably have any
14 effect on the estate being administered in bankruptcy'"); Sasson
15 v. Sokoloff (In re Sasson), 424 F.3d 864, 868-69 (9th Cir. 2005)
16 ("A bankruptcy court's 'related to' jurisdiction is very broad,
17 'including nearly every matter directly or indirectly related to
18 the bankruptcy.'" (quoting Mann v. Alexander Dawson (In re Mann),
19 907 F.2d 923, 926 n.4 (9th Cir. 1990)). But I question whether
20 that is the case here. Unless related to the claims resolution
21 process, the liquidation of a nondischargeability claim against
22 the debtor does not necessarily affect the estate.

23 That point is driven home here as Deitz's case is a no-asset
24 case in which creditors were instructed not to file claims.³ See

26 ³ Were it otherwise, the filing of the nondischargeability
27 complaint would likely be held to be an informal proof of claim,
28 depending on the prayer for relief. This would bring those
matters relevant to the resolution of the debtor-creditor
relationship squarely before the court. See Pac. Res. Credit
Union v. Fish (In re Fish), 456 B.R. 413, 416 (B.A.P. 9th Cir.
2011) (proof of claim issue raised through a debtor's objection to
a claim as late-filed).

1 FED. R. BANKR. P. 2002(e) (allowing trustee to notify creditors to
2 not file claims if it appears that there will be no dividends
3 paid). There was no claims resolution process here because there
4 was no bankruptcy estate to administer and then distribute. As a
5 consequence, the liquidation or allowance of the claim that will
6 never be paid has absolutely no effect on the estate. There thus
7 can be no "related to" jurisdiction. See Brubaker, supra, 41 WM.
8 & MARY L. REV. at 916-18 & n.603.

9 Sasson adverts to this conundrum, and attempts to settle
10 jurisdiction on a pragmatic basis by merging supplemental
11 jurisdiction into "related to" jurisdiction. Sasson accomplishes
12 this through pointing out that the facts related to the
13 determination of nondischargeability and the facts necessary to
14 liquidate the claim arise from the same nucleus of facts. Sasson,
15 424 F.3d at 869 ("the bankruptcy court's 'related to' jurisdiction
16 also includes the district court's supplemental jurisdiction
17 pursuant to 28 U.S.C. § 1367 'over all other claims that are so
18 related to claims in the action within [the court's] original
19 jurisdiction that they form part of the same case or controversy
20 under Article III of the United States Constitution.'") (quoting
21 Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1195
22 (9th Cir. 2005)). Compare Susan Block-Lieb, The Case Against
23 Supplemental Bankruptcy Jurisdiction: a Constitutional, Statutory,
24 and Policy Analysis, 62 FORDHAM L. REV. 721 (1994) with Brubaker,
25 supra.

26 It would be a waste of judicial resources to require a second
27 trial on the same facts, especially since the bankruptcy court's
28 determination of the essential nucleus of facts would likely have

1 issue preclusive effect on whatever court ultimately liquidated
2 the claim. See Katchen v. Landy, 382 U.S. 323, 334 (1966) ("The
3 normal rules of res judicata and collateral estoppel apply to the
4 decisions of bankruptcy courts."); see also Veal v. Am. Home
5 Mortgage Servicing, Inc. (In re Veal), 450 B.R. 897, 918 (B.A.P.
6 9th Cir. 2011). But Sasson does not refer to matters of issue
7 preclusion, arguing by analogy to supplemental jurisdiction only,
8 and citing to § 105 of the Bankruptcy Code to assist in the
9 argument.⁴ Sasson, 424 F.3d at 868.

10 Sasson's reference to § 105 may help here, even though it is
11 not a jurisdictional statute in the traditional sense, as the
12 close nexus between the nondischargeability claims and the
13 liquidation of the amount of those claims is undeniable. See id.
14 But the efficacy of the reference to § 105 requires analysis
15 beyond the scope of this concurrence.

16 A Bankruptcy Court's Power to Enter a Money Judgment Against
17 the Debtor

18 This concern over the proper basis of subject matter
19 jurisdiction bleeds into Stern concerns. If supplemental
20 jurisdiction as augmented by § 105 is the best argument for a
21 District Court's jurisdiction to liquidate a claim in a
22

23 ⁴ The Ninth Circuit Court of Appeals has held District
24 Courts have supplemental jurisdiction under 28 U.S.C. § 1367 when
25 hearing bankruptcy matters in the first instance, Security Farms
26 v. Int'l Bhd. of Teamsters, 124 F.3d 999, 1008 n.5 (9th Cir.
27 1997). It has also, as noted in Sasson, 424 F.3d at 869, approved
28 bankruptcy courts' exercise of § 1367 supplemental jurisdiction
over "state tort and contract claims" not otherwise connected to
the bankruptcy so long as those claims share a "common nucleus of
operative facts" with "related to" claims and "would ordinarily
be expected to be resolved in one judicial proceeding" along with
the "related to" claims. In re Pegasus Gold Corp., 394 F.3d at
1194-95.

1 nondischargeability setting, one has to wonder if Stern would
2 allow the delegation of that power to an Article I bankruptcy
3 court. Stern seems to suggest that, in the absence of consent, a
4 bankruptcy court's power to enter a final judgment is necessarily
5 dependent on whether that bankruptcy court is exercising a power
6 constitutionally conferred by Congress to an Article I tribunal.
7 After all, what Stern found unconstitutional was the statutory
8 grant of the power to hear and determine a counterclaim based on
9 some, but not all, of the facts bound up in the original action
10 against the estate.⁵

11 Stern did not, however, question a bankruptcy court's
12 authority to hear and determine state law claims that "stem[] from
13 the bankruptcy itself or would necessarily be resolved in the
14 claims allowance process," id. at 2618, at least as long as that
15 determination is a necessary incident of the claims resolution
16 process. Stern seems to call into question the bankruptcy court's
17 exercise of jurisdiction in any instance when that necessity is
18 lacking. Here, if Sasson's augmented "related to" jurisdiction is
19 suspect, then so too is the constitutional ability for an Article
20 I tribunal to enter a final judgment on a common law claim when
21 the sole jurisdictional basis is § 1367 of title 28.

22 But even if that problem is resolved, there remain other
23 concerns. Although most disputes in bankruptcy are linked to or
24 bound up in claim determinations which are so related to the
25 bankruptcy power that Congress can authorize Article I tribunals
26

27 ⁵ "The Bankruptcy Court below lacked the constitutional
28 authority to enter a final judgment on a state law counterclaim
that is not resolved in the process of ruling on a creditor's
proof of claim." 131 S. Ct. at 2620.

1 to hear them,⁶ there are other, common, situations that may cause
2 concern. Section 502(b) of the Bankruptcy Code, for example, is
3 full of situations in which nonbankruptcy claims, otherwise valid
4 outside of bankruptcy, are limited in bankruptcy. For example,
5 § 502(b)(2) of the Bankruptcy Code permits parties in interest to
6 object to unmatured interest as a claim against the estate (except
7 for oversecured creditors). As a result, determination of
8 postpetition interest (especially if a variable rate) on claims
9 against the debtor would be a determination not within the scope
10 of the claims allowance process. Similarly, claims by landlords
11 for fraud in procuring a lease would be limited by § 502(b)(6)'s
12 limitation on landlords' claims against the estate, with amounts
13 in excess of the limitations being valid against the debtor but
14 unnecessary to the administration of the bankruptcy case. Other
15 examples can be imagined for each paragraph of § 502(b) that
16 places federal limitations on otherwise valid state law claims.

17 Further complicating this analysis is the potential inability
18 of an Article I tribunal to make binding determinations on
19 critical factual issues with respect to nondischargeability
20 claims. Under Crowell v. Benson, 285 U.S. 22 (1932), Congress can
21 generally delegate final factfinding to an Article I legislative
22 tribunal with respect to those matters within the purview of the
23 statutory scheme unless the facts are "fundamental" or

24

25
26 ⁶ In response to arguments that the decision would "create
27 significant delays and impose additional costs on the bankruptcy
28 process," Chief Justice Roberts noted in Stern that the Court did
not believe that "removal of counterclaims . . . 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." 131 S. Ct. at
2619-20.

1 "jurisdictional" as to the authority of the tribunal. See Stern,
2 131 S.Ct. at 2612 n.6 ("Although the Court in Crowell went on to
3 decide that the facts of the private dispute before it could be
4 determined by a non-Article III tribunal in the first instance,
5 subject to judicial review, the Court did so only after observing
6 that the administrative adjudicator had only limited authority to
7 make specialized, narrowly confined factual determinations
8 regarding a particularized area of law and to issue orders that
9 could be enforced only by action of the District Court."). An
10 argument could be made that facts essential to determining the
11 full amount of creditors' nonbankruptcy claims against the debtor
12 are fundamental in Crowell's sense, or that they are at least made
13 outside the "specialized, narrowly confined factual
14 determinations" Stern refers to in note 6. As a consequence,
15 Stern raises the issue of whether a bankruptcy court has to defer
16 deciding postpetition accrued interest and excessive landlord
17 claims, among others, unless the parties otherwise consent to its
18 jurisdiction.

19 These issues, however, can only be decided by the Ninth
20 Circuit if and when it reconsiders Kennedy and Sasson. I thus
21 concur.
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