# RECENT CASE

BANKRUPTCY — PUBLIC RIGHTS — FIFTH CIRCUIT FINDS IMPLIED CONSENT TO NON–ARTICLE III ADJUDICATION BASED ON GAMESMANSHIP. — *Excluded Lenders v. Serta Simmons Bedding, L.L.C.* (*In re Serta Simmons Bedding, L.L.C.*), 125 F.4th 555 (5th Cir. 2024).

Bankruptcy courts occupy an odd place in the judicial system. In *Stern v. Marshall*,[1] the Supreme Court held that the Constitution guarantees parties in bankruptcy proceedings an Article III judge for certain claims.[2] Later, in *Wellness International Network, Ltd. v. Sharif*,[3] the Court determined that non–Article III bankruptcy judges could nevertheless adjudicate these "*Stern* claims" with the "knowing and voluntary" consent of the parties.[4] Recently, in *Excluded Lenders v. Serta Simmons Bedding, L.L.C.* (*In re Serta Simmons Bedding, L.L.C.*),[5] the Fifth Circuit applied an expansive interpretation of the *Wellness* exception on its way to resolving an important contract law question. The court's finding of consent to bankruptcy court adjudication[6] despite the careful and consistent objections of the parties highlights the extent to which *Wellness* has weakened *Stern*'s Article III guarantee.

The COVID-19 pandemic in 2020 exacerbated Serta's already serious financial troubles.[7] To avoid bankruptcy, the company explored restructuring deals known as "liability management[] transactions."[8] Serta negotiated with competing groups of its preexisting lenders to borrow new money and reduce old debt.[9] Ultimately, Serta picked one group of lenders ("the prevailing lenders"), who used their voting majority to amend the earlier loan agreements to facilitate a non–pro rata "uptier."[10] The defining characteristic of a non–pro rata uptier is that the debtor lets a slim majority of lenders jump to first in line for repayment in exchange for consent to amend earlier agreements.[11]

Serta's uptier was aggressive. The prevailing lenders permitted Serta to create new, superpriority loans.[12] They then exchanged $1.2

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[1] 564 U.S. 462 (2011).

[2] *Id.* at 503.

[3] 575 U.S. 665 (2015).

[4] *Id.* at 685–86.

[5] 125 F.4th 555 (5th Cir. 2024).

[6] *Id.* at 574.

[7] Amended Adversary Complaint ¶ 34, Serta Simmons Bedding LLC v. AG Ctr. St. P'ship (*In re* Serta Simmons Bedding, LLC), Ch. 11 Case No. 23-90020, Adv. No. 23-9001 (Bankr. S.D. Tex. June 6, 2023), Dkt. No. 38.

[8] *Id.* ¶¶ 35–36, 43.

[9] *Id.* ¶¶ 35–36.

[10] *Id.* ¶¶ 4–5, 40–42.

[11] *See* Vincent S.J. Buccola, *Efficacious Answers to the Non-Pro Rata Workout*, 171 U. PA. L. REV. 1859, 1865 (2023).

[12] *See Serta*, 125 F.4th at 569.

billion of old loans with Serta in return for $875 million of superpriority loans and lent Serta an additional $200 million with superpriority.[13] As a result, Serta reduced its total debt and acquired the cash it needed to weather the pandemic.[14] The prevailing lenders emerged first in line for repayment.[15] Other secured creditors became effectively unsecured, unlikely to be repaid in the event of bankruptcy.[16]

Lenders excluded from the transaction immediately filed suit to block it. One set of plaintiffs, whom the Fifth Circuit referred to as the "Excluded Lenders,"[17] had unsuccessfully competed with the prevailing lenders to obtain superpriority.[18] These plaintiffs sued in New York state court in June 2020 but lost their preliminary injunction motion.[19] Shortly thereafter, they voluntarily dismissed their suit.[20] Another group of lenders — all funds affiliated with LCM Asset Management (LCM) — sued Serta in the Southern District of New York.[21] Unlike the other excluded lenders, LCM had no knowledge of the liability management transaction negotiations until Serta publicly announced the uptier that June.[22] LCM's suit survived a motion to dismiss on claims for breach of contract and breach of the implied covenant of good faith and fair dealing.[23] In November 2022, the other excluded lenders refiled in New York state court after a favorable decision in another uptier case.[24]

The controversy revolved around an exception in the loan agreement that allowed Serta to repurchase loans from select lenders through undefined "open market purchases."[25] Under the contract, Serta could normally repurchase loans only from *all* lenders in proportion to how much they had lent.[26] This right to "ratable treatment" required consent from all affected lenders to amend.[27] Although Serta amended other provisions of the contract to effectuate the uptier, it could not amend

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13 *Id.* at 568–69.

14 *See* Amended Adversary Complaint, *supra* note 7, ¶ 43.

15 *Serta*, 125 F.4th at 569.

16 *See* Answering Defendants' Answer to the Amended Adversary Complaint, Counterclaims and Third-Party Claims ¶¶ 99, 279, Serta Simmons Bedding LLC v. AG Ctr. St. P'ship (*In re* Serta Simmons Bedding, LLC), Ch. 11 Case No. 23-90020, Adv. No. 23-9001 (Bankr. S.D. Tex. June 6, 2023), Dkt. No. 68 [hereinafter Excluded Lenders' Answer].

17 *Serta*, 125 F.4th at 570. For convenience, this comment refers to all lenders excluded from Serta's uptier as "excluded lenders," specifying LCM Asset Management when relevant.

18 *See* North Star Debt Holdings, L.P. v. Serta Simmons Bedding, LLC, No. 652243/2020, 2020 WL 3411267, at *2 (N.Y. Sup. Ct. June 19, 2020).

19 *Id.* at *3, *6.

20 Amended Adversary Complaint, *supra* note 7, ¶ 67.

21 LCM XXII Ltd. v. Serta Simmons Bedding, LLC, No. 21 Civ. 3987, 2022 WL 953109, at *1, *5 (S.D.N.Y. Mar. 29, 2022).

22 *Id.* at *3.

23 *Id.* at *6, *14.

24 Excluded Lenders' Answer, *supra* note 16, ¶¶ 260–261.

25 *See* Amended Adversary Complaint, *supra* note 7, ¶¶ 41, 48.

26 *See Serta*, 125 F.4th at 565, 567.

27 Amended Adversary Complaint, *supra* note 7, ¶¶ 52, 54; *Serta*, 125 F.4th at 565.

the right to ratable treatment.[28] When Serta and the prevailing lenders swapped old loans for new superpriority loans, they risked breaching the agreement's ratable-treatment provision unless the "open market purchase" exception applied.[29] The excluded lenders contended that a privately negotiated debt-for-debt swap limited to just the prevailing lenders could not be an "open market purchase."[30]

The lawsuits ground to a halt after Serta filed for bankruptcy in January 2023.[31] Serta filed before Chief Judge Jones in the Southern District of Texas, automatically staying all suits against Serta just before discovery was to close in the LCM suit.[32] Although the non-LCM excluded lenders tried to continue their New York suit against the prevailing lenders, Serta obtained an order from Chief Judge Jones staying those claims too.[33] In the bankruptcy court, Serta and the prevailing lenders promptly launched an adversary proceeding against the excluded lenders.[34] They sought declaratory judgment on the very same claims brought in New York: whether the uptier violated Serta's loan agreement and whether Serta and the prevailing lenders breached the implied covenant of good faith and fair dealing.[35]

Chief Judge Jones granted partial summary judgment for Serta and the prevailing lenders.[36] He ruled that the uptier did not violate the ratable-treatment provision as the meaning of "open market purchase" was "clear and unambiguous."[37] In order to immediately appeal the decision, the excluded lenders requested entry of partial final judgment.[38] Chief Judge Jones granted the request and certified the open market purchase question for immediate appeal to the Fifth Circuit.[39] He denied summary judgment on the implied covenant claim, which proceeded to bench trial.[40] After trial, he again ruled for Serta and the

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[28] Amended Adversary Complaint, *supra* note 7, ¶¶ 54–55, 58–59.

[29] *See* Excluded Lenders' Answer, *supra* note 16, ¶ 266.

[30] *Id.* ¶¶ 267–269.

[31] LCM Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for Summary Judgment ¶ 20, Serta Simmons Bedding LLC v. AG Ctr. St. P'ship (*In re* Serta Simmons Bedding, LLC), Ch. 11 Case No. 23-90020, Adv. No. 23-9001 (Bankr. S.D. Tex. June 6, 2023), Dkt. No. 80 [hereinafter LCM MSJ Opposition Brief].

[32] *Id.*; *see* 11 U.S.C. § 362 (treating debtor's bankruptcy filing as automatic stay of most judicial proceedings against debtor).

[33] *See* Diane Lourdes Dick, *Tactical Restructurings*, 93 FORDHAM L. REV. 1, 28–30 (2024).

[34] *See generally* Adversary Complaint, *Serta Simmons Bedding LLC*, Ch. 11 Case No. 23-90020, Adv. No. 23-9001, Dkt. No. 1.

[35] *Compare id.* ¶ 80, *with* LCM XXII Ltd. v. Serta Simmons Bedding, LLC, No. 21 Civ. 3987, 2022 WL 953109, at *6, *14 (S.D.N.Y. Mar. 29, 2022).

[36] Order on Summary Judgment ¶ 1, *Serta Simmons Bedding LLC*, Ch. 11 Case No. 23-90020, Adv. No. 23-9001, Dkt. No. 142.

[37] *Id.* ¶ 3.

[38] *See* Motion Hearing at 136, *Serta Simmons Bedding LLC*, Ch. 11 Case No. 23-90020, Adv. No. 23-9001, Dkt. No. 133.

[39] Order on Summary Judgment, *supra* note 36, ¶ 4.

[40] *Id.* ¶ 5.

prevailing lenders, finding they had acted in good faith.[41] It was the non-LCM excluded lenders whose conduct "raise[d] an eyebrow" because they sued over the same hardball tactics they had attempted themselves.[42] Finally, Chief Judge Jones confirmed Serta's plan of reorganization, which provided a controversial indemnity to the prevailing lenders for any future liability arising from the uptier.[43]

Notably, both excluded lender parties sought an Article III judge in their pleadings.[44] They argued that the bankruptcy court lacked constitutional authority to resolve the implied covenant question.[45] After trial, Chief Judge Jones ruled that the non-LCM excluded lenders had implicitly consented to the bankruptcy court's authority by requesting summary judgment and failing to object at summary judgment and at trial.[46] The court made no specific findings with respect to LCM's consent but issued judgment anyway.[47]

The Fifth Circuit reversed.[48] Writing for the panel,[49] Judge Oldham first found the statutory requirements for jurisdiction satisfied.[50] As to constitutional requirements, the parties' implied consent cured any *Stern* problem.[51] The panel held that "the bankruptcy court did not err when it found that the Excluded Lenders implicitly consented to non-Article III adjudication."[52] Although the bankruptcy court made no specific findings about LCM's consent, the panel held that LCM had implicitly consented based on its request for partial final judgment on the open market purchase claim, "the connection between that claim and [LCM's] counterclaims," and considerations of "efficiency and gamesmanship."[53] The court stressed gamesmanship in particular.[54] Having agreed to partial final judgment on the open market purchase question, the parties could not object to the bankruptcy court adjudicating closely related claims.[55]

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41 *Serta Simmons Bedding LLC*, 2023 WL 3855820, at *13–14.

42 *Id.* at *13.

43 *Id.* at *10–12.

44 Excluded Lenders' Answer, *supra* note 16, at 8, ¶ 235; LCM Defendants' Answer to the Amended Adversary Complaint and Counterclaims at 2, ¶ 108, *Serta Simmons Bedding LLC*, Ch. 11 Case No. 23-90020, Adv. No. 23-9001, Dkt. No. 146 [hereinafter LCM Answer].

45 Excluded Lenders' Pre-Trial Memorandum of Law at 31–33, *Serta Simmons Bedding LLC*, Ch. 11 Case No. 23-90020, Adv. No. 23-9001, ECF No. 240; LCM Defendants' Pre-Trial Brief ¶¶ 25–32, *Serta Simmons Bedding LLC*, Ch. 11 Case No. 23-90020, Adv. No. 23-9001, Dkt. No. 243.

46 *Serta Simmons Bedding LLC*, 2023 WL 3855820, at *8.

47 *See id.*

48 *Serta*, 125 F.4th at 593.

49 Judge Oldham was joined by Judge Haynes and Judge Willett.

50 *Serta*, 125 F.4th at 573.

51 *Id.* at 574.

52 *Id.*

53 *Id.*

54 *Id.* n.10.

55 *Id.*

On the merits, the Fifth Circuit parted from the bankruptcy court. It concluded that the uptier was not an "open market purchase."[56] Relying on dictionaries and New York case law, the court reasoned that an "open market purchase" must take place on a relevant market, such as the secondary market for syndicated loans.[57] Furthermore, Serta's expansive reading of "open market purchase" would "render [as] surplusage" the agreement's other ratable-treatment exception.[58] Lastly, the panel held that the plan indemnity violated the Bankruptcy Code.[59] It rejected the appellees' contention that confirmation of the plan had made the indemnity challenge equitably moot.[60] The court excised the indemnity from the plan and remanded the case for reconsideration of the excluded lenders' counterclaims.[61]

Though the *Serta* decision was highly anticipated for its contract-interpretation holding,[62] its less-discussed jurisdictional holding merits attention too. The Fifth Circuit appeared to craft an even more permissive holding on implied consent than the scant case law from the courts of appeals would suggest. The panel's affirmation of the bankruptcy court's authority demonstrates the difficulty of obtaining an Article III judge in bankruptcy after *Wellness*.

*Stern* matters to creditors contesting liability management transactions because bankruptcy rules flip the standard choice-of-forum playbook on its head. As "the master of the complaint," a plaintiff-creditor normally chooses where to bring its state law contract claim.[63] But the debtor ordinarily chooses where to file for bankruptcy.[64] And when a debtor files, nearly all pending and future litigation against it is automatically stayed.[65] The Bankruptcy Code enables debtors to file virtually anywhere.[66] Manufacturing venue is as easy as incorporating a new subsidiary in the desired district and having it file for bankruptcy there.[67] Increasingly, sophisticated debtors have been able to secure not just their desired district but also their desired judge by manipulating

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[56] *Id.* at 578.

[57] *Id.* at 579–80.

[58] *Id.* at 581.

[59] *Id.* at 588.

[60] *Id.* at 585.

[61] *Id.* at 584, 593.

[62] *See, e.g.*, *Appellate Review of Uptier Transactions:* Serta *and* Mitel *Decisions Reversed on Appeal*, PAUL, WEISS (Jan. 10, 2025), https://www.paulweiss.com/insights/client-memos/appellate-review-of-uptier-transactions-serta-and-mitel-decisions-reversed-on-appeal [https://perma.cc/M6AK-HNCZ].

[63] Caterpillar Inc. v. Williams, 482 U.S. 386, 398–99 (1987).

[64] *See* 11 U.S.C. § 301; 28 U.S.C. § 1408.

[65] 11 U.S.C. § 362.

[66] *See* 28 U.S.C. § 1408. Bankruptcy rules provide for nationwide service of process, so personal jurisdiction over creditors rarely presents an obstacle. FED. R. BANKR. P. 7004(d), (f).

[67] *See* Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 361–62.

division assignment.[68] Consequently, excluded lenders seeking damages after a liability management transaction often must bring their claims before a bankruptcy judge of the debtor's choosing.[69]

Predictably, debtors choose the most favorable venues. In recent years, the Southern District of Texas has emerged as the country's leading corporate bankruptcy venue[70] — largely due to the efforts of former Chief Bankruptcy Judge David Jones.[71] Some of the reasons for Chief Judge Jones's popularity were laudable. Lawyers appreciated Chief Judge Jones's efficiency and responsiveness, as well as his facility with complex bankruptcy issues.[72] More perniciously, debtors flocked to Houston because Chief Judge Jones built a reputation for prioritizing speedy reorganizations and debtors' interests over creditors' entitlements.[73] It is no mystery, then, why Serta and its lawyers decided to file in his court.

Article III of the Constitution provides one limited option for lenders to escape less-than-ideal bankruptcy courtrooms. In *Stern v. Marshall*, the Supreme Court held that non–Article III courts, such as bankruptcy courts, cannot adjudicate claims involving only private rights.[74] Although the Court "has not been entirely consistent" in defining the scope of this doctrine,[75] "traditional contract action[s] arising under state law"[76] between two private parties are assuredly matters of private rights.[77] Breach of contract and breach of implied covenant of good

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[68] *See id.* at 353–54, 374. "In 2020, 55% of large, public company bankruptcy filings were heard before just *three* of the nation's 375 bankruptcy judges." *Id.* at 354.

[69] *See, e.g.*, Wesco Aircraft Holdings, Inc. v. SSD Invs. Ltd. (*In re* Wesco Aircraft Holdings, Inc.), Ch. 11 Case No. 23-90611, Adv. No. 23-3091, 2024 WL 156211, at *1–2 (Bankr. S.D. Tex. Jan. 14, 2024); Robertshaw US Holding Corp. v. Invesco Senior Secured Mgmt. Inc. (*In re* Robertshaw US Holding Corp.), 662 B.R. 146, 150–51 (Bankr. S.D. Tex. 2024).

[70] Levitin, *supra* note 67, at 374.

[71] *Id.* at 373; Sujeet Indap, *The Downfall of the Judge Who Dominated Bankruptcy in America*, FIN. TIMES (Nov. 21, 2023), https://www.ft.com/content/574f0940-d82e-4e4a-98bd-271058cce434 [https://perma.cc/2254-G7TV]. Chief Judge Jones resigned in October 2023 over undisclosed conflicts of interest in several cases. *See id.*

[72] *See* Indap, *supra* note 71.

[73] *See* Alexander Gladstone, Andrew Scurria & Akiko Matsuda, *Top Bankruptcy Judge's Exit Shakes Houston Hub He Built*, WALL ST. J. (Oct. 19, 2023, at 15:05 ET), https://www.wsj.com/articles/houston-judges-sudden-exit-threatens-bankruptcy-hub-he-built-33026f80 [https://perma.cc/TKZ4-QS4T]; *Wow*, PETITION (Oct. 15, 2023), https://www.petition11.com/p/judge-david-jones-toast [https://perma.cc/4UKM-HTHN].

[74] *See* 564 U.S. 462, 487 (2011). The Fifth Circuit in *Serta* adopted the broad reading of *Stern* stated here, *see* 125 F.4th at 573, though some courts read *Stern* to apply only to a debtor's state law counterclaims, *see, e.g.*, Paragon Litig. Tr. v. Noble Corp. (*In re* Paragon Offshore PLC), 598 B.R. 761, 775 n.83 (Bankr. D. Del. 2019) (quoting Zazzali v. 1031 Exch. Grp. (*In re* DBSI, Inc.), 467 B.R. 767, 773 (Bankr. D. Del. 2012)).

[75] *Stern*, 564 U.S. at 488.

[76] *Id.* at 494 (quoting *id.* at 510 (Breyer, J., dissenting)).

[77] *See id.* at 493–94.

faith and fair dealing claims fall under this definition.[78] For a bankruptcy court to resolve these types of claims, the claim must "stem[] from the bankruptcy itself or . . . necessarily be resolved in the [bankruptcy] claims allowance process."[79] In *Wellness International Network, Ltd. v. Sharif*, the Court added that "Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent."[80] If consent is necessary but lacking, the bankruptcy court can issue a report and recommendation for the district court to review entirely de novo.[81] By denying consent, excluded lenders get the benefit of factfinding from a judge not chosen by the debtor.

Denying consent is easier said than done. The Court in *Wellness* held that parties can implicitly consent to bankruptcy court jurisdiction, so long as that consent is "knowing and voluntary."[82] The party must be "aware of the need for consent and the right to refuse it, and still voluntarily appear[] to try the case."[83] At the same time, the *Wellness* Court stressed the "pragmatic virtues" of "increasing judicial efficiency and checking gamesmanship" that underpin the rule.[84] The courts of appeals are still fleshing out when parties implicitly consent under *Wellness*.[85] At a minimum, failure to timely object establishes implied consent.[86] Filing a motion seeking judgment can also constitute consent.[87] Even when litigants object, too much participation in the litigation can create consent.[88] One bankruptcy court — quoted at length by Chief Judge Jones in his *Serta* opinion[89] — has suggested that the only way to deny consent is to "promptly move[] for withdrawal of the reference and prosecute[] that motion to conclusion in the District Court."[90]

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[78] *See, e.g.*, OHA Inv. Corp. v. Bennu Oil & Gas, LLC (*In re* ATP Oil & Gas Corp.), 570 B.R. 764, 767 (S.D. Tex. 2017) ("The district court must issue the final judgment on a motion to dismiss in an adversarial proceeding involving state-law claims by two non-debtor parties who have not consented to the Bankruptcy Court's entry of a final judgment." (citing *Stern*, 564 U.S. at 467)).

[79] *Stern*, 564 U.S. at 499; 10 COLLIER ON BANKRUPTCY ¶ 7008.02[1] (Richard Levin & Henry J. Sommer eds., 16th ed. 2025).

[80] 575 U.S. 665, 686 (2015).

[81] *See* Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 28 (2014).

[82] 575 U.S. at 685.

[83] *Id.* (quoting Roell v. Withrow, 538 U.S. 580, 590 (2003)).

[84] *Id.* at 684–85.

[85] *See* Mawerdi Hamid, *Constitutional Authority of Bankruptcy Judges: The Effects of* Stern v. Marshall *as Applied by the Courts of Appeals*, 27 AM. BANKR. INST. L. REV. 51, 89–92 (2019).

[86] *See, e.g.*, *In re* Trib. Media Co., 902 F.3d 384, 395–96 (3d Cir. 2018).

[87] *See, e.g.*, Teter v. Baumgart (*In re* Teter), 90 F.4th 493, 497 (6th Cir. 2024) (discussing motion for attorneys' fees); Green v. Unaatuq, LLC (*In re* Cath. Bishop of N. Alaska), 669 F. App'x 398, 399 (9th Cir. 2016) (discussing motion for relief from order).

[88] *See* GPX Cap., LLC v. Argonaut Mfg. Servs., Inc. (*In re* Bioserv Corp.), No. 23-60033, 2024 WL 4200575, at *1 (9th Cir. Sep. 16, 2024).

[89] Serta Simmons Bedding LLC v. AG Ctr. St. P'ship (*In re* Serta Simmons Bedding, LLC), Ch. 11 Case No. 23-90020, Adv. No. 23-9001, 2023 WL 3855820, at *8 n.8 (Bankr. S.D. Tex. June 6, 2023).

[90] Haley v. Barclays Bank Del. (*In re* Carter), 506 B.R. 83, 88 (Bankr. D. Ariz. 2014). Bankruptcy courts hear cases by reference from their district court. Parties in bankruptcy can move to "withdraw" this reference and proceed before the district court. *See* 28 U.S.C. § 157(a), (d).

Like Chief Judge Jones, the *Serta* court elided many of the nuances in the parties' litigation choices. In finding consent as to all claims, the panel stressed that the parties requested partial final judgment on the open market purchase question.[91] But it's not clear why the request mattered under *Wellness* because this claim arguably never required consent for adjudication in the first place under *Stern*. For all excluded lenders, priority in Serta's bankruptcy depended on whether Serta breached the loan agreement by swapping loans with the prevailing lenders.[92] Therefore, "the process of adjudicating [the] proof[s] of claim would necessarily resolve" the open market purchase question, excepting it from the guarantee of an Article III judge.[93] In fact, the non-LCM excluded lenders took pains to distinguish their claims against the prevailing lenders from their claims against Serta for this reason.[94]

Moreover, the Fifth Circuit adopted debatable factual contentions from Chief Judge Jones's opinion. For example, the panel stated that the non-LCM excluded lenders "failed to object at the summary judgment stage, before trial, and at trial."[95] While these lenders did fail to mention *Stern* or *Wellness* at summary judgment and at trial,[96] their pre-trial brief plainly argued that the bankruptcy court lacked constitutional authority to ajdudicate their claims against the prevailing lenders.[97] The panel also seemed to say the non-LCM excluded lenders requested summary judgment on the implied covenant claim too.[98] But their brief asked the court to allow discovery to continue on the implied covenant claim.[99] Appellate courts review the bankruptcy judge's finding of *Wellness* consent for clear error,[100] and these mistakes may not have been material. Still, *Serta* demonstrates how the clear error standard makes it more difficult to obtain an Article III judge. Indeed, clear

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91 *Serta*, 125 F.4th at 574 & n.10.

92 *See* Amended Adversary Complaint, *supra* note 7, ¶ 7; Amended Answering Defendants' Answer to the Amended Adversary Complaint, Counterclaims and Third-Party Claims at 124–25, *Serta Simmons Bedding LLC*, Ch. 11 Case No. 23-90020, Adv. No. 23-9001, Dkt. No. 148 (seeking rescission of the uptier, among other remedies).

93 Stern v. Marshall, 564 U.S. 462, 497 (2011); *cf.* U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc., 761 F.3d 409, 419–20, 424–25 (5th Cir. 2014) (holding that debtor's fraudulent transfer claims against creditor would necessarily be resolved in process of adjudicating creditor's proofs of claim).

94 *See* Excluded Lenders' Pre-Trial Memorandum of Law, *supra* note 45, at 32–33.

95 *Serta*, 125 F.4th at 574.

96 *See* Excluded Lenders' Memorandum of Law in Opposition to Plaintiffs' Motions for Partial Summary Judgment, *Serta Simmons Bedding LLC*, Ch. 11 Case No. 23-90020, Adv. No. 23-9001, Dkt. No. 86 [hereinafter Excluded Lenders' MSJ Opposition Brief]; Confirmation Closing Arguments at 112–59, *Serta Simmons Bedding LLC*, Ch. 11 Case No. 23-90020, Adv. No. 23-9001, Dkt. No. 318.

97 *See* Excluded Lenders' Pre-Trial Memorandum of Law, *supra* note 45, at 31–33.

98 *Serta*, 125 F.4th at 574 ("[I]n No. 23-20450 [regarding the trial claims], the bankruptcy court found that the Excluded Lenders[] impliedly consented to its authority by requesting that it enter summary judgment.").

99 Excluded Lenders' MSJ Opposition Brief, *supra* note 96, at 6, 46–47, 51.

100 *See Serta*, 125 F.4th at 574.

error deference is ironic because parties in bankruptcy seeking an Article III judge do so to get nondeferential review.

The Fifth Circuit stretched *Wellness* especially far to find implied consent from LCM. The LCM lenders duly objected in their initial answer[101] and reiterated their objections before,[102] during,[103] and after trial.[104] Only at summary judgment did LCM neglect to mention *Stern*,[105] but the open market purchase question resolved at summary judgment arguably did not require consent to begin with. Recognizing that the bankruptcy court had made no consent findings about LCM, the panel hung its hat on the request for partial final judgment.[106] The Fifth Circuit's affirmation of consent despite LCM's careful and consistent denials suggests that a prompt motion for withdrawal of the reference may be the only surefire way to avoid inadvertent consent.[107]

To be sure, the Fifth Circuit did not have to break new ground to uphold the finding of consent. For example, the appellants appealed straight to the circuit court, bypassing the district court.[108] On appeal, nobody addressed *Stern* or *Wellness*;[109] the court actually raised it sua sponte. One circuit court has treated both of these choices as evidence of *Wellness* consent, albeit in a nonprecedential opinion.[110] But the Fifth Circuit chose to focus on only the parties' actions before the bankruptcy judge, and it did so in a precedential opinion.[111] Creditors in the popular bankruptcy destination of Houston will now find it even tougher to obtain an Article III judge, and perhaps creditors in other circuits will too.

Although the difference between bankruptcy judges and Article III judges may seem small, it matters for excluded lenders. After a liability management transaction, excluded lenders can sue nondebtors on a variety of factbound *Stern* claims, in particular breach of the implied

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101 LCM Answer, *supra* note 44, ¶ 108.

102 *See* LCM Defendants' Pre-Trial Brief, *supra* note 45, ¶¶ 25–32.

103 *See* Confirmation Closing Arguments, *supra* note 96, at 109–10.

104 *See* LCM Defendants' Post-Trial Brief ¶ 21, Serta Simmons Bedding LLC v. AG Ctr. St. P'ship (*In re* Serta Simmons Bedding, LLC), Ch. 11 Case No. 23-90020, Adv. No. 23-9001 (Bankr. S.D. Tex. June 6, 2023), Dkt. No. 291.

105 *See generally* LCM MSJ Opposition Brief, *supra* note 31.

106 *Serta*, 125 F.4th at 574 & n.10.

107 *See* Haley v. Barclays Bank Del. (*In re* Carter), 506 B.R. 83, 88 (Bankr. D. Ariz. 2014).

108 *Serta*, 125 F.4th at 574.

109 *See generally* Corrected Brief of Appellants Excluded Lenders, *Serta*, 125 F.4th 555 (No. 23-20181); Corrected Brief for Appellants LCM Lenders, *Serta*, 125 F.4th 555 (No. 23-20181); Oral Argument, *Serta*, 125 F.4th 555 (No. 23-20181), https://www.ca5.uscourts.gov/OralArgRecordings/23/23-20181_7-10-2024.mp3 [https://perma.cc/PN9M-MEPW].

110 GPX Cap., LLC v. Argonaut Mfg. Servs., Inc. (*In re* Bioserv Corp.), No. 23-60033, 2024 WL 4200575, at *1 (9th Cir. Sep. 16, 2024).

111 *See Serta*, 125 F.4th at 574.

covenant of good faith and fair dealing.[112] If the bankruptcy court issues judgment, adverse factual findings — such as whether prevailing lenders acted in good faith[113] — get clear error deference on appeal.[114] In this case, LCM had good reason to avoid factfinding from a debtor-friendly judge because its clean hands made it a stronger implied covenant claimant.

At the same time, there are risks to making *Stern* objections. Withdrawing claims might antagonize the bankruptcy judge, who will certainly decide other matters in the case.[115] The bankruptcy judge could also surprise by ruling in an excluded creditor's favor.[116] Additionally, the district judge might not conduct truly independent review.[117] Even so, excluded lenders seem to believe objecting is worth it. In at least two subsequent proceedings challenging uptiers, excluded lenders have litigated the issue.[118]

Moving beyond tactics, today's litigation over liability management transactions demonstrates the pitfalls of *Wellness*. As the Chief Justice noted in dissent, "[t]he Framers adopted the formal protections of Article III for good reasons."[119] Some bankruptcy judges feel pressure to favor debtors and their allies.[120] This tendency is exacerbated by the Bankruptcy Code's generous venue and jurisdictional rules, which encourage forum shopping by debtors. If courts continue to apply *Wellness* in capacious ways, these pressures will erode Article III's promise of "impartial and independent federal adjudication."[121]

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112 *See Lead Article: Liability Management Exercises: What They Are and What They Mean for Market Participants*, QUINN EMANUEL (Jan. 15, 2025), https://www.quinnemanuel.com/the-firm/publications/lead-article-liability-management-exercises-what-they-are-and-what-they-mean-for-market-participants [https://perma.cc/5DP2-6224].

113 *See, e.g.*, Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 98 (2d Cir. 2007) (quoting 23 WILLISTON ON CONTRACTS § 63:22 (4th ed. 2006)).

114 10 COLLIER ON BANKRUPTCY, *supra* note 79, ¶ 7052.02.

115 *See* Levitin, *supra* note 67, at 383–84 (discussing the chilling effect on lawyers' conduct).

116 *E.g.*, Ryan Preston Dahl, Leonard Klingbaum & Stephen L. Iacovo, *Can Reasonable Minds Disagree?* Wesco *Sends Uptier Claims to Fact-Finding*, ROPES & GRAY (Feb. 7, 2024), https://www.ropesgray.com/en/insights/alerts/2024/02/can-reasonable-minds-disagree-wesco-sends-uptier-claims-to-fact-finding [https://perma.cc/A4M7-GYRN] ("Indeed, *Wesco* surprised at least some market observers by the extent to which it departed so quickly and so directly from [*Serta*].").

117 A 2019 study found that district judges "almost always" adopt the recommendations of the bankruptcy judge. Laura B. Bartell, Stern *Claims and Article III Adjudication — The Bankruptcy Judge Knows Best?*, 35 EMORY BANKR. DEVS. J. 13, 14 (2019).

118 *See* Transcript of Motion for Summary Judgment at 187–97, Wesco Aircraft Holdings, Inc. v. SSD Invs. Ltd. (*In re* Wesco Aircraft Holdings, Inc.), Ch. 11 Case No. 23-90611, Adv. No. 23-3091 (Bankr. S.D. Tex. Jan. 14, 2024), Dkt. No. 372; Defendants and Counterclaim Plaintiffs' Emergency Motion to Abstain or, in the Alternative, Transfer Venue ¶¶ 23–30, Robertshaw US Holding Corp. v. Invesco Senior Secured Mgmt. Inc. (*In re* Robertshaw US Holding Corp.), 662 B.R. 146 (Bankr. S.D. Tex. June 20, 2024) (No. 24-03024), Dkt. No. 55.

119 Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 688 (2015) (Roberts, C.J., dissenting).

120 *See* LYNN M. LOPUCKI, COURTING FAILURE 20–21, 23, 124–26, 137–38 (2005) (discussing local bars' close ties with bankruptcy judges and influence over reappointment); Levitin, *supra* note 67, at 365, 373 & n.169 (discussing Chief Judge Jones's open support for the Texas bankruptcy bar).

121 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986).