SQUIRE SANDERS

SQUIRE SANDERS SERVES AS COUNSEL TO AMERICAN COLLEGE OF BANKRUPTCY IN US SUPREME COURT AMICUS BRIEF

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On June 24, 2013, the US Supreme Court granted certiorari to consider an appeal of the decision of the Ninth Circuit Court of Appeals in *Executive Benefits Insurance Agency v. Peter H. Arkison, Trustee, solely in his capacity as Chapter 7 Trustee of the Estate of Bellingham Insurance Agency, Inc.* (*Bellingham*). In *Bellingham*, interpreting *Stern v. Marshall*, the Ninth Circuit held that, notwithstanding a constitutional limitation against entry of a final judgment by a bankruptcy judge in a fraudulent conveyance action against a non-creditor, a defendant may nonetheless consent to entry of a final judgment by a bankruptcy judge. The defendant, Executive Benefits Insurance Agency, was found to have consented by waiving its "personal right" to Article III adjudication. This implied consent resulted from the failure of EBIA to raise the necessary constitutional objection before the Ninth Circuit. The *Bellingham* decision is in direct conflict with the 2012 decision of the Sixth Circuit Court of Appeals in *Waldman v. Stone*, which held that a defendant cannot waive the constitutional right to Article III adjudication.

Reversal of the Ninth Circuit decision in *Bellingham* would cause severe adverse ramifications to the bankruptcy system and likely also render the Bankruptcy Appellate Panel (BAP) system, used in five Circuits, unconstitutional. In collaboration with Professor Ralph Brubaker of the University of Illinois College of Law and Latham & Watkins, Squire Sanders is representing The American College of Bankruptcy (College) in its first-ever amicus brief in which it supports affirmance of the *Bellingham* decision. The College brief focuses primarily on the history of Supreme Court jurisprudence concerning Article III adjudication of summary and plenary matters in bankruptcy, well-recognized and time honored principles of litigant consent to non-Article III adjudication of otherwise constitutionally mandated Article III matters and the practical implications on the bankruptcy system and other non-Article III tribunals (such as the BAP and US Magistrates) if litigant consent is not upheld.

The College was formed in 1989 as an honorary association of bankruptcy and insolvency professionals. Membership is by invitation only. Its 800 fellows include individuals associated with all facets of bankruptcy practice: commercial and consumer bankruptcy attorneys, corporate turnaround advisors, United States trustees, bankruptcy trustees, investment bankers, insolvency accountants, law professors, judges, government officials, appraisers, and others involved in all aspects of the bankruptcy and insolvency community.

The Squire Sanders team was led by Stephen D. Lerner (Chair, Restructuring & Insolvency Practice), Pierre H. Bergeron (Chair, Appellate & Supreme Court Practice), G. Christopher Meyer (Senior Partner, Restructuring & Insolvency), Colter L. Paulson (Senior Associate, Litigation), Larisa M. Vaysman (Associate, Litigation), Andrew M. Simon (Associate, Restructuring & Insolvency) and Peter R. Morrison (Associate, Restructuring & Insolvency).

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