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Post Stern v. Marshall: Navigating Uncertainties in Bankruptcy Claims Litigation

Arguing Issues of Fraudulent Transfer/Preference and Ponzi Clawback Claims, Waiver and Consent, and Core vs. Non-Core Proceedings

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Post *STERN v. MARSHALL: Navigating Uncertainties in Bankruptcy Claims Litigation*

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Part 1

Stern and its Lower Court Progeny

Core vs. Non-Core Bankruptcy Jurisdiction

- "As explained below, bankruptcy courts may hear and enter final judgments in "core proceedings" in a bankruptcy case. In non-core proceedings, the bankruptcy courts instead submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of a final judgment." *Stern* at pp. 2601-2602.

Core Claims
(Final Judgments May Be Entered by Bankruptcy Courts)

"Bankruptcy judges may hear and enter final judgments in 'all core proceedings arising under title 11, or arising in a case under title 11.' § 157(b)(1). 'Core proceedings include, but are not limited to' 16 different types of matters, including 'counterclaims by [a debtor's] estate against persons filing claims against the estate.' § 157(b)(2)(c). Parties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards. See § 158(a); Fed. Rule Bkrpcy. Proc. 8013."

Stern at pp. 2603-2604.

Non-Core (Proposed Findings of Fact and Conclusions of Law Submitted to the District Court)

"When a bankruptcy judge determines that a referred 'proceeding… is not a core proceeding but… is otherwise related to a case under title 11,' the judge may only 'submit proposed findings of fact and conclusions of law to the district court.' § 157(c)(1). It is the district court that enters final judgment in such cases after reviewing *de novo* any matter to which a party objects."

Stern at p. 2604.

U.S. Constitution, Art. III, § 1

- "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

- Bankruptcy judges do not hold life tenure and therefore cannot be Article III judges entitled to exercise the "judicial Power of the United States."

The Facts of *Stern*

- *Stern* arose from the bankruptcy of Vickie Lynn Marshall, more famously known as Anna Nicole Smith.
- Vickie married octogenarian oil magnate J. Howard Marshall roughly one year before his death.
- As J. Howard's health failed, Vickie discovered that neither his living trust nor his will made any provision for her.
- Vickie then sued J. Howard's son, Pierce, in Texas probate court, alleging tortious interference with her expected testamentary gift.
- With her suit still unresolved at the time of J Howard's death, Vickie filed for bankruptcy.

Background Facts

- Pierce commenced an adversary proceeding against Vickie in bankruptcy court, alleging defamation and seeking a declaration of non-dischargability.
  - Critically, Pierce also filed a proof of claim in the bankruptcy, seeking damages on account of his defamation claim.
- Vickie responded by filing a counterclaim against Pierce, raising tortious interference claims identical to those raised before the Texas probate court.
- Pierce argued that the bankruptcy court lacked jurisdiction to enter a final order on Vickie's counterclaim, asserting that it was a "non-core matter" under 28 U.S.C. § 157.
- The bankruptcy court rejected this argument and ultimately enter a judgment for $475 million in favor of Vickie.

Background Facts

- Following the bankruptcy court's order, the Texas probate court came to the opposite conclusion and held that no tortious interference occurred.
- On appeal of the bankruptcy court's order, the district court concluded that the bankruptcy court lacked jurisdiction to enter a final order on Vickie's claim, but nevertheless entered its own order in favor of Vickie, albeit for significantly reduced damages.
- These conflicting orders created a quandary:
  - If the district court was correct that the bankruptcy court lacked jurisdiction to enter a final order, then the Texas probate court's decision was the first final order on the matter and should have been given preclusive effect.
  - If, however, the bankruptcy court possessed the authority to enter a final order, then its judgment should have been given preclusive effect.
  - In either case, the district court's order would necessarily be reversed.
  - After a number of further appellate proceedings (including a separate hearing by the Supreme Court), the case that is the subject of today's presentation came before the Supreme Court.

Stern v. Marshall

- "We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so . . . ." *Stern v. Marshall, 131 S.Ct. 2594,* 2601 (S.Ct. 2011).

- Bankruptcy Courts have the statutory authority to enter final judgments as to each of the "core proceedings" defined in 28 U.S.C. § 157(b)(2), but do not have the Constitutional authority to do so as to certain proceedings defined as core (e.g., state law counterclaims).

There Was Initial Uncertainty as to the Impact of the Decision

"Everyday I am presented with numerous orders that Congress expects me to sign either as final or forward on with a report and recommendation. However, prior to *Stern*, I did have a standard—28 U.S.C. § 157(b)(2)—to serve as my guide. But now I am told that that standard is unreliable when tested against the Constitution itself. My frustration with *Stern* is that it offers virtually no insight as to how to recalibrate the core/non-core dichotomy so that I can again proceed with at least some assurance that I will not be making the same constitutional blunder with respect to some other aspect of Authority Section 157(b)(2) . . . .

One Alternative would be to play it safe and simply refer without reflection every future determination I make to a district judge for his or her final review. However, I do not see how I can do so in good faith given Authority Section 157(b)(3)'s direction that I must decide even in instances when not requested whether I have the ability or not under that section to enter a final order. 28 U.S.C. § 157(b)(3). Moreover, I suspect that the Article III judges in my district would not be pleased with the extra workload such an approach would impose upon them . . . ."

In re Teleservices Group, Inc. (Meoli v. Huntington National Bank), 2011 WL 3610050, 2-3 (Bankr. W.D. Mi. 2011).

Initially, Lower Courts Often Construed *Stern* Narrowly

- "Except for the types of counterclaims addressed in *Stern v. Marshall,* a bankruptcy judge remains empowered to enter final orders in all core proceedings." *In re Hudson* (*Tibble v. Wells Fargo Bank, N.A.*), 2011 WL 3583278 (Bankr. W.D. Mi. 2011).

- "Of course, years from now, the Supreme Court may hold that section 157(b)(2)(F) dealing with fraudulent conveyances is unconstitutional, just as it did with section 157(b)(2)(C). But the job of bankruptcy courts is to apply the law as it is written and interpreted today. Bankruptcy courts should not invalidate a Congressional statute, such as section 157(b)(2)(F)—or otherwise limit its authority to finally resolve other core proceedings—simply because dicta in *Stern* suggests the Supreme Court may do the same down the road. The Supreme Court does not ordinarily decide important questions of law by cursory dicta. 76 And it certainly did not do so in *Stern.*" *In re Safety Harbor Resort and Spa a/k/a S.H.S. Resort, LLC*, 2011 WL 3849639 (M.D. Fla. 2011).

Courts are Building a Consensus that *Stern* Applies Broadly

- "While fraudulent conveyance actions are also designated as "core" in the bankruptcy statute, they were not at issue in *Stern.* Thus, the question is whether the holding of Stern applies to other "core" matters in the statute. Upon examination, the Court determines the reasoning of *Stern* does apply to the fraudulent conveyance claims in this case, and that the bankruptcy court cannot enter a final judgment on these claims." *In re Heller Ehrman LLP (Heller Ehrman LLP v. Arnold & Porter LLP)*, 464 B.R. 348, 352 (N.D. Cal. 2011).

- "Having now fully considered the parties' briefs, notices of supplemental authority, oral arguments, and the opinions of the various district courts and bankruptcy courts around the country likewise attempting to reconcile *Stern v. Marshall* with settled bankruptcy practice, the Court, for the reasons that follow, answers the questions thusly: (1) Under the doctrine of *Stern v. Marshall*, the Bankruptcy Court lacks the constitutional authority to enter final judgment on the Trustee's claims against the Movants, and therefore these claims must be adjudicated by an Article III court." *Kirschner v. Agoglia*, 2012 WL 1622496, (S.D. N.Y. 2012)(Hon. Jed S. Rakoff).

- "Courts in this district have consistently held that, after *Stern*, bankruptcy courts lack authority to issue final judgments on fraudulent conveyance claims brought against a person who has not submitted a claim against the estate. That is the case here. Moreover, just as in *Stern*, the claims were brought solely to augment the bankrupt estate."… "I therefore conclude that the Bankruptcy Court lacks the authority to finally adjudicate the fraudulent conveyance claims." *In re Madison Bentley Associates, LLC (Messer v. Bentley Manhattan, Inc.)*, 474 B.R. 430, (S.D. N.Y. 2012).

Some Delaware Courts Still Construe *Stern* Narrowly

- "This Court disagrees that the *Stern* decision stands for the Broad Interpretation and proposition that a non-Article III court does not have authority to enter a final judgment on a preference or fraudulent conveyance claim brought by the Debtor to augment the estate, or any other core claim (as defined in 28 U.S.C. section 157(b)(2)) that is not a state law counterclaim. The Broad Interpretation is based on a holding that the Supreme Court has never made, namely, that restructuring of the debtor-creditor relationship is not a public right, nor falls within any other exception that would permit a non-Article III court to finally adjudicate those matters. As previously stated, the Supreme Court expressly took measures to limit the reach and breadth of its opinion and its interpretation by lower courts. The Court adopts the Narrow Interpretation and holds that *Stern* only removed a non-Article III court's authority to finally adjudicate one type of core matter, a debtor's state law counterclaim asserted under section 157(b)(2)(C). By extension, the Court concludes that *Stern* does not remove the bankruptcy courts' authority to enter final judgments on other core matters, including the authority to finally adjudicate preference and fraudulent conveyance actions like those at issue before this Court."… *In re Direct Response Media, Inc. (Burtch v. Seaport Capital, LLC, et al.)*, 466 B.R. 626, 644 (Bankr. D. De. 2012).

- "I agree with my colleagues that Stern's holding should be read narrowly and thus restricted to the case of 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. I note also that numerous other recent decisions have agreed with the narrow interpretation. . . . . I conclude that I can enter a final judgment on the core preference, post-petition transfer, fraudulent transfer, and unjust enrichment claims and issue proposed findings of fact and conclusions of law on the non-core causes of action." *In re DBSI, Inc. (Zazzali v. 1031 Exchange Group, et al.)*, 467 B.R. 767, 772-773 (Bankr. D. De. 2012).

Stern "Workarounds"

- In response to a broader reading of *Stern*, litigants and lower courts developed opposing workarounds to limitations imposed by *Stern*:
  - Increased use of motions to withdraw the reference from the bankruptcy court;
  - Treatment of final orders that potentially violate *Stern* as proposed findings of fact and conclusions of law.

- Ultimately, some district courts amended their "standing order" that refers bankruptcy related matters to bankruptcy courts to formalize or limit these workarounds.

Treatment of Final Orders as Proposed Findings and Conclusions

- "Since Congress delegated broader authority to bankruptcy courts in core matters than non-core matters, 28 U.S.C. § 157(b)(1), (c)(1), and the delegation included the authority to hear and determine all cases and enter appropriate orders, 28 U.S.C. § 157(b)(1), there appears to be no reason why bankruptcy courts cannot continue to hear all pretrial proceedings and enter as an appropriate order proposed findings of fact and conclusions of law in the manner authorized by Section 157(c)(1)." *In re Heller Ehrman LLP (Heller Ehrman LLP v. Arnold & Porter LLP)*, 464 B.R. 348, 355 (N.D. Cal. 2011).

- "[T]he Bankruptcy Court does have lawful authority to conduct proceedings and issue a report and recommendation to the District Court on Movants' motion to dismiss, provided it is subject to *de novo* review." *Kirschner v. Agoglia*, 2012 WL 1622496, (S.D. N.Y. 2012)(Hon. Jed S. Rakoff).

Litigants Seek to Withdraw Reference, Courts Generally Refuse

- "[T]he permissive withdrawal analysis does not end at the core/non-core determination. Considering other factors like the efficient use of judicial resources, the Court finds the Bankruptcy Court is the appropriate forum to first hear this case. To start, the Bankruptcy Court has greater familiarity with the facts and holds a unique vantage point from the center of the overall bankruptcy proceeding. Withdrawal is also likely to increase costs… Under the circumstances, a de novo review here would be an efficient use of judicial resources. The decision to decline withdrawal is further bolstered by the knowledge that bankruptcy courts routinely resolve these types of disputes, as stated above. Accordingly, the Court declines to permissively withdraw the reference of this non-core proceeding." *Siegel v. FDIC (In re Indymac Bancorp. Inc.)*, 2011 WL 2883012, 7.

- "[T]he Court determines that it would be the most efficient use of judicial resources for the bankruptcy court to keep the actions at this point, and thus, declines to exercise its discretion to withdraw the reference." *In re Heller Ehrman LLP (Heller Ehrman LLP v. Arnold & Porter, LLP)*, 464 B.R. 348, 354 (N.D. Cal. Dec. 2011).

Standing Orders Changed to Halt Flood of Withdrawal Requests

- United States District Courts for the Southern District of New York and District of Delaware:
  - "…If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution."

Part 2
Stern in the Circuit Courts

Stern in the Circuit Courts

- Certain early Circuit courts decisions concerning *Stern*, like many early bankruptcy court and district court decisions, were initially skeptical of construing *Stern* broadly.

- However, Circuit Courts have generally read *Stern* relatively broadly, and have applied it outside of the context of state law counterclaims that it was decided in.

- The Circuit's have split on the propriety of the *Stern* "workarounds" adopted by certain lower courts.

2d Circuit: *In re DPH Holdings Corp*.

- Chapter 11 debtor's insurers sought declaratory judgment against debtor and others regarding policies issued to debtor.
- Bankruptcy court rejected argument that it lacked jurisdiction under *Stern* and the 2d Circuit affirmed.
- The 2d Circuit held as long as the "proceeding is one or the other [core or non-core], the Bankruptcy Court possessed subject matter jurisdiction."
- The 2d Circuit found that the matter was a "core proceeding" because:
  - At issue were several post-petition contracts;
  - Proceeding was likely to "directly affect a core bankruptcy function" because the validity of the contracts would determine the allowance or disallowance of claims against the estate; and
  - The resolution of the matter concerns and affects the liquidation of the assets of the estate.

2d Circuit: *In re Quigley Co. Inc.*

- Bankruptcy court ruled that an injunction issued during the bankruptcy case also stayed a class-action suit against the debtor's parent company.
- The bankruptcy court's authority to issue such an injunction was challenged under *Stern*.
- On appeal, the Second Circuit found *Stern* inapposite and stressed that the Supreme Court indicated that its in *Stern* holding was a narrow one.
- "Enjoining litigation to protect bankruptcy estates during the pendency of bankruptcy proceedings, unlike the entry of a final tort judgment at issue in *Stern*, has historically been the province of the bankruptcy courts."

5th Circuit: *Tech. Automation Serv. Corp. v. Liberty Surplus Ins. Corp.*

- An insured sued a commercial liability insurer, seeking a declaration that the insurer was obligated to defend the insured in a negligence action.

- The insurer removed the case to federal court and asserted a counter claim.

- A federal magistrate judge, who, like bankruptcy judges, was not an "Article III" judge, entered summary judgment for the insured.

5th Circuit: *Tech. Automation Serv. Corp. v. Liberty Surplus Ins. Corp.*

- On appeal, the insurer argued that, under *Stern*, the magistrate judge was prohibited from entering a final order on the claims at issue.

- The 5th Circuit rejected the insurer's argument, finding that the Supreme Court did not "sub silentio" overrule precedent that permitted a non-article III magistrate judge to enter a final order.

5th Circuit: *In re Frazin*

- Chapter 13 debtor's appellate counsel filed fee applications.
- Debtor objected and filed state law counterclaims for, among other things, negligence, violations of Texas's Deceptive Trade Practices Act, and breach of fiduciary duty.
- Bankruptcy court ruled against the debtor on all claims.
- Debtor appealed, arguing, among other things, that the bankruptcy court lacked authority to rule on state law counterclaims under *Stern.*

5th Circuit: *In re Frazin*

- The 5th Circuit noted that "[d]espite the narrowing language at the end of the Court's opinion, *Stern* clearly grounded its reasoning in principles that are broad in scope."

- Applying *Stern*, the Court found that, although the state law counterclaims would all normally need to be resolved by an Article III court, the negligence and breach of fiduciary duty claims were necessarily resolved in the course of ruling on appellate counsel's fee application, and were therefor appropriately resolved by the bankruptcy court.

5th Circuit: *In re Frazin*

- The debtors claim for breach of the Texas Deceptive Trade Practices Act, however, did not need to be decided in order to address the fee application.

- Accordingly, the 5th Circuit found that the bankruptcy court lacked authority to enter a final order on the Deceptive Trade Practices Act counterclaim.

- Oddly, *Frazin* did not address or attempt to distinguish Technical Automation, which was decided by the 5th Circuit barely a year and a half before *Frazin*.

6th Circuit: *Waldman v. Stone*

- A chapter 11 debtor brought an adversary proceeding against one of its creditors, asserting, fraud and seeking disallowance of the creditor's claims.
- The creditor filed counterclaims, seeking payment of its debts and relief from the automatic stay.
- After a trial, the bankruptcy court found that the creditor had committed fraud
- The court then disallowed the creditor's claims and awarded the debtor nearly $4 million in compensatory and punitive damages.

6th Circuit: *Waldman v. Stone*

- On appeal, the creditor argued that the bankruptcy court lacked constitutional authority to enter final judgment on the debtor's claims.

- The Sixth Circuit rejected the debtor's argument as to the disallowance claim, reasoning that the debtor "sought no affirmative relief with these claims instead he sought only to prevent [the creditor] from collecting on [the debtor's] debts . . . . ."

- Because the disallowance claims were "part and parcel of the claims-allowance process," the bankruptcy court was permitted to enter a final judgment.

6th Circuit: *Waldman v. Stone*

- The debtor's claims for fraud, in contrast, "arose exclusively under state law" and "were not part of [the debtor's] effort to restructure his relations with his creditors . . . ."

- Accordingly, the bankruptcy court exceeded its constitutional authority in entering a final judgment on the debtor's fraud claims.

- The Sixth Circuit also explicitly rejected the debtor's argument that the creditor could waive a *Stern* objection by litigating before the bankruptcy court, reasoning the right to be heard by an Article III court "implicates not only . . . Personal rights, but also the structural principle advance by Article III. And that right is not [an individual creditor's] right to waive."

7th Circuit: *Ortiz v. Aurora Health Care, Inc.*

- Debtors filed class-action complaints against Aurora in state court, claiming that Aurora violated a Wisconsin medical records confidentiality statute by attaching their respective medical records to proofs of claim filed in their respective bankruptcy cases.

- Aurora removed the actions to the bankruptcy court.

- The bankruptcy court ultimately dismissed the debtors' complaint, finding that the debtors failed to provide proof of actual damages.

- The Seventh Circuit granted a direct appeal, but *sua sponte* raised the question of whether, in light of *Stern*, the bankruptcy court was permitted to enter a final order dismissing the debtors' claims.

7th Circuit: *Ortiz v. Aurora Health Care, Inc.*

- First, the court found that the debtors' claims qualified as core proceedings because they concerned "administrative matters that arise *only* in bankruptcy cases."

- Next, the court found that the "debtors' claimed right to relief does not flow from a federal statutory scheme" and were instead "simply ordinary state-law claims."

- Accordingly, the Seventh Circuit found that the bankruptcy court lacked constitutional authority to enter final judgment in the actions.

- The Seventh Circuit also squarely rejected the proposition that a reviewing court may treat a final order entered by a bankruptcy court in a core proceeding but in violation of *Stern* as proposed findings of fact or conclusions of law, stating "[f]or a bankruptcy judge's orders to function as proposed findings of fact or conclusions of law under 28 U.S.C. § 157(c)(1), we would have to hold that the debtors' complaints were 'not a core proceeding' but are 'otherwise related to a case under title 11.'"

7th Circuit: *Wellness Intern'l Network Ltd. v. Sharif*

- Wellness International Network ("WIN") brought an adversary complaint against Sharif, a chapter 7, asserting various state law claims based on alter-ego theories.

- The bankruptcy court ultimately entered a default judgment in favor of WIN, which was affirmed by the district court. Sharif appealed that ruling to the Seventh Circuit

- *Wellness Intern'l Network Ltd. v. Sharif* raised two questions:
  - Can a bankruptcy court constitutionally enter a final order on an alter-ego claim against a non-party?
  - If not, may a litigant waive its right to be heard by an Article III Court?

- Taking these questions in reverse order, the 7th Circuit, observed that section 1 of Article III implicated both personal and structural rights, which "renders notions of waiver and consent more nuanced than they are in other areas."

7th Circuit: *Wellness Intern'l Network Ltd. v. Sharif*

- "The practical problem, of course, is the difficulty of separating out the waivable personal safeguard from the nonwaivable structural safeguard, for in every case an argument that a party waived the personal protection can be met with the argument that the court must still consider the objection because the structural aspect cannot be waived."

- Ultimately, the court concluded that, in bankruptcy, a *Stern* objection ***could not be waived***, reasoning that "unlike *Schor*, where party consent was permissible because the statutory scheme at issue did not implicate structural concerns, the Supreme Court has already held that the statutory scheme granting bankruptcy judges authority to enter final judgment in core proceedings *does* implicate structural concerns where the core proceeding at issue is 'the stuff of traditional actions at common law tried by the courts at Westminster in 1789.'"

- The court then went on to hold that the bankruptcy court lacked constitutional authority to enter a final order on the alter ego claim because it was "a state law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process."

Part 3

In re Arkison: Stern Revisited by the Supreme Court

The Ninth Circuit's Decision in Executive Benefits Insurance Agency v. Arkison (In re Bellingham Insurance Agency, Inc.) ("*Bellingham*")

702 F.3d 553 (9th Cir. 2012)

The Prelude: The 9th Circuit's Invitation for Amicus Briefs

- "The court invites supplemental briefs by any amicus curiae addressing the following questions: Does *Stern v. Marshall,* —— U.S. ——, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance? If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?" *In re Bellingham Ins. Agency, Inc. (Executive Benefits Insurance Agency v. Arkison)*, 661 F.3d 476 (9th Cir. 2011).
- Amicus briefs filed with the Ninth Circuit by (among others):
  - The United States Attorney's Office
  - The National Association of Bankruptcy Trustees
  - Concerned Chapter 7 and 11 Trustees and Plan Administrators

The 9th Circuit Bellingham Decision Core vs. Non-Core

- In all "core proceedings arising under title 11, or arising in a case under title 11," a bankruptcy judge has the power to "hear and determine the controversy" and enter final orders, subject only to appellate review. *Id.* § 157(b)(1). In a non-core proceeding "that is otherwise related to a case under title 11," however, a bankruptcy judge may only "submit proposed findings of fact and conclusions of law to the district court." *Id.* § 157(c)(1). The entry of final judgment in non-core proceedings is the sole province of Article III judges.
  - *Bellingham* at p. 558.

The 9th Circuit Bellingham Decision Core vs. Non-Core (cont.)

- Section 157(b)(2) enumerates sixteen nonexclusive examples of "core proceedings." Among these are "proceedings to determine, avoid, or recover fraudulent conveyances." *Id.* § 157(b)(2)(H). The bankruptcy judge hearing the Trustee's claim was thus empowered by statute to enter a final judgment. Indeed, until quite recently, the exercise of that statutory power was routine and uncontroversial. *See, e.g., Jones v. Schlosberg,* No. 04–00571, 2005 WL 6764810, at *5–6 (C.D.Cal.2005) (affirming a bankruptcy court's entry of judgment in a fraudulent conveyance action); *see also Duck v. Munn (In re Mankin),* 823 F.2d 1296, 1300–01 (9th Cir.1987) (holding that both state- and federal-law fraudulent conveyance actions are core proceedings). But following the Supreme Court's decision in *Stern v. Marshall,* the view that such judgments are consistent with the Constitution is no longer tenable.
  - *Bellingham* at p. 558.

The 9th Circuit Bellingham Decision *Mankin*'s Demise

- Encouraged by the Supreme Court's retreat from a formalist conception of the public rights exception and the limitations of Article III more generally, we concluded in 1987 that certain controversies at the core of the bankruptcy process implicated public rights. *See In re Mankin,* 823 F.2d at 1308 ("The public rights doctrine in large part simply constitutionalizes the historical understanding of what need and need not be committed to Article III officers for determination. While, as indicated above, it has always been understood that the property rights of creditors cannot be committed exclusively to the political branches for determination, by the same token it has always been understood that bankruptcy proceedings need not be solely determined by Article III officers."). We also held that the portion of bankruptcy-related proceedings that fit within the public rights exception was coextensive with that portion which had been designated as "core" by the 1984 Act. *Id.* Today, we acknowledge *Mankin's* demise.[5] It has been felled by two cases: *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), and *Stern v. Marshall,* which together point ineluctably to the conclusion that fraudulent conveyance claims, because they do not fall within the public rights exception, cannot be adjudicated by non-Article III judges.
  - *Bellingham* at pp. 560-561.

The 9th Circuit Bellingham Decision Granfinanciera's Return

- *Granfinanciera* clarified that fraudulent conveyance actions are not matters of public right, and that a noncreditor retains a Seventh Amendment right to a jury trial on a bankruptcy trustee's fraudulent conveyance claim. Some courts, however, seemed disinclined to deduce from those holdings that such litigants also retain a right to be heard by an Article III court. *See, e.g., McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.),* 40 F.3d 763, 770 (5th Cir.1994), *withdrawn and replaced* by 52 F.3d 1330 (5th Cir.1995); *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.),* 4 F.3d 1556, 1561 (10th Cir.1993). *But see Leyh,* 52 F.3d at 1336–37; *Gower v. Farmers Home Admin. (In re Davis),* 899 F.2d 1136, 1140 n. 9 (11th Cir.1990). Following *Stern,* we can no longer resist *Granfinanciera's* logic.
  - *Bellingham* at p. 562.

The 9th Circuit Bellingham Decision Fraudulent Transfer Actions As Not Matters of Public Right

- Here, the Trustee's fraudulent conveyance claims are not matters of "public right," and, *ipso facto,* cannot be decided outside the Article III courts.[7] Our conclusion is buttressed by the Supreme Court's equation of litigants' Article III rights with their Seventh Amendment jury trial rights in bankruptcy-related cases.
  - *Bellingham* at pp. 562-563.

The 9th Circuit Bellingham Decision Granfinanciera and Fraudulent Transfer Actions

- And the Court in *Stern* characterized cases involving Seventh Amendment jury trial rights as binding authority on the Article III issue. *Stern* described *Granfinanciera*—a case about Seventh Amendment rights—as deciding that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court." 131 S.Ct. at 2614 n. 7.
  - *Bellingham* at p. 563.

The 9th Circuit Bellingham Decision Article III Courts and Jury Trials

- *Stern* fully equated bankruptcy litigants' Seventh Amendment right to a jury trial in federal bankruptcy proceedings with their right to proceed before an Article III judge. Hence, *Granfinanciera*'s statement that "[u]nless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial" is powerful evidence that Congress also may not deprive such parties of their right to an Article III tribunal. 492 U.S. at 53, 109 S.Ct. 2782.
  - *Bellingham* at p. 563.

The 9th Circuit Bellingham Decision BK Courts Do Not Have the General Authority To Enter Final Judgments Against Non-Creditors

- Taken together, *Granfinanciera* and *Stern* settle the question of whether bankruptcy courts have the general authority to enter final judgments on fraudulent conveyance claims asserted against noncreditors to the bankruptcy estate. They do not. We now turn to a subsidiary question: whether bankruptcy judges may constitutionally hear such claims, and prepare recommendations for de novo review by the federal district courts.
  - *Bellingham* at p. 565.

The 9th Circuit Bellingham Decision Gap in the Statutory Framework

- Federal law authorizes bankruptcy judges to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). Bankruptcy judges have the narrower power to "hear" a proceeding that is "not a core proceeding but that is otherwise related to a case under title 11," and to "submit proposed findings of fact and conclusions of law to the district court" for the entry of final judgment. *Id.* § 157(c)(1).
  - *Bellingham* at p. 565.

The 9th Circuit Bellingham Decision Gap in the Statutory Framework (cont.)

- Our conclusion today creates a gap in this framework: Federal law classifies fraudulent conveyance proceedings as "core" proceedings, 28 U.S.C. § 157(b)(2)(H), but the Constitution prohibits bankruptcy judges from entering a final judgment in such core proceedings. Nowhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding; § 157(c)(1) is expressly limited to "non-core" proceedings. Is the power "to hear and determine" capacious enough to include the power to submit proposed findings in a core proceeding? Or are bankruptcy courts impotent to address fraudulent conveyance proceedings, because they fall in the interstices of § 157?
  - *Bellingham* at p. 565.

The 9th Circuit Bellingham Decision Ability to Issue Findings of Fact and Conclusions of Law

- In sum, § 157(b)(1) provides bankruptcy courts the power to hear fraudulent conveyance cases and to submit reports and recommendations to the district courts. Such cases remain in the core, and the § 157(b)(1) power to "hear and determine" them authorizes the bankruptcy courts to issue proposed findings of fact and conclusions of law. Only the power to enter final judgment is abrogated.[8]
  - *Bellingham* at pp. 565-566.

The 9th Circuit Bellingham Decision Ability to Issue Findings of Fact and Conclusions of Law (cont.)

- Our conclusion is consistent with the *Stern* Court's tacit approval of bankruptcy courts' continuing to hear and make recommendations about statutory core proceedings in which entry of final judgment by a non-Article III judge would be unconstitutional.
  - *Bellingham* at p. 566.

The 9th Circuit Bellingham Decision Right to Article III Court is Waivable

- Several *amici* contend that even if defendants in fraudulent conveyance suits have a right to a hearing in an Article III court, that right is waivable. We agree, and hold that EBIA waived its right to an Article III hearing.
  - *Bellingham* at p. 566.
- If consent permits a non-Article III judge to decide finally a non-core proceeding, then it surely permits the same judge to decide a core proceeding in which he would, absent consent, be disentitled to enter final judgment. The only question, then, is whether EBIA did in fact consent to the bankruptcy court's jurisdiction.
  - *Bellingham* at p. 567.

The 9th Circuit Bellingham Decision Consent By Conduct

- EBIA's conduct bore considerable indicia of consent. EBIA initially demanded a jury trial, invoking its rights under *Granfinanciera,* which the district court treated as a motion to withdraw the reference.
  - *Bellingham* at p. 568.
- But EBIA elected not to pursue a hearing in an Article III court. Instead, EBIA petitioned the district court to stay its consideration of the motion to withdraw the reference to give the bankruptcy court time to adjudicate the Trustee's motion for summary judgment. *See* Order, *Arkison v. Exec. Benefits Ins.,* No. 10–cv–00171 (W.D.Wash. Mar. 26, 2010), ECF No. 5. In other words, EBIA did not simply fail to object to the bankruptcy judge's authority to enter final judgment in the fraudulent conveyance action; it affirmatively assented to suspend its demand for a jury trial in district court to give the bankruptcy judge an opportunity to adjudicate the claim.
  - *Bellingham* at p. 568.

The 9th Circuit Bellingham Decision FRBP 7008 and 7012 vs. Consent by Conduct (cont.)

- …Federal Rules of Bankruptcy Procedure 7008 and 7012, which implement the statutory core/non-core dichotomy, preclude a finding of implied consent. These rules provide that an adversary proceeding complaint "shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge"; a similar requirement applies to responsive pleadings. *See* Fed. R. Bankr.P. 7008(a), 7012(b). A 1987 advisory committee note to Rule 7008 provides that "only express consent in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding." We have subsequently held, however, that a litigant's actions may suffice to establish consent.
  - *Bellingham* at pp. 568-569.

The 9th Circuit Bellingham Decision Consent by Conduct (cont.)

- Although EBIA may not be as sophisticated or creative as Pierce, it fully litigated the fraudulent conveyance action before the bankruptcy court and the district court, without so much as a peep about Article III—even going so far as to abandon its motion to withdraw the reference. "[T]he consequences of a litigant sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor—can be ... severe." *Id.* at 2609 (internal quotation marks, alterations, and citations omitted). Having lost before the bankruptcy court, EBIA cannot assert a right it never thought to pursue when it still believed it might win. Id. Because we conclude that EBIA consented to the bankruptcy court's jurisdiction, we proceed to the merits of that judgment.
  - *Bellingham* at p. 570.

The 9th Circuit Bellingham Decision Bankruptcy Judges May Not Enter Final Judgments Against Non-Creditors Absent Consent

- Fraudulent conveyance claims are "quintessentially suits at common law" designed to "augment the bankruptcy estate." *Granfinanciera,* 492 U.S. at 56, 109 S.Ct. 2782. Thus, Article III bars bankruptcy courts from entering final judgments in such actions brought by a noncreditor absent the parties' consent. But here EBIA consented to the bankruptcy court's jurisdiction, rendering that court's entry of summary judgment in favor of the Trustee constitutionally sound. That judgment was also correct.
  - *Bellingham* at pp. 572-573.

The Petition for Writ of Certiorari
(2013 WL 1329527)

- *Stern* left open two questions on which the courts of appeals are now divided. First, under what circumstances, if any, can litigant consent cure an otherwise unconstitutional exercise of the judicial power of the United States by a bankruptcy judge? And second, does the grant to bankruptcy judges of authority to "hear and determine" certain proceedings (including proceedings labeled "core") subject to district court appellate review include the authority to issue proposed findings of fact and conclusions of law subject to de novo adjudication by the district court?
  - Petition at pp. 2-3.

The Petition for Writ of Certiorari (cont.) (2013 WL 1329527)

- As demonstrated by the decision below, and by the circuit splits of which it is part, this Court's decision in *Stern,* has given rise to tremendous uncertainty among the lower courts.
  - Petition at pp. 32-33.
- *Stern* has also resulted in substantial confusion regarding the authority of bankruptcy judges to propose findings of fact and conclusions of law in core proceedings.
  - Petition at p. 33.
- The questions presented by this petition implicate the integrity of the Constitution's system of separated powers and directly affect countless federal proceedings that occur before non-Article III judges every day. These issues have perplexed the bankruptcy and district courts, and now have divided the courts of appeals. Prompt resolution of these questions by this Court is therefore critical.
  - Petition at p. 34.

Certiorari Granted

- The petition for writ of certiorari was granted by the Supreme Court (133 S.Ct. 2880).
- Oral arguments are scheduled for January 14, 2014.

Petitioners' Brief on Writ of Certiorari

(2013 WL 4829341) (filed 9/9/13)

- Questions presented:
  - 1. Whether Article III permits the exercise of the judicial power of the United States over private rights by non-Article III bankruptcy judges on the sole basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III.
  - 2. Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. 157(b).

Respondent's Brief on Writ of Certiorari

(2013 WL 6019314) (filed 11/8/13)

- Questions presented:
  - 1. May a defendant in a federal fraudulent conveyance action consent to have the matter adjudicated by a bankruptcy judge?
  - 2. If a defendant in a fraudulent conveyance action does not so consent to final bankruptcy judge adjudication, may the bankruptcy judge nonetheless hear the matter and issue a report and recommendation of proposed findings of fact and conclusions of law to the district judge adjudicating the matter for de novo consideration?

Amicus Briefs Overview

- Law School Professors
- Business Law Section of Florida Bar
- Kerr-McGree Corporation
- Nvidia Corporation
- Robert R. McCormick Foundation and the Cantigny Foundation
- TOUSA Defendants
- National Association of Ch. 13 Trustees
- Irving Picard, trustee in the Madoff case
- TOUSA Liquidation Trustee
- Ronald Rotunda and other law professors
- Various States
- American College of Bankruptcy
- United States of America

Professors' Amicus Brief

(2013 WL 6055259)(filed 11/12/13)

- The *Amici* believe that under this Court's Article III jurisprudence, a bankruptcy court's exercise of adjudicating authority based on implied consent and waiver by a party does not run afoul of Article III.
  - Amicus Brief at pp. 1-2.
- The *Amici* support Respondent's position that Article III of the Constitution gives rise to a personal right, and that Article III does not bar the adjudication of an action by a bankruptcy court based on consent of the parties.[3] They argue that express consent is not required, and that an Article III personal right may be waived by implication from litigation conduct, as happened in this case.
  - Amicus Brief at p. 2.

Business Law Section of Florida Bar Amicus Brief (2013 WL 5274835) (filed 9/16/13)

- For many reasons, numerous "Ponzi" and similar fraud cases seem to be ultimately resolved in Florida bankruptcy courts. One such case alone can give rise to hundreds of fraudulent transfer adversary proceedings. Removing those proceedings from bankruptcy courts and transferring them instead to state court or the federal district court (or worse, trying them once in bankruptcy court and then again in federal district court) would have a significant impact on the administration of justice in states such as Florida, where federal and state courts are already struggling with overly crowded dockets. Doing so would also impact the quality of justice for bankruptcy estates that have limited resources, thus impairing the ability of creditors to recover losses. The Section acknowledges that concern for efficient judicial administration and timely justice alone cannot trump constitutional requirements, but it does caution prudence and restraint in considering the constitutionality of an important and longstanding practice.
  - Amicus Brief at pp. 1-2.

Kerr-Mcgee Corporation's Amicus Brief (2013 WL 5274836) (filed 9/16/13)

- …the Court should conclude that a bankruptcy court's consented-to adjudication of a fraudulent-transfer claim is unconstitutional. Bankruptcy courts are not expert agencies like the CFTC. They are courts, exercising the full range of judicial power - including entry of binding final judgments. Congress did not empower them to adjudicate fraudulent-transfer claims for a benign reason, like facilitating litigants' preferences for efficient or expert adjudication. Congress mandated that bankruptcy courts adjudicate those claims *whether or not litigants consent.* Finally, even if litigants can waive the personal aspects of Article III's vesting clause, courts should not infer waiver from conduct. Waiver cannot be inadvertent, and "whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Olano,* 507 U.S. 725, 733 (1993).
  - Amicus Brief at pp. 4-5.

Nvidia Corporation's Amicus Brief
(2013 WL 5274837) (filed 9/16/13)

- Petitioner does not discuss the power of bankruptcy judges to resolve causes of action that must be decided as part of the claims allowance process. If the Court takes the same silent approach, however, there will be a heightened risk that lower courts might mistakenly interpret the Court's opinion to abrogate that well established power. Accordingly, the Court should state that bankruptcy courts may resolve actions that must necessarily be decided as part of the claims allowance process.
  - Amicus Brief at p. 4.

McCormick Foundation and Cantigny Foundation's Amicus Brief

- Here, the effect of the Ninth Circuit's decision is to create precisely the type of bankruptcy proceeding that this Court declared in *Stern* does not exist: one defined as core but administered and adjudicated as non-core. The Ninth Circuit proposed this new hybrid procedure to plug what it perceived as the statutory "gap" created by *Stern*, in which, contrary to Section 157(b)(1), core proceedings involving private rights can no longer be decided in bankruptcy court. But, of course, the "interstices" the Ninth Circuit conjured are entirely imaginary: core proceedings before district judges would be addressed in just the way district judges administer the other cases on their docket, both simple and complex. Courts do not have the authority to improvise such procedural devices *ad lib.* Such innovations are for Congress, and it is not at all clear whether, when[4] or how Congress might decide to plug the "gap" that so troubled the Ninth Circuit.
  - Amicus Brief at p. 9.
- In short, there is no role for a bankruptcy judge in a fraudulent transfer case or other core proceeding justiciable only in an Article III court. The involvement of a bankruptcy judge in such cases would only add confusion, expense and delay with no countervailing enhancement to the fairness or accuracy of the result.
  - Amicus Brief at p. 13.

TOUSA Defendants' Amicus Brief

(2013 WL 5274839) (filed 9/16/13)

- If this Court rejects EBIA's submission that a litigant cannot consent by implication to bankruptcy court adjudications barred by *Stern,* the Court should nevertheless hold that EBIA's conduct here did not qualify as implied consent. EBIA's conduct - an omission, actually - was simply the failure to raise a *Stern* objection before *Stern* was decided. Under this Court's own precedents, and as a matter of basic fairness and common sense, the failure to assert a right before the law recognizes it cannot be considered a knowing and intelligent waiver of that right. *Stern* gave EBIA a right - *viz.*, the right not to be subject to the bankruptcy court's final adjudicative power - that did not exist under controlling law when EBIA was litigating before the bankruptcy court. Indeed, existing judicial precedent *denied* EBIA that right, as did the express language of 28 U.S.C. § 157(b). EBIA did not impliedly consent to the bankruptcy court's exercise of unlawful authority by failing to raise an argument that contradicted existing law. The failure to assert a presently-nonexistent right is not a knowing waiver of that right.
  - Amicus Brief at p. 4.

Chapter 13 Trustees' Amicus Brief
(filed 11/14/13)

- The NACTT urges the Court to affirm the Ninth Circuit's conclusion that bankruptcy courts may adjudicate fraudulent conveyance actions with party consent. These determinations do not offend the constitutional limits on bankruptcy court authority.
- Successful consumer bankruptcy practice involves high case volumes. In this environment, the efficiency demands are high. The cumulative effect of inefficiencies that might be minor irritants in a single case is potentially serious. It not only increases the cost of proceedings that—in most cases—already involve inadequate resources; it also affects the viability of effective representation in these proceedings. These considerations, of course, would not be sufficient to overcome a true structural constitutional deficiency in the bankruptcy system, but the considerations do underlie the importance of the Court's practical approach to Article III.

Irving Picard's Amicus Brief
(filed 11/15/13)

- A decision that removes avoidance actions from the bankruptcy courts would impair that interest by fundamentally altering the division of labor between bankruptcy courts and the district courts. It would essentially bifurcate every complex bankruptcy proceeding (and many non-complex ones), placing initial responsibility for the recovery of assets in one tribunal and their distribution in another, even in cases where the two turn on overlapping sets of facts and evidence. History and experience have necessarily treated the recovery and distribution of assets in bankruptcy as two sides of the same coin. There is no reason now to upset that settled practice—particularly in a case where the Petitioner in fact received plenary Article III adjudication and has no current injury.

Irving Picard's Amicus Brief (cont.)

- The parties in this case do not raise the central issue that has vexed courts following *Stern*: the constitutional limits on bankruptcy court jurisdiction. Rather than address that issue, EBIA asks the Court to amplify the consequences for when lower courts get it wrong. The predictable result will be to channel tens of thousands of cases into already overburdened district courts, imposing delays and litigation burdens that are incompatible with the purposes of any sound bankruptcy regime. That should be reason enough for the Court to hesitate in reaching the merits here. But if the Court does do so, and if it reverses the decision below, it should take care to affirm the vitality of its decisions in Katchen v. Landy, 382 U.S. 323 (1966), and Langenkap v. Kulp, 498 U.S. 42 (1990) (per curiam), so as to avoid causing entirely predictable but unnecessary injury to parties already injured by insolvency and fraud."

TOUSA Liquidation Trustee's Amicus Brief

(filed 11/15/13)

- It is therefore important at the outset to note that a bankruptcy court's inability to adjudicate fraudulent transfer claims without litigant consent is merely an assumption, not an issue the Court will resolve in this case. Even on that assumption, the court of appeals correctly held that Article III permits bankruptcy judges to enter final judgment on fraudulent transfer claims with litigant consent and, further, that petitioner gave such consent in this case.

National Association of Bankruptcy Trustees' Amicus Brief

(filed 11/15/13)

- The National Association of Bankruptcy Trustees ("NABT") submits its brief in support of the Respondent, and respectfully urges the Court to conclude that bankruptcy courts may continue to preside over and propose findings of fact and conclusions of law, subject to *de novo* review in the district court, in proceedings involving matters denominated as core under 28 U.S.C. § 157(b)(2), but where the bankruptcy court lacks the constitutional authority to enter a final judgment.
- The NABT's position is that neither this Court's recent opinion in *Stern v. Marshall*, 131 S.Ct. 2594 (2011) nor 28 U.S.C. § 157 prohibits a bankruptcy court from hearing private causes of action and submitting proposed findings of fact, conclusions of law and recommendations for *de novo* review and entry of a final order by a district court. Thus, this Court's decision on this issue is of critical importance to the NABT because it will affect the ability of trustees to efficiently and cost-effectively administer chapter 7 cases in accordance with their fiduciary mandates under the Bankruptcy Code.

Professors S. Todd Brown, G. Marcus Cole and Ronald Rotunda Amicus Brief (filed 11/15/13)

- … Congress intended "core" and "non-core" proceedings to be, respectively, proceedings as to which the bankruptcy court may constitutionally enter final judgment and proceedings as to which (absent consent) it may not. Once that is understood, principles of severability readily provide the answer to the statutory question: Bankruptcy courts may enter proposed findings of fact and conclusions of law in fraudulent conveyance actions. As for the constitutional question—whether parties may consent to entry of final judgment by the bankruptcy court in non-core proceedings—amici agree with respondent that parties may consent. But consent may not be implied…

Commercial League of America's Amicus Brief (filed 11/15/13)

- A defendant who fails to object to a final determination by a bankruptcy judge in a bankruptcy proceeding prior to the entry of judgment has waived the right to do so even if the judge decided an Article III matter. This is because the procedures of 28 U.S.C. § 157 as limited by *Stern*, afford such a defendant the right to an Article III judge unless the matter before the bankruptcy court is constitutionally core to the bankruptcy process.
- *Stern* proceedings are non "core" proceedings in which bankruptcy judges may enter final judgments where the parties either expressly or impliedly consent. Since bankruptcy judges lack constitutional authority to enter final judgments in *Stern* proceedings, the subsections of 28 U.S.C. § 157(b)(2) that include *Stern* proceedings are void. As a result, *Stern* proceedings fall within the scope of 28 U.S.C. § 157(c)(1). It would be impractical if bankruptcy judges could hear "related to" proceedings that are more attenuated than *Stern* proceedings simply because *Stern* proceedings were impermissibly classified as "core" within the Bankruptcy Code.

New Hampshire, Washington, Hawaii, South Carolina, Oregon, Nevada amd Tennessee's Amicus Brief (filed 11/15/13)

- The *Amici States* agree with the vast majority of the courts around the nation that have found that the bankruptcy courts can bridge the gap and enter findings of fact and conclusions of law.
- The Court concluded *Stern* noting that the ruling there was not intended to change the division of labor between the bankruptcy and district court. The Ninth Circuit's judgment is sustainable because it does not disturb the division of labor in the prevailing schema.
- *Amici States* urge the Court in affirming the judgment below to adopt for bankruptcy purposes the same approach that it employed in *Roell v. Withrow*. That standard, that consent may only be found where the party clearly knew of the need for consent and the right to refuse it, and still voluntarily appeared, provides greater certainty for parties litigating these matters and provides much needed uniformity across the hundreds of bankruptcy court jurisdictions in the nation.

American College of Bankruptcy's Amicus Brief (filed 11/15/13)

- Where Article III bars the bankruptcy judge from entering final judgment in a statutory core proceeding (a "*Stern* claim") without litigant consent, the Court should nonetheless hold that the bankruptcy judges can submit proposed findings of fact and conclusions of law to the district court. Section 157(b)(1)'s grant of authority to bankruptcy judges, as limited by *Stern*, includes this lesser power, which is expressly acknowledged by the language and structure of the statute itself. A holding to that effect would also be consistent with this Court's tradition of minimizing the damage to a statutory scheme when only part of the scheme is unconstitutional.

Amicus Brief of the United States
(filed 11/15/13)

- Although petitioner was constitutionally entitled to have the fraudulent-conveyance claim against it decided by an Article III judge, petitioner's right to that decisionmaker was a waivable personal right.
- In circumstances like these, where the 1984 Act designates a particular matter as a "core" proceeding, but the Constitution entitles a litigant to have judgment entered by an Article III decisionmaker, the bankruptcy court may enter proposed findings of fact and conclusions of law.
- Under established principles of severability, the claim should therefore be treated, for purposes of the statutory allocation of responsibilities between the bankruptcy and district courts, as a non-core matter. That approach is consistent with the weight of recent lower-court authority, and with many local rules and orders that authorize bankruptcy judges to submit proposed findings of facts and conclusions of law when Article III precludes them from entering final judgment on a particular matter.

The Upcoming Supreme Court Decision: Open Issues

- Was *Stern v. Marshall* really a narrow holding or a broader holding?
- Will the Supreme Court embrace its dicta in *Stern v. Marshall* regarding fraudulent transfer actions?
- What will happen with the statutory "gap" in 28 U.S.C. § 157(b)?
- Can parties consent or impliedly consent to bankruptcy courts entering final judgments?

QUESTIONS