CASE NO. 11-35162

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of: BELLINGHAM INSURANCE AGENCY, INC., Debtor

EXECUTIVE BENEFITS INSURANCE AGENCY,

Appellant

v.

PETER ARKISON, as Trustee for the bankruptcy estate of

Bellingham Insurance Agency, Inc.,

Appellee

Appeal from the United States District Court For the
Western District of Washington

Case No. 06-11721, Adversary Proceeding No. 08-1132

AMICUS BRIEF

VANDERHOFF LAW GROUP
Alan Vanderhoff, Cal. Bar No. 138032
Jeanne C. Vanderhoff, Cal. Bar No. 138011
750 “B” Street, Suite 1620
San Diego, California 92101
Telephone: (619) 299-2050
alan.vanderhoff@vanderhofflaw.com

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I. AUTHORITY FOR AMICUS BRIEF

This brief is filed pursuant to the Order of this Court entered on November 4, 2011, pursuant to which this Court invited supplemental briefs by any amicus curiae addressing the following questions: Does *Stern v. Marshall*, 131 S. Ct. 2594 (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? This brief does not advocate for a particular party. Rather, it is submitted solely to assist the Court in the analysis of the issue posed by the Court.

II. IDENTITY OF AMICUS CURIAE

This brief is submitted by Alan Vanderhoff. Mr. Vanderhoff is a Bankruptcy Law Specialist certified by the State Bar of California Board of Legal Specialization. He is the immediate past Chair of the State Bar of California Committee on Federal Courts. Mr. Vanderhoff spoke on the subject of the *Stern v. Marshall* case at the 2011 Annual Meeting of the State Bar of California. A copy of Mr. Vanderhoff curriculum vitae is attached hereto as Exhibit "A." Mr. Vanderhoff has no connection to any of the parties or counsel in the above-captioned case. No party's counsel authored this brief in whole or in part. No one contributed money for the funding of this brief.

III. INTRODUCTION

Stern v. Marshall is often misconstrued by parties who do not have a thorough understanding of dichotomy between Article III courts and legislative courts. Original bankruptcy jurisdiction rests with the United States district courts which are Article III courts. Bankruptcy matters are referred by the district courts to the bankruptcy courts. The bankruptcy courts are "legislative courts" in that they were created by Congress and do not have their origins in Article III of the Constitution. Bankruptcy judges do not enjoy life tenure, nor are their salaries guaranteed.

The jurisdiction of the bankruptcy courts is created in section 157 of title 28 of the United States Code. That section provides that bankruptcy courts may enter final, binding judgments with regard to certain "core" bankruptcy matters. The section contains a non-exclusive list of matters that are "core." As to "non-core" matters, bankruptcy courts may enter final, binding judgments only with the consent of the parties. If the parties do not consent, a bankruptcy court must submit proposed findings and conclusions to an Article III district court judge and any final order or judgment must be entered by the district judge after a *de novo* review.

The United States Supreme Court in *Stern v. Marshall* found that section 157 was unconstitutional to the extent that it purports to grant broad substantive jurisdiction on common law causes of action when the action neither derives from

nor depends upon any agency regulatory regime. The express holding of *Stern v. Marshall* is narrow in that it addresses only one of the "core" matters enumerated in section 157. However, the reasoning employed by the Supreme Court applies equally to any of the enumerated "core" matters to the extent that they involve common law causes of action that do not fall with the bankruptcy court's special area of expertise.

Fraudulent conveyance causes of action exist under both bankruptcy and non-bankruptcy law. Although Bankruptcy Code section 548 provides that bankruptcy trustees may avoid fraudulent conveyances, causes of action for fraudulent conveyance already existed under common law. As such, fraudulent conveyance claims are private rights that fall within the purview of the Article III courts. Under the reasoning of *Stern v. Marshall*, bankruptcy judges would be prohibited from entering final judgments in fraudulent conveyance actions without the consent of the parties.

The issues addressed by *Stern v. Marshall* are limited to whether the bankruptcy court (1) may enter the final order, or (2) must submit its proposed findings and conclusions to the district court for *de novo* review. The decision does not prohibit bankruptcy courts from submitting proposed findings and conclusions to the district court for *de novo* review. However, the Supreme Court's decision in *Granfinanciera, S. A. v. Nordberg, 492 U.S. 33 (1989)* held that a defendant in a

fraudulent conveyance action who has not filed a proof of claim has a Seventh Amendment right to a jury trial. If the jury trial right was preserved, a bankruptcy judge would not be able to make proposed findings and conclusions to the district court. If the right to jury trial right was not preserved, a bankruptcy judge would be able to make proposed findings and conclusions to the district court.

IV. ARGUMENT

A. Statutory Jurisdiction of the District and Bankruptcy Courts.

In determining the scope of a bankruptcy court's jurisdiction, the analysis begins with the statutory scheme because the "jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards, 514 U.S. 300, 307 (1995); Battle Ground Plaza, LLC v. Douglas Ray (In re Ray), 624 F.3d 1124, 1130 (9th Cir. 2010).* Original jurisdiction over bankruptcy matters rests with the United States district courts. *28 U.S.C. § 1334*. Section 1334 of title 28 provides that the district courts have original and exclusive jurisdiction of all cases under title 11 (*i.e.*, bankruptcy cases).[1] *28 U.S.C. § 1334(a)*. The district courts also have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11. *28 U.S.C. § 1334(b); Celotex Corp. v. Edwards, 514 U.S. at 307*. The district courts may, in turn, refer "any or all proceedings arising under title 11 or arising in or

[1] Title 11 of the United States Code is commonly referred to as the Bankruptcy Code.

related to a case under title 11 . . . to the bankruptcy judges for the district." *28 U.S.C. § 157(a); Celotex Corp. v. Edwards, 514 U.S. at 307*.

Section 157(b)(1) of title 28 provides that "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11" that are referred to them by the district court. *28 U.S.C. § 157(b)(1)*. Congress also provided a non-exhaustive list of core proceedings in Section 157. That list includes "proceedings to determine, avoid, or recover fraudulent conveyances." *28 U.S.C § 157(b)(2)(H)*.

A bankruptcy judge may hear a proceeding that is not a core proceeding but is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge must submit proposed findings of fact and conclusions of law to the district court. Any final order or judgment must be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected. *28 U.S.C § 157(c)(1)*.

B. The Legacy of Northern Pipeline and the Public Rights Doctrine.

The Supreme Court previously addressed an Article III challenge to the bankruptcy court's authority in the landmark decision of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)*. In *Northern Pipeline*, the Court considered whether bankruptcy judges serving under the

Bankruptcy Act of 1978 could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. *Id. at 88, n. 40* (plurality opinion). In that case, the Supreme Court noted that Article III of the Constitution both defines the power and protects the independence of the Judicial Branch. It provides that "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." *Art. III, § 1*; *Northern Pipeline, 458 U.S. at 58*. The judicial power of the United States must be exercised by courts having the attributes prescribed in Article III. Those attributes, which include life tenure and salary guaranties, form the basis for judicial impartiality. Bankruptcy judges under the Bankruptcy Act of 1978 lacked the tenure and salary guarantees of Article III. *Id*. Bankruptcy judges under the current Bankruptcy Code also lack those Article III attributes. *Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011)*.

The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. *Stern v. Marshall, 131 S. Ct. at 2610*. The public rights doctrine draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political branches of government. The doctrine extends only to matters arising "between the Government

and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," *Crowell v. Benson, 285 U.S. 22, 50 (1932)*, and only to matters that historically could have been determined exclusively by those departments. The Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination. As a result, there can be no constitutional objection to Congress committing their determination to a legislative court or an administrative agency. *Crowell v. Benson, supra, at 50; Northern Pipeline, 102 S. Ct. at 2869-70*.

Shortly after *Northern Pipeline*, the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular federal government action. *Stern v. Marshall, 131 S. Ct.at 2613*.

A full majority of the Court in *Northern Pipeline*, while not agreeing on the scope of the public rights exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case. *Northern Pipeline, 458 U.S. at 71-72*. The Court also rejected the debtor's argument that the Bankruptcy Court's

exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals. *Northern Pipeline, 458 U.S. at 76-87.*

After the decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. With respect to the "core" proceedings listed in section 157(b)(2), however, the bankruptcy courts under the Bankruptcy Amendments and Federal Judgeship Act of 1984 exercise the same powers they wielded under the 1978 Act. *Stern v. Marshall, 131 S. Ct.at 2610*.

C. The Reasoning of Stern v. Marshall.

The *Stern v. Marshall* case arises from the dispute between Vickie Marshall (Anna Nicole Smith) and her late husband's son, Pierce Marshall. Vickie married J. Howard Marshall II approximately a year before his death. Shortly before J. Howard died, Vickie filed a suit against Pierce in Texas state court, asserting that J. Howard meant to provide for Vickie through a trust and Pierce tortiously interfered with that gift. After J. Howard died, Vickie filed for bankruptcy. Pierce filed a proof of claim in her bankruptcy case asserting that Vickie had defamed him. Vickie responded by filing a counterclaim for tortious interference (the same claim that was pending in Texas state court). *Stern v. Marshall, 131 S. Ct. at 2595-96*.

The Bankruptcy Court granted Vickie summary judgment on the defamation claim and eventually awarded her damages on her counterclaim. Pierce objected that

the Bankruptcy Court lacked jurisdiction to enter a final judgment on the counterclaim because it was not a "core proceeding" as defined by 28 U.S.C. § 157(b)(2)(C). *Stern v. Marshall, 131 S. Ct. at 2601*. Section 157(b)(2) lists 16 categories of core proceedings, including "counterclaims by the estate against persons filing claims against the estate." *28 U.S.C. § 157(b)(2)(C)*.

On appeal, the District Court recognized that Vickie's counterclaim fell within the literal language of section 157(b)(2)C), but held that to treat the counterclaim as "core" would be unconstitutional under the Supreme Court's decision in *Northern Pipeline*. The District Court treated the Bankruptcy Court's judgment as proposed, rather than final, and engaged in an independent review of the record. Although the Texas state court had, by that time, conducted a jury trial on the merits and entered a judgment in Pierce's favor, the District Court declined to give that judgment preclusive effect. The District Court ruled in Vickie's favor and awarded her compensatory and punitive damages. *Stern v. Marshall, 131 S. Ct. at 2602*.

On further appeal, the Ninth Circuit Court of Appeal held that, although Vickie's counterclaim might fall within the express terms of section 157(b)(2)(C), there could properly be jurisdiction over such a claim only where "the counterclaim is so closely related to [a creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim

itself." *Id. at 2602*. The Ninth Circuit ruled that Vickie's counterclaim did not meet this test. *Id*. However, the Ninth Circuit reversed the District Court on the grounds that it should have given preclusive effect to the prior judgment entered by the Texas court. *Id. at 2602-03*.

The Supreme Court affirmed the Ninth Circuit Court of Appeal. *Id. at 2620*. The Supreme Court found that, although section 157(b)(2)(C) permitted the bankruptcy court to enter final judgment on Vickie's counterclaim, Article III of the Constitution did not. *Id. at 2608*. The Court's decision was based on the separation of powers and the limits of the public rights doctrine. The Court drew extensively from its decision in *Northern Pipeline*.

The Court explained that Article III protects liberty, not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges." *Stern v. Marshall, 131 S. Ct. at 2609* (quoting 1 Works of James Wilson 363 (J. Andrews ed. 1896). Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the

other branches of the federal government could confer the government's "judicial power" on entities outside Article III. *Id.*

The Court examined Vickie's counterclaim and found that it did not fall within any of the formulation of the public rights exceptions. It found that the claim was one under state common law between two private parties which did not depend on the will of congress. *Id. at 2614*. The Court stated:

> This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." [citations omitted] The "experts" in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay.

Stern v. Marshall, 131 S. Ct. at 2615.

The Court ultimately held that the Bankruptcy Court lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. *Stern v. Marshall, 131 S. Ct. at 2620*.

D. Stern v. Marshall Applied to Fraudulent Conveyance Actions.

There can be little doubt that under the analysis of *Stern v. Marshall*, bankruptcy courts lack the constitutional authority to enter final judgments on fraudulent conveyance actions brought by a bankruptcy estate against a third party.

Section 157(b)(2)(H) expressly includes within the definition of core proceedings "proceedings to determine, avoid, or recover fraudulent conveyances." *28 U.S.C § 157(b)(2)(H)*. The question, however, is whether section 157(b)(2)(H) violates Article III of the Constitution by authorizing a non-Article III court to enter final judgments in matters that are reserved for Article III courts. It is clear from *Stern v. Marshall* and the case of *Granfinanciera, S. A. v. Nordberg, 492 U.S. 33 (1989)* that section 157(b)(2)(H) does violate the Constitution.

In *Granfinanciera*, the Supreme Court addressed the issue of whether a defendant in a fraudulent conveyance action who had not filed a proof of claim had a Seventh Amendment right to a jury trial. The Court held that there was a right to a jury trial, notwithstanding Congress' designation of fraudulent conveyance actions as "core proceedings" in 28 U.S.C. § 157(b)(2)(H). *Granfinanciera, 492 U.S. at 36*. The Court in *Granfinanciera* employed the same "public rights" analysis employed in *Northern Pipeline* and *Stern v. Marshall* to determine whether a defendant in a fraudulent conveyance action had a right to a jury trial. The Court held that, unless a legal cause of action involves "public rights," Congress may not deprive parties of the Seventh Amendment's guarantee to a jury trial. *Id. at 53*.

The Court also stated that if a statutory cause of action, such as a fraudulent conveyance action under Bankruptcy Code section 548, is not a "public right" for Article III purposes, Congress may not assign its adjudication to a specialized non-

Article III court. *Granfinanciera, 492 U.S. at 53*. The Court ultimately concluded that fraudulent conveyance actions by bankruptcy trustees are "quintessentially suits at common law." As a consequence, the Court concluded that fraudulent conveyance actions were "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Granfinanciera, 492 U.S. at 55*.

In *Stern v. Marshall*, the Supreme Court specifically referred to the *Granfinanciera* case in its discussion of the public rights exception. It pointed to the fraudulent conveyance action in *Granfinanciera* as the kind of proceeding that does not fall within the public rights exception. That Court stated:

> Vickie's counterclaim -- like the fraudulent conveyance claim at issue in *Granfinanciera* -- does not fall within any of the varied formulations of the public rights exception in this Court's cases. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee*, [citation omitted], or one that "historically could have been determined exclusively by" those branches [citation omitted]. The claim is instead one under state common law between two private parties. It does not "depend[ ] on the will of congress," [citation omitted] Congress has nothing to do with it.

Stern v. Marshall, 131 S. Ct. at 2614.

The Supreme Court did not expressly decide the issue of the whether 28 U.S.C. § 157(b)(2)(H) violates Article III of the Constitution in *Granfinanciera*. But it did decide that fraudulent conveyance claims are common law claims which involve private rights and which fall within the purview of Article III courts. In

Stern v. Marshall the Court decided that bankruptcy courts do not have the authority to enter final judgments with regard to common law claims which involve private rights. The Court pointed to fraudulent conveyance claims as an example of the very kind of claims that do *not* fall within any of the public rights exceptions in the Court's Article III cases. Accordingly, it is clear that fraudulent conveyance claims are outside the authority granted to legislative courts.

E. Bankruptcy Courts May Submit Findings to the District Court if there is no Seventh Amendment Right to Jury Trial.

Stern v. Marshall does not prohibit bankruptcy courts from submitting proposed findings and conclusions to the district court for *de novo* review. Rather, the Court only held that bankruptcy courts may not enter final judgments on those matters that are reserved for Article III courts. The Court acknowledged that bankruptcy courts could still submit proposed findings to the district court when it stated:

> Pierce has not argued that the bankruptcy courts "are barred from 'hearing' all counterclaims" or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that "finally decide[s]" them.

Stern v. Marshall, 131 S. Ct. at 2620.

Although *Stern v. Marshall* does not prohibit bankruptcy courts from submitting proposed findings and conclusions to the district court for *de novo* review, the Court did hold in *Granfinanciera* that a defendant in a fraudulent

conveyance action who has not filed a proof of claim has a Seventh Amendment right to a jury trial. If the jury trial right was preserved, a bankruptcy judge would have the authority to make proposed findings and conclusions to the district court. If the jury trial right was not preserved, a bankruptcy judge would not have authority to make proposed findings and conclusions to the district court.

V. CONCLUSION

It is clear from the Supreme Court's decisions in *Northern Pipeline*, *Granfinanciera*, and *Stern v. Marshall* that Article III of the Constitution prohibits bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance. The Court in *Stern v. Marshall* did not disturb the procedure under which bankruptcy court may hear non-core matters and submit proposed findings and conclusions to the district court for *de novo* review. However, if there is a right to a jury trial and that right has been preserved, the right to a jury trial would prohibit a bankruptcy judge from submitting proposed findings to the district court.

DATED: December 2, 2011 VANDERHOFF LAW GROUP

/s/ Alan Vanderhoff
By: _____
Alan Vanderhoff, Amicus Curiae

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December 2, 2011
Date

/s/ Alan Vanderhoff
Signature of Attorney or Unrepresented Litigant

ALAN VANDERHOFF

VANDERHOFF LAW GROUP • 750 "B" Street, Suite 1620, • San Diego, California 92101 • (619)299-2050 • alan.vanderhoff@vanderhofflaw.com

EDUCATION

BOALT HALL SCHOOL OF LAW
University of California, Berkeley
J.D., 1988

UNIVERSITY OF CALIFORNIA, SANTA CRUZ
B.A., American Studies, 1983

EXPERIENCE

VANDERHOFF LAW GROUP
1998-Present
Represents creditors, corporate debtors, creditors committees, and trustees in insolvency and bankruptcy related matters. Represents businesses and individuals in business transactions and business-related civil litigation.

SHEPPARD, MULLIN, RICHTER & HAMPTON
Attorney, 1988-1998
Represented corporate clients in a wide variety of complex business litigation matters. Specializations included chapter 11 bankruptcy reorganizations, complex financing transactions, real property secured transactions, secured transactions and sales issues under the Uniform Commercial Code.

CALIFORNIA SUPREME COURT
Judicial Extern to the late Justice Allen Broussard, *1987-1988*
Analyzed California Court of Appeal opinions and conferred with justices regarding decertifications; advised justices on merits of petitions for review; conferred with Justice Broussard regarding merits of pending cases.

PROFESSIONAL

- Bankruptcy Law Specialist, Certified by the State Bar of California Board of Legal Specialization.
- Chair, Federal Courts Committee, State Bar of California, *2010-2011*.
- Member, Federal Courts Committee, State Bar of California, *2006 - present*.
- Member, United States Bankruptcy Court Mediation Panel.
- Director, San Diego Bankruptcy Forum, *2003 - 2005*.
- Delegate, California Bankruptcy Forum, *2004 - 2006*.
- Issue Editor, California Bankruptcy Journal, *2005*.
- Consultant on Bankruptcy Issues, California Continuing Education of the Bar.
- Co-Chair, Bankruptcy Section, San Diego County Bar Association, *1998 - 2008*.
- Judge Pro Tempore, San Diego County Superior Court, *1997 - 2006*.
- Attorney Advisory Committee to the United States Bankruptcy Court, *1994-1998*.
- Co-Chair, Commercial Law Section, San Diego County Bar Association, *1996*.

Exhibit "A"

Executive Benefits Insurance v. Arkison
Case No. 11-35162

PROOF OF SERVICE BY MAIL

I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 years and not a party to the within action or proceeding. My business address is 750 "B" Street, Suite 1620, San Diego, California 92101, which is located in the county in which the within-mentioned mailing occurred.

On December 2, 2011, I served the following document(s):

AMICUS BRIEF

by placing a true copy in a separate envelope for each addressee set forth below, with the name and address of the persons served shown on the envelope as shown below, and by sealing the envelope and depositing it with the United States Postal Service with postage fully prepaid in accordance with ordinary business practices.

Nicholas Paleveda, Esq.
Law Offices of Nicholas Paleveda
4164 Meridian #208
Bellingham WA 98226

Denise E. Moewes, Esq.
Wood and Jones P.S.
303 N. 67th Street
Seattle WA 98103

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct. Executed on December 2, 2011, at San Diego, California.

/s/ Alan Vanderhoff

Alan Vanderhoff