

Case No. 11-35162

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE: BELLINGHAM INSURANCE AGENCY, INC.
Debtor,

EXECUTIVE BENEFITS INSURANCE AGENCY,
Appellant,

v.

PETER H. ARKISON, Chapter 7 Trustee of the Estate of Bellingham
Insurance Agency, Inc.,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NO. 2:10-CV-00929-MJP

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES
IN SUPPORT OF APPELLEE, PETER H. ARKISON, CHAPTER 7 TRUSTEE
AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for *Amicus Curiae* National Association of Bankruptcy Trustees states that the National Association of Bankruptcy Trustees has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF INTEREST OF THE NABT AS AMICUS CURIAE¹

The National Association of Bankruptcy Trustees (“NABT”) is a non-profit professional association formed in 1982 to address the needs of chapter 7 bankruptcy trustees throughout the country, and to promote the effectiveness of the bankruptcy system as a whole. There are approximately 1,200 bankruptcy trustees currently receiving new cases, and approximately 900 of them are NABT members. In forty-eight states and the federal territories, the United States Trustee has the responsibility of appointing chapter 7 panel trustees pursuant to 28 U.S.C. § 586(a)(1). The United States Trustee appoints a bankruptcy trustee in every chap-

¹ Undersigned counsel authored this brief in its entirety, and no party’s counsel authored the brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person or entity, other than NABT, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

ter 7 case. The trustee has primary responsibility for all aspects of chapter 7 case administration.²

This appeal addresses the issue of whether *Stern v. Marshall*, --- U.S. ---, 131 S. Ct. 2594 (2011), prohibits a bankruptcy court from entering a final judgment in a fraudulent transfer action. It also addresses, in the event this Court rules there is such a prohibition, whether a bankruptcy court may hear the matter and submit a report and recommendation to the federal district court in lieu of entering a final judgment.

The NABT's position is that *Stern v. Marshall* does not prohibit a bankruptcy court from adjudicating fraudulent transfer claims brought under 11 U.S.C. §§ 544 and 548. Rather, adjudication by the bankruptcy court represents a constitutional exercise of authority and does not violate Article III of the Constitution. If this Court rules otherwise, NABT supports the position that a bankruptcy court may hear the proceeding and submit a report and recommendation to the federal district court.

This Court's decision is important because it will affect the ability of trustees to efficiently and cost-effectively administer chapter 7 cases in accordance

² Generally, about 5 to 10% of chapter 7 cases are "asset" cases. In FY 2010, there were 1,116,745 chapter 7 cases filed; for that period there were 50,628 chapter 7 asset cases closed with \$2.3 billion distributed to creditors by trustees. *See* http://www.justice.gov/ust/eo/public_affairs/annualreport/docs/ar2010.pdf.

with their fiduciary mandates under the Bankruptcy Code. Moving fraudulent transfer actions to the district courts, or requiring a two-step process rather than completing the avoidance actions in the bankruptcy court, would place further burdens upon the courts and trustees – already challenged with additional administrative burdens under BAPCPA.³ The end result would be diminished and delayed returns to creditors and exposure of the bankruptcy estate and debtors to increased costs.

SUMMARY OF ARGUMENT

Chapter 7 trustees, as the fiduciaries responsible for the administration of all chapter 7 bankruptcy cases, are charged with preserving and promoting the system's integrity by, among other things, efficiently administering their bankruptcy cases. This includes prosecuting fraudulent transfer actions under both 11 U.S.C. §§ 544 and 548. *See also* 11 U.S.C. §§ 704(a)(1), 704(a)(5); 28 U.S.C. § 157(b), (c).

In *Stern v. Marshall*, the Supreme Court held that Congress's grant of authority to a bankruptcy judge to enter a final order on a purely state law counterclaim in response to a creditor's proof of claim, violates Article III, section I of the Constitution if the counterclaim is not necessarily resolved in the claims allow-

³ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. (BAPCPA).

ance/disallowance process. 131 S. Ct. at 2618. The Court explicitly stated that its holding was a narrow one that did not “meaningfully change[] the division of labor in the current statute.” *Id.* at 2620. A fraudulent transfer action “stems from the bankruptcy itself” and is “derived from or dependent upon bankruptcy law.” *See id.* at 2618. Thus, a bankruptcy judge’s adjudication does not run afoul of *Stern* or the Constitution.

Moreover, allowing bankruptcy judges to enter final judgments in fraudulent transfer actions through a unitary adversary proceeding – with a single adjudication – promotes administrative efficiency. This jurisdictional scheme is replete with safeguards that support a constitutional adjudication of fraudulent transfer actions in bankruptcy cases.⁴ In the alternative, affirming the bankruptcy court’s power to issue a report and recommendation will ensure the continued extraordinary expertise of the bankruptcy courts in handling fraudulent transfer claims, which have represented a major component of bankruptcy courts’ litigation dockets for centuries.

⁴ *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (“1984 Act”).

ARGUMENT

I. A BANKRUPTCY COURT'S ADJUDICATION OF A FRAUDULENT TRANSFER ACTION UNDER 11 U.S.C. §§ 544 OR 548 DOES NOT RUN AFOUL OF *STERN V. MARSHALL*

In *Stern v. Marshall*, the Supreme Court addressed the constitutionality of 28 U.S.C. § 157(b). The Court held that as an Article I body, the bankruptcy court was precluded from entering a final judgment on a debtor's state law counterclaim against a creditor who had filed a proof of claim in the bankruptcy case. *Stern* at 2618. The Court determined that despite § 157(b)(2)(C)'s designation of "counterclaims by the estate against persons filing claims against the estate" as core, such allocation of judicial power from Article III district courts to Article I bankruptcy courts was unconstitutional. *Id.* at 2620. In other words, the statutory authority conferred by § 157(b)(2)(C) could not supplant the constitutional authority held lacking by the Supreme Court. *Id.* at 2600–01.

Stern has replaced *Iqbal/Twombly* as the decision du jour for avoidance action defendants seeking to short circuit fraudulent transfer actions. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Fraudulent transfer beneficiaries contend that *Stern* affirmatively prohibits bankruptcy courts from entering final judgments in the underlying fraudulent transfer

actions. *See, e.g., McCarthy v. Wells Fargo Bank, N.A. (In re El-Atrari)*, No. 11-cv-1090, 2011 WL 5828013, at *2 (E.D. Va. Nov. 18, 2011) (“Although *Stern* addressed a different type of ‘core’ adversary proceeding . . . defendant argues that *Stern* ‘made clear that fraudulent conveyance claims like the one asserted in [this] Adversary Proceeding may not be heard and determined by a non-Article III bankruptcy court . . .’”; *In re Ambac Fin. Grp., Inc.*, 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011) (“Unfortunately, *Stern v. Marshall* has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court”).

On the contrary, *Stern* does not impact the ability of bankruptcy judges to rule on federal or state law fraudulent transfer claims. *In re Salander O'Reilly Galleries*, 453 B.R. 106, 117 (Bankr. S.D.N.Y. 2011) (citing *Stern*, 131 S. Ct. at 2607). A bankruptcy court may rule “with respect to state law when determining a proof of claim in the bankruptcy, or when deciding a matter directly and conclusively related to the bankruptcy.” *Id.*; *see Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, No. 08-32514, 2011 WL 4542512, at *4 (Bankr. N.D. Cal. Sept. 28, 2011) (“[T]he Supreme Court did not hold in *Stern* that bankruptcy judges lack authority to render final judgments on fraudulent transfer claims.”); *see also Kirschner v. Agolia, et al. (In re Refco Inc.)*, No. 05-bk-60006, 2011 WL

5974532, at *4 (Bankr. S.D.N.Y. Nov. 30, 2011); *Goldstein v. Eby-Brown (In re Universal Mktg., Inc.)*, 459 B.R. 573, 576 (Bankr. E.D. Pa. 2011).

A. Fraudulent Transfer Claims Are Derived From, and Dependent Upon, Federal Bankruptcy Law

In *Stern*, the Supreme Court distinguished the debtor's state law counterclaim from a trustee's claim that was "derived from or dependent upon bankruptcy law." *Stern*, 131 S.Ct. at 2618. The Court specifically instructed: "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* Accordingly, a fraudulent transfer action falls within the bankruptcy court's authority because the trustee's claim depends upon 11 U.S.C. § 544, even though the underlying claim relies upon state law. Furthermore, the trustee's very existence and standing to pursue such a claim stems from the Bankruptcy Code. 11 U.S.C. § 704. Thus, a fraudulent transfer action brought under § 548 or § 544, depends upon, and stems from, the bankruptcy itself.

Applying the same reasoning, the court in *In re Heller Ehrman* held that *Stern* did not limit its power to enter a final judgment on a state law fraudulent transfer claim pursued by a liquidating debtor because the claim, brought under 11 U.S.C. § 544, arose under bankruptcy law and "would not exist but for the bankruptcy (unlike the counterclaims in *Stern*)". *In re Heller Ehrman*, 2011 WL

4542512, at *5; see *In re Safety Harbor Resort and Spa*, 456 B.R. 703, 715 (Bankr. M.D. Fla. 2011). The *Heller Ehrman* court noted that, while a contract suit can be brought at any time, a fraudulent transfer action “is inextricably tied to the bankruptcy scheme” because it can only exist where the transferor is insolvent or about to become insolvent. *In re Heller Ehrman*, 2011 WL 4542512, at *5.

Several other bankruptcy courts have reached the same conclusion. See, e.g., *Gugino v. Canyon County (In re Bujak)*, No. 10-bk-03569, 2011 WL 5326038, at *2-3 (Bankr. D. Idaho Nov. 3, 2011) (“because the Trustee’s claims [under § 544] may only be prosecuted by a bankruptcy trustee on behalf of the bankruptcy estate, and because a trustee and a bankruptcy estate are strictly creatures of the Bankruptcy Code, there would be no legal basis for this action were there no bankruptcy case”); *Liberty Mutual Ins. Co. v. Citron (In re Citron)*, No. 08-bk-71442, 2011 WL 4711942, at *2 (Bankr. E.D.N.Y. Oct. 6, 2011) (“claims against the Defendant [under § 548 and § 544] and the potential counterclaim are related to the underlying bankruptcy case and are not a plain-vanilla state law counterclaim”); cf. *Blixseth v. Kirschner (In re Yellowstone)*, Case No. 08-61570, Adv. No. 09-00014 (Bankr. D. Mont. Dec. 13, 2011) (court reconsiders its prior decision holding it lacked subject matter jurisdiction). But see *Heller Ehrman v. Arnold & Porter, LLP (In re Heller Ehrman)*, --- F. Supp.2d. ---, No. 11-04848,

2011 WL 6179149, at *4 (N.D.Cal. Dec. 13, 2011) (*Stern*'s reliance on *Northern Pipeline* and *Granfinanciera* "imply[s] that the bankruptcy court lacks constitutional authority to enter final judgment on the fraudulent conveyance claims presented here").

In re Refco held that Article III does not prohibit the bankruptcy courts' determination of fraudulent transfer claims because they "flow[] from a federal statutory scheme," are "completely dependent upon adjudication of a claim created by federal law," their "adjudication [] in a bankruptcy context is a particularized area of the law," and "the pursuit of avoidance claims has been a core aspect of the administration of bankruptcy estates since the 18th century." *In re Refco*, 2011 WL 5974532, at *4, *5 (Bankr. S.D.N.Y. Nov. 30, 2011) (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2614, 2615 (2011) and *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 369–70 (2006)). In the same vein, *In re Universal Marketing* held:

[This § 544 claim] differs from the debtor's claim in *Stern*. It is not a "state law action *independent of the federal bankruptcy law*," *Stern*, 131 S. Ct. at 611 (emphasis added). To the contrary, it "flow[s] from a federal statutory scheme" *id.* at 2614.

459 B.R. at 576.

B. The Supreme Court Explicitly Ruled that Its Holding was Narrow

As observed by Justice Scalia in his concurring opinion, the majority relied on at "least seven reasons" in reaching its decision. *Stern*, 131 S.Ct. at 2621 (Sca-

lia, J., concurring). The Court was explicit, however, regarding the a major premise of its opinion: the scope of its decision was narrow. Indeed, the Court advised that its decision did not “meaningfully change[] the division of labor in the current statute.” *Stern*, 131 S. Ct. at 2620. The Court emphasized, “our decision today does not change all that much.” *Id.* And the Court held, “We conclude today that Congress, *in one isolated respect*, exceeded that [Article III] limitation. *Id.* (emphasis added). Therefore, the holding’s direct application is limited to state law counterclaims decided pursuant to § 157(b)(2)(C) and anything regarding fraudulent transfer actions is dicta.⁵ See *In re Heller Ehrman LLP*, 2011 WL 4542512 at *4-5.

⁵ Footnote 7 of *Stern* states: “Our conclusion [in *Granfinanciera*] was that . . . Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court.” One commentator suggests that the Court’s reliance on *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782 (1989), demonstrates that the Court may now equate the right to final judgment from an Article III judge with the Seventh Amendment right to jury trial. Ralph Brubaker, *Article III’s Bleak House (Part II): The Constitutional Limits of Bankruptcy Judges’ Core Jurisdiction*, Bankruptcy Law Letter (Sept. 2011) at 61, available at http://html.documation.com/cds/NCBJ2011/assets/PDFs/VIII_E.pdf. *Stern*, 131 S.Ct. at 2614 n.7. *But see In re Safety Harbor Resort and Spa*, 456 B.R. at 717 (“The sole issue in *Granfinanciera* was whether the Seventh Amendment conferred on petitioners a right to a jury trial in the face of Congress’ decision to allow a non-Article III tribunal to adjudicate the claims against them . . . the Court did not express any view regarding whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts.”); see also in *In re Refco* (“majority of courts after *Granfinanciera* continued to hold that bankruptcy courts had

Other courts have likewise relied upon the narrow scope of *Stern*, opining that it “does not impact a bankruptcy court’s ability to enter a final judgment in any other type of core proceeding authorized under 28 U.S.C. § 157(b)(2).” *Peacock v. Ford Motor Credit Co., LLC (In re Peacock)*, 455 B.R. 810 (Bankr. M.D. Fla. Sept. 2, 2011); *see also Burtch v. Huston (In re USDigital, Inc.)*, No. 07-bk-10374, 2011 WL 6382551, at *10 (Bankr. D. Del. Dec. 20, 2011) (“To broadly apply *Stern*’s holding is to create a mountain out of a mole hill.”); *Dragisic v. Boricich (In re Boricich)*, No. 08-bk-15248, 2011 WL 5579062, at *1 (Bankr. N.D. Ill. Nov. 15, 2011) (“In *Stern* itself the holding was limited to the debtor’s counterclaim and similar actions, namely state law counterclaims that are not resolved in the process of ruling on a creditor’s proof of claim.”); *Field v. Lindell (In re Mortgage Store, Inc.)*, No. 11-cv-00439, 2011 WL 5056990, at *6 (D. Haw. Oct. 5, 2011); *In re Safety Harbor Resort and Spa*, 456 B.R. at 715; *Gecker v. Flynn (In re Emerald Casino, Inc.)*, 459 B.R. 298, 300 (Bankr. N.D. Ill. 2011).

In *In re Salander O'Reilly Galleries*, the bankruptcy court highlighted numerous points in *Stern* where the Supreme Court acknowledged the limited nature of its holding:

the power to issue final judgments in fraudulent transfer proceedings as core matters.”). 2011 WL 5974532, at *7 (citations omitted).

Stern is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case, and the ruling does not remove from the bankruptcy court its jurisdiction over matters directly related to the estate that can be finally decided in connection with re-structuring debtor and creditor relations.

In re Salander O'Reilly Galleries, 453 B.R. at 115-16 (citing *Stern*, 131 S. Ct. at 2610); see also *In re USDigital, Inc.*, 2011 WL 6382551, at *9 (narrow interpretation supported based upon "Supreme Court's belief that its ruling would have little effect"). The *USDigital* court observed: "had the Supreme Court believed its opinion would render delineating as core all state law claims was [sic] unconstitutional it would not have characterized the infraction as 'slight,' 'chipping away at the authority of the Judicial Branch,' or 'obnoxious in its mildest and least repulsive form.'" *Id.* at *10 (citing *Stern*, 131 S.Ct. at 2620).

Beyond *Stern*, the Ninth Circuit previously concluded that fraudulent transfer actions under both §§ 544(b) and 548 are core proceedings and that 28 U.S.C. § 157(b)(2)(H) does not run afoul of Article III by authorizing bankruptcy courts to preside over, and enter final judgments in such matters. *Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987).⁶ As observed by the court in *In re Safety Harbor Resort & Spa*:

⁶ In contrast to *Granfinanciera*, *Mankin* concluded that a trustee's ability to avoid a fraudulent transfer is a public right as opposed to a private right. *Id.* at 1307-08.

[T]he 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.

456 B.R. at 718. While *Safety Harbor* addressed adjudication of preference actions pursuant to 28 U.S.C. § 157(b)(2)(F), the same argument applies to adjudication of fraudulent transfer actions pursuant to § 157(b)(2)(H).

Thus, *Stern* represents a narrow holding, specifically addressing the constitutionality of a bankruptcy court's final adjudication of a compulsory counterclaim to a proof of claim, where that counterclaim is derived exclusively from state law and not necessary to resolving the claim objection. *Stern* did not hold that the universe of § 157(b) actions cannot be delegated to non-Article III courts for final determination. In the case at bar, unlike *Stern*, the claims would not exist *but for* the bankruptcy case, and *but for* bankruptcy law. Therefore, *Stern* does not prohibit a bankruptcy judge from entering a final judgment in an action to avoid a fraudulent transfer brought under § 548 or § 544. *See Stern*, 131 S. Ct. at 2618.

II. FRAUDULENT TRANSFER ACTIONS ARE A FUNDAMENTAL ELEMENT OF BANKRUPTCY CASES

The power to avoid fraudulent conveyances has been directly incorporated into bankruptcy laws for centuries.⁷ See Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 716-20 (May 1985). England's Bankruptcy Act of 1604 provided that fraudulent conveyances were avoidable in bankruptcy. *Id.* at 716 (citing 1 Jac., ch. 15, § 5 (1604)). The first bankruptcy legislation in this country, the Bankruptcy Act of 1800, was modeled on English law; hence, it included a fraudulent conveyance provision. *Id.* at 718-19 (citing 2 Stat. 21 (1800)). Because the Congress of 1800 included many of this country's founders, this provides contemporaneous evidence of the views of the founders regarding what is an essential component of bankruptcy law. Moreover, every manifestation of bankruptcy law since that time – the bankruptcy acts of

⁷ The Statute of Elizabeth, enacted in 1571, is one of the oldest debt collection devices. It served as the model for the Uniform Conveyance Act, its successor the Uniform Fraudulent Transfer Act, § 548 of the Bankruptcy Code. *In re Maxwell Sheraton, Inc.*, 46 F. Supp. 680, 682 (S.D.N.Y. 1942) (UFCA “is the modernized Statute of Elizabeth”); see also *Goveart v. Capital Bank (In re Miami Gen. Hosp., Inc.)*, 124 B.R. 383, 391 (Bankr. S.D. Fla. 1991) (Florida fraudulent conveyance statute “was basically a restatement of the law on fraudulent conveyances as declared by the Statute of Elizabeth” until statute's recent amendment). The Statute of Elizabeth and its progeny voided any conveyance made with intent “to delay, hinder or defraud creditors and others of their just and lawful actions.” *Sexton v. Wheaton*, 21 U.S. (8 Wheat.) 229, 242 (1823); *Glinka v. Bank of Vt. (In re Kelton Motors, Inc.)*, 130 B.R. 170, 176 (Bankr. D. Vt. 1991).

1841, 1867, 1898, and 1978 – included fraudulent conveyance avoidance powers. *See id.* at 719-21; *see also In re Newman*, 183 B.R. 239, 245 (Bankr. D. Kan. 1995) (“recovery of fraudulent transfers has been a basic feature of all bankruptcy laws passed”) (internal quotations omitted).

Therefore, fraudulent transfer actions are inherently different from the state law counterclaim at issue in *Stern*, because they are an integral, historical part of federal bankruptcy law. As observed *In re Refco*: “Statutory avoidance claims under the Bankruptcy Code may not be the meat and potatoes of bankruptcy practice, but they are at least the salad and dessert, in marked contrast with the peculiar tortious interference claim in *Stern*.” 2011 WL 5974532, at *16, n. 6. Unlike the state law tortious interference claim in *Stern*, the trustee’s “fraudulent transfer claim here ‘flow[s] from a federal statutory scheme,’ and is ‘completely dependent upon adjudication of a claim created by federal law.’” *Id.* at *4 (citing *Stern*, 131 S. Ct. at 2614). The *Refco* court further stated:

[S]ince the enactment of the Bankruptcy Code, the management and determination of statutory avoidance claims has been a primary function of the bankruptcy courts. Such claims often play a prominent role in bankruptcy cases, either because of their sheer numbers or because of the effect that the potential avoidance of a transfer, lien or obligation may have on creditor recoveries.

In re Refco, 2011 WL 5974532, at *5.

The fundamental purpose of fraudulent transfer laws is to protect creditors from debtors' actions that craft "last-minute diminutions in the pool of assets" in an attempt to place property beyond the reach of their creditors. *Pioneer Liquidating Corp. v. San Diego Trust & Sav. Bank (In re Consol. Pioneer Mortg. Entities)*, 211 B.R. 704, 717 (S.D. Cal. 1997), *aff'd in part, rev'd in part*, 166 F.3d 342 (9th Cir. 1999). Utilizing the fraudulent transfer provision under § 548 of the Code, a trustee may recover transfers made up to two years before the filing of the bankruptcy petition. 11 U.S.C. § 548(a). Section 544 of the Code expands the trustee's powers to include underlying state law avoidance claims. 11 U.S.C. § 544. In effect, § 544(b) gives a trustee the status of a hypothetical lien creditor to avoid a transfer by the debtor that would be avoidable under applicable state law. This power typically expands the Code's two year look-back period to the four years provided under most state law fraudulent transfer statutes.⁸ As a result of this enlarged timeframe to bring fraudulent transfer actions, § 544(b) increases the scope of potential recoveries by trustees and thereby enhances bankruptcy estates and equitable distributions to creditors – a fundamental purpose of bankruptcy law.

⁸ Here, the applicable state law is the Washington fraudulent transfer statute, Rev. Code Wash. § 19.40.091, which states: "A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought: (a) . . . within *four years* after the transfer was made or the obligation was incurred" *Id.* (emphasis added).

III. PROMPT AND EFFECTIVE SETTLEMENT OF BANKRUPTCY ESTATES IS A VALID CONGRESSIONAL GOAL REQUIRING THAT BANKRUPTCY COURTS BE AUTHORIZED TO ENTER FINAL JUDGMENTS IN FRAUDULENT TRANSFER ACTIONS

The district courts have original and exclusive jurisdiction over all bankruptcy cases. 28 U.S.C. § 1334(a). District courts have original but not exclusive jurisdiction over all proceedings arising under title 11, or arising in or related to cases under title 11. 28 U.S.C. § 1334(b). Finally, district courts have jurisdiction over appeals from bankruptcy court decisions. 28 U.S.C. § 158(a)(1)-(3).

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court determined that bankruptcy courts lack jurisdiction to preside over a state law breach of contract claim. In response, Congress enacted procedures through 28 U.S.C. § 157 which establish the extent to which a bankruptcy court may decide matters described in 28 U.S.C. § 1334(a) and (b). Section 157(a) also permits a district court to refer such matters to the bankruptcy court. Holistically, § 157 is a mechanism to promote the efficient administration of bankruptcy cases – a primary goal of the 1984 Act. This includes adjudication of fraudulent transfer claims that arise within the confines of a bankruptcy case. 28 U.S.C. § 157(b)(2)(C).

In addition to the authorization to preside over core proceedings under § 157(b), a bankruptcy judge may also hear non-core proceedings that are otherwise

related to the bankruptcy case. 28 U.S.C. § 157(c)(1). In proceedings arising from this non-core, related-to jurisdiction, a bankruptcy court “shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy court’s proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.” *Id.*

Congress intended the core jurisdiction delineated in § 157(b) to be construed as broadly as possible in order to foster the goal of administrative efficiency. *See Bankruptcy Servs. Inc. v. Ernst & Young (In re CBI Holdings Co.)*, 529 F.3d 432, 459-60 (2d Cir. 2008). This legislative purpose of the 1984 Act comports with the Supreme Court’s long-standing view concerning the need for efficiency in bankruptcy proceedings. *See Katchen v. Landy*, 382 U.S. 323, 328 (1966) (noting “a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of the estate”); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 346-47 (1874); *cf. Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851, 855 (1986) (*Schor*) (admonishing “formalistic and unbending rules” that “unduly constrict Congress’ ability to take needed and innovative action pursuant to its Article I powers”).

Section 157 “allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction.” *Stern*, 131 S. Ct. at 2607 (citation omitted).⁹ Subject matter jurisdiction exists for all matters referred to the bankruptcy court by the district court, especially those designated as *core* causes of action, which includes those brought under 11 U.S.C. §§ 544 and 548. *See Stern* 131 S. Ct. at 2607. *Stern* does not undermine this axiom. *See id.*

The adjudication in a single forum of fraudulent transfer claims brought under §§ 544 and 548 is vital to chapter 7 trustees’ ability to effectively and efficiently perform their duties under the Bankruptcy Code. The duties of chapter 7 trustees are generally defined in 11 U.S.C. § 704. In addition, chapter 7 trustees follow a substantial handbook issued by the Executive Office for United States Trustees.¹⁰ The UST Handbook governs a wide variety of practices and procedures

⁹ Several courts have concluded that *Stern v. Marshall* does not deprive bankruptcy courts of subject matter jurisdiction. *See, e.g., Hagan v. Classic Products Corp. (In re Wilderness Crossings, LLC)*, No. 09-bk-14547, 2011 WL 5417098, at *1 (Bankr. W.D. Mich. Nov. 8, 2011); *In re Bujak*, 2011 WL 5326038, at *2; *Hawaii National Bancshares, Inc. v. Sunra Coffee LLC (In re Sunra Coffee LLC)*, No. 09-bk-01909, 2011 WL 4963155, at *4 (Bankr. D. Haw. Oct 18, 2011); *In re Citron*, 2011 WL 4711942, at *2; *In re Yellowstone*, Case No. 08-61570, Adv. No. 09-00014, at 5-6.

¹⁰ *See Handbook for Chapter 7 Trustees*, www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/ch7_handbook/ch7_handbook_pii_2011.pdf (“UST Handbook”).

pertaining to chapter 7 cases. Under § 704, as elaborated upon in the UST Handbook, trustees are duty-bound to close a bankruptcy estate as expeditiously as is compatible with the best interests of the estate.¹¹

This Court's rejection of a bankruptcy judge's authority to adjudicate fraudulent transfer claims outright would require trustees to litigate those proceedings in the district courts. Also, if the bankruptcy court merely serves as a quasi-magistrate court that issues reports and recommendations on fraudulent transfer actions, a trustee may be required to undertake two separate proceedings: litigation of fraudulent transfer claims in the bankruptcy court followed by an action in the district court seeking final entry of judgment and an affirmative recovery for the estate.

Moving fraudulent transfer actions to the already busy district courts, or requiring a two-step process rather than completing the action in the bankruptcy court, would place further burdens upon the courts and trustees – already chal-

¹¹ See 11 U.S.C. § 704(a)(1); see also UST Handbook at 6-1, 8-42 (“Delays in case closure diminish returns to creditors, undermine the creditors’ and public’s confidence in the bankruptcy system, increase the trustee’s exposure to liabilities, raise the costs of administration, and, in cases involving non-dischargeable tax liabilities, expose the debtor to increased penalties and interest. Delays also give rise to public criticism of the bankruptcy process.”) *Id.* at 8-42.

lenged with additional administrative responsibilities under BAPCPA.¹² The end result would be diminished and delayed returns to creditors and exposure of the bankruptcy estate and debtors to increased costs. Such an outcome undermines the Congressional intent behind enactment of 28 U.S.C. § 157.

Inasmuch as *Stern* does not opine or rule on the constitutionality of § 157(b)(2)(C) pertaining to fraudulent transfer claims, this provision should therefore be upheld. Upholding the constitutionality of § 157(b)(2)(C) ensures that the fundamental purpose of maximizing equitable distributions to creditors through the efficient administration of fraudulent transfer claims will continue, as has been the case throughout centuries of various bankruptcy laws.

IV. AT A MINIMUM, A BANKRUPTCY COURT PRESIDING OVER A FRAUDULENT TRANSFER ACTION MAY SUBMIT A REPORT AND RECOMMENDATION TO THE FEDERAL DISTRICT COURT

The Supreme Court instructed that bankruptcy courts are not barred from hearing state law claims and issuing proposed findings of fact and conclusions of law, which the district court then finally decides. *Stern*, 131 S.Ct. at 2620; *In re*

¹² Under BAPCPA, trustees are responsible for giving notices to child support claimants. 11 U.S.C. § 704(a)(10), (c) (2006). If the debtor had an employee benefits plan, the trustee now assumes the responsibilities of the plan administrator under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002. *See* 11 U.S.C. § 704(a)(11). In health care cases, trustees are responsible for maintaining and disposing of patient medical records, and must use reasonable and best efforts to transfer patients to other appropriate health care facilities. *See* 11 U.S.C. § 704(a)(12), § 351.

Heller Ehrman, --- F.Supp.2d. ---, 2011 WL 6179149 at *4; *In re Heller Ehrman*, 2011 WL 4542512 at *6. Thus, at a minimum, a fraudulent transfer action remains a “related-to” matter within the bankruptcy case pursuant to 28 U.S.C. § 1334(b).

Fraudulent transfer actions are fundamental components of bankruptcy cases. One bankruptcy court recently observed, “a trustee’s collection of money or property through the exercise of his or her avoidance powers will affect the handling and administration of the bankrupt estate.” *In re Universal Mktg, Inc.*, 459 B.R. at 579 (citations omitted). In *In re Innovative Comm. Corp.*, the bankruptcy court observed that *Stern* was a narrow holding that did not affect its ability to enter a final judgment on claims brought under § 548. *Springel v. Prosser (In re Innovative Commun. Corp.)*, No. 07-bk-30012, 2011 WL 3439291, at *2-3 (Bankr. D.V.I. Aug. 5, 2011). Nonetheless, concerned that the district court might disagree, the court submitted its findings regarding a § 544 claim to serve as a report and recommendation to the district court. *Id.* at *3.

In the wake of *Stern*, numerous courts have likewise held that *Stern* does not impact the bankruptcy court’s authority to handle pre-trial matters involving fraudulent transfer claims. *See e.g., Paloian v. American Express Co. (In re Canopy*

Fin.), No. 11-C-5360, 2011 WL 3911082 (N.D. Ill. Sept. 1, 2011).¹³ In *In re Canopy Financial*, the trustee brought a § 544 action seeking to avoid and recover payments made by the debtor to American Express utilizing the Illinois fraudulent transfer law. The defendant argued that *Stern* precluded the bankruptcy court from hearing the debtors' state law claims. *Id.* Denying the defendant's motion, the district court said that *Stern* never suggested that bankruptcy courts could not otherwise "hear" state law fraudulent transfer claims. *Id.* at *4. The court determined that such claims "undoubtedly remain 'related to' [plaintiffs'] bankruptcy proceedings and therefore fall within the reach of the bankruptcy court's authority." *Id.*; see also *In re Refco*, 2011 WL 5974532, at *3.

These decisions comport with the axiom that when determining the consequences of holding a statute unconstitutional, courts must employ a remedy that best implements what Congress would have done had it anticipated such a holding. See *United States v. Booker*, 543 U.S. 220, 246 (2004) (citing *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996)). It would be absurd to conclude that bankruptcy courts are deprived of jurisdiction

¹³ See also *Walker, Truesdell, Roth & Assocs. V. Blackstone Group, L.P. (In re Extended Stay)*, No. 09-bk-13764, 2011 WL 5532258, at *10 (S.D.N.Y. Nov. 10, 2011) (allowing the matters to proceed initially in the bankruptcy court); *Perkins v. Verma*, No. 11-2557, 2011 WL 5142937, at *4 (D.N.J. Oct. 27, 2011) (holding *Stern* presents "no reason why the Bankruptcy Court may not preside over [an] adversary proceeding and adjudicate discovery disputes and motions").

over matters designated by Congress as core when, for Article III reasons, Congress conferred jurisdiction on bankruptcy courts to issue proposed findings of fact and conclusions of law in noncore matters. *See, e.g., In re Mortg. Store, Inc.*, 2011 5056990, at *4-6; *see also Retired Partners of Coudert Bros. Trust v. Baker & McKenzie, LLP (In re Coudert Bros. LLP)*, No. 11-2785, 2011 WL 5593147, at *14 (S.D.N.Y. September 23, 2011) (deeming bankruptcy court judgment granting a motion to dismiss to be proposed conclusions and recommendation, stating “*Stern* suggests that the usual division of labor should not be much upset”); *In re Emerald Casino, Inc.*, 459 B.R. at 300 n.1 (“Even if the Supreme Court had not already directed a more reasonable remedy for the constitutional violation it found in *Stern*, the perverse effect of the remedy suggested by defendants’ argument would require that it be rejected.”). The Texas bankruptcy court aptly observed, “it is absurd to think that simply because Congress did not anticipate the Supreme Court’s ruling in *Stern* when it enacted, in 1984, 28 U.S.C. §§ 1334 . . . and 157 . . . that the bankruptcy courts can now do nothing with respect to these types of claims.” *Reed v. Linehan (In re Soporex)*, No. 08-bk-34174-BJH-7, 2011 WL 5911674, at *4 (Bankr. N.D. Tex. Nov. 28, 2011).

Recently, the Seventh Circuit, in *In re Ortiz*, without analysis, reached the opposite conclusion, stating that *Stern* precluded the bankruptcy court from hearing

the debtor's state law claims because such claims may not constitutionally be treated as core proceedings, nor may they be treated as non-core proceedings that are "otherwise related to a case under title 11" under 28 U.S.C. § 157(c)(1). *Ortiz v. Aurora Health Care Inc. (In re Ortiz)*, --- F.3d. ---, 2011 WL 6880651 at *7 (7th Cir. Dec. 30, 2011). *Ortiz* employs the same flawed rationale adopted in the roundly criticized and now reconsidered opinion *Samson v. Blixseth (In re Blixseth)*. No. 09-bk-60452-7, 2011 WL 3274042 (Bankr. D. Montana. Aug. 1, 2011); see *Blixseth v. Kirschner (In re Yellowstone)*, Case No. 08-61570, Adv. No. 09-00014 (Bankr. D. Mont. Dec. 13, 2011). Before the *Blixseth* court reversed itself, characterizing its prior decision as flawed, courts throughout the country rejected *Blixseth* as an erroneous interpretation of *Stern*. In *McCarthy v. Wells Fargo Bank, N.A. (In re El-Atari)*, the district court for the Eastern District of Virginia expressly rejected the holding in *Blixseth*, stating, "the *Blixseth* conclusion fails to consider properly the text of the Bankruptcy Act as well as the limiting language of *Stern*." 2011 WL 5828013 at *4.

In *In re El-Atari*, the defendant brought a motion to withdraw the reference of the trustee's fraudulent transfer action, arguing that the bankruptcy court lacked the constitutional authority to hear and decide the matter after *Stern*. *Id.* at *1. The court held that even if fraudulent transfer claims are no longer core proceedings,

they are clearly “related to a case under title 11” and, therefore, the bankruptcy court retains authority to submit proposed findings of fact and conclusions of law. *Id.* at *4. Thus, *Stern* “in no respect diminishes the authority of the bankruptcy court to ‘hear’ a fraudulent conveyance action.” *Id.* at *3. The *El-Atari* court observed that “the majority of district courts have also concluded that the bankruptcy courts retain the power to hear but not decide state law claims.”¹⁴ *Id.* at *4.

Moreover, in rejecting *Blixseth*, these courts uniformly recognize that the Supreme Court did not declare as unconstitutional the statutory framework permitting bankruptcy courts to hear non-core matters. Consequently, if this Court determines that *Stern* prohibits an Article I judge from entering a final judgment on a § 548 or § 544(b) claim, then a bankruptcy judge may nonetheless enter a report and recommendation on such claim pursuant to 28 U.S.C. § 157(c)(1). *See In re Heller Ehrman*, 2011 WL 6179149, at *4.

¹⁴ *See also Emerald Casino, Inc*, 459 B.R. at 300 n.1 (*Blixseth* conclusion fails to consider properly the text of the Act as well as limiting language of *Stern*); *In re Mortg. Store, Inc.*, 2011 WL 5056990, at *5 (same); *In re Universal Mktg., Inc.*, 2011 WL 5553280, at *4 (“*Blixseth* court did not suggest the bankruptcy court lacked constitutional authority to exercise jurisdiction over a fraudulent transfer claim, provided the court issued only proposed findings of fact and conclusions of law . . .”).

CONCLUSION

Based on the foregoing, the National Association of Bankruptcy Trustees, as *Amicus Curiae* for the Trustee-Appellee, respectfully requests that this Court affirm the decision below, wherein *Stern* is limited to the unique circumstances of that case and does not impact the bankruptcy court's jurisdiction to finally decide fraudulent transfer actions brought under 11 U.S.C. §§ 548 and 544. Should the Court not treat the bankruptcy court decision below as final, it should nevertheless treat it as a report and recommendation, and upon de novo review, affirm.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2012, I electronically filed the foregoing document with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signed under the penalties of perjury January 19, 2012.

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