No. 11-35162

In the United States Court of Appeals for the Ninth Circuit

IN RE: BELLINGHAM INSURANCE AGENCY, INC.

EXECUTIVE BENEFITS INSURANCE AGENCY,
Appellant,

v.

PETER H. ARKISON, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,
Appellee.

On Appeal from the United States District Court For the Western District of Washington
Case No. 06-11721, Adversary Proceeding No. 08-1132

BRIEF OF PROFESSORS S. TODD BROWN, G. MARCUS COLE, RONALD D. ROTUNDA, AND TODD J. ZYWICKI AS *AMICI CURIAE*

PHILIP D. ANKER
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

SETH P. WAXMAN
CRAIG GOLDBLATT
DANIELLE SPINELLI
ISLEY MARKMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

DOCKETED CASES

STATUTES

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose expertise ranges from bankruptcy law to federal jurisdiction to constitutional law.[2] When the case that became *Stern v. Marshall*, 131 S. Ct. 2594 (2011), was pending before this Court, *amici* filed a brief providing their views on the statutory and constitutional questions presented. Among other issues, the brief addressed the question presented here—whether a fraudulent conveyance action brought against a party who has not filed a proof of claim may constitutionally be adjudicated to final judgment by a bankruptcy court. *See* Brief For Amici Curiae Professors of Law 25-26, No. 02-56002, *Marshall v. Stern (In re Marshall)* (May 12, 2009). This Court described *amici*'s brief as

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation and submission of this brief.

[2] S. Todd Brown is an Associate Professor and the Director of the Center for the Study of Business Transactions at the State University of New York at Buffalo. G. Marcus Cole is the Wm. Benjamin Scott and Luna M. Scott Professor of Law at Stanford Law School. Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law. Todd J. Zywicki is the George Mason University Foundation Professor of Law at George Mason University School of Law and Senior Scholar of the Mercatus Center at George Mason University.

"thoughtful," *Marshall v. Stern (In re Marshall)*, 600 F.3d 1037, 1049 n.20 (9th Cir. 2010), and adopted its analysis over that of either party, *see id.* at 1058-1059.[3]

Amici continue to share a scholarly interest in the application and development of the law in these areas, as well as in the interpretation of the Supreme Court's decision in *Stern*. In view of this Court's invitation to any *amicus curiae* to file a brief regarding the application of *Stern* to the question presented in this case, *see* Order, Dkt. 35, No. 11-35162 (Nov. 4, 2011), *amici* offer their views for the Court's consideration.

INTRODUCTION

The Supreme Court's decision in *Stern*, together with the Court's prior holding in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), make clear that the defendant in a fraudulent conveyance action has the constitutional right to an Article III tribunal. It follows that, notwithstanding the inclusion of fraudulent conveyance actions in the list of "core" matters in Section 157 of the Judicial Code, *see* 28 U.S.C. §157(b)(2)(H), bankruptcy courts may not constitutionally enter final judgment in such actions without the consent of all parties. Rather, a bankruptcy court may only submit proposed findings of fact and conclusions of

[3] After the Supreme Court granted certiorari to review this Court's decision, 131 S. Ct. 63 (2010), *amici* also filed a brief in the Supreme Court urging that Court to affirm this Court's judgment, as it subsequently did.

law for *de novo* review by the district court. *Cf. id.* §157(c)(1). To the extent that Section 157 provides to the contrary, it is unconstitutional.

In a case like this one, however, in which the district court has affirmed the bankruptcy court's grant of summary judgment after *de novo* review, the appropriate remedy is to vacate the bankruptcy court's judgment, deem its opinion proposed findings of fact and conclusions of law, treat the district court's judgment as the final judgment in the case, and review the merits of the appeal as this Court ordinarily would. *Amici* take no position regarding the merits of the appeal.

STATEMENT

Amici understand the facts in this case as follows: The debtor, Bellingham Insurance Agency, marketed insurance plans. In late 2005, an arbitrator issued a judgment and temporary award against Bellingham for approximately $100,000. In January 2006, three days before the entry of the final arbitration award, Bellingham ceased operations, and its directors and officers began operating in the name of a new company, Executive Benefits. In February 2006, following the issuance of the final arbitration award, funds were transferred from Bellingham to Executive Benefits.

Bellingham thereafter filed a chapter 7 bankruptcy petition. The chapter 7 Trustee commenced an adversary proceeding against Executive Benefits, former officers and directors of Bellingham, and an entity previously affiliated with

Bellingham. *See* Compl., Dkt. 1, Adv. Pro. No. 08-1132 (Bankr. W.D. Wash. May 31, 2008). The Trustee alleged that the defendants had closed Bellingham and established Executive Benefits in order to avoid paying their debts, including the arbitration award. The complaint sought to avoid the transfers of funds from Bellingham to Executive Benefits as fraudulent conveyances under Sections 544 and 548 of the Bankruptcy Code and state law. The Trustee alleged that the action was a core proceeding pursuant to 28 U.S.C. §157(b)(2)(H). *See* Compl. ¶ 2.1.

Executive Benefits filed an answer and jury demand. *See* Answer, Dkt. 170, No. 06-11721 (Bankr. W.D. Wash. Aug. 6, 2008); Jury Demand, Dkt. 171, No. 06-11721 (Bankr. W.D. Wash. Aug. 6, 2008). In response to the complaint's allegation that the proceeding was core, the answer stated: "Paragraph 2.1 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies." Answer ¶ 2.1. In addition, both the answer and jury demand stated: "Defendant elects to have the above-entitled cause of action tried before a jury on all issues upon which it is entitled to a jury. Defendant does not consent to have said jury trial in this Court or any other bankruptcy panel." Answer ¶ 26.1; *see also* Jury Demand. Executive Benefits did not file a proof of claim against the debtor. *See* Claims Register, No. 06-11721 (Bankr. W.D. Wash.).

The Trustee moved for summary judgment on the fraudulent transfer claims against Executive Benefits, and the bankruptcy court granted the motion. Order, Dkt. 62, No. 08-1132 (Bankr. W.D. Wash. May 27, 2010). On appeal, the district court reviewed the bankruptcy court's judgment *de novo*, concluded that the Trustee was entitled to judgment as a matter of law, and affirmed. Order, Dkt. 15, No. 10-cv-929, (W.D. Wash. Jan. 21, 2011); Judgment, Dkt. 16, No. 10-cv-929, (W.D. Wash. Jan. 21, 2011). Executive Benefits then appealed to this Court. After briefing and argument, this Court invited *amicus* briefs on the question whether, in light of *Stern*, the bankruptcy court was constitutionally permitted to enter final judgment on the Trustee's fraudulent conveyance claims. *See* Order, Dkt. 35, No. 11-35162 (Nov. 4, 2011).

ARGUMENT

I. BANKRUPTCY COURTS MAY NOT CONSTITUTIONALLY ENTER FINAL JUDGMENT IN FRAUDULENT TRANSFER ACTIONS WITHOUT CONSENT OF THE PARTIES

A. The Statutory Scheme

Section 1334 of the Judicial Code grants district courts original jurisdiction over "all civil proceedings [1] arising under title 11 [the Bankruptcy Code], or [2] arising in or [3] related to cases under title 11." 28 U.S.C. §1334(b). Proceedings "aris[e] under title 11" when the Bankruptcy Code itself creates the cause of action—for example, a motion by a trustee to reject an executory contract,

see 11 U.S.C. §365. *See Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir. 1987). Proceedings "aris[e] in … cases under title 11" when they do not originate in an express right or cause of action created by the Bankruptcy Code, but nevertheless can arise only in a bankruptcy case—for example, a proceeding to determine the validity of a claim against the estate, *see* 11 U.S.C. §502. *See Wood*, 825 F.2d at 97. Finally, proceedings "relate[] to cases under title 11," even if they do not arise under the Bankruptcy Code or in a bankruptcy case, so long as their resolution could affect the bankruptcy estate—for example, a damages claim by the estate against a third party. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307-308 (1995); *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994-995 (3d Cir. 1984).

Section 157 of the Judicial Code provides that district courts may refer any of the proceedings identified in Section 1334(b) "to the bankruptcy judges for the district." 28 U.S.C. §157(a). "The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved." *Stern v. Marshall*, 131 S. Ct. 2594, 2603 (2011).

"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[.]" 28 U.S.C. §157(b)(1). In other words, bankruptcy courts may enter final judgment in such matters, subject to ordinary appellate review by the district court. *See id.* §158(a). The statute sets forth a non-exclusive list of these "core" bankruptcy

proceedings, including the "allowance or disallowance of claims against the estate," *id.* §157(b)(2)(B), and "confirmations of plans," *id.* §157(b)(2)(L). The list of "core" proceedings also includes certain claims by the debtor against third parties, such as "counterclaims by the estate against persons filing claims against the estate," *id.* §157(b)(2)(C), and "proceedings to determine, avoid, or recover fraudulent conveyances," *id.* §157(b)(2)(H).

By contrast, bankruptcy courts may only "hear"—but not "determine"—"a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." 28 U.S.C. §157(c)(1). In such "non-core" proceedings, the bankruptcy court plays a role analogous to that of a magistrate, *cf. id.* §636(b)(1), "submit[ting] proposed findings of fact and conclusions of law to the district court," which enters final judgment only after reviewing the bankruptcy court's findings and conclusions *de novo*, *id.* §157(c)(1).[4]

The statutory distinction between "core" and "non-core" proceedings has its origins in the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The 1978 Bankruptcy Code had empowered bankruptcy courts to enter final judgment in *all* the proceedings covered by present-day Section 1334(b), including those that were merely "related

[4] Like a magistrate, a bankruptcy court may enter final judgment in non-core matters with the consent of all parties. *See* 28 U.S.C. §157(c)(2).

to cases under title 11." 28 U.S.C. §1471(b) (repealed 1984). Bankruptcy courts thus had the power to decide any dispute that could affect a debtor's estate, including state-law claims by a trustee against a non-creditor that were "related to" the bankruptcy case only because the bankruptcy estate would increase if the trustee prevailed.

Marathon involved such a claim—a state-law contract claim by the debtor. *See* 458 U.S. at 54, 71-72 (plurality opinion). The defendant, Marathon, contended that the bankruptcy court could not constitutionally adjudicate Northern Pipeline's suit against it under Article III, which 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" and requires that the judges of those courts hold office "during good Behaviour" and receive undiminished compensation during their tenure. U.S. Const. art. III, §1. Bankruptcy courts are non-Article III tribunals, whose judges are appointed for 14-year terms and do not receive undiminished compensation. *See* 28 U.S.C. §152(a)(1).

The Supreme Court held that a bankruptcy court could not exercise plenary jurisdiction over Northern Pipeline's state-law contract claim merely because that claim was "related to" the bankruptcy case. The Court thus struck down the 1978 jurisdictional scheme because it improperly removed "'the essential attributes of

the judicial power' from the Art. III district court[] and … vested those attributes in a non-Art. III adjunct." *Marathon*, 458 U.S. at 87 (plurality opinion); *id.* at 91-92 (Rehnquist, J., concurring in the judgment).

The four-Justice plurality distinguished between matters of "public right," which could constitutionally be determined by a non-Article III tribunal, and matters of "private right," as to which the litigants were entitled to an Article III court. 458 U.S. at 67-70. Without agreeing on the scope of the "public rights" category, a majority of the Court concluded that Northern Pipeline's state-law, breach-of-contract action fell outside that category and that Marathon was entitled to an Article III tribunal. *See id.* at 69-72; *id.* at 90-91 (Rehnquist, J., concurring in the judgment). As the plurality put it, "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a 'public right,' but the latter obviously is not." *Id.* at 71; *see id.* at 91 (Rehnquist, J., concurring in the judgment).

In 1984, Congress amended the bankruptcy jurisdictional provisions in an attempt to cure this constitutional defect. Drawing on *Marathon*'s distinction between "the restructuring of debtor-creditor relations" and "the adjudication of state-created private rights," the statutory amendments introduced the categories of

"core" and "non-core" proceedings. As discussed above, the Judicial Code, as amended in 1984, limits bankruptcy courts' power to enter final judgment to "core" proceedings. *See* 28 U.S.C. §157.

The statute's non-exclusive list of "core" proceedings includes "proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. §157(b)(2)(H). The statute thus permits bankruptcy courts to enter final judgment in fraudulent conveyance actions like the one at issue here.

B. *Stern v. Marshall*

In *Stern*, the Supreme Court concluded that Congress's efforts in Section 157 to remedy the constitutional flaw identified in *Marathon* had, at least in part, failed. The Court held that a "counterclaim[] by the estate against persons filing claims against the estate"—one of the categories of "core" proceedings that the statute authorizes bankruptcy courts to "hear and determine," 28 U.S.C. §157(b)(2)(C)—could not constitutionally be adjudicated by a non-Article III tribunal.

Stern arose from a dispute between Vickie Lynn Marshall and E. Pierce Marshall over the estate of J. Howard Marshall, Vickie's deceased husband and Pierce's father. Vickie sued Pierce in Texas state court, alleging that J. Howard had promised to give her half his assets and that Pierce had tortiously interfered with that promise by defrauding his father into making a will and trust that did not

provide for Vickie. She then sought Chapter 11 relief. Pierce filed a proof of claim in Vickie's bankruptcy case for defamation, and Vickie counterclaimed, asserting the same state-law tortious interference claim pending in Texas court. *Stern*, 131 S. Ct. at 2601. After holding an evidentiary hearing, the bankruptcy court entered judgment for Vickie on her tortious interference counterclaim, concluding that it was a core proceeding under Section 157(b)(2)(C). *See id.* Thereafter, the Texas court ruled in Pierce's favor, holding that Vickie was entitled to nothing. The district court then decided Pierce's appeal from the bankruptcy court's decision. It concluded that the matter was non-core but declined to accord preclusive effect to the Texas judgment. Instead, it held another hearing, decided the question *de novo*, and again entered judgment in Vickie's favor.

After intervening decisions by this Court and the Supreme Court on a question not relevant here, the matter returned to this Court on remand. The central issue was whether Vickie's tortious interference counterclaim was a "core" matter as to which the bankruptcy court was entitled to enter final judgment. If not, Pierce contended, the Texas judgment should be given preclusive effect. This Court held that, under principles of constitutional avoidance, Section 157 should be construed to treat matters of "private right"—including counterclaims by the estate against persons with claims against the estate, if the counterclaims would not necessarily be resolved in the process of allowing or disallowing the creditor's

claims—as "non-core" matters. *Marshall v. Stern (In re Marshall)*, 600 F.3d 1037, 1058-1059 (9th Cir. 2010). Finding that Vickie's state-law tort counterclaim was a matter of private right, this Court reversed the district court and directed entry of judgment for Pierce.

The Supreme Court affirmed, employing a slightly different rationale. It concluded that Article III bars a bankruptcy court from entering judgment on a matter of "private right," and that Vickie's counterclaim against Pierce was such a matter. Accordingly, even though the Court construed Section 157(b)(2)(C) to give the bankruptcy court the *statutory* authority to enter final judgment on Vickie's counterclaim, the Court held the statute unconstitutional as applied to "a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." *Stern*, 131 S. Ct. at 2620.

Stern relied on the public right/private right distinction previously articulated in *Marathon* and subsequent Supreme Court decisions. Synthesizing its precedents, the Court explained that the public rights exception is limited "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." *Stern*, 131 S. Ct. at 2613; *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) (federal statute requiring arbitration of claim to compensation created by

federal law did not violate Article III because "[a]ny right to compensation … results from [the statute] and does not depend on or replace a right to such compensation under state law"); *CFTC v. Schor*, 478 U.S. 833, 852-855 (1986) (CFTC could constitutionally rule on counterclaim by broker against customer together with customer's claim against broker when both concerned the same dispute over the same account, governed by the same federal regulatory scheme, and customer had consented to CFTC adjudication). In short, "what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." *Stern*, 131 S. Ct. at 2613.

The Court concluded that Vickie's counterclaim did "not fall within any of the varied formulations of the public rights exception." *Stern*, 131 S. Ct. at 2614. To the contrary, the bankruptcy court's ruling on Vickie's counterclaim "involve[d] the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime." *Id.* at 2615. Just as in *Marathon*, Vickie's counterclaim was a cause of action derived from state common law—although sounding in tort rather than contract—and was related to her bankruptcy case only because, if she prevailed, the estate's assets would increase. *Id.* at 2614-2615.

The *Stern* Court rejected Vickie's argument that Pierce's filing of a proof of claim differentiated her counterclaim from the contract dispute in *Marathon.* 131 S. Ct. at 2616. The Court distinguished its prior decisions in *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Culp*, 498 U.S. 42 (1990) (per curiam)—which held that a bankruptcy court could exercise plenary authority over a preference action by the estate against a creditor who had filed a proof of claim—on the ground that the Bankruptcy Code required adjudication of such preference actions before the creditor's claim could be allowed or disallowed. *See* 11 U.S.C. §502(d) ("the court *shall* disallow any claim" advanced by the transferee of an avoidable preference that has not been turned over to the estate (emphasis added)). In such cases, the preference action becomes part of the claims allowance process itself and thus is "'integral to the restructuring of the debtor-creditor relationship.'" *Stern*, 131 S. Ct. at 2617. By contrast, "there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim." *Id.* Accordingly, the bankruptcy court "lacked the constitutional authority to enter a final judgment" on Vickie's counterclaim. *Id.* at 2620.

C. A Fraudulent Transfer Action Against A Party Who Has Not Filed A Claim Against The Estate Is A Matter Of Private Right Requiring An Article III Tribunal

Stern's analysis of the tort-law counterclaim in that case applies equally to the fraudulent transfer actions at issue here. Like Vickie's tortious interference claim, fraudulent transfer claims are essentially common-law actions brought to resolve disputes between private parties. The government is not a party to fraudulent transfer suits between private entities, nor are such suits part of an integrated scheme of federal regulation. And fraudulent transfer suits are brought to augment the bankruptcy estate, rather than as part of the adjustment of debtor-creditor rights under the federal bankruptcy scheme.[5] Accordingly, even though fraudulent transfer actions (like estate counterclaims) are included in the list of "core" proceedings in Section 157, *see* 28 U.S.C. §157(b)(2)(H), a bankruptcy court may not constitutionally adjudicate them unless all parties consent or the defendant has filed a claim against the estate and the estate's fraudulent transfer claims would necessarily be resolved in the process of ruling on the defendant's claim.

To be sure, the fraudulent transfer claims asserted here differ from Vickie's state-law counterclaim in one respect: They are brought in part under the

[5] *Cf. In re Apex Long Term Acute Care-Katy, L.P.*, No. 09-bk-37096, 2011 WL 6826838, at *9-10 (Bankr. S.D. Tex. Dec. 28, 2011) (distinguishing between fraudulent transfer and preference claims).

Bankruptcy Code itself rather than solely under state law. Specifically, the Trustee's complaint asserts claims under Sections 544 and 548 of the Bankruptcy Code. Section 544 permits the trustee to avoid any transfer of property of the debtor that would be avoidable by an unsecured creditor under applicable state law. 11 U.S.C. §544. Section 548 similarly permits the trustee to avoid any transfer of an interest of the debtor in property made up to two years before the petition date if the debtor actually intended to defraud its creditors, or if it received less than reasonably equivalent value and was insolvent or inadequately capitalized when the transfer occurred. *Id.* §548.

Although fraudulent transfer claims, unlike tort or breach of contract claims, are codified in the Bankruptcy Code, that distinction makes no difference for purposes of Article III. The Supreme Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), on which the *Stern* Court heavily relied, makes this clear. *Granfinanciera* held that a fraudulent conveyance action brought under Section 548 of the Bankruptcy Code against a party who had not filed a proof of claim was a legal action entitling the defendant to a jury trial under the Seventh Amendment. *See id.* at 64. The Court's reasoning extends to the Article III question presented here.

Granfinanciera explained that when a cause of action is legal, rather than equitable, in nature, "the question whether the Seventh Amendment permits

Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." 492 U.S. at 53. Accordingly, having concluded that the trustee's "fraudulent conveyance action plainly seeks relief traditionally provided by law courts," the Court considered whether Congress had "permissibly withdrawn jurisdiction over that action by courts of law and assigned it exclusively to non-Article III tribunals sitting without juries." *Id.* at 49. Tracing the development of the public rights exception since *Marathon*, the Court explained that "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." *Id.* at 54-55. The Court held that fraudulent conveyance actions fell outside the scope of this public rights exception:

> There can be little doubt that fraudulent conveyance actions by bankruptcy trustees—suits which … 'constitute no part of the proceedings in bankruptcy but concern controversies arising out of it'—are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.

Id. at 56.

Distinguishing *Katchen*, the Court noted that "[b]ecause petitioners here … have not filed claims against the estate, respondent's fraudulent conveyance action does not arise 'as part of the process of allowance and disallowance of claims.'" *Granfinanciera*, 492 U.S. at 58. Moreover, although they are brought under federal bankruptcy law and classified as "core proceedings," fraudulent conveyance actions under Section 548 are not "integral to the restructuring of debtor-creditor relations." *Id.* By codifying fraudulent transfer claims in the Bankruptcy Code, Congress merely "reclassified a pre-existing, common-law cause of action"—one that dates back centuries. *Id.* at 60; *see id.* at 43-47. "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing … jurisdiction in … a specialized court of equity." *Id.* at 61.

Although *Granfinanciera* did not expressly hold that fraudulent conveyance actions could not be finally adjudicated by bankruptcy courts, the Court's analysis compels that conclusion. Moreover, *Stern* reaffirmed *Granfinanciera*'s analysis. The Court there approved of *Granfinanciera*'s conclusion 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.'" *Stern*, 131 S. Ct. at 2614 (quoting *Granfinanciera*, 492 U.S. at 55). And it analogized Vickie's tortious interference counterclaim to *Granfinanciera*'s fraudulent transfer

action: "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." *Id.*

Under *Granfinanciera* and *Stern*, therefore, a fraudulent conveyance action brought by a trustee against a third party who has not filed a claim against the estate is not a matter of public right and may not be finally decided by a non-Article III bankruptcy court absent the parties' consent.[6] Indeed, since *Stern*, many lower courts have reached that conclusion.[7] And although *Granfinanciera*

---

[6] This Court has previously held that 28 U.S.C. §157(b)(2)(H) does not violate Article III of the Constitution by authorizing bankruptcy judges to enter final judgment in fraudulent transfer actions. *See Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987). The *Mankin* decision predates the Supreme Court's decision in *Granfinanciera* and relies on the premise that a trustee's ability to avoid a fraudulent transfer is a public right. As discussed above, *Granfinanciera* reached the opposite conclusion. *See* 492 U.S. at 54-56; *Stern*, 131 S. Ct. at 2614. *Mankin* is thus no longer good law.

[7] *See, e.g.*, *Development Specialists, Inc., v. Orrick, Herrington & Sutcliffe, LLP*, No. 11-cv-6337, 2011 WL 6780600, at *3 (S.D.N.Y. Dec. 23, 2011); *Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, No. 11-cv-04848, 2011 WL 6179149, at *3-5 (N.D. Cal. Dec. 13, 2011); *McCarthy v. Wells Fargo Bank, N.A. (In re El-Atari)*, No. 11-cv-1090, 2011 WL 5828013, at *2 (E.D. Va. Nov. 18, 2011); *Development Specialists, Inc., v. Akin Gump Strauss Hauer & Feld LLP*, No. 11-cv-5994, 2011 WL 5244463, at *9 (S.D.N.Y. Nov. 2, 2011); *Retired Partners of Coudert Bros. Trust v. Baker McKenzie LLP (In re Coudert Bros. LLP)*, No. 11-2785, 2011 WL 5593147, at *9 (S.D.N.Y. Sept. 22, 2011); *Paloian v. American Express Co. (In re Canopy Fin., Inc.)*, No. 09-bk-44943, 2011 WL 3911082 (N.D. Ill. Sept. 1, 2011); *Reed v. Linehan (In re Soporex, Inc.)*, No. 08-bk-34174, 2011 WL 5911674, at *3 (Bankr. N.D. Tex. Nov. 28, 2011); *Samson v. Blixseth (In re Blixseth)*, No. 09-bk-60452-7, 2011 WL 3274042, at *11 (Bankr. D. Mont. Aug. 1, 2011). A minority of lower courts have reached the opposite

addressed only fraudulent transfer claims brought under Section 548, the same analysis applies, *a fortiori*, to claims under Section 544, which merely permits the assertion of claims that already exist under state law.[8]

Accordingly, the bankruptcy court in this case lacked constitutional authority to enter final judgment on the Trustee's fraudulent transfer claims. Executive Benefits did not file a proof of claim against the estate. Nor did it consent to the bankruptcy court's finally adjudicating the claims against it. In bankruptcy, as elsewhere, a litigant's waiver of its constitutional right to an Article III tribunal—while it need not always be express—must be unequivocal. *See Roell v. Withrow*, 538 U.S. 580, 590-591 (2003) (deciding that consent to entry of judgment by a magistrate judge could be implied from parties' conduct in the litigation where the parties continued participating in proceedings before magistrate judge after being advised of their right to withhold consent);

---

result. *See, e.g.*, *Menotte v. United States (In re Custom Contractors, LLC)*, No. 09-bk-24404, 2011 WL 6046397 (Bankr. S.D. Fla. Dec. 5, 2011); *Kirschner v. Agoglia (In re Refco Inc.)*, No. 05-bk-60006, 2011 WL 5974532, at *3-9 (Bankr. S.D.N.Y. Nov. 30, 2011).

[8] *See Tabor v. Kelly (In re Davis)*, No. 05-bk-15794, 2011 WL 5429095, at *11 (Bankr. W.D. Tenn. Oct. 5, 2011) ("Under *Granfinanciera* it makes no difference that a portion of the claim is brought under section 548(a)(2) of the Bankruptcy Code and another portion under section 544(b), which incorporates state law. … It is a matter of private right that cannot constitutionally be determined without a jury if demanded nor by a non-Article III tribunal.").

Development Specialists, 2011 WL 5244463, at *12 (citing *Roell*); *Coudert Bros.*, 2011 WL 5593147, at *12 (same).

The record in this case provides no basis for finding consent. In compliance with Federal Rule of Bankruptcy Procedure 7008(a),[9] the Trustee alleged in the complaint that the proceeding was core. Compl. ¶ 2.1. In response, Executive Benefits denied that allegation. Answer ¶ 2.1. In addition, although Executive Benefits did not specify whether it consented to entry of final order or judgment by the bankruptcy judge, as required by Federal Rule of Bankruptcy Procedure 7012(b),[10] it did demand a jury trial of all triable issues and refused to consent to having that jury trial held in bankruptcy court. *See* Answer ¶26.1; Jury Demand. Where a jury trial is demanded, it can only be held before a bankruptcy court if the parties give *express* consent. *See* 28 U.S.C. §157(e). And "the right to a jury trial necessarily implies the right to final determination by an Article III court." *Davis*, 2011 WL 5429095, at *15; *see also Granfinanciera*, 492 U.S. at 53. By refusing to consent to a jury trial in the bankruptcy court, Executive Benefits "thereby

[9] Federal Rule of Bankruptcy Procedure 7008(a) provides that complaints filed in adversary proceedings "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."

[10] Federal Rule of Bankruptcy Procedure 7012(b) provides that responsive pleadings filed in adversary proceedings "shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge."

express[ed] its intention to reserve whatever Article III rights it had" in connection with the final determination of the dispute, whether by trial or—as proved to be the case—summary judgment. *Davis*, 2011 WL 5429095, at *15; *see also Coudert Bros.*, 2011 WL 5593147, at *12 (finding no consent was given, in part, because defendant demanded a jury trial).[11] The bankruptcy court below accordingly erred when it entered final judgment on the Trustee's fraudulent transfer claims.

II. BANKRUPTCY COURTS MAY ISSUE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN FRAUDULENT TRANSFER ACTIONS SUBJECT TO *DE NOVO* REVIEW BY THE DISTRICT COURT

As demonstrated above, bankruptcy courts may not finally adjudicate fraudulent transfer claims against parties that have not filed claims against the estate, absent the parties' consent. However, bankruptcy courts may hear such actions and issue proposed findings of fact and conclusions of law for *de novo* review by the district court, just as they may in any non-core proceeding. *See* 11 U.S.C. §157(c)(1); *Stern*, 131 S. Ct. at 2620; *see also supra* Part I.A. They may also enter final judgment in such actions with the express consent of all parties, just as they may in any non-core proceeding. 11 U.S.C. §157(c)(2). In other words,

[11] The Trustee asserts that Executive Benefits consented by not raising the defense of subject matter jurisdiction. However, "[c]onsenting to jurisdiction—which everyone agrees the Bankruptcy Court possesses under the 'related to' doctrine enshrined in 28 U.S.C. §1334—is not the same as consenting to the entry of a final determination by a non-Article III tribunal." *Development Specialists*, 2011 WL 5244463, at *11; *see also supra* Part I.A; *infra* p.24.

even though Congress's decision to deem fraudulent transfer claims "core proceedings" that the bankruptcy court can finally "determine" contravenes Article III, bankruptcy courts may constitutionally "hear" such claims, treating them as non-core proceedings.

The overall statutory scheme described above, *see supra* Part I.A, supports that result. Fraudulent transfer claims fall within the proper scope of the district court's bankruptcy jurisdiction. At a minimum, they are "'related' to the bankruptcy within the meaning of 28 U.S.C. 1334(b)." *Goldstein v. Eby-Brown, Inc. (In re Universal Mktg., Inc.)*, 459 B.R. 573, 579 (Bankr. E.D. Pa. 2011). If a trustee prevails in a fraudulent conveyance action and can reclaim the transferred property, there will be more property in the estate available to satisfy creditors' claims. That is sufficient to bring a matter within the "related to" jurisdiction. *See Celotex*, 514 U.S. at 307-308; *Pacor*, 743 F.2d at 994-995; *Universal Mktg.*, 459 B.R. at 579 ("a trustee's collection of money … through the exercise of his or her avoidance powers will affect the handling and administration of the bankrupt estate"). And Section 157(c) permits bankruptcy courts to "hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11," directing the court to "submit proposed findings of fact and conclusions of law to the district court" for *de novo* review. 28 U.S.C. §157(c)(1).

Stern also supports treating fraudulent transfer claims not resolved in the claims allowance process as non-core proceedings. The Court there made clear that its decision did not implicate the federal courts' subject-matter jurisdiction, which is governed by Section 1334 of the Judicial Code. As the Court explained:

> 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.

131 S. Ct. at 2607 (citations omitted). Rather, *Stern* addressed the distinction between core and non-core proceedings and "what a Bankruptcy Judge may do once a case is referred to it, not whether that judge has jurisdiction to hear the case at all." *In re Olde Prairie Block Owner, LLC*, 457 B.R. 692, 700-701 (Bankr. N.D. Ill. 2011) (citing *Stern*, 131 S. Ct. at 2620). The Court viewed its decision as merely the "removal of counterclaims such as Vickie's from *core* bankruptcy jurisdiction." *Stern*, 131 S. Ct. at 2620 (emphasis added). It noted: "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." *Id.* *Stern* thus suggests that matters that may not, under its analysis, be "heard and determined" by the bankruptcy courts as core matters may still proceed in bankruptcy court as non-core matters, with the bankruptcy court issuing proposed findings of fact and conclusions of law. *See Heller Ehrman*, 2011 WL 6179149, at *5-7; *Canopy Fin.*,

2011 WL 3911082, at *3-4; *Field v. Lindell (In re Mortgage Store, Inc.)*, No. 11-cv-439, 2011 WL 5056990, at *6 (D. Haw. Oct. 5, 2011); *Refco*, 2011 WL 5974532, at *9-10; *but see Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, No. 10-3465, 2011 WL 6880651, at *7 (7th Cir. Dec. 30, 2011) (suggesting, in dicta, that bankruptcy courts cannot issue proposed findings of fact and conclusions of law in statutorily core proceedings after *Stern*).

As a matter of severability analysis, moreover, treating such fraudulent conveyance claims as non-core proceedings comports with congressional intent. In enacting 28 U.S.C. §157, Congress's intent was to give bankruptcy courts the broadest authority permitted by the Constitution to adjudicate cases relating to Title 11. *See Celotex*, 514 U.S. at 308 ("Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." (internal quotation marks omitted)). To effectuate Congress's intent, fraudulent conveyance claims that cannot be core proceedings after *Stern* should be treated as non-core proceedings, rather than proceedings that cannot be heard by bankruptcy courts at all. *See El-Atari*, 2011 WL 5828013, at *3; *Mortgage Store*, 2011 WL 5056990, at *6 ("[T]he court has little difficulty in finding that Congress, if faced with the prospect that bankruptcy courts could not enter final judgments on certain 'core' proceedings, would have intended them to fall within 28 U.S.C. §157(c)(1)

granting bankruptcy courts authority to enter findings and recommendations."); *Soporex*, 2011 WL 5911674, at *4.

In short, after *Stern*, bankruptcy courts' authority with respect to fraudulent transfer claims that are not necessarily resolved in the claims allowance process is the same as a bankruptcy court's authority with respect to any other non-core "related to" proceeding. The court may preside over pre-trial proceedings and may issue proposed findings of fact and conclusions of law subject to *de novo* review.[12] In addition, with the consent of the parties, a bankruptcy court may issue a final judgment subject to ordinary appellate review. *See Olde Prairie Block Owner*, 457 B.R. at 699-701; *Meoli v. Huntington Nat'l Bank (In re Teleservices Group, Inc.)*, 456 B.R. 318, 338 (Bankr. W.D. Mich. 2011).

In that respect, *Stern* is indeed a "narrow" decision that does not "meaningfully change[] the division of labor in the current statute." 131 S. Ct. at 2620. It has no impact on the heart of what bankruptcy courts do—deciding motions to sell assets or to assume or reject executory contracts, reordering the

[12] *See Heller Ehrman*, 2011 WL 6179149, at *5-7; *El-Atari*, 2011 WL 5828013, at *2, *3-4; *Canopy Fin.*, 2011 WL 3911082, at *3-4; *Boyd v. King Par, LLC*, No. 11-cv-1106, 2011 WL 5509873, at *2 (W.D. Mich. Nov. 10, 2011); *Mortgage Store*, 2011 WL 5056990, at *6; *Kelley v. JPMorgan Chase & Co.*, No. 11-cv-193, 2011 WL 4403289, at *6 (D. Minn. Sept. 21, 2011); *Universal Mktg.*, 459 B.R. at 579; *Davis*, 2011 WL 5429095, at *14; *Gecker v. Flynn (In re Emerald Casino, Inc.)*, 459 B.R. 298, 300 (Bankr. N.D. Ill. 2011).

priority of creditor claims against the estate,[13] confirming plans of reorganization, and the like. In these "core" bankruptcy proceedings, bankruptcy courts may continue to issue final judgments subject to ordinary appellate review. Bankruptcy courts may also issue final judgments in fraudulent transfer and other avoidance actions when, as is often the case, the defendant is a creditor who filed a proof of claim against the bankruptcy estate because under those circumstances resolution of the avoidance action is a necessary part of the claims allowance process itself. *See* 11 U.S.C. §502(d). And when the defendant in an avoidance action has not filed a proof of claim, bankruptcy courts may still preside over the litigation, decide non-dispositive pre-trial matters, and issue proposed findings of fact and conclusions of law, just as they did before *Stern* in adversary proceedings involving state-law and other non-core claims brought by the bankruptcy estate.

The appropriate remedy for the bankruptcy court's error in this case is accordingly straightforward. Because the district court reviewed the bankruptcy court's grant of summary judgment to the Trustee *de novo*, Executive Benefits has received the Article III review to which it is entitled. This Court therefore need not remand to the district court for a rehearing of the merits of the claim. Rather, it should vacate the bankruptcy court's purported "judgment" and treat its opinion as proposed findings of fact and conclusions of law. *See, e.g.*, *Coudert Bros.*, 2011

[13] *See Burtch v. Huston (In re USDigital, Inc.)*, No. 07-bk-10374, 2011 WL 6382551 (Bankr. D. Del. Dec. 20, 2011).

WL 5593147, at *13 (treating bankruptcy court's determination dismissing claims as a report and recommendation of dismissal). The district court's order affirming the decision of the bankruptcy court should be treated as the entry of final judgment accepting the bankruptcy court's proposed findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 9033.[14] Finally, the district court's judgment, which did not specify any monetary amount, should be deemed amended to incorporate the bankruptcy court's judgment, which did. *See* 28 U.S.C. §2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."); *id.* §1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). This Court can then proceed to consider the merits of the appeal, as to which *amici* take no position.

[14] Federal Rule of Bankruptcy Procedure 9033 provides that, with respect to non-core proceedings heard by a bankruptcy court pursuant to 28 U.S.C. §157(c)(1), a district judge shall review the bankruptcy judge's findings of fact and conclusions of law *de novo*, and may accept, reject, or modify those findings and conclusions, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.

CONCLUSION

The bankruptcy court's judgment should be vacated and its opinion treated as proposed findings of fact and conclusions of law, the district court's order should be deemed to be a judgment accepting those proposed findings of fact and conclusions of law, and the district court judgment should be deemed to incorporate the monetary amount specified by the bankruptcy court. This appeal should otherwise proceed on its merits before this Court.

Respectfully submitted,

/s/ Seth P. Waxman

SETH P. WAXMAN
CRAIG GOLDBLATT
DANIELLE SPINELLI
ISLEY MARKMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

PHILIP D. ANKER
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

Counsel for Amici Curiae

January 13, 2012

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7). The brief has been prepared in proportionately spaced typeface using Microsoft Word Version 2003 in Times New Roman 14 point type. Based upon the word-count function in Microsoft Word Version 2003, the brief contains 6,985 words.

/s/ Craig Goldblatt
CRAIG GOLDBLATT

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2012, I electronically filed the foregoing Brief for *Amici Curiae* Professors of Law S. Todd Brown, G. Marcus Cole, Ronald D. Rotunda, and Todd J. Zywicki with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Craig Goldblatt
CRAIG GOLDBLATT