

THE HON. ARTHUR L. MOLLER/DAVID B. FOLTZ, JR.
BANKRUPTCY INN OF COURT

TEAM 5 PRESENTATION

JANUARY 28, 2014

“Respect My Authority, Please –

A Moot Court Presentation on Consent to Authority of the Bankruptcy Court”

TEAM FIVE

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Additional materials are posted at the Inn website:

<http://home.innsforcourt.org/for-members/inns/the-moller-foltz-american-inn-of-court.aspx>

TIMELINE OF CASES

	Stern v. Marshall (& Marshall v. Marshall)	Executive Benefits Ins. Agcy v. Arkinson
01/25/96	Vickie Lynn Marshall files Ch. 11	
05/07/96	Pierce Marshall files adv. proceeding to determine dischargeability of his defamation claim against Vickie (<i>Marshall v. Marshall</i>)	
06/14/96	Vickie files C/C in adv. proceeding including claim of tortious interference with expectation of gift or inheritance	
11/05/99	Bkr Ct. grants SJ for Vickie on Pierce's claim	
09/27/00	Bkr Ct. grants SJ for Vickie on C/C	
06/19/01	On appeal, Dist. Ct. vacates Bkr. Ct. judgment for lack of jurisdiction, reviews case de novo, and renders judgment for Vickie	
12/30/04	9th Cir. reverses Dist. Ct. on "probate exception" to federal jurisdiction	
05/01/06	U.S. Sup. Ct. reverses and remands case to 9th Cir. to consider whether Vicki's C/C was core and Pierce's argument of issue preclusion based upon Tx probate court judgment	
06/01/06		Bellington Ins. Agcy, Inc. ("BIA") files Ch. 7
05/31/08		Trustee files preference and fraudulent transfer adversary proceeding against Executive Benefits Ins. Agcy ("EBIA"), Parelda, et al
03/19/10	9th Cir. determines that Vickie's C/C is non-core; reverses Dist. Ct. judgment and remands with	

	Stern v. Marshall (& Marshall v. Marshall)	Executive Benefits Ins. Agency v. Arkison
	instructions to enter judgment in favor of Pierce based upon preclusive effect of judgment entered in TX Probate Ct. suit (and findings of fact by jury and conclusions of law by court)	
05/27/10		Bkr. Ct. grants Trustee's MSJ against EBIA
08/03/10	Petition for Writ of Cert. filed (Petition granted 9/28/10)	
01/11	Oral argument (01/18/11)	On appeal, Dist. Ct. affirms Bkr Ct. judgment (01/24/11)
02/18/11		EBIA files Notice of Appeal
05/31/11		Appellant EBIA files its Brief
06/23/11	Sup. Ct. issues decision concluding Bkr. Ct. lacked constitutional authority to render judgment on Vickie's C/C and affirms 9th Cir.	
6/28/11		Trustee requests extension until 7/12/11 to file Appellee's Brief
07/22/11		EBIA files Mot'n to Vacate Judgment based upon lack of jurisdiction due to Stern decision
07/26/11		EBIA files Reply Brief raising lack of jurisdiction
10/13/11		Oral arguments before 9th Cir.
12/04/12		9th Cir. reverses Dist. Ct. and Bkr. Ct.
04/03/13		EBIA files Petition for Writ of Cert.
06/24/13		Petition Granted
01/14/14		Oral Arguments before Sup. Ct.

QUESTIONS PRESENTED

1. Whether litigation conduct reflecting an implied consent to the entry of final judgment by a bankruptcy judge may waive the right to have certain fraudulent-conveyance claims adjudicated only by an Article III court.

2. Whether a bankruptcy judge has statutory authority to issue proposed findings of fact and conclusions of law, subject to a district court's *de novo* review, regarding a fraudulent-conveyance claim filed by the estate against a noncreditor.

EXECUTIVE BENEFITS INSURANCE AGENCY v. PETER H. ARKISON, TRUSTEE
(ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.)

No. 12-1200

<p>EBIA (Petitioner)</p> <p>Position to be argued at IOC by Trey Monsour</p>	<p>Petitioner</p>	<p>Bankruptcy court lacked const. authority to enter final judgment.</p> <p>Purported consent cannot cure constitutional deficiency.</p> <p>If consent relevant, statute must authorize (puts parties on notice).</p> <p>Consent must be knowing and voluntary; failure to object is not sufficient.</p> <p>Defect in SMJ may be raised at any time. Failure to object analysis inapplicable</p> <p>The Bankruptcy Court lacks statutory authority to issue proposed findings of fact and conclusions of law in core proceedings.</p> <p>Statutory gap must be addressed by Congress, not the courts.</p> <p>Does not address standard of review.</p>
<p>ARKISON (Respondent)</p> <p>Position to be argued at IOC by Michelle Friery</p>	<p>Respondent</p>	<p>Bankruptcy courts have constitutional authority to enter final judgment in a private-rights controversy where there is consent.</p> <p>There is a long history of approving this practice, modern cases continue this tradition in the context of magistrate judges, and <i>Stern</i> confirms the Court's approval of this practice.</p> <p>The fatal flaw in contrary cases is lack of consent.</p> <p><i>Commodity Futures Trading Comm'n v. Schor</i>, 478 U.S. 833, is distinguishable because it should only apply to inter-branch encroachment on the separation of powers. Consensual bankruptcy</p>

		<p>court adjudication is not an impermissible delegation of judicial authority and otherwise satisfies <i>Schor</i>.</p> <p>Contrary arguments ignore that Stern’s holding was narrow (citing <u>Frazin</u> in the 5th Circuit as an example).</p> <p>Consent to adjudication by the bankruptcy court can be implied.</p> <p>The Court does not need to address whether a party consented when there was a de novo review of the decision in district court.</p> <p>Stern does not create a gap in section 157, because courts can treat the core matters, which cannot be treated as core constitutionally, as non-core matters.</p>
<p>(amicus) U.S. Solicitor General U.S. Dept. of Justice</p> <p>Position to be argued at IOC by Nancy Holley</p>	<p>Supports Respondent</p>	<p>Fraudulent conveyance claims are NOT outside the subject matter jurisdiction of the BK Ct and can be heard with consent of the parties.</p> <p>BK Judges are an extension and integral part of the justice system, not an attempt by Congress to remove Article III authority.</p> <p>If this Court holds the 1984 Act def. of FC causes of action as “core” to be unconstitutional, it should not invalidate the entire statute, but under the doctrine of “severability”, hold FC actions to be “non-core” allowing BK courts to render findings/conclusions for de novo review by the District Court until Congress has an opportunity to respond to <i>Stern</i> in a more comprehensive way.</p>
<p>(amicus) National Assn of Bankruptcy Trustees (NABT)</p> <p>Position to be argued at IOC by Vianey Garza</p>	<p>Supports Respondent</p>	<p>An unconstitutional core matter is deemed a non-core matter authorizing a BK court to submit FF/CL. Accordingly the BK court can still “hear” but cannot “determine” a case.</p> <p>Judicial economy and efficient case</p>

		<p>administration for the benefit of credits per the UST Handbook</p> <p>Allowing a BK court to submit FF/CL ensures that expert courts continue to hear fraudulent conveyance actions and prevents litigants from using the issue as a tactic aimed at increasing costs and delaying suit.</p>
<p>(amicus) National Assn of Chapter 13 Trustees (NACTT)</p> <p>Position to be argued at IOC by Vianey Garza</p>	<p>Supports Respondent</p>	<p>The right to be heard by an Art. III court is a personal right subject to waiver. Moreover, BK courts exist at the will of district courts, are expert courts and ensure efficient administration of estates. As a result, adjudication by the BK court does not implicate structural concerns protected by Art. III.</p> <p>There is no statutory requirement of express consent and implied consent is actual consent. Holding differently would waste judicial resources and cause sandbagging.</p> <p>Even if BK courts cannot “determine” the outcome of a fraudulent conveyance action on constitutional grounds, they retain the right to “hear” the case and thus submit FF/CL. This is consistent with legislative history.</p>
<p>(amicus) Kerr-McGee Corp.</p> <p>Position to be argued at IOC by Abbie Sprague</p>	<p>Supports petitioner; Defendant in another fraudulent transfer action</p>	<p>Bankruptcy court's entry of final judgment on the fraudulent transfer claim violated Article III and the bankruptcy court's consented-to adjudication of a fraudulent transfer claim is unconstitutional.</p> <p>The personal right to an Article III judge belongs to a class of trial rights that cannot be waived impliedly.</p> <p>Congress requires bankruptcy courts to adjudicate fraudulent transfer claims without regard to litigants' preferences; therefore, a court cannot reasonably infer a knowing, voluntarily, and intelligent relinquishment of a defendant's personal Article III right</p>

		<p>from the fact that he did not object.</p> <p>Litigants' personal rights under the vesting clause, if they are waivable, should be waived by implication only when Congress addresses the form that consent must take and delineates the circumstances in which consent effects a waiver. Because Congress has not done so here, implied consent is insufficient.</p> <p>Consent is irrelevant (cannot cure defect; if it could, needs statutory basis). <i>Schor</i> is wrong on waiver.</p>
<p>(amicus) Robert R. McCormick Foundation and the Cantigny Foundation</p> <p>Position to be argued at IOC Abbie Sprague</p>	<p>Supports petitioner; Charitable organization shareholders of the Tribune Company sued by creditors of the Tribune Company for fraudulent transfers</p>	<p>Whether bankruptcy judges are to play a role in core matters that must be adjudicated in the district court implicates important policy choices that are for Congress, not the courts to make that determination. Courts have no authority to anticipate how Congress may rework the Bankruptcy Code nor to implement extra-statutory stop gaps in the meantime.</p> <p>Distinguishes the role of magistrate judges from bankruptcy judges; argues that bankruptcy judges are unable to render findings of fact and conclusions of law even in core cases; claims all can and should be done by Article III judges with the assistance of magistrates.</p> <p>Bankruptcy judge has no statutory authority to submit findings of fact and conclusions of law</p> <p>Any utility of having a bankruptcy judge involved can be provided by a magistrate judge, who has statutory authority.</p> <p>There is no role for a bankruptcy judge in a fraudulent transfer case or other core proceeding justiciable only in an Article III court. The involvement of a bankruptcy judge in such cases would only add confusion, expense and delay</p>

		with no countervailing enhancement to the fairness or accuracy of the result.
(amicus) 20 Law Professors Position to be argued at IOC	Supports Respondent	Petitioner, like any litigant, is charged with knowledge of existing case law, e.g. caselaw pre- <i>Stern</i> holding that fraudulent conveyance litigation is a matter of private right. Petitioner's conduct indicates it know of its Article III rights and failed to raise same despite several opportunities to do so.
(amicus) 3 Law Professors,et.al. Position to be argued at IOC	Supports Respondent	Fraudulent conveyance claims are non-core permitting the bankruptcy court to enter proposed findings/conclusions only with express consent
(amicus) American Bar Assn Position to be argued at IOC by Matthew Cavanaugh	Supports Respondent	The holding of <i>Stern</i> should not be extended to eliminate the ability of litigants to consent to adjudications in non-Article III courts. Statistical support via caseload projections and unfilled Art. III benches will severely strain the judicial system should the current Bk Ct system not be authorized.
(amicus) FLA BAR (Business Section only) NOT TB ARGUED @ IOC	Claims to not support either party	Purely pragmatic in favor of affirming consent to preserve past determinations of the Bankruptcy Court; consent is sufficient; fraudulent transfer actions should not be treated as non-core
(amicus) NVIDIA Corp NOT TB ARGUED @ IOC	Claims to not support of either party, but a party in a fraudulent transfer appeal in the 9 th Circuit	Distinguishes the claims process from an adversary proceeding claiming consent is possible in the claims process only
(amicus) Florida Bar NOT ARGUED BY IOC	In support of neither	Arguing that Bankr judge should enter final decision on FTA for reasons of efficiency; no prior decision suggests otherwise; FTA intrinsically tied to claims resolution (if defendant files a POC);if no POC, still core as FTA essential to fundamental bankr. function, FTA is different in bankr as it is for benefit of all creditors (544 and 548); FTA fits within in rem nature of bankr; avoidance different than other state law actions; consent is sufficient

TITLE 28 — JUDICIARY AND JUDICIAL PROCEDURE
(Selected Provisions)

§ 151. Designation of bankruptcy courts

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) 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, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge 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 judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals^(*)

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

The following chart summarizes that analysis:

Court	§548 & §544	§547	St. Law	<i>Total</i>	Dist. Ct./ % Inc. ¹⁸
1st Cir. (D. Mass.)	147	370	126	643	11,996 <i>5.36%</i>
2d Cir. S.D. N.Y.)	1,029	5,951	221	7,201	40,078 <i>17.97%</i>
3d Cir. (D. Del.)	973	12,189	112	13,274	6,232 <i>213.00%</i>
4th Cir. (E.D. Va.)	185	1,221	70	1,476	13,418 <i>11.00%</i>
5th Cir. (N.D. Tex.)	188	731	82	1,001	23,018 <i>4.35%</i>
6th Cir. (E.D. Mich.)	360	1,656	92	2,108	23,368 <i>9.02%</i>

¹⁸ <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-june-2013.pdf&page=1/district-fcms-profiles-june-2013.pdf&page=1>; http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/FederalCourtManagementStatistics_Archive.aspx.

Court	§548 & §544	§547	St. Law	<i>Total</i>	Dist. Ct./ % Inc.
7th Cir. (N.D. Ill.)	402	1,842	71	2,315	38,912 <i>5.95%</i>
8th Cir. (D. Minn.)	363	1,257	32	1,652	15,885 <i>10.40%</i>
9th Cir. (C.D. Cal.)	1,138	3,112	227	4,477	59,273 <i>7.55%</i>
10th Cir. (D. Col.)	191	845	101	1,137	13,346 <i>8.52%</i>
11th Cir. (M.D. Fla.)	970	1,174	211	2,355	31,512 <i>7.47%</i>

The ABA's analysis necessarily underestimates the potential impact on the district courts for three reasons. *First*, a broad reading of *Stern* is likely to lead to matters in addition to fraudulent transfer, preference, and state law counterclaims being deemed outside of the bankruptcy court's constitutional authority to enter a final judgment. The Seventh Circuit, for example, recently held that a bankruptcy court could not constitutionally decide an action seeking a declaration against the debtor