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Litigating Fraudlent Transfer Cases

By Sullivan, Christopher*

Of particular importance in litigating fraudulent transfer cases are the many questions raised with respect to the proper court to hear, and the procedures to be followed in deciding, such claims. Fraudulent transfer claims have long been a key tool available to bankruptcy estates, trustees and receivers to recover assets: (a) transferred by debtors to hinder, delay, or defraud creditors; or (b) transferred for insufficient consideration at a time when the transferor was insolvent. In a bankruptcy case, fraudulent transfer claims can be brought based on transfers that are actually fraudulent under Section 548(a)(1)(A) of the Bankruptcy Code,[1] for transfers that are constructively fraudulent under Section 548(a)(1)(B), and under state law fraudulent transfer provisions through the authority provided by Section 544(b)(1).

The Supreme Court's decision in *Stern v. Marshall* held that Article III of the Constitution prohibits a bankruptcy court from exercising the authority to finally adjudicate a "state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."[2] Since then, fraudulent transfer defendants frequently attempted to remove such claims from the bankruptcy court to the district court in light of the uncertain scope of the *Stern* decision. The Supreme Court's recent decision last term in *Wellness Intern. Network, Ltd. v. Sharif*[3] upheld the authority of bankruptcy courts to enter final judgments in actions where the parties consent, and its 2014 decision in *Executive Benefits Ins. Agency v. Arkison*[4] confirmed that bankruptcy courts can hear and make proposed findings of fact and conclusions of law as to so-called "*Stern* claims" ("unconstitutional core claims").[5] With those two decisions, it is now far more certain how to determine the proper forum to hear fraudulent transfer claims and the procedures to be followed. The *Stern/Executive Benefits/Wellness* trilogy of cases provide a solid framework for deciding where fraudulent transfer claims should be heard and how such decisions should be reviewed. This article will discuss key factors that play a role, such as whether a party has or has not filed a claim in the bankruptcy case.

I. Claims Brought Against a Creditor Who Has Filed a Proof of Claim

In *Executive Benefits,* the Supreme Court left undisturbed the Ninth Circuit's holding below that "Article III does not permit a bankruptcy court to enter final judgment on a fraudulent conveyance claim against a noncreditor unless the parties consent.[6] The Ninth Circuit's holding (and presumably the Supreme Court's decision) was based on the conclusion that *Stern*, taken together with the Supreme Court's 1989 decision in *Granfinanciera, S.A. v. Nordberg*, compelled categorizing fraudulent transfer claims against noncreditors as outside the claims allowance process and thus beyond the constitutional limits where bankruptcy courts can enter final judgments.[7] In *Granfinanciera*, the Supreme Court held that a noncreditor retains a Seventh Amendment right to a jury trial on fraudulent transfer claim, reasoning that fraudulent transfer claims seeking a money judgment "are quintessentially suits at common law" when brought against a noncreditor and therefore outside the claims allowance process.[8] Thus, because bankruptcy courts lack the power to conduct a jury trial absent the parties' consent,[9] without such consent they cannot preside over a trial on a fraudulent transfer claim involving a noncreditor when there is a jury demand.

At first blush, the holdings in *Executive Benefits* and *Granfinanciera* seem to leave a question as to whether a bankruptcy court properly can exercise authority and enter a final judgment in a fraudulent transfer claim against a creditor who has filed a claim. Those cases hold that: (1) a bankruptcy court lacks constitutional authority to enter a final judgment in a fraudulent transfer case against a noncreditor; and (2) that such a claim gives rise to a constitutional right to a jury trial. Indeed, creditor-defendants in fraudulent transfer claims have vigorously pressed such arguments.[10] The issue is highlighted since fraudulent transfer claims involving tens of millions (or more) are often brought in bankruptcy court against creditor-defendants, some of whom may have relatively small claims. Upon close examination, however, because fraudulent transfer claims are necessary to resolve as part of the claims allowance process, the bankruptcy court is well within its authority to enter a final judgment on fraudulent transfer claims against creditor-defendants. For the same reason, there is no constitutional right to a jury trial on such claims.

A. The Bankruptcy Court's Authority to Enter a Final Judgment Against Creditor Defendants

Once a creditor files a claim in a bankruptcy proceeding, the claim becomes part of the claims allowance process governed by, among other provisions, Section 502. As to fraudulent transfer claims in particular, "the court shall disallow any claim from any entity from which property is recoverable" as a fraudulent transfer.[11] Thus, a creditor's claim cannot be resolved until after the fraudulent transfer claim is determined first.

Despite the questions initially raised by *Stern*, its holding explicitly was intended to be "narrow." In *Stern*, the Court held that "Congress, in one isolated respect" ran afoul of the constitutional separation of powers principles under Article III by attempting to give bankruptcy courts

"authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."[12] In essence, the separation of powers concern at issue in *Stern* boils down to the following: "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[13] The state law claims at issue in *Stern* did not satisfy this standard. In particular, the Supreme Court observed: "there was never any reason to believe that the process of adjudicating [the] proof of claim [at issue in *Stern*] would necessarily resolve [the bankruptcy estate's] counterclaim [for tortious interference]," and the bankruptcy estate's "claim [for tortious interference] is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding."[14]

The state law counterclaim was, therefore, fundamentally different than the claims at issue in the Court's earlier decisions in *Katchen v. Landy*[15] and *Langenkamp v. Culp.*[16] In those cases, the Supreme Court held that where a creditor filed a claim, no right to a jury trial attached on fraudulent transfer and preferential transfer claims filed against the creditor-defendants. As noted by *Stern*, the Supreme Court's key principle underpinning the *Katchen* and *Langenkamp* decisions was that the bankruptcy court's exercise of power was proper over avoidance claims that would "necessarily be resolved in the claims allowance process."[17] *Langenkamp* was decided after Granfinanciera and therefore confirmed that, post-Granfinanciera, the distinction continues between claims resolved in the claims allowance process and those that are not.

The Ninth Circuit, as well, in its comprehensive treatment of the issues in *Executive Benefits*, focused extensively on the fundamental difference between (a) *Katchen* and *Langenkamp*, where no jury trial right was held to apply to the fraudulent transfer claim at issue, and (b) *Granfinanciera*, where the jury trial right did attach, and *Stern*, where Article III was applicable. The Ninth Circuit expressly stated: "the dispositive distinction between the claims in *Stern* [(and *Granfinanciera*)] and *Katchen* is that in *Katchen*, the trustee's [] action 'would necessarily be resolved in the claims allowance process."[18]

Although *Stern* does not specifically elaborate on the meaning of the phrase "necessarily be resolved in the claims allowance process," fraudulent transfer claims under Sections 544 and 548 should satisfy this standard in light of the plain text of 11 U.S.C. § 502(d). As held in one bankruptcy case, "The mandatory language 'shall' [in section 502(d)] makes it necessary to resolve the issues referred to in the statute unless the party filing a proof of claim either turns over the property or pays for it."[19] In other words, issues regarding a creditor's liability for fraudulent transfers necessarily must be decided before or in connection with a bankruptcy court's ruling on whether to disallow that creditor's claim under Section 502(d). Even post-*Stern*, therefore, a bankruptcy court may fully and finally adjudicate fraudulent transfer and preference claims against a creditor who has filed a proof of claim without crossing any constitutional separation of powers boundaries.

The Supreme Court's discussion in *Stern* of its earlier *Katchen* and *Langenkamp* decisions cements this conclusion. In *Katchen v. Landy*, the Supreme Court "permitted a bankruptcy referee acting under the Bankruptcy Acts of 1898 and 1938 (akin to a bankruptcy court today) to exercise what was known as 'summary jurisdiction' over a voidable preference claim brought by the bankruptcy trustee against a creditor who had filed a proof of claim in the bankruptcy proceeding."[20] The creditor in *Katchen* argued that the "preferen[tial transfer at issue in that case] should be resolved through a 'plenary suit' in an Article III court," but the Supreme Court "concluded that summary adjudication in bankruptcy was appropriate, because it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue."[21] "There was no question that the bankruptcy referee could decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim" under the version of Section 502(d) then in effect.[22] Thus, "[t]he plenary proceeding the creditor sought could be brought into the bankruptcy court because the same issue arose as part of the process of allowance and disallowance of claims."[23] In other words, one of the consequences of filing the proof of claim "was resolution of the preference issue as part of the process of allowing or disallowing claims, and accordingly there was no basis for the creditor to insist that the issue be resolved in an Article III court." For purposes of this analysis, "of course it makes no difference…whether the bankruptcy trustee urges only a [claim] objection or also seeks affirmative relief."[24]

Langenkamp v. Culp similarly supports the conclusion that filing a proof of claim necessarily brings resolution of fraudulent transfer and preference actions within the claims allowance process and, by extension, within the constitutionally permissible realm of bankruptcy court authority. In *Stern*, the Supreme Court quoted *Langenkamp's* explanation "that a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because then 'the ensuing preference action by the trustee becomes integral to the restructuring of the debtor creditor relationship."[25] "If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does not 'become part of the claims-allowance process' subject to resolution by the bankruptcy court." In essence, Langenkamp confirms the proposition "that by filing a claim against a bankruptcy estate[,] the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power."[26]

Moreover, *Langenkamp* clarified the scope of the Court's then recent, prior *Granfinanciera S.A. v. Nordbeg* opinion, making clear that the constitutional limits in *Granfinanciera* do not apply where a creditor has filed a proof of claim: "In *Granfinanciera* we recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction."[27]

When read together with *Stern*, the *Katchen* and *Langenkamp* decisions bring the "necessarily be resolved in the claims allowance process" standard in *Stern* into focus. Given the reaffirmation of these cases in *Stern* and the unambiguous text of Section 502(d), it should be evident that where a creditor has filed a proof of claim, fraudulent transfer and preference claims asserted against that creditor under 11 U.S.C. §§ 544, 547, 548, and 550 "necessarily" become part of the claims allowance process within the meaning of *Stern*. As such, the "narrow" and "isolated" constitutional separation of powers concern identified in Stern simply does not apply to such claims.

Two circuits essentially have adopted this reading of *Stern* as it applies to fraudulent transfer claims against creditors who have filed claims. In

a 2013 post-*Stern* decision, *Peterson v. Somers Dublin Ltd.*,[28] the Seventh Circuit came to the same conclusion outlined above for basically the same reasons. The Seventh Circuit held that, "The current dispute comes within a bankruptcy judge's authority, notwithstanding Stern, because all of the defendants submitted proof of claims as . . . creditors and thus subjected themselves to preference recovery and fraudulent conveyance claims by the Trustee."[29] The Seventh Circuit's conclusion was based on a citation to Section 502(d) and its observations that the "Supreme Court [so] held in *Katchen* [] and *Langenkamp*," and that "Stern stated that its outcome is consistent with those decisions."[30]

Similarly, in *Onkyo America Inc. v. Global Technovations, Inc. (In re Global Technovations, Inc.)*,[31] the Sixth Circuit held that, "It is crystal clear that the bankruptcy court had constitutional jurisdiction to adjudicate [a fraudulent transfer claim] because 'it was not possible . . . to rule on [the creditor's] proof of claim without first resolving the fraudulent transfer issue. *Stern*, 131 S.Ct. at 2616 [citations omitted]." The Sixth Circuit noted that the debtor's defense against the proof of claim was the fraudulent transfer claim against the creditor.[32] This defense, of course, arises out of Section 502(d) and applies in all cases where the debtor pursues a fraudulent transfer claim against a creditor who filed a proof of claim.

The Sixth Circuit went on to observe that "[w]hat is not crystal clear is whether the bankruptcy court had jurisdiction under *Stern*" to make findings that may not have been necessary to determine the creditor's proof of claim.[33] The Court of Appeal then further held that, "We do not believe that Stern requires a court to determine, in advance, which facts will ultimately prove strictly necessary to resolve a creditor's proof of claim."[34] Findings that the bankruptcy court reaches as part of its resolution of the fraudulent transfer defense are within the authority of the bankruptcy court to make. Under the sound logic of the *In re Global Technovations, Inc.* decision, because it is necessary to resolve a fraudulent transfer defense to resolve a creditor's proof of claim, the bankruptcy court is within its constitutional authority, as refined by *Stern*, to enter a final judgment on the affirmative claim for relief that is part and parcel of the fraudulent transfer issues raised by the Section 502(d) defense.

B. A Creditor Who Filed a Claim Loses the Right to a Jury Trial With Respect to a Debtor's Fraudulent Transfer Action

For the same reasons outlined above, a creditor who has filed a proof of claim loses his or her right to a jury trial with respect to a debtor's fraudulent transfer claim. As described by the Ninth Circuit in *Executive Benefits*, "*Stern* fully equated bankruptcy litigants' Seventh Amendment right to a jury trial in federal bankruptcy proceedings with their right to proceed before an Article III judge."[35] A creditor who has filed a proof of claim subjects himself or herself to the claims allowance process. Under *Katchen* and *Langenkamp*, the claims allowance process is within the authority of the bankruptcy court to decide and does not give rise to a right to a jury trial. *Stern* described in detail how its decision was consistent with the *Katchen/Granfinanciera/ Lagenkamp* precedents.[36] In sum, the long familiar rule that there is no right to a jury trial on a debtor's fraudulent transfer action if the creditor has filed a proof of claim still stands on solid ground.

C. A Bankruptcy Court's Final Judgment Against a Creditor Who Has Filed a Proof of Claim is Subject to the Standard Appellate Process

As a practical matter, one of the most significant results of the bankruptcy court entering a final judgment is that such a final judgment is subject to the normal process for appellate review of bankruptcy court appeals from "final judgments, orders and decrees" under 28 U.S.C. § 158(a). The appeal is then governed by Federal Rules of Bankruptcy Procedure ("FRBP") Rules 8001 – 8020. Factual findings are reviewed under the "clearly erroneous" standard of review as set forth in FRBP Rule 8013 and "due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Conclusions of law are reviewed *de novo*. The briefing process for bankruptcy appeals generally mirrors the traditional appellate process.

In contrast, of course, when the bankruptcy court lacks authority to enter a final judgment, it may only issue proposed findings of fact and conclusions of law. These are presented to the district judge for entry of a final judgment "after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters as to which any party has timely and specifically objected" pursuant to 28 U.S.C. § 157(c)(1). The review of proposed findings of fact and conclusions of law is governed by FRBP Rule 9033. As discussed below, review of findings of fact is *de novo* "upon the record, or after additional evidence, of any portion" of the proposed findings as to which there is a specific objection made.[37] The briefing is limited by rule to the written objections and a response, with shorter time periods than in the usual appellate review process.

II. Fraudulent Transfer Claims Brought Against Parties that Are Not Creditors

A. Determining the Proper Forum

The Supreme Court's 2015 decision in *Wellness*, coupled with its 2014 decision in Executive Benefits, reaffirms the essential underpinnings of the "division of labor in the current statute." Indeed, in *Wellness*, the Supreme Court expressly noted the importance of bankruptcy judges (and magistrate judges) to the work of the federal courts: "[I]t is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind to a halt."[38] The Court emphasized the importance of practical attention to substance rather than form in considering the proper forum to hear claims related to bankruptcy proceedings. The Court also noted that the close relationship of Article III courts to bankruptcy judges diminishes concerns that leaving *Stern* claims for decision in the bankruptcy courts usurps the role of Article III courts.[39]

The Court recognized the basic value of the effort by Congress to "supplement[] the capacity of the district courts through the able assistance of bankruptcy judges. So long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers."[40] The Wellness decision thus builds on the recognition in *Executive Benefits* that the process for handling non-core claims by submitting proposed findings of fact and conclusions of law "may be applied naturally to *Stern* claims."[41] With respect to fraudulent transfer claims in particular, the Court in *Executive Benefits* noted the inherent relationship between the bankruptcy case as a whole and fraudulent transfer claims, which "[a]t bottom . . . assert that property that should have been part of the bankruptcy estate and therefore available to creditors pursuant to Title 11 was improperly removed."[42]

The two recent decisions should go far in reassuring district courts and litigants, as well as bankruptcy courts, that, absent unusual

circumstances, fraudulent transfer claims remain a prime example of the type of labor that is appropriate to rest on the shoulders of the bankruptcy courts, rather than Article III judges, in the first instance.[43] Thus, even when there is a fraudulent transfer claim against a noncreditor, the cases presumptively should be adjudicated in the bankruptcy court before being sent to the district court for entry of a final judgment.

In cases in which there is no jury demand, *Executive Benefits* teaches that "these Stern claims fit comfortably within the category of claims governed by section 157(c)(1) [thus permitting] the Bankruptcy Court . . . to follow the procedures required by that provision, i.e., submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*."[44] When such claims are filed in the bankruptcy courts, they will remain there unless there is a motion to withdraw the reference in accordance with 28 U.S.C. § 157(d). Withdrawal can be sought on mandatory or permissive grounds. It is now established that mandatory withdrawal of the reference is not required as a result of some statutory "gap," as had been argued often in the wake of *Stern*.[45]

That leaves permissive withdrawal of the reference as the option for removing fraudulent transfer claims filed in the bankruptcy court. Permissive withdrawal of the reference requires that it be for "cause shown." Although Section 157(d) does not define "cause," the following factors help guide whether sufficient cause exists for permissive withdrawal of the reference: (1) the efficient use of judicial resources; (2) the delay and costs to the parties; (3) the uniformity of bankruptcy administration; (4) the prevention of forum shopping; and (5) other related factors.[46] "Permissive withdrawal is permitted only in a limited number of circumstances."[47] As such, courts "strictly construe the section 157(d) factors so that it does not provide an 'escape hatch' out of bankruptcy court."[48]

It should be the rare case in which sufficient cause will exist to remove fraudulent transfer claims from bankruptcy courts under ordinary circumstances. Many courts throughout the country have recognized that all of the factors generally will weigh in favor of keeping the case with the bankruptcy courts and thus taking advantage of the bankruptcy courts knowledge of the underlying case, promoting uniformity with respect to multiple claims, the specialized expertise of the judges in bankruptcy law, and the judicial efficiency to be gained by keeping these cases on the bankruptcy court's docket.[49] While there was initial uncertainty in the immediate aftermath of Stern about the wisdom of keeping the cases in the bankruptcy forum,[50] the established recent trend is to maintain fraudulent transfer cases in the bankruptcy courts.[51]

Even in cases where a jury demand has been made and thus the case may ultimately be removed to the district court for the jury trial, permissive withdrawal of the reference generally should be delayed until discovery is complete, all dispositive motions have been ruled upon, and the case is ready for trial. As held by the Ninth Circuit in *In re Healthcentral.com,* "[a] Seventh Amendment jury trial in the district court does not mean the bankruptcy court must instantly give up jurisdiction and that the action must be transferred to the district court."[52] To the contrary, as the Chief District Judge in the Eastern District of California also recently held, "[a]llowing the bankruptcy court to handle the discovery issues, settlement conferences, and motion practice is the most efficient outcome" and best ensures that the efficient division of labor between district courts and bankruptcy courts is maintained.[53] Indeed, withdrawing the reference simply because there is a jury demand creates a serious risk of inconsistent results, since many bankruptcy cases involve multiple fraudulent actions and most are likely to be filed against creditors, in which no jury trial right attached, so most actions would likely be heard in the bankruptcy courts.

Many of the concerns with keeping fraudulent transfer cases raised in the aftermath of *Stern* arose out of the prospect that *de novo* review by an Article III would require the functional equivalent of a complete "do over."[54] As discussed next, however, the nature of the *de novo* review of proposed findings of fact and conclusions of law in fraudulent transfer actions against noncreditors where there has been no jury demand does not create any need for a complete rehash of the underlying proceedings, but is a targeted, focused, and flexible review process. Similarly, where there is a valid jury demand against a noncreditor the review process for any case dispositive rulings by the bankruptcy court would be the substantially the same as the review for other proposed findings of fact and conclusions of law by bankruptcy courts. With respect to any non-dispositive case rulings in jury trial cases, the district court should retain great flexibility to decide which, if any, non-dispositive case rulings by the bankruptcy court to review before submitting any remaining claims to a jury.

B. The Review of Bankruptcy Court Decisions on Claims Brought Against Parties that Are Not Creditors.

The *de novo* review of proposed findings of facts and conclusions of law outlined in 28 U.S.C. §157(c)(1) is statutorily contained to a review of "those matters to which any party has timely and specifically objected." It thus does not require that a district court conduct a rehearing or broadly reconsider all matters that were before the bankruptcy court from scratch. Rather, the review proceeds in accordance with FRBP Rule 9033(a) with a targeted focus on a party's "written objections [that] identify the specific grounds for such proposed findings or conclusions objected to and state the grounds for such objection." The Rule is modelled after Federal Rule of Civil Procedure ("FRCP") Rule 72, which governs the review of proposed findings of fact and conclusions of law submitted to district courts by magistrate judges.[55]

In the 1980 decision of *United States v. Raddatz*, the Supreme Court considered whether the procedure in FRCP Rule 72 comported with due process.[56] The Court began by stating that, "It should be clear that on these dispositive motions [the procedures] call[] for a *de novo* determination, not a *de novo* hearing." The Court noted that the statute governing proposed findings of fact and conclusions of law submitted by magistrate judges to the district court, the language of which is tracked in Section 157(c)(1), "grants the district judge the broad discretion to accept, reject or modify the magistrate's proposed findings."[57] The Court recognized the value to the district courts in making use of the proceedings already had and the assembling and analysis of facts presented for review. The Supreme Court held that the district judges act well within their broad discretion "to give such weight as [their] merit commends and the sound discretion of the judge warrants[.] [T]hat delegation does not violate Article III so long as the ultimate decision is made by the district court."[58]

The *Raddatz* decision established that there is no general duty on the part of district courts either to conduct new *de novo* hearings or to comb exhaustively through the underlying record to conduct a *de novo* review of the bankruptcy court's recommendations. Rather, much as is the case with traditional appellate review, the reviewing court's focus will be driven by the parties' contentions of error and the support presented by the parties from the record to support or rebut the contentions While the district court reviewing proposed findings of fact and conclusions of law may request "additional evidence" or "recommit the matter to the bankruptcy judge with instructions," the district judge

retains great flexibility in using his or her judgment to evaluate the need for more evidence and choosing the proper course. The Courts of Appeal will review the district judge's decisions in accepting, rejecting, or modifying the proposed findings on the merits and presume that the district court conducted an appropriate analysis of the record before ruling on the recommendations of the bankruptcy court.[59]

In his concurring opinion in *Radditz*, Justice Blackmun emphasized the benefits from the two step review of proposed findings of fact and conclusions of law to accurate decision-making. As the Justice astutely observed, eliminating the first level of decision-making would undermine, not enhance, the procedural protections and efforts to get to the right results.[60] For decades, the process by bankruptcy courts of submitting proposed findings of fact and conclusions of law to district courts has improved the efficient use of judicial resources, relieved overburdened district courts of their work, and resulted in a system that works well. As the dust has settled after Stern, it should be considerably more apparent that the specter of having to conduct proceedings twice in order to conduct *de novo* review of proposed findings of fact and conclusions of law was overblown. The system established by Section 157(c)(1) and FRBP Rule 9033, and related rules, does not result in inefficiencies, extra work, or unnecessary duplication.

In fraudulent transfers cases against a noncreditor in which there is a jury demand and the case is left in the bankruptcy court until it is ready for trial, questions may arise with respect to both rulings on case-dispositive motions (i.e., motions for summary judgment or dismissal as a matter of law) and with regard to non-case dispositive motions ruled upon by the bankruptcy court in the course of getting the matter ready for trial. The question should be easily answered with respect to dispositive motions – those rulings should be submitted as proposed findings of fact and conclusions of law following the procedures in Section 157(c)(1) and FRBP Rule 9033 in accordance with the holding in *Executive Benefits.*

The decision on how a district court should handle non-dispositive rulings when the case is withdrawn as ready for trial, especially rulings on summary adjudication motions that resolve some, but not all claims, is more difficult. One option would be to proceed to a jury trial on all of the remaining claims and consider the non-dispositive rulings once there is a final judgment. Indeed, in a recent district court case, the defendants argued that the district court had no authority to rule on partial summary judgment orders of the bankruptcy court – that such orders could only be reviewed on direct appeal to the Court of Appeal after there was a final judgment entered.[61] The district court rejected the argument, finding that the bankruptcy court's rulings granting summary adjudication of entire claims should be considered as final dispositions of those claims and treated as proposed findings of fact and conclusions of law.[62] Those rulings would be considered *de novo* before the jury trial on the remaining claims. On the other hand, the district court declined to review *de novo* pre-trial rulings that were not dispositive of entire claims.[63]

The district court's approach is consistent with the general rule for non-dispositive motions set forth in Federal Rule of Civil Procedure, Rule 54(b). Rule 54(b) provides that "any order or decision . . . that adjudicates fewer than all of the claims . . . may be revised at any time before entry of a [final] judgment." When the bankruptcy court has certified the case as ready for trial and the case is withdrawn to the district court, the district court will be in the best position to judge how the trial should proceed before the jury and what issues and prior rulings are significant enough to merit *de novo* review before the trial is conducted. The parties should be provided an opportunity to specify which, if any, pre-trial rulings should be reviewed and the reasons for their position. The other party should be afforded an opportunity to oppose the request to re-consider pre-trial rulings. With respect to non-dispositive rulings that dispose of entire causes of action or resolve the claims as to some, but not all parties, a proper default rule may be to consider all such rulings as proposed findings of fact and conclusions of law subject to *de novo* review.[64] With respect to those rulings that are reviewed, the review should be conducted in accordance with FRBP 9033.

Conclusion

The *Stern* decision caused a lot of chaos, confusion, and procedural maneuvering by litigants. Recent case law, however, provides substantial guidance. The procedures for litigating fraudulent transfer claims to final judgment both in and out of bankruptcy courts should develop further and with more predictability going forward.

1 Unless noted otherwise, statutory citations will be to the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*.
2 131 S. Ct. 2594 (2011).
3 135 S. Ct. 1932 (2015).
4 134 S. Ct. 2165 (2014).
5 In particular, the term "Stern claims" refers to those claims that Congress designated as "core" proceedings under 28 U.S.C. § 157(b)(2), but as to which bankruptcy courts lack constitutional authority to enter a final judgment under the holding of *Stern. Executive Benefits* held that bankruptcy courts can hear such "unconstitutional core claims" and issue proposed findings of fact and conclusions of law in the same manner that statutory "non-core" proceedings are treated under 28 U.S.C. § 157(c)(1).
6 134 S. Ct. 2169 (quoting *In re Bellingham Insurance Agency, Inc.,* 702 F.3d 553, 565 (9th Cir. 2012). Interestingly, the Supreme Court did not actually reach the issue, but instead "assume[d] without deciding that the fraudulent claims in this case are Stern claims [(claims that are designated by statute as core, but that as to which the bankruptcy court cannot constitutionally enter a final judgment)]." 134 S. Ct. at 2174.

7 See 702 F.3d at 561.

8 492 U.S. 33, 56 (1989).

9 28 U.S.C. § 157(e).

10 See, e.g., *In re Heller Ehrman LLP*, 464 B.R. 348, 358 (N.D. Cal. 2011); *Kelly v. J.P. Morgan Chase & Co*., 464 B.R. 854, 858 (D. Minn. 2011).

11 11 U.S.C. § 502(d). "Entity" includes any person. 11 U.S.C. § 101(15).

12 131 S. Ct. at 2619-20.

13 *Id*. at 2618.

14 *Id*. at 2617-18.

15 86 S. Ct. 467 (1966).

16 498 U.S. 42, 111 S. Ct. 330 (1990).

17 131 S. Ct. at 2616-17 (internal quotations and citations omitted).

18 702 F.3d at 564.

19 *Doctors Hosp. of Hyde Park,* —-BR—-, 2013, WL 5524696, at *20-21 (emphasis added).

20 *Stern*, 131 S. Ct. at 2616 (citing *Katchen v. Landy*, 86 S. Ct. 46 (1966)).

21 *Stern*, 131 S. Ct. at 2616.

22 *Stern*, 131 S. Ct. at 2616; see *Katchen*, 86 S. Ct. at 473.

23 *Stern*, 131 S. Ct. at 2616.

24 *Katchen*, 86 S. Ct. at 477.

25 *Stern*, 131 S. at 2617 (quoting *Langenkamp*, 498 U.S. at 44).

26 *Langenkamp*, 498 U.S. at 44.

27 *Id*. at 42, 44-45 (internal quotations and citations omitted).

28 729 F.3d 741, 747 (7th Cir. 2013).

29 *Id*.

30 *Id*. 747 (citations omitted).

31 694 F.3d 705, 722 (6th Cir. 2012).

32 *Id*.

33 *Id*.

34 *Id*.

35 702 F.3d at 563.

36 *Stern*, 131 S. Ct. at 2616-18; *see also Peterson*, 729 F.3d at 747.

37 FRBP 9033(d).

38 135 S. Ct. at 1938-39.

39 *Id*. at 1944-45.

40 *Id*. at 1946.

41 134 S. Ct. at 2173.

42 *Id*. at 2174.

43 *See Wellness*, 135 S. Ct. at 1946.

44 134 S. Ct. at 2174.

45 *See, e.g., In re Heller Ehrman LLP*, 464 B.R. 348, 358 (N.D. Cal. 2011); In re Blixeth, 2011 Bankr. LEXIS 29533, 2011 WL 3274042 (Bankr. D. Mont. 2011).

46 *See, e.g., In re Canter*, 299 F.3d 1150, 1154 (9th Cir. 2002) (quoting *Sec. Farms v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers*, 124 F.3d 999, 1008 (9th Cir. 1997)).

47 *E.g., In re The Mortgage Store, Inc.*, 464 B.R. 421, 428 (D. Haw. 2011) (quoting *Hawaiian Airlines,* 355 B.R. at 223).

48 *In re Don's Making Money*, LLP, No. CV-07-319-PHX-MHM, 2007 WL 1302748, at *7 (D. Ariz. May 1, 2007) (internal quotations and citations omitted). The movant, moreover, bears the burden of showing that these factors constitute sufficient cause to withdraw the reference. *See, e.g., In re First Alliance Mortgage Co.*, 282 B.R. 894, 902 (C.D. Cal. 2001).

49 *E.g., In re Healthcentral.com*, 504 F.3d 775, 788 (9th Cir. 2007).

50 See, e.g., In re Bearingpoint, Inc., 453 B.R. 486, 488 (Bankr. S.D.N.Y. 2011) (bankruptcy court declined to hear state law claims as required in confirmation plan due to concerns raised by Stern).

51 *See, e.g., In re Rhodes Companies, LLC,* No. 2:12-CV-01272-MMD, 2012 WL 5456084, at *6 (D. Nev. Nov. 7, 2012) ("Judicial economy militates in favor of allowing the bankruptcy court to proceed with pre-trial matters in cases involving fraudulent conveyance claims."); *In re Heller Ehrman LLP*, 464 B.R. 348, 358 (N.D. Cal. 2011) (denying motion to withdraw the reference and noting that "several other district courts have come to the same conclusion, focusing on the efficiency of the bankruptcy system as a whole and the specific knowledge of bankruptcy judges as to federally-created fraudulent conveyance actions").

52 504 F.3d at 788.

53 *Bell v. Lehr,* 2014 WL 526406, at *2 (E.D. Cal. Feb. 7, 2014).

54 *See Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld, LLP (In re Coudert Brothers LLP)*, 462 B.R. 457, 472 (S.D.N.Y. 2012). [check cite]

55 FRBP 9033, Notes of Advisory Committee on Rules—1987.

56 447 U.S. 667, 669 (1980).

57 *Id.* at 680-81.

58 *Id.*

59 *See Home Federal Savings & Loan Ass'n v. Dillon Construction Company, Inc. (In re Dillon Construction Company, Inc.)*, 922 F.2d 495, 497 (8th Cir 1982); *Vekamaf Holland B.V. v. Pipe Benders, Inc.,* 671 F.2d 1185, 1886 (9th Cir. 1982).

60 447 U.S. at 438-39 (Blackmun, J., concurring).

61 *Schoenmann v. Torchia (In re Synergy Acceptance Corp.)*, 2015 WL 3958155 *3 & n.6 (N.D. Cal. June 29, 2015).

62 *Id*. at *4.

63 *Id*.

64 See, e.g., *id.; In re Rady*, 138 B.R. 608, 610 (D. Nev. 1992).

Christopher D. Sullivan *is managing partner of the San Francisco office of Diamond McCarthy LLP. He currently represents Ms. Beverly McFarland as litigation counsel for her as Chapter 11 Trustee in the IMG/Wannakuwatte Ponzi scheme case in the Eastern District of California, where he is prosecuting a number of fraudulent transfer actions.*