



Office of the Attorney General
Washington, D. C. 20530

January 19, 2012

The Honorable John A. Boehner
Office of the Speaker
United States House of Representatives
Washington, DC 20515

Re: In re Bellingham, No.11-35162 (9th Cir.)

Dear Mr. Speaker:

In accordance with 28 U.S.C. 530D, I write to inform you that the Department of Justice is filing today an amicus brief in the above-captioned case acknowledging that the federal statute allowing district courts to refer fraudulent-conveyance claims to bankruptcy judges for final decision, 28 U.S.C. 157(b)(2)(H), is unconstitutional in certain applications. The Department has determined that the Supreme Court's recent decision in Stern v. Marshall, 131 S. Ct. 2594 (2011), compels that conclusion.

In this case, a bankruptcy trustee brought a fraudulent-conveyance suit under 11 U.S.C. 548(a)(2), along with a similar claim under state law, seeking recovery for the bankruptcy estate of assets allegedly transferred to a successor corporation shortly before the debtor declared bankruptcy. The bankruptcy court entered summary judgment for the trustee, pursuant to its statutory authority to "hear and determine" certain "core" bankruptcy proceedings, including "proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. 157(b)(1), (b)(2)(H). The defendant appealed to the district court, which affirmed the bankruptcy court's judgment.

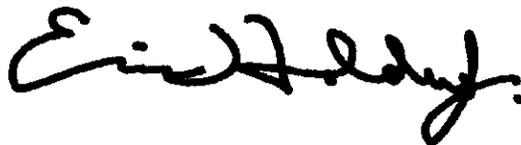
While the defendant's appeal from the district court to the Ninth Circuit was pending, the Supreme Court decided Stern, which held that Article III of the Constitution precluded a bankruptcy court from entering final judgment on a state tort-law counterclaim brought by a debtor against a creditor who had filed a claim in the bankruptcy proceeding. The defendant in this case then filed a motion with the Ninth Circuit requesting that the bankruptcy court's judgment in the fraudulent-conveyance suit be vacated on Article III grounds. Following oral argument, the Ninth Circuit issued a public invitation for amicus briefs on two questions: (1) "Does Stern v. Marshall, 131 S. Ct. 1594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance?"; (2) "If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering final judgment?" The Ninth Circuit originally requested briefs by December 5, 2011, but the Department of Justice received an extension through January 19, 2012.

The amicus brief to be filed today by the Department of Justice acknowledges that, under Stern, bankruptcy courts lack authority to issue final judgments in some fraudulent-conveyance suits. The decision in Stern explains that Article III limits bankruptcy courts to adjudication only of matters that can be characterized as concerning “public rights.” 131 S. Ct. at 2611. Although the “public rights exception” to Article III is not well-defined in the Court’s case law, the Court cited its prior decision in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), for the proposition that “a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding” falls outside that exception. Stern, 131 S. Ct. at 2614. The Department thus reads Stern as precluding bankruptcy judges from issuing final decisions in at least some fraudulent-conveyance suits.

The Department’s brief emphasizes, however, that there are circumstances in which a bankruptcy court could potentially enter final judgment on a fraudulent-conveyance claim. For example, a case in which a fraudulent-conveyance action is brought against a defendant who has himself filed a claim in the bankruptcy proceeding would not be controlled by Stern and Granfinanciera. See Stern, 131 S. Ct. 2617-2618; Langenkamp v. Culp, 498 U.S. 42 (1990) (per curiam). The Department also takes the position that the parties could consent to final decision by the bankruptcy court of a fraudulent-conveyance claim, and that a defendant can waive his right to final decision by an Article III court by failing to assert it in a timely fashion. See 28 U.S.C. 157(c)(2); Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 848-850 (1986). Finally, in response to the second question on which the Ninth Circuit has solicited amicus input, the Department’s brief contends that even if a bankruptcy court cannot issue final judgment on a fraudulent-conveyance claim, it nevertheless may issue a report and recommendation to a federal district court. See 28 U.S.C. 157(c)(1); Stern, 131 S. Ct. at 2620.

The Department will send you a final copy of the brief once it is filed. Please do not hesitate to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Holder, Jr.", written in a cursive style.

Eric H. Holder, Jr.
Attorney General