TWO AND A HALF HURDLES BETWEEN EUROZONE DEBTS AND U.S. COURTS:
How Recent Distressed Foreign Deals Could Soon Be Unwound Domestically

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I. Introducing the Two and a Half Hurdles from the Eurozone to U.S. Courts.

The recent financial unrest in Europe has created significant distressed opportunities. Buyers with free capital have been able to obtain significant quantities of distressed assets at free-fall pricing. In a typical arms-length transaction, these buyers would leave without further concern for the viability of their counter-parties. But these parties may soon find themselves reacquainted with their sweetheart deals if their counter-parties fail to weather financial depressions and seek bankruptcy protection before the waves subside.

When storms settle and economies improve, assets whose values were temporarily distressed often experience a sudden rebound in value. Such price fluctuations create incentive for counterparties to reclaim assets that once seemed like broken glass, but now appear to be crown jewels. Fraudulent transfer laws, which date back to the Statute of Elizabeth in the 16th century,[1] allow courts to unwind transactions after the fact. Before June 2011, U.S. bankruptcy courts regularly used fraudulent transfer provisions in the U.S. Bankruptcy Code (the Code)[2] to reach domestic transactions with little fanfare.[3] But recent shifts in domestic jurisprudence may affect U.S. bankruptcy courts' ability to exercise both jurisdiction and constitutional authority over domestic and *foreign* transfers.

This article discusses the link between the debt crisis in the Eurozone and a potential flood of future litigation to unwind foreign transactions in U.S. courts. Specifically, this article

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1 13 Eliz., c. 5 (1571) (Eng.).

2 11 U.S.C. §§ 544(b), 548 (2006).

3 Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp.), 456 B.R. 318, 320-21 (2011) ("For over twenty-five years, my colleagues and I have . . . entered countless orders as final *without a second thought* about the legitimacy . . . .") (emphasis added).

will address the two and a half hurdles litigants must overcome to reach foreign transactions with U.S. law. Part II will briefly describe how economic forces created these distressed opportunities in the Eurozone. Part III will discuss how improving global economies create incentives for fraudulent transfer actions in U.S. courts and analyze a recent example. Part IV will outline how the 2005 Amendments to the Code, an ensuing circuit split over extraterritorial jurisdiction, and the Supreme Court's watershed decision in *Stern v. Marshall* have created the two and a half hurdles. Finally, Part V will offer winning arguments for litigants to overcome or to defend the hurdles to U.S. adjudication.

II. Reason for Concern: Distressed Opportunities in the Eurozone.

A. Economic Woes in the Eurozone.

As a harbinger to the 2008 financial crisis, Warren Buffet was famously quoted as saying: "It's only when the tide goes out that you learn who's been swimming naked."[4] The financial tides accompanying the aftershocks of the 2008 financial depression uncovered considerable concern for the bare balance sheets across the Eurozone. A severe debt crisis stemming from the banking and property bubbles bursting led to liquidity constraints, defaults, and downgrades across the Eurozone; most notably in Ireland, Portugal, and Spain.[5] Additionally, persistent fiscal profligacy led to two separate sovereign bailouts for Greece in a union too big to fail.[6] The ripple effects of these financial woes have reached private sector sources of liquidity, forcing both private and public financial institutions alike to seek liquidity

4 Alex Crippen, *Warren Buffett and the Perils of Swimming Naked*, CNBC (Aug. 6, 2007), http://www.cnbc.com/id/20147026/Warren_Buffett_and_the_Perils_of_Swimming_Naked.

5 *See* Marcus Walker, *Budget Treaty: Neither Panacea Nor Poison*, WALL ST. J., Jan. 31, 2012, at A8.

6 *See id.* "Too big to fail" means that the aggregate gross domestic product (GDP) of a country is smaller than the potential liabilities of a particular market sector, which is most often the financial or banking sector of an economy.

from a consortium of international investors.[7] These efforts are to fill an estimated balance-sheet shortfall of €1 to 1.3 *trillion* for Europe's major banks.[8] Overall, experts estimate that the Eurozone needs approximately €3 trillion of fresh capital to create sufficiently liquidity.[9] To correct the gap between book value and the actual value of the bad assets, the Eurozone must face a significant deleveraging process.[10] Europe has three basic options for deleveraging: (1) raise money; (2) print money; or (3) default and deflate.[11] The third option of markdowns provides immediate relief, but carries significant consequences such as potentially re-igniting global financial panic.[12] The European Central Bank (ECB) appears to have adopted the second option and has begun flooding Europe's banks with over half a trillion euros of fresh capital.[13] Despite the increased lending and artificially fixed low rates, many of Europe's major banks have refused to accept funds, opting for instead private investment and off-balance sheet restructurings.[14] If the situation deteriorates and remedial measures prove insufficient, the

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7 *See* Alkman Granitsas et. al., *Greece Passes Sweeping Cuts*, WALL ST. J., Feb. 13, 2012, at A1.

8 Interview with Chris D. Wallis, Chief Executive Officer & Chief Investment Officer, Vaughan Nelson Inv. Mgt. (Jan. 20, 2012). The author would like to thank Mr. Wallis for his insight and explanations of the Eurozone debt crises.

9 *Id.*

10 *See* STEPHEN G. MOYER, DISTRESSED DEBT ANALYSIS, STRATEGIES FOR SPECULATIVE INVESTORS 207 (2005). Deleveraging is the process by which a company or country reduces the amount of debt or "leverage" from its balance sheet. *Id.*

11 Wallis, *supra* note 8. Under this third option, Europe could have risked systemic rick by immediately marking the bad assets' values down to market value or could have accepted an estimated 20 percent *de*flation annually for three to five years. *Id.* Either result would have the opposite result of the first two options: a decreasing money supply. *Id.*

12 *See* Geoffrey T. Smith, *ECB Chief Says Bank Helped Avert Disaster*, WALL ST. J., Jan. 28, 2012, at A9.

13 *Id.*

14 David Enrich, *Some Europe Banks Shun ECB Loans*, WALL ST. J., Feb. 7, 2012, at C1.

United States could perhaps take drastic measures to protect itself, which would leave Europe more isolated to take the leverage hemlock alone.[15]

In coordination with the ECB's central funding efforts, the Eurozone countries have also completed member-funded bailouts of troubled Eurozone countries.[16] The second round of bailouts for Greece staved off another potentially chaotic liquidity crisis that would have threatened defaults by other member nations like Spain and Italy. Germany's Chancellor Angela Merkel and Finance Minister Wolfgang Schauble called for significant austerity measures and reforms amidst concern that increasing financial ties with Greece would threaten Germany's ability to afford pensions and health care for its aging society.[17] Germany insisted throughout the negotiations that Greece adopt austerity measures, tighten public spending, and improve on tax collection. Leaders of the twenty-five EU governments agreed on January 31, 2012 to provide Greece with approximately €130 billion ($171.5 billion) of aid, including help from the International Monetary Fund.[18] In return, the Greek Parliament agreed to significant austerity measures, yielding to the German-led charge for tighter fiscal discipline.[19] Specifically, Greece agreed to "steep cuts in private-sector wages, sacking 15,000 public-sector workers and drumming up another [three] billion euros in government-spending cuts [in 2012]."[20] The measures have caused considerable strife, both within the Greek Parliament, where parties were

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15 Wallis, *supra* note 8. One such drastic measure could involve nationalization of key U.S banks to consolidate U.S. balance sheets amidst the turmoil created by a potential immediate deleveraging in Europe. *Id.*

16 Matthew Dalton et. al., *Europe Reaches a Greek Deal*, WALL ST. J., Feb. 21, 2012, at A1, A12.

17 Marcus Walker et. al., *Germany Warns Greece on Aid Funds*, WALL ST. J., Jan. 30, 2012, at A7.

18 Stephen Fidler et. al., *Europe Tightens Fiscal Ties*, WALL ST. J., January 31, 2012, at A1.

19 Granitsas, *supra* note 7, at A1.

20 *Id.*

expelled "for not toeing the party line," and in the streets of Athens, where protestors continued to oppose any cuts in Greece's public spending.

In addition to bickering among Eurozone countries over austerity and liquidity measures, the Eurozone faces a number of other ancillary barriers that threaten to hinder already weak economies. Amidst these liquidity disruptions—and perhaps because of the constraints—the Eurozone now faces the prospect of *exporting* its pool of skilled labor as many former European colonies in Latin America are luring many skilled professionals.[21] The 2014 World Cup of soccer and 2016 Olympic Games are creating considerable opportunities in Brazil, as the country scrambles to build accommodations, venues, and airport terminals. Meanwhile, the Eurozone faces economic contractions, with GDP falling 1 to 1.5 percent in the fourth quarter of 2011 and a "steady unemployment rate across the region . . . [rising to] the highest level since the first quarter of 2001."[22] Demonstrating a trend across the Eurozone, almost 60 percent of the "37,000 Spanish citizens who left the country in 2010 . . . emigrated to countries *outside* the European Union."[23] If trends continue, members of the European Union must overcome declining economic growth and increasing global competition with a diminishing skilled work force.

B. APPLYING TRADITIONAL DEFINITIONS OF DISTRESSED ASSETS TO THE EUROZONE.

The confluences of liquidity crisis, infighting over austerity measures, and increased financial ties across the Eurozone have created distressed opportunities for buyers with free capital. Distressed opportunities exist in many forms; in fact, "[t]here is not a universally

21 Richard Boudreaux & Paul Prada, *Europe Hit by Downgrades—Exodus of Workers From Continent Reverses Old Patterns*, WALL ST. J., Jan. 14, 2012, at A1.

22 Ilona Billington, *Contraction Threat Clouds Euro Zone*, WALL ST. J., Feb. 1, 2012, at A10.

23 Boudreaux, *supra* note 21, at A1.

accepted definition of distressed debt."[24] Four general definitions often guide the term, including (1) third-party ratings; (2) liquidity availability; (3) debt spreads; and (4) debt and equity nominal trading values. Rating agencies, the most common prognosticators of financial strength, are third-party companies that independently assess investment quality.[25] The major rating agencies, which together control more than 90 percent of the market, include Standard & Poor (S&P), Moody's Investor Services, and Fitch IBCA. The major rating agencies use different labels to describe a ten-grade system that places bonds below a certain category as being "junk."[26] Ratings affect a company's ability to raise capital as ratings below a certain level prevent certain investors, such as pension and endowment funds, from investing in the company's debt or equity securities. But the rating agencies have been several criticized for their failure to assess companies' financial viability accurately, most notably in the wake of Enron and the structured investments leading to the 2008 financial crisis.[27] Unfortunately, ratings are often driven—or at least delayed—by politics as much as financial strength.[28] For instance, the long-expected Eurozone downgrades in 2012 were received with little significant reaction in the markets.[29] S&P and Fitch lowered ratings across the Eurozone in January, and Moody's followed suit in

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24 MOYER, *supra* note 10, at 6.

25 *See* Claire A. Hill, *Rating Agencies Behaving Badly: The Case of Enron*, 35 CONN. L. REV. 1145, 1146 (2003).

26 MOYER, *supra* note 10, at 6.

27 Hill, *supra* note 25, at 1146.

28 *C.f.* Randall D. Guynn, *The Global Financial Crisis and Proposed Regulatory Reform*, 2010 B.Y.U.L. REV. 421, 472-73.

29 Drew Fitzgerald & Stephen L. Bernard, *Moody's Warns U.K. on Outlook*, WALL ST. J., FEB. 14, 2012, at A8; David Gauthier-Villars & Charles Forelle, *Europe Hit by Downgrades*, WALL ST. J., Jan. 13, 2012, at A1.

February 2012, lowering six European nations, as well as warning that the United Kingdom may soon face downgrades.[30]

Compared to the holistic purview of ratings, a liquidity approach considers discrete events causing a company or a country to be unable to meet their financial obligations.[31] Distressed situations may also be created when "cheap credit, and not value-added products, drives a nation's economy or a company's production."[32] When market forces, trade partners, or critical decisions withdraw, or even simply interrupt, the means of immediate liquidity, debt becomes distressed for lack of short-term viability. For example, before investment banks changed structures to borrow directly from the U.S. Federal Reserve, Bear Stearns became distressed (and ultimately deceased) when counter-parties withdrew all forms of liquidity.[33]

The two remaining definitions of distressed require a more analytical approach. A cost-of-debt approach defines a security as distressed when the spread between the risk-free rate[34] and the company's debt exceeds 1000 basis points.[35] According to this approach, the major Eurozone debts would have been nearing distressed levels as early as September 2009.[36] The same determination would result under the trading values approach, which considers the nominal trading value of a security. Typical hallmarks of financial distress under this approach include a

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30 Fitzgerald, *supra* note 29; Gaithier, *supra* note 29.

31 Wallis, *supra* note 8.

32 *Id.*

33 Susanne Craig et. al, *Lehman Faces Mounting Pressures*, WALL ST. J., Sept. 10, 2008, at A1.

34 "Risk-free rate" means the rate that investors would expect to earn in a theoretical risk-free environment for a given period, often estimated to be the yield on U.S Treasury Bills.

35 Jean Helwege & Paul Kleiman, *Understanding Aggregate Default Rates of High Yield Bonds*, CURRENT ISSUES ECO. & FIN. vol. 2, No. 6, at 5-6 (1996), *available at* http://ssrn.com/abstract=1001231 or doi:10.2139/ssrn.1001231.

36 Richard Barley, *Europe Dodges Worst of Ratings Mess*, WALL ST. J., Sept. 4, 2009, at C10.

de minimis equity value or debt trading at a significant discount.[37] For example, Greece's sovereign debt would qualify as distressed under this final definition because estimated recovery for bondholders is thirty-two cents on the euro.[38]

C. EXAMPLES OF DISTRESSED DEALS ALREADY MADE IN THE EUROZONE.

The traditional definitions of distressed debt demonstrate that the Eurozone was likely distressed for a significant period before the rating agencies issued downgrades.[39] During this unannounced period of distress, several lucrative transactions closed. For example, Anglo Irish Bank Corporation turned to Ireland's most wealthy citizen, Sean Quinn for balance sheet support.[40] After the situation failed to improve, Mr. Quin was left bankrupt,[41] and a number of international investors purchased Irish banks' distressed assets.[42] Specifically, Kennedy Wilson, a global real estate investment and services firm based in the United States, purchased €1.6 billion of distressed residential housing developments from Bank of Ireland's portfolio. U.S-based State Street Global Advisors increased its assets under management by $36 billion when it purchased Bank of Ireland Asset Management for €57 million. In a similar transaction, U.S.-based real estate giant CB Richard Ellis purchased ING Real Estate Investment Management from ING Groep of the Netherlands.

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37 MOYER, *supra* note 10, at 7. A typical equity marker would be a stock trading for less than $1 per share, and a typical debt indicator would be a discount of 40 percent or more from face value. *Id.*

38 *See* Greece Government Bond 10Y, TRADING ECONOMICS, http://www.tradingeconomics.com/greece/government-bond-yield (last visited Mar. 1, 2012, 3:35 PM).

39 *See* Barley, *supra* note 36, at C10.

40 Colm Heatley & Finbarr Flynn, *Former Irish Billionaire Sean Quinn Declared Bankrupt*, BLOOMBERG (Jan. 16, 2012), http://www.bloomberg.com/news/2012-01-16/former-irish-billionaire-sean-quinn-declared-bankrupt-1-.html.

41 *Id.*

42 *SPECIAL REPORT: End of an Eire*, PERE (July 1, 2011, 10:35 AM), *available at* http://www.perenews.com/Article.aspx?aID=0&article=61860.

Even for buyers within the Eurozone, distressed deals for state-owned assets created opportunities. In June 2011, Germany-based Deutsche Telekom AG increased its ownership in Greece's Hellenic Telecommunications Organization SA by 10 percent for €400 (approximately $590 million).[43] In comparison, Deutsch Telekom had spent nearly €4 billion since 2008 to acquire its existing 30 percent stake.[44] Likewise, Fraport AG, a German company that owns or manages twelve airports around the world, announced interest in acquiring a 55 percent state in Athens International Airport.[45] Czech power company CEZ AS indicated in April 2011 an interest to acquire an equity position in Greece's largest power supplier, Public Power Corp., as Greek officials sought to reduce debt levels through state-owned asset sales.[46]

III. Incentives in Fraudulent Transfer Litigation and How Such Incentives May Cause Eurozone Deals To Replicate Recent History.

A flurry of Eurozone distressed transfers creates a potential problem for foreign investors if two situations occur. First, the distressed party selling the assets does not survive either the immediate liquidity crisis or the broader economic rebalancing. This failure may initially take the form of an out-of-court restructuring, but later result in a bankruptcy filing in U.S. courts under Chapters 11 or 15 of the Code. Second, the discrete liquidity crisis, or broader economic depression, causing the initial distress opportunity reverses. As result, the market re-prices the transferred asset at non-distressed levels. When these two situations combine, a hindsight view

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43 Christopher Lawton & Laura Stevens, *Bargain Hunting in Greece*, WALL ST. J., June 7, 2011, at B10.

44 *Id.*

45 *Id.*

46 *Id.*

of the original transaction appears significantly stilted—as if the distressed buyer pilfered the spoils of the unwilling seller and stole the crown jewels.[47]

Although this characterization of the distressed transaction tends to inflate the original balance of power, such a hindsight view often leads critics to impugn the actions of the "vulture investor."[48] Vultures, a pejorative term for distressed purchasers, "are so named because they have a predilection for businesses that are dead or dying . . . [Vultures are] betting that a company on its knees will once again stand up and resume walking."[49] The opinion of two such critics offended by a vulture's success is particularly important: the now-bankrupt seller and its creditors. Significant rebounds in asset prices may lead the distressed seller, or the distressed seller's creditors, to feel taken advantage of or even cheated. This potential situation may even discourage distressed purchasers from completing out-of-court transactions for fear that this unique form of "seller's remorse" will incentivize avoidance actions.[50]

Fraudulent transfer laws would, at least initially, appear to allay these reservations.[51] The party seeking avoidance must show that the consideration exchanged did not constitute "reasonably equivalent value" under an actual, quasi, or constructive fraudulent transfer theory.[52]

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47 *See* ASARCO LLC v. Americas Mining Corp., 396 B.R. 278, 304 (S.D. Tex. 2008).

48 HILARY ROSENBERG, THE VULTURE INVESTOR 22 (1992).

49 *Id.*

50 MOYER, *supra* note 10, at 201.

51 *See generally* 11 U.S.C. §§ 544(b), 548 (2006); Uniform Fraudulent Transfer Act §§ 4-5 (1984) [hereinafter UFTA]. The UFTA serves as a reasonable proxy for state fraudulent transfer law, while § 548 provides the standard for federal courts.

52 ASARCO LLC v. Americas Mining Corp., 396 B.R. 278, 335 (S.D. Tex. 2008). Actual fraud requires that "the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor." UFTA §§ 4(a)(1), (a)(2)(ii). The other two theories require no such finding. Quasi-constructive fraud occurs when a transaction makes the debtor's remaining assets "unreasonably small in relation to the business or transaction." UFTA § 4(a)(2)(i). Similarly, constructive fraud requires strict

Because all of these theories calculate "reasonably equivalent value" as it existed *at the time of the transfer*.[53] Accordingly, a court must calculate value using industry valuation practices as of the time of the transfer. Such an analysis would likely preclude any recovery, even in distressed situations, because comparable transactions would usually provide a baseline for "reasonably equivalent value."[54] But the *potential* to recover valuable assets with successful avoidance actions provides *incentive* to test the bounds of reasonably equivalent value.

The last three economic cycles have presented remarkably similar iterations of the situation described. None is more indicative of the incentives behind avoidance actions than *ASARCO LLC v. Americas Mining Corporation*.[55] Before becoming what the bankruptcy judge described as "the most successful major bankruptcy reorganization in history,"[56] *ASARCO* was perhaps the largest and most complex environmental bankruptcy. For much of the 20th Century, Americas Smelting and Refining Company (ASARCO) was the leading copper producer in the United States. In 2005, faced with "[l]ow copper prices, labor strikes, environmental liabilities, asbestos claims," and significant bond debts from a leveraged buyout, ASARCO sought chapter 11 bankruptcy protection in the Southern District of Texas.[57] The centerpiece of the eventual

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liability where a transfer is made for less than reasonably equivalent value and is made during or itself causes a debtor's insolvency. UFTA § 5(a).

53 *ASARCO*, 396 B.R. at 337.

54 *See id.* at 355-57.

55 *Id.* at 278.

56 Press Release, Haynes and Boone Helps Copper Giant ASARCO Emerge from Bankruptcy (Dec. 12, 2009), *available at* http://www.prweb.com/releases/haynes-boone/ASARCO-bankruptcy/prweb3332794.htm.

57 Judith Elkin, *Recent Cases and Strategies That Impact Distressed Business Sales: Is it Worth the Headache?*, *in* BUYING AND SELLING DISTRESSED BUSINESSES, at 15 (2010), *available at* 2010 WL 6425204.

"100-cent plan"[58] was ASARCO's successful fraudulent conveyance claim against its parent corporation, Grupo Mexico, S.A.B. de C.V. (Grupo).[59] ASARCO's bankruptcy counsel, Baker Botts L.L.P, brought the avoidance action against Grupo to recover the "crown jewel" of ASARCO: a controlling equity interest in the Southern Peru Copper Company (SPCC).[60] In 2000, Grupo formed a no-asset company, Americas Mining Corporation (AMC), to hold the controlling interest in SPCC purchased in a leveraged buyout.[61]

In short, the SPCC transaction was fraught with complications stemming from ARASCO's perilous financial condition and AMC/Grupo's tactics to force a deal. Notably, these complications included: (1) ASARCO had stopped paying various creditors and had technically defaulted on its $450 million revolver by October 2001;[62] (2) Grupo had maneuvered to prevent the advising investment banks from soliciting other offers for the SPCC equity;[63] (3) certain ASARCO board members had been asked to resign after withdrawing their consent for the SPCC transaction;[64] and (4) valuation opinions from several investment banks had conflicted regarding the enterprise value of the transaction.[65] In fact, after one restructuring

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58 *In re* ASARCO LLC, No. 05-21207, 2011 WL 2974957, at ¶ 15 (Bankr. S.D. Tex. July 20, 2011). A "100-cent case" is the rare case in bankruptcy where creditors receive full payment through the plan of reorganization. *See id.*

59 ASARCO LLC v. Americas Mining Corp., 396 B.R. 278, 297-98 (S.D. Tex. 2008).

60 *Id.* at 297-98, 304.

61 *Id.* at 302.

62 *Id.* at 305-06.

63 *Id.* at 308.

64 *Id.* at 313-14.

65 *Id.* at 307.

advisor attempted to withdraw its fairness opinion,[66] ASARCO's pre-bankruptcy restructuring counsel predicted the eventual fraudulent transfer lawsuit.[67] Despite the myriad of complications, the SPCC transaction closed on March 1, 2003.[68] From the day after the SPCC transaction closed to the time of the fraudulent transfer proceeding, copper prices improved dramatically—rising from approximately $0.71 per pound to over $3.50 per pound.[69] The substantial improvement in copper prices buoyed the estimated value of the SPCC equity interest from an estimated $811.4 or $853 million[70] to well over $3 billion.[71] Incentivized by the prospect of recovering the "crown jewel" asset, Baker Botts brought the fraudulent transfer proceeding to recover the SPCC interest on behalf of ASARCO's creditors.[72] Following a four-week bench trial, the district court entered a voluminous, 186-page opinion and order unwinding the SPCC transaction.[73] The court concluded that the price paid for the SPCC interest constituted "reasonably equivalent value," which defeated the constructive fraudulent transfer theory,[74] but that the SPCC transaction was still avoidable as an "actual" fraudulent transfer.[75]

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66 *Id.* at 311, 13.

67 *Id.* at 312.

68 *Id.* at 313.

69 *Id.* at 303, 357.

70 *Id.* at 355.

71 *Id.* at 350.

72 *Id.* at 315.

73 *Id.* at 433.

74 *Id.* at 364.

75 *Id.* at 386. In addition to the statutory badges, the Court considered suggested badges of fraud, including: (1) pilfering the "crown jewel" asset; (2) order of payment from proceeds; (3) remaining past due obligations left unpaid; (4) ability to pay other creditors; and (5) competitive bidding and sale to highest bidder. *Id.* at 374-77.

In addition to the incentive for debtors in avoidance actions, *ASARCO* provides an example of the incentive for *law firms* to bring avoidance proceedings or take other actions to augment the estate.[76] The Fifth Circuit affords bankruptcy courts the discretion to enhance attorneys' fees in the rare and exceptional case where counsel accomplishes a substantial recovery for their clients that would not have otherwise occurred without their efforts.[77] Based on the "significant hurdles" faced and the "rare and extraordinary" results produced, the bankruptcy court in *ASARCO* awarded Baker Botts a four million dollar fee enhancement for its successful avoidance of the SPCC transaction.[78] Likewise, other firms received fee enhancements for litigation leading to a settlement in which asbestos claimants received almost one billion dollars.[79] *ASARCO* demonstrates that foreigners facing litigation in U.S. courts may face losing their sweetheart deal *and* having damages or fee enhancements assessed.[80] Depending on the assets exchanged in distressed Eurozone transactions, improvements in the broader economic climate, or even intermittent liquidity fixes, may create similar financial incentives as improving copper prices did in *ASARCO*. Likewise, the size of the transactions

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76 *In re* ASARCO LLC, No. 05-21207, 2011 WL 2975882, ¶ 28 (Bankr. S.D. Tex. July 20, 2011); *In re* ASARCO LLC, No. 05-21207, 2011 WL 2974957, ¶¶ 208-18 (Bankr. S.D. Tex. July 20, 2011).

77 Ross Pass Mines, Inc. v. Howard, 615 F.2d 1088, 1092 (5th Cir. 1980) (enhancing fees by sixteen percent); Wolf v. Frank, 555 F.2d 1213, 1218 (5th Cir. 1977) (enhancing fees by thirty-three percent); CRG Partners, LLC v. U.S Tr., 445 B.R. 667, 673 (N.D. Tex. 2011) (enhancing fees by sixteen percent); *but c.f.* Perdue v. Kenny A. *ex rel.* Winn, 130 S. Ct. 1662, 1676-77 (2010) (denying "arbitrary" fee enhancement of seventy-five percent in an action brought under 42 U.S.C. § 1983). The bankruptcy court in *ASARCO* distinguished *Perdue* saying, "a civil-rights case that goes not even contain the word 'bankruptcy'" should not displace "decades of established bankruptcy jurisprudence." *ASARCO*, 2011 WL 2974957, ¶ 213.

78 *ASARCO*, 2011 WL 2974957, ¶ 218. Baker Botts total fees for the *ASARCO* case, including the fee enhancement, exceeded $117 million. *Id.* ¶ 237. The court calculated the fee enhancement by applying a ten percent increase to the 58,781.2 hours *alone* that Baker Botts attorneys spent on the SPCC fraudulent transfer litigation. *Id.* ¶ 218 n.103.

79 *ASARCO*, 2011 WL 2975882, *13.

80 *See id.* *13.

discussed in *ASARCO*, presumably comparable to those in transactions in the Eurozone, provide significant incentive for debtors and their creditors to challenge the two and half hurdles.

IV. The Two and a Half Hurdles to U.S. Adjudication of Foreign Fraudulent Transfers.

Distressed Eurozone opportunities, counter-party failures, and improving economics may create similar incentives as present in *ASARCO* to bring avoidance actions. The opportunity appears to be ripe, but the question remains: Can U.S. bankruptcy courts exercise both jurisdiction and constitutional authority to act? First, litigants must demonstrate that the failures of the 2005 Amendments to the Code, which added Chapter 15, allow courts to shun cooperation in cross-border insolvencies, contrary to statutory guidance.[81] Empirical evidence suggests this argument creates only a "half" hurdle.[82] After proving that Chapter 15 does not preclude U.S. adjudication, litigants must prove that the Code otherwise allows courts to reach foreign transactions. A split over whether bankruptcy courts may apply the Code extraterritorially has developed since the addition of Chapter 15 in 2005.[83] As of yet, the Supreme Court has denied the opportunity to settle the dispute.[84] Thus, the extraterritoriality hurdle would require carefully choosing the proper forum and then successfully arguing that U.S. courts' jurisdiction under the Code extends beyond the territorial borders of the United States.[85]

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81 *See* 11 U.S.C. § 1525 (2006).

82 *See* Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, at 25 (2010), http://works.bepress.com/jeremy_leong/1 (characterizing Chapter 15 as a hypocritical "setback rather than a step forward for international cooperation in insolvency law.").

83 *Compare* French v. Liebmann (*In re* French), 440 F.3d 145, 150-51 (4th Cir. 2006) *with* Barclay v. Swiss Fin. Corp. (*In re* Midland Eurp Exch. Inc.), 347 B.R. 708, 717-18 (Bankr. S.D.N.Y. 2006).

84 French v. Liebmann, 127 S. Ct. 72, 72 (2006) (denying certiorari).

85 *See generally* T. Brandon Welch, Comment, *The Territorial Avoidance Power of the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 553 (2008).

The final hurdle to U.S. adjudication is whether bankruptcy courts have constitutional authority to determine fraudulent transfer actions of foreign property. The Supreme Court's 2011 decision in *Stern v. Marshall*[86] revived a formalist approach to the separation of powers regarding bankruptcy courts' constitutional authority.[87] While litigants have been struggling to reconcile its impact on *domestic* fraudulent transfer actions,[88] *Stern* will also provide the final hurdle for U.S. bankruptcy courts to reach *foreign* transactions without offending Article III.

A. THE HALF HURDLE OF CHAPTER 15.

Congress created the first hurdle to U.S. courts' jurisdiction with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[89] Among other significant changes to the Code, BAPCPA added the much-anticipated Chapter 15, which created new protocols for handling cross-border insolvency cases. Chapter 15 integrated many of the changes proposed by the United Nations Commission on International Trade Law (UNCINTAL) in its Model Law on Cross-Border Insolvency.[90] UNCINTAL's Model Law was

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86 131 S. Ct. 2594 (2011).

87 Tim S. Springer, *Supreme Court's Answer to the Anna Nicole Smith Saga in Stern v. Marshall Leaves Bankruptcy World Asking Questions*, BEHIND BENCH NEWSL. (Ass'n Bankr. Jud. Assistants), Sept. 2011, at 3.

88 Omar J. Alaniz, *Has the Stern v. Marshall Dust Settled?: A Survey of Cases Interpreting the Stern Decision (Part I)*, 17 (No. 2) A.B.A. SECT. BANKR. & INSOLVENCY LIT. 21-34 (Winter 2012), *available at* http://apps.americanbar.org/litigation/committees/bankruptcy/articles/winter2012-survey-interpreting-stern.html (listing cases with both narrow and expansive views of *Stern*).

89 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 801-02, 119 Stat. 23.

90 Model Law of Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, art. 6, U.N. Doc. A/RES/52/158 (Jan. 30, 1998).

intended to encourage a universalist approach to cross-board insolvencies and to promote continuity and predictability between courts in different countries.[91]

Many U.S. bankruptcy scholars argued before BAPCPA's passage that international bankruptcies should not incorporate a universalist principle.[92] For instance, Professor Lynn LoPucki advocated for a territorialist approach, which would limit a country's judicial powers to enforcement only within its territorial borders.[93] Another prominent U.S. bankruptcy scholar, Professor Jay L. Westbrook, acknowledged while supporting a theory of universalism that: "[I]t seems unrealistic to think that universalism will be accepted absent roughly similar laws."[94] UNCINTRAL's Model Law would appear to address Professor Westbrook's later qualification by creating harmonious laws among different territorial jurisdictions. But to affect a truly universalist change, all jurisdictions that cross-border insolvencies might force to cooperate must have first adopted the Model Law.[95] As of January 2012, only nineteen countries have adopted the Model Law, with China and India conspicuously absent from the list.[96] The United States has begun harmonizing its bankruptcy procedures with other international jurisdictions,[97] but

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91 *See* 11 U.S.C. § 1525 (2006) ("[T]he court shall cooperate to the maximum extent possible with a foreign court . . . ."). For further discussion of UNCINTAL's Model Law and its application to U.S. courts, see generally Timothy S. Springer, Note, *Paved with Good Intentions: Creditors Face a New Roadblock to Recovery in Mexican Bankruptcies*, 18 L. & BUS. REV. AM. 83 (2012).

92 *See, e.g.*, Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2216-17 (2000).

93 *Id.*

94 Jay Lawrence Westbrook, *Theory and Pragmatism In Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 485 (1991).

95 *See id.*

96 Status, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited Mar. 1, 2011).

97 *See* Springer, *Paved with Good Intentions*, *supra* note 91, at 8.

Chapter 15 does not provide a clear answer to U.S. courts' ability to reach distressed Eurozone transactions. BAPCPA and Chapter 15 did much to recognize foreign proceedings and U.S. courts' abilities to apply foreign law to U.S. proceedings.[98] But "neither Chapter 15 nor any other part of the Code extensively covers the opposite question—the degree to which U.S. courts can apply U.S. bankruptcy provisions abroad."[99]

Empirical evidence suggests that Chapter 15 may not be "as universalist as its proponents claim it to be."[100] In fact, the evidence suggests that Chapter 15 may be an ineffective solution "to resolve conflicting priority rules between the United States and foreign proceedings."[101] In one sense, "Chapter 15 . . . does not significantly further cooperation because it applies only to debtors already subject to a foreign proceeding."[102] Chapter 15 also requires that a U.S. court recognize its case is ancillary to a "foreign main proceeding,"[103] which the Code defines as "a foreign proceeding pending in the country where the debtor has the center of its main interest."[104] U.S. courts have "recognized foreign main proceedings in almost every Chapter 15 case" since BAPCPA's passage in 2005, but empirical data indicates the courts have still withheld jurisdiction over some assets even *after* recognition in a vast majority of cases—77.3 percent.[105]

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98 *C.f. Developments in the Law—Extraterritoriality: VII. Chapter 15 and Cross-Border Bankruptcy*, 124 HARV. L. REV. 1292, 1293 (2011).

99 *Id.*

100 Leong, *supra* note 82, at 8.

101 *Id.* at 9.

102 *Developments*, *supra* note 98, at 1300.

103 *See* 11 U.S.C. § 1502(4) (2006)

104 *Id.*

105 Leong, *supra* note 82, at 7-8, 14-15 & Fig. 1. Such withholding is authorized under Chapter 15. *See* 11 U.S.C. §§ 1522(a), 1529-30 (2006).

In only 9.1 percent of cases did the U.S. court entrust to foreign courts all distribution of estate assets where U.S. creditors were at stake.[106]

These failures document Chapter 15's inability to address whether U.S. courts can apply U.S. bankruptcy laws extraterritorially. Even in situations where a Eurozone debtor is subject to a foreign proceeding, the current trend since BAPCPA's passage indicates U.S. courts would not willingly part with jurisdiction without at least some qualifications.[107] Where no such proceeding exists, litigants in future avoidance actions involving Eurozone distressed assets will therefore face only a "half" hurdle to convincing a U.S. court to apply jurisdiction in light of Chapter 15. Next, litigants must address the more daunting hurdle—explaining the statutory and constitutional authority for extraterritorial jurisdiction in bankruptcy courts amidst the confusion surrounding questions left unanswered by Chapter 15.

B. THE U.S. CIRCUIT SPLIT OVER EXTRATERRITORIAL JURISDICTION.

Following BAPCPA and the wake of Chapter 15, U.S. courts are still potentially able to use U.S. law to settle issues involving foreign-based property. Generally, courts are faced with two questions before applying U.S. law outside of its territorial borders: (1) Can the statute be applied extraterritorially, and (2) Does such an application violate principles of international comity?[108] For U.S. courts to reach distressed Eurozone transactions, litigants must prove both that Congress intended the federal law to apply extraterritorially and that the intrusion into international affairs does not violate comity between U.S. and Eurozone law.[109]

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106 *Id.* at 16.

107 *See id.*

108 *See* French v. Liebmann (*In re* French), 440 F.3d 145, 149 (4th Cir. 2006).

109 *See id.*

It is well settled that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."[110] Additionally, it is presumed that "when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute."[111] As a result, a presumption exists that Congress intends for legislation "to apply only within the territorial jurisdiction of the United States," unless a contrary intent is made clear.[112] This presumption may be overcome by some "clearly expressed purpose" to apply the law extraterritorially,[113] demonstrated by the three-factor test the Supreme Court announced in *Foley Brothers, Inc. v. Filardo*.[114] Courts must examine the statutory language, review the statute's legislative history, and consider any administrative interpretations of the statute.[115]

Section 541 of the Code defines what property and interests of a debtor constitute the bankruptcy estate over which the court has custody.[116] Applying the *Foley* Factors, the operative language of § 541 provides that, as of the commencement of a case under Title 11, the estate "is comprised of all the following property, *wherever located* and by whomever held."[117] Reviewing the legislative history, the phrase "wherever located" was originally included in 1952

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110 EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949)).

111 *Arabian*, 499 U.S. at 258 (quoting Argentine Republic v. Amerado Hess Shipping Corp., 488 U.S. 428, 440 (1989)).

112 *Id.* (quoting *Foley*, 336 U.S. at 285).

113 *Foley*, 336 U.S. at 286.

114 *Id.* at 285-88.

115 *Id.*

116 11 U.S.C. § 541 (2006).

117 *Id.* (emphasis added).

into § 70a of the Bankruptcy Act, the predecessor of § 541.[118] Congress explained that the phrase makes "clear that a trustee in bankruptcy is vested with the title of the bankruptcy in property which is located *without, as well as within*, the United States."[119] Legislative reports from the 1978 reforms give less specific guidance, but merely seem to incorporate by reference all property included under § 70a of the Bankruptcy Act.[120] Congress's lack of retreat from the 1952 report in either 1972 or any of the subsequent amendments would tend to weigh toward a tactic adoption. The third *Foley* Factor does not apply in a § 541 analysis because no agency interpretations are available.[121]

Despite the extraterritorial application of § 541 using the *Foley* Factors, courts remain split as to whether § 541 may apply extraterritorially to incorporate foreign-based property.[122] Specifically, the dispute centers around whether the extraterritorial application of § 541, which has been widely applied,[123] extends to include the trustee's avoidance powers under § 548. The academic community has articulated eloquent arguments for both camps amongst the debate.[124]

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118 *See* Frank R. Kennedy, *Bankruptcy Legislation of 1962*, 4 B.C. INDUS. & COM. L. REV. 241, 241 & n.1, 247 (1963) (citing Pub. L. No. 82-456, 66 Stat. 420, 429-30).

119 H.R. Rep. No. 82-2320, at 15 (1952), *reprinted in* 1952 U.S.C.A.A.N. 1960, 1976.

120 Welch, *supra* note 85, at 562-63 (quoting H.R. Rep. No. 95-595, at 367 (1977) and S. Rep. No. 95-989, at 82 (1978)).

121 *Id.* at 563.

122 *Compare* French v. Liebmann (*In re* French), 440 F.3d 145, 151 (4th Cir. 2006) *with* Barclay v. Swiss Fin. Corp. (*In re* Midland Eurp Exch. Inc.), 347 B.R. 708, 717-18 (Bankr. S.D.N.Y. 2006).

123 *E.g.*, Hong Kong & Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996 (9th Cir. 1998) (holding § 541 applies extraterritorially); Lykes Bros. Steamship Co. v. Hanseatic Marine Serv. (*In re* Lykes Bros. Steamship Co.), 207 B.R. 282, 284 (Bankr. M.D. Fla. 1997) (same); Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (same).

124 *Compare* Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2217 (2000) (advocating territorialist approach) *and* Welch, *supra* note 85, at 564-65 (same) *with* Jay Lawrence Westbrook, *Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases*, 42 TEX. INT'L L.J. 899, 915 (2007) (advocating universalist approach) *and* David M. Green & Walter

Nonetheless, the Supreme Court has not yet spoken, but instead rejected the opportunity to settle the circuit split over the Code's extraterritorial application.[125]

As a result, courts' remain split over whether the language of § 541 incorporates foreign transferred property prepetition.[126] The Fifth Circuit has twice held that the trustee's strong-arm powers under Title 11 may be applied extraterritorially through § 541, either because the estate *retains* an equitable interest in fraudulently transferred property[127] or because the estate *regains* an equitable interest in fraudulently transferred property following a § 550 recovery order.[128] But the Fifth Circuit's logic has been criticized as circular.[129] Despite the potential fallacy, at least one court has concluded that, because fraudulent transfers involve transitory law, such actions may be brought wherever personal jurisdiction has been established.[130]

In addition to concerns about § 548 importing extraterritoriality from § 541, litigants must also address principles of international comity. Courts look to factors such as: (1) the regulations and laws of the potentially conflicting foreign territory; (2) the connection and economic activities of the parties with this territory; (3) the likelihood of conflict of laws; and

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Benzija, *Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code*, 10 Am. Bankr. Inst. L. Rev. 85, 109-110 (2002) (same).

125 French v. Liebmann, 127 S. Ct. 72, 72 (2006) (denying certiorari). It is possible that the Supreme Court has yet to rule on extraterritoriality in this context for fear that such a ruling would violate the separation of powers. *See* Welch, *supra* note 85, at 559 n.51.

126 *Compare* Cullen Ctr. Bank & Trust v. Hensley (*In re* Criswell), 102 F.3d 1411, 1415-16 (5th Cir. 1997) *and* Am. Nat'l Bank v. MortgageAmerica Corp. (*In re* MortgageAmerica Corp.), 714 F.2d 1266, 1273 & n.7, 1275-76 (5th Cir. 1983) *with* Welch, *supra* note 85, at 563 ("Irrespective of the extraterritorial application of § 541, foreign transferred property is not within the estate.").

127 *Cullen*, 102 F.3d at 1415-16.

128 *MortgageAmerica*, 714 F.2d at 1273 & n.7.

129 *See* Welch, *supra* note 85, at 563-64 (The argument that fraudulently transferred property is within bankruptcy court's in rem authority "simply assumes what it seeks to prove. Without adopting this circular argument, extraterritorial jurisdiction cannot be premised on notions of domestic jurisdiction.").

130 Diaz-Barba v. Kismet Acq., LLC, No. 08CV1446, 2010 WL 2079738, at *5 (S.D. Cal. May 20, 2010).

(4) the foreign territory's interest in regulating the transaction.[131] At least one court has required an actual conflict between foreign and domestic law exist to violate international comity.[132] Moreover, Chapter 15, at least on its face, would appear to settle concerns about international comity and provide statutory cover for courts to reach Eurozone transactions, especially if the foreign jurisdiction has adopted UNCINTRAL's Model Law and embraced universalism.

If litigants are unable to overcome the presumption against extraterritoriality using the *Foley* Factors, one option remains: prove that the presumption never arose. First, the presumption does not arise when a transfer happened in the United States.[133] As many transactions touch several territorial jurisdictions simultaneously, some courts avoid the presumption if the United States was the "center of gravity."[134] Likewise, the presumption does not arise if the property recovered was already considered part of the estate, either through an action under 11 U.S.C. § 549[135] or by a convincing argument extending inclusion date for property before the petition date.[136] Finally, litigants may argue that the presumption against extraterritoriality does not arise in bankruptcy because bankruptcy is materially different from

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131 French v. Liebmann (In re French), 440 F.3d 145, 152-54 (4th Cir. 2006) (discussing the Restatement (Third) of Foreign Relations Law of the United States § 403 (1987)).

132 *Diaz-Barba*, 2010 WL 2079738, at *10.

133 *Diaz-Barba*, 2010 WL 2079738, at *8-9.

134 David B. Stratton, *Reflections on the Extraterritorial Application of the Bankruptcy Code*, 24-SEP AM. BANKR. INST. J. 44, 73 (2005).

135 *Diaz-Barba*, 2010 WL 2079738, at *4, 10 (determining that no presumption arose because, although transfer occurred post-petition, the transferee was debtor's alter ego, the transfer applied *nunc pro tunc*, and the transferred property was considered part of the estate).

136 *See* West v. Freedom Med., Inc. (*In re* Apex Long Term Acute Care—Katy), -- B.R. ---, Adv. No. 11-3213, 2011 WL 6826838, at *10 (Bankr. S.D. Tex. Dec. 28, 2011).

other contexts and requires special consideration.[137] In *French*, one justice concurred to emphasize his view that the Supreme Court's "strong presumption against extraterritoriality" remained "intact" after the panel's decision.[138] Judge Wilkinson distinguished prior precedent because, in the context of anti-discrimination or hourly wage laws, "ease of administration is not the *raison* d'être, and congressional intent for extraterritorial application is considerably less clear."[139] As a result, litigants must argue that bankruptcy should be considered separately and not be grounds "to set forth general pronouncements on extraterritoriality."[140]

Finally, litigants seeking to reach Eurozone transactions use the Affiliate Rule to file in a circuit willing to exercise jurisdiction extraterritorially. The rule allows a company to file in the jurisdiction either of its principal place of business or that of an affiliated company.[141] The rule cannot be used offensively to establish business in a favorable jurisdiction solely for the purpose filing bankruptcy,[142] but it "is the rare case, indeed, in which a debtor's business does not have *some* international aspect."[143] In the age of global business operations, the Affiliate Rule casts a wide-enough net to reach most major U.S. jurisdictions for bankruptcy filings.

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137 French v. Liebmann (*In re* French), 440 F.3d 145, 155 (4th Cir. 2006) (Wilkinson, J., concurring).

138 *Id.*

139 *Id.*

140 *Id.*

141 28 U.S.C. § 1408(2) (2006).

142 *In re* Reichmann Petroleum Corp., 364 B.R. 916, 921 (Bankr. E.D. Tex. 2007) (denying venue transfer where asserts were acquired solely for purposes of manipulating venue).

143 Stratton, *supra* note 134, at 44 (emphasis added).

C. QUESTIONS OF CONSTITUTIONAL AUTHORITY AFTER *Stern v. Marshall*.

Once a litigant convinces a court to exercise jurisdiction extraterritorially, the Supreme Court's watershed decision in *Stern v. Marshall*[144] may provide yet another constitutional hurdle. The *Stern* Court made clear that not every proceeding within a bankruptcy court's jurisdiction is necessarily within its constitutional reach.[145] In fact, although *Stern* considers a question of bankruptcy courts authority, the decision "is not really a bankruptcy decision at all; it is a constitutional separation of powers decision."[146] Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may time to time ordain and establish."[147] Bankruptcy judges are not Article III judges; they lack the hallmark characteristics of life tenure and salary protection.[148] As a result, bankruptcy courts exercising the judicial power of the United States would constitute one branch of the government aggrandizing its powers to the detriment of another and violate the separation of powers.[149] Although money and job security may appear insignificant reasons, the Framers of the Constitution recognized that these two features protected the courts from tyranny.[150]

The *Stern* Court held that Congress had violated the separation of powers by allocating final-order authority to non-Article III courts in a traditional common law action that would have

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144 131 S. Ct. 2594 (2011).

145 *Id.* at 2608.

146 George W. Kuney, *Stern v. Marshall: A Likely Return to the Bankruptcy Act's Summary/Plenary Distinction in Article III Terms*, 21 J. BANKR. L. & PRAC. 1, art. 1, at 1 (2012).

147 U.S. CONST. art. III.

148 *Stern*, 131 S. Ct. at 2601.

149 *See* INS v. Chada, 462 US 919, 974 (1983).

150 THE FEDERALIST No. 10 (James Madison).

been brought common law courts at Westminster in 1789.[151] Although the holding in *Stern* was self-limiting,[152] "[s]ince its release, a maelstrom of opinions and articles have been written about the scope of *Stern*, ranging from 'much ado about nothing' to 'the end of the bankruptcy world as we know it.'"[153] Caught squarely in the middle is whether bankruptcy courts still have authority to enter final orders in fraudulent transfer actions.[154]

1. Statutory Framework for Bankruptcy Courts' Jurisdiction.

To explain the implications of *Stern*, some discussion of the authority allocation between district courts and bankruptcy courts is necessary. Article I of the U.S. Constitution provides a directive regarding the debtor-creditor relationship, and empowers Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[155] Congress exercised its Article I powers in 1978 to replace the then-existing Bankruptcy Act, with the present Bankruptcy Code.[156] Like other federal courts, bankruptcy courts' jurisdiction is therefore "grounded in, and limited by, statute."[157] Following the Supreme Court's decision in *Northern Pipeline v. Marathon*,[158] Congress revisited the bankruptcy allocation scheme and

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151 *Stern*, 131 S. Ct. at 2609.

152 *Id.* at 2620 ("We conclude today that Congress, *in one isolated respect*, exceeded" its authority) (emphasis added); *see also In re* Salander O'Reilly Galleries, 453 B.R. 106, 115-16 (Bankr. S.D.N.Y. 2011) ("*Stern* is replete with language emphasizing that this ruling should be limited to the unique circumstances of that case . . . .").

153 BankUnited Fin. Corp. v. FDIC (*In re* BankUnited Fin. Corp.), 462 B.R. 885, 890 (Bankr. S.D. Fla. Nov. 23, 2011).

154 Alaniz, *supra* note 88.

155 U.S. CONST. art. I, § 8, cl. 4.

156 11 U.S.C. §§ 101-1532 (2006).

157 Celotex Corp. v. Edwards, 514 U.S. 300, 307 (1995).

158 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (rejecting Congress's inclusion of common law matters within bankruptcy court's plenary powers).

restructured jurisdictional allocations under Title 28.[159] Under the revised allocation framework, federal district courts have original and exclusive jurisdiction for all *cases* arising under Title 11.[160] Section 157(a) provides statutory authority for district courts to refer jurisdiction to the bankruptcy courts over cases under Title 11, as well as *proceedings* "arising in," "arising under," or "related to" a case under Title 11.[161] By way of referral, bankruptcy courts have in rem authority over "all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."[162] District courts supervise referrals with the ability to withdraw the reference at any time by their own motions.[163]

Even looking beyond the plain language of the referral statute, the Supreme Court has recognized that "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."[164] Before her appointment to the Supreme Court, Justice Sotomayor defended this principle and noted that the Supreme Court and other courts "have broadly construed the jurisdictional grant of [the 1984 Act]."[165] Moreover, the express "language of

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159 Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified in 11 U.S.C. §§ 101-1329 and scattered sections of Titles 26 and 28).

160 28 U.S.C. § 1334(a) (2006).

161 *Id.* § 157(a).

162 *Id.* §§ 157(a), 1334(e). *See also* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447-48 (2004).

163 *Id.* § 157(d).

164 Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (citing H.R. Rep. No. 95-595, at 43-48 (1977)).

165 Universal Oil Ltd. v. Allfirst Bank (*In re* Millenium Seacarriers, Inc.), 419 F.3d 83, 99 (2d Cir. 2005).

§ 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate."[166]

Congress allocated original jurisdiction to bankruptcy courts to hear and determine proceedings concerning estate property that arise in a bankruptcy case or under Title 11.[167] "Arising in" jurisdiction pertains to matters that could only arise in a case under Title 11.[168] In comparison, "arising under" jurisdiction includes proceedings created by Title 11.[169] When taken together actions "arising in" or "arising under" comprise core proceedings within bankruptcy courts' jurisdiction.[170] Bankruptcy courts may hear and determine these core matters and enter final orders, which are subject to appellate review by the district court under a clearly erroneous standard of review.[171]

2. Why Stern *Creates a Problem for the Current Framework.*

Instead of "arising in" or "arising under" jurisdiction, *Stern* involved only the third type of original bankruptcy court jurisdiction under § 157(a): proceedings "related to" the bankruptcy.[172] A proceeding invokes "related to" jurisdiction when the "action is related to bankruptcy [in that] the outcome could alter the debtor's rights, liabilities, options, or freedom of action."[173] Put simply, an action "is related to a title 11 case if the action's outcome might have

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166 *Celotex*, 514 U.S. at 308.

167 11 U.S.C. §§ 157(b)(1), 1334(b) (2006).

168 Wilborn v. Wells Fargo Bank (*In re* Wilborn), 609 F.3d 748, 752 (5th Cir. 2010).

169 Schatz v. Chase Home Fin. (*In re* Schatz), 452 B.R. 544, 551 (Bankr. M.D. Pa. 2011).

170 Stern v. Marshall, 131 S. Ct. 2594, 2604-05 (2011).

171 11 U.S.C. § 157(b)(1) (2006).

172 *See Stern*, 131 S. Ct. at 2605.

173 *Celotex*, 514 U.S. at 308 n.6 (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

any conceivable effect on the bankruptcy estate."[174] "Related to" jurisdiction stands on an opposite edge of the jurisdictional canyon from core proceedings allocated under § 157(b)(1). Proceedings invoking only "related to"—and not "arising in" or "arising under"—jurisdiction are not core proceedings.[175] Absent consent of the parties under § 157(c)(2), the most the statute authorizes bankruptcy courts to do in "related to" proceedings is to submit proposed findings of fact and conclusions of law to the district court for a *de novo* review.[176]

The *Stern* case hinged on a proceeding invoking only the "related to" jurisdiction of the bankruptcy court.[177] *Stern* involved a dispute over a considerable inheritance, and a widow's attempt to recover in bankruptcy court a tort claim against her late husband's son.[178] The tort claim was not predicated on the bankruptcy, meaning it neither arose, nor was it tried exclusively in connection with a case, under Title 11.[179] Therefore, because of the conceivable effect on the estate, § 157 should have allocated jurisdiction over the purely state-law counterclaim under the "related to" or non-core framework.[180] But since the 1984 Act, Congress had included

174 Parmalat Capital Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572, 579 (2d Cir. 2011) (internal quotations removed) (emphasis added).

175 *C.f. Stern*, 131 S. Ct. at 2605.

176 11 U.S.C. § 157(c)(1) (2006).

177 *Stern*, 131 S. Ct. at 2605, 2611.

178 *Id.* at 2601-02.

179 *C.f. id.* at 2605; *see also* 11 U.S.C. § 157(a) (2006).

180 *See* 11 U.S.C. § 157(c)(1) (2006).

counterclaims by the estate in the non-exhaustive list of core proceedings,[181] and the bankruptcy court relied on this provision to enter a final order.[182]

The *Stern* Court rejected the defunct label for state law counterclaims as core proceedings under § 157(b)(2)(C), but declared only this narrow sub-provision alone to be unconstitutional.[183] Absent consent, which the Court determined was not given for the counterclaim,[184] the bankruptcy court's only authority under the § 157 allocation scheme was to submit proposed findings.[185] Even assuming that the Court's holding in *Stern* affected proceedings not invoking solely "related to" jurisdiction, a bankruptcy court may still hear and determine such matters after *Stern* with the consent of the parties.[186] Chief Justice Roberts defined "core proceedings [as] those that arise in a bankruptcy case or under Title 11."[187] Thus, the Court is referring to the only remaining original bankruptcy jurisdiction—"related to"—when saying that "parties may consent to entry of final judgment by [a] bankruptcy judge [a] in non-core case."[188] The Court did not reject any other core proceeding under § 157(b)[189] or even renounce bankruptcy courts' ability to hear and submit proposed and conclusions under the § 157(c)(1) allocation scheme.[190]

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181 *Id.* § 157(b)(2)(C).

182 *Stern*, 131 S. Ct. at 2602.

183 *Id.* at 2608, 2620.

184 *Id.* at 2614.

185 11 U.S.C. § 157(c)(1) (2006).

186 *E.g.*, Mercury Cos. v. FNF Sec. Acquisition, Inc., 460 B.R. 778, 783 (D. Colo. 2011); *In re* Olde Prairie Block Owner, 457 B.R. 692, 699-700 (Bankr. N.D. Ill. 2011).

187 *Stern*, 131 S. Ct. at 2605.

188 *Id.* at 2607 (citing 11 U.S.C. § 157(c)(2) (2006)).

189 *In re* Safety Harbor Resort & Spa, 456 B.R. 703, 715 (Bankr. M.D. Fla. 2011).

190 Grecker v. Flynn (*In re* Emerald Casino, Inc.), 459 B.R. 298, 300 n.1 (Bankr. N.D. Ill. 2011).

What the *Stern* decision *has* done is to revive arguments over significant dicta in the decision of *Granfinanciera, S.A. v. Nordberg*.[191] The Supreme Court in *Granfinanciera* held that a foreign party subjected to a fraudulent transfer action retained the right to a jury trial under the Seventh Amendment because the proceeding was legal, and not equitable, and because it closely mirrored a common law action.[192] Although deciding the case on Seventh Amendment grounds, the Court indicated that the fraudulent transfer action was a private and not public right, despite arising under Title 11. The opinion in *Granfinanciera* echoed many of the Supreme Court's earlier concerns in *Marathon*, although specifically rejecting any limitation that cases involving public rights require the federal government be a party to the action.

This revival of *Granfinanciera*, along with the maelstrom surrounding *Stern*, has created considerable consternation among bankruptcy courts and practitioners trying to grapple with its implications.[193] Although the bankruptcy and district courts have fallen into either the narrow, neutral, or expansive camps regarding *Stern*,[194] only the Seventh Circuit has yet to address a *Stern* issue in a bankruptcy context, rejecting authority for an "arising in" proceeding seeking damages provided by a state statute.[195] The Ninth Circuit has requested briefing on whether *Stern* prohibits bankruptcy courts from entering final orders on actions.[196] The Fifth Circuit held

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191 492 U.S. 33 (1989).

192 *Id.* at 46-47, 50.

193 *See* Springer, *Supreme Court's Answer*, *supra* note 87, at 3.

194 As of February 28, 2012, 368 cases have cited *Stern*, including 177 discussing the decision. Of these 177 cases, eighty-two fall within the "narrow" camp, fifty-four within the "expansive" camp, and forty-one remain "neutral.

195 Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 665 F.3d 906, 915 (7th Cir. 2011).

196 *In re* Bellingham Ins. Agency, Inc., 661 F.3d 476, 476-77 (9th Cir. 2011).

the decision does not affect the jurisdictional allocation for magistrate courts.[197] Despite the self-limiting holding, one commentator advocating for an expansive view of *Stern* astutely summarized his camp's general sentiment:

> "Justice Breyer may not have been able to command a majority of the court and thus be 'constitutionally correct,' but he has definitely been right about one thing: Justice Roberts's statement that as a 'practical matter' the *Stern v. Marshall* decision 'does not change all that much' was either ***tongue-in-cheek or decidedly incorrect***."[198]

Within the context of fraudulent transfers brought under the Code, the expansive camp may have a strong argument that the progeny of *Marathon*, *Granfinanciera*, and *Stern* preclude adjudication in bankruptcy courts.[199]

If bankruptcy courts can adjudicate fraudulent transfers after *Stern*, it will likely be through the public rights exception to Article III. The exception is linked to Congress's Article I legislative powers.[200] Congress may except three types of powers from Article III determinations: (1) territorial courts, (2) courts martial, and (3) cases involving public rights.[201]

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197 Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., No: 10-20640 (5th Cir. Sept. 9, 2011) (per curiam). The statute allocating authority for magistrate courts is so similar to 11 U.S.C. § 157 in its application that a constitutional decision on one is often viewed as affecting the other. *See* Kuney, *supra* note 146, at 1.

198 Kuney, *supra* note 146, at 1 (emphasis added). Although the facts of *Stern* were limited to 11 U.S.C. § 157(b)(2)(C), the decision has broad implications on the others included in the non-exhaustive list under § 157(b)(2), including fraudulent conveyances. *Id.*

199 *Compare* Heller Ehrman LLP v. Arnold & Porter, LLP (*In re* Heller Ehrman LLP), No. C 11-04848, 2011 U.S. Dist. LEXIS 143223, at *14-15 (N.D. Cal. Dec. 13, 2011) (holding bankruptcy court could not determine § 544 or § 548 proceeding) *and* McCarthy v. Wells Fargo Bank (*In re* El–Atari), No. 1:11cv1090, 2011 WL 5828013, at *4-5 (E.D. Va. Nov. 18, 2011) (same for only § 548 proceeding) *with* Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 187 (Bankr. S.D.N.Y. Nov. 30, 2011) (bankruptcy court could determine both § 544(b) and § 548 claims); Mercury Cos. v. FNF Sec. Acquisition, Inc., 460 B.R. 778, 783-84 (D. Colo. 2011) (§ 548); *and* Goldstein v. Eby-Brown, Inc. (*In re* Universal Mktg., Inc.), 459 B.R. 573, 580 (Bankr. E.D. Pa. 2011) (§ 544 and § 549).

200 *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 585 (1985).

201 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64-67 (1982). Depending on the desired persuasion, parties may describe public rights as a "doctrine" or "exception."

Cases falling within these three categories "may be removed from [Article] III courts and delegated to legislative courts or administrative agencies for their determination."[202] Although the public rights doctrine was first applied to a dispute between the government and an individual,[203] it has since been recognized to include actions where the government is not directly a party.[204] Congress may create rights under a public regulatory scheme that bear "many of the characteristics of a public right," even when the right is asserted between individuals.[205] Similarly, Congress may also "create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[206] When Congress creates such a statutory right, "it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right."[207]

A plurality of the *Stern* Court distilled the test for the public rights exception to find that Congress may allocate adjudication of public rights that derive from a federal regulatory scheme or are integrally related to a particular federal government action.[208] But Article III would serve little "purpose in the system of checks and balances nor preserve the integrity of judicial decision

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202 *Id.* at 70.

203 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 283-85 (1855).

204 *See Thomas*, 473 U.S. at 586. Although the doctrine continued to be applied in similar procedural settings after *Murray's Lessee* , the inquiry of whether a right is public, rather than private, is "not to mere matters of form but to the substance of what is required." Id. (quoting Crowell v. Benson, 285 U.S. 22, 53 (1932)). Justice Scalia's concurrence in *Stern* suggests that he would require the government to be a party for a fraudulent transfer to fit within the public rights exception. *See* Stern v. Marshall, 131 S. Ct. 2594, 2620-21 (2011) (Scalia, J., concurring).

205 *Thomas*, 473 U.S. at 586 (internal punctuation removed).

206 *Id.* at 594.

207 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982).

208 *Stern*, 131 S. Ct. at 2613 (citing United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323 (2011)).

making if the other branches of the Federal Government could confer the Government's 'judicial power' on entities outside of Article III."[209] Accordingly, the *Stern* Court tempered any test for public rights with a broader historical test: "When a suit is made of the *stuff* of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts."[210] Thus, jury trial rights attach when suits—both "the mundane as well as the glamorous"—involve the "stuff" of 18th Century common law actions, and Congress may not withdraw such suits from Article III judicial cognizance.[211]

3. How the Questions Lingering After Stern Affect Potential Eurozone Litigation.

Bankruptcy courts' constitutional authority to adjudicate fraudulent transfer actions to finality after *Stern* is in doubt because the Supreme Court itself has characterized fraudulent conveyance actions as "quintessentially suits at common law."[212] Parties advocating an expansive approach must argue that Article III and the Seventh Amendment, as discussed in *Granfinanciera*, preserve a jury trial right in these legal actions based in common law. As a result, Congress may not simply "federalize and inoculate against Article III challenge" such traditional common law proceedings "by enacting [them] as part of the Bankruptcy Code."[213] In comparison, the "narrow" camp argues that the multi-party nature of bankruptcy[214] and the

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209 *Id.* at 2609.

210 *Id.* (citing *Marathon*, 458 U.S. at 90) (Rehnquist, J., concurring) (internal citations and punctuation removed; emphasis added).

211 *Id.* (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855)).

212 Granfinanciera, N.A. v. Norberg, 492 U.S. 33, 56 (1989).

213 Kuney, *supra* note 146, at 1 n.64 (internal punctuation removed).

214 Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 187 (Bankr. S.D.N.Y. Nov. 30, 2011) (differentiating multiparty nature of bankruptcy with two-party nature of state law).

fundamental differences between fraudulent transfer actions brought under § 544(b) and § 548 of the Code provide a bright-line test.[215] Both camps may have to wait until the next constitutional challenge reaches the Supreme Court until questions still debated after *Stern* are settled.[216]

For now, foreign litigants dragged into U.S. bankruptcy courts may use *Stern*, the final hurdle to adjudication, as a sword. In particular, investment funds, investment banks, and other financial investors that are often the targets of suits by debtors may find the *Stern* lineage is best used offensively.[217] Bankruptcy courts are known for efficiently handling heavy dockets, and, in a practical sense, things move faster in bankruptcy court.[218] As a result, Stern "has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court."[219] While foreign counterparties may desire "elsewhere" to be in another country, any Stern analysis would presume that the court has already decided to exercise jurisdiction extraterritorially. As such, the Stern analysis affects only the division of labor between the U.S. federal district and bankruptcy courts and not between courts in the United States and in the Eurozone. But as long as the debate over *Stern* and fraudulent transfers continues, foreign counterparties will face prolonged fights over constitutional authority;[220]

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215 Section 544(b) allows the chapter 11 trustee to apply *state* fraudulent transfer laws in bankruptcy proceedings. 11 U.S.C. § 544(b). Most often, the trustee invokes § 544(b) to take advantage of longer statutes of limitation under state law. *See* Goldstein v. Eby-Brown, Inc. (*In re* Universal Mktg., Inc.), 459 B.R. 573, 580 (Bankr. E.D. Pa. 2011) (noting § 544/§ 548 distinction, but concluding bankruptcy court had final-order authority).

216 Springer, *Supreme Court's Answer*, *supra* note87, at 3.

217 Robin E. Phelan et. al., *The People and the Courts Get Confuseder and Confuseder: Recent Ridiculous Rulings from Bankruptcyland* (CLE to Dallas Bar Assoc. Aug. 3, 2011), at 10; *see also* Springer, *Supreme Court's Answer*, *supra* note 193, at 1.

218 Kuney, *supra* note 146, at 1 n.69.

219 *In re* Ambac Fin. Grp., 457 B.R. 299, 308 (Bankr. S.D.N.Y.), *aff'd*, No. 10-B-15973, 2011 WL 6844533 (S.D.N.Y. Dec. 29, 2011).

220 Kuney, *supra* note 146, at 1.

longer time for decisions to be appealed, references withdrawn, or judgments entered after the bankruptcy court's submission of proposed findings;[221] and demands for jury trials.[222] Each of these additional steps was often simply assumed before *Stern*,[223] but will now cause foreign litigants to expend more time, more money, and more resources defending themselves in courts in which they never intended fighting.

V. Conclusion: Winning Arguments For and Against the Two and a Half Hurdles.

Each of these hurdles to U.S. adjudication will cause further argument and delay in cases, inevitably leading to more money spent.[224] But arguments for and against adjudication that have been persuasive with many courts exist at each hurdle. Foreign counter-parties will argue that the plain meaning of and congressional intent behind Chapter 15 provides a clear directive for U.S. recognition of and cooperation with foreign proceedings. In comparison, litigants seeking to obviate Chapter 15 will argue that (1) ambiguity exists related to the United States *exporting* laws;[225] (2) domestic creditor interests are best protected in U.S. Courts; or (3) alternatively, at a minimum, express qualifications requiring U.S. law be applied elsewhere are necessary.[226] Alternatively, counter-parties may argue that distressed Eurozone transactions are so egregious

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221 *See* 11 U.S.C. § 157(c)(1), (d) (2006) (proposed findings and conclusions of law by bankruptcy court require *de novo* review by district courts and reference to bankruptcy courts may be withdraw at any time by the district court *sua sponte*).

222 *See* Granfinanciera, N.A. v. Norberg, 492 U.S. 33, 64 & n.19 (1989).

223 *See* Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp.), 456 B.R. 318, 320-21 (2011).

224 Kuney, *supra* note 146, at 1.

225 *Developments*, *supra* note 98, at 1293.

226 Leong, *supra* note 82, at 12, 14-15.

as to invoke Chapter 15's exception for "manifestly contrary" to public policy,[227] although this exception requires a potentially impossible standard of proof.[228]

Regarding the extraterritoriality hurdle, several U.S. circuits have yet to rule on the extraterritorial powers of bankruptcy courts under the Code. Litigants seeking U.S. adjudication should use the Affiliate Rule offensively to select a favorable—or at least neutral—circuit for filing. Such litigants must argue that the presumption never arose or, alternatively, that it has been overcome using the *Foley* Factors. Foreign counter-parties must argue that the plain language of 11 U.S.C. § 541 and other statutes do not provide clear evidence that Congress intended for the Code to apply extraterritorially.

Finally, parties litigating whether U.S. courts can adjudicate distressed Eurozone transactions must confront *Stern v. Marshall*. Foreign counter-parties must argue that fraudulent transfers, whether brought under 11 U.S.C. § 544(b) or § 548, are "quintessentially suits at common law" and "paradigmatic private rights."[229] Courts will hear a melodic refrain that *Granfinanciera* unequivocally guarantees a right to Article III adjudication in fraudulent transfer proceedings.[230] The chorus will echo that because fraudulent transfer proceedings invoke private rights, and thus require a jury trial, both Article III and the Seventh Amendment guarantee an audience before an Article III judge in an Article III court.[231] Conversely, counter-parties

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227 11 U.S.C. § 1506 (2011).

228 *See In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 638 (Bankr. E.D. Ca. 2006) (observing that this standard "has consistently been narrowly interpreted by courts around the world to mean violating 'the most fundamental policies' of the host nation).

229 *See* Granfinanciera, N.A. v. Norberg, 492 U.S. 33, 56 (1989).

230 *Id.* at 64 n.19.

231 Ralph Brubaker, *Article III's Bleak House (Part II): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 No. 9 BANK'R L. LETTER 1, 6 (Sept. 2011).

arguing that bankruptcy courts have constitutional authority must rely on the public rights doctrine to justify Congress's allocation of adjudication to non-Article III courts. Counter-parties must argue that the multi-party aspects of bankruptcy[232] and the differences between federal and state fraudulent transfer laws mean that an action under § 548 is not of the "stuff" of 1789. Alternatively, counter-parties may be forced to distinguish § 544(b) as having the "1789 stuff" and focus the argument on separating § 548. In either instance, counter-parties will seek to silence the *Granfinanciera* hymn as inapposite dicta. U.S. courts are still sorting out whether the Constitution permits adjudication domestic property fraudulently transferred in bankruptcy courts after *Stern*. But *Stern* has significant implications on the adjudication of *foreign* proceedings, as well—a prospect that U.S. courts may face in the near future.

The prospect of Eurozone distressed purchased reaching U.S. courts requires a number of economic and jurisprudential events to occur. But as the *ASARCO* case demonstrates, litigants seeking strategic or tactical advantages are incentivized to avail themselves of U.S. fraudulent transfer law. As austerity skirmishes give way to greater financial solidarity, the Eurozone will be both further protected, and yet paradoxically more exposed, to systemic and acute liquidity risks. Any number of financial scenarios may soon leave foreign counterparties subjected to opportunistic litigants preparing to challenge the two and a half hurdles to reach U.S. courts.

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232 Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 187 (Bankr. S.D.N.Y. Nov. 30, 2011).