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ANDREW P. VANCE MEMORIAL WRITING COMPETITION WINNER: 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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TWO AND A HALF HURDLES BETWEEN EUROZONE DEBTS AND U.S. COURTS: HOW RECENT DISTRESSED FOREIGN DEALS COULD SOON BE UNWOUND DOMESTICALLY

*Timothy S. Springer**

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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 counterparties. But these parties may soon find themselves reacquainted with their sweetheart deals if their counterparties 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 incentives 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 sixteenth-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.

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

2. *See* 11 U.S.C. §§ 544(b), 548 (2006).

3. *See* Meoli v. Huntington Nat'l Bank (*In re* Teleservices Grp.), 456 B.R. 318, 320–21 (Bankr. W.D. Mich. 2011) ("For over twenty-five years, my colleagues and I have operated with the understanding that we were properly constituted judges . . . I have entered countless orders as final *without a second thought* about the legitimacy . . . .") (emphasis added).

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 will address the two and a half hurdles litigants must overcome to reach foreign transactions with U.S. bankruptcy 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 arguments for litigants to overcome or to defend the hurdles to U.S. adjudication.

I. REASON FOR CONCERN: DISTRESSED OPPORTUNITIES IN THE EUROZONE

A. Economic Woes in the Eurozone

As a harbinger of the 2008 financial crisis, Warren Buffet was famously quoted as saying: "It's only when the tide goes out that you can see who's 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 led to liquidity constraints, defaults, and downgrades across the Eurozone; most notably in Greece, Ireland, Cyprus, Portugal, and Spain.[5] 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

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4. *America's Economy: Danger Time for America*, ECONOMIST, Jan. 14, 2006, *available at* 2006 WLNR 746681.

5. *See* Harriet Torry, *Germany Approves Cyprus Bailout*, WALL ST. J., Apr. 19, 2013, at A12; Marcus Walker, *Budget Treaty: Neither Panacea Nor Poison*, WALL ST. J., Jan. 31, 2012, at A8.

6. *See id.* Aside from pejorative characterizations, "too big to fail" means that the aggregate gross domestic product ("GDP") of a country is smaller

have reached private sector sources of liquidity, forcing both private and public financial institutions alike to seek liquidity 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] In January 2012, one expert estimated that the Eurozone needed approximately €3 trillion of fresh capital to create sufficient 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, including potentially re-igniting global financial panic.[12] The European Central Bank ("ECB") appeared to have adopted the second option by the spring of 2012, when it began flooding Europe's banks with more than 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 instead

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than the potential liabilities of a particular market sector, which is most often the financial or banking sector of an economy.

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

8. Telephone Interview with Chris D. Wallis, Chief Exec. Officer & Chief Inv. Officer, Vaughan Nelson Inv. Mgt. (Jan. 20, 2012) [hereinafter Wallis Interview]; Chris Wallis, Chief Exec. Officer & Chief Inv. Officer, Vaughan Nelson Inv. Mgt., Presentation to the Baylor Angel Network: Investment Risks Inherent in Global Economic Rebalancing (Feb. 17, 2012) [hereinafter Presentation to BAN].

9. Wallis Interview, *supra* note 8.

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 Interview, *supra* note 8. Under the "default and deflate" option, Europe could have gambled systemic risk either by immediately marking the bad assets' values down to market value or by accepting an estimated 20% *de*flation annually for three to five years. *Id.* Either result would have the opposite outcome of the first two options: a decreasing money supply. *Id.*

12. *Id.*

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

for private investment and off-balance sheet restructurings.[14] If the situation deteriorates and remedial measures prove insufficient, the United States could even take drastic measures to insulate and protect itself, which would leave Europe more vulnerable 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 in February 2012 staved off another potentially chaotic liquidity crisis that would have threatened defaults by other member nations, such as Spain and Italy. German 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 pay for pensions and health care in an aging society."[17] Germany insisted throughout the negotiations that Greece adopt austerity measures, tighten public spending, and improve on tax collection.[18] Leaders of the twenty-five EU governments agreed on January 31, 2012, to provide Greece with approximately €130 billion (US$171.5 billion) of aid, which included assistance from the International Monetary Fund.[19] In return, the Greek Parliament agreed to significant austerity measures, yielding to the German-led charge for tighter fiscal discipline.[20] These measures included "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]."[21]

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

15. *See* Wallis Interview, *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.

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

18. *Id.*

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

20. *Id.*

21. *Id.*

The measures have caused considerable strife in both the Greek Parliament, where parties were expelled "for not toeing the party line," and the streets of Athens, where protestors continued to oppose any cuts in Greece's public spending.[22] The spending cuts continued for 2013 budgets amid negotiations to reduce Greece's debt to "manageable levels."[23] As in Greece, austerity measures across the Eurozone were met with similar hostilities as workers organized strikes in Spain and Portugal.[24] Cyprus too was forced to agree to overhaul its public finance system and restructure its two biggest banks in return for €10 billion ($13.05 billion) bailout from its international creditors.[25] Although the negotiations remained precarious at the time, EU leaders accepted the Nobel Peace Prize on December 10, 2012, for their efforts.[26]

In addition to the 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 have started to lure skilled professionals.[27] The 2014 World Cup of soccer and 2016 Olympic Games are creating considerable opportunities in Brazil, as

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22. *Id.*

23. Gabriele Steinhauser & Stephen Fidler, *Lenders at Odds over Greek Debt*, WALL ST. J., Nov. 13, 2012, at A17.

24. Matt Moffett et. al, *Big Europe Strikes Have Little Effect*, WALL ST. J., Nov. 15, 2012, at A11.

25. Torry, *supra* note 5, at A12.

26. Gabriele Steinhauser & Kjetil Malkenes Hovland, *EU Bickering Pauses for Nobel*, WALL ST. J., Dec. 11, 2012, at A12. One can only hope that the triumphant photo of French President François Hollande and German Chancellor Angela Merkel clasping hands in celebration of the prize is not looked upon in the future with similar disbelief as President George Bush's infamous "Mission Accomplished" photo. *Compare Amid Tensions, Europe's Leaders Accept Peace Prize*, WALL ST. J., Dec. 11, 2012, at A1 (celebrating, in 2012, success in averting crises in the Eurozone), *with* Bob Kemper, *Bush: Iraq War Won; But President Warns 'Dangerous Work' Lies Ahead in Global Terror Fight*, CHI. TRIB., May 2, 2003, at C1 (celebrating, in 2003, success in Iraq while a banner saying "Mission Accomplished" was visible in the background).

27. Richard Boudreaux & Paulo Prada, *Europe Hit by Downgrades*, WALL ST. J., Jan. 14, 2012, at A1.

the country scrambles to build accommodations, venues, and airport terminals.[28] Meanwhile, the Eurozone faces economic contractions, with GDP falling 1% to 1.5% 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."[29] Demonstrating a trend across the Eurozone, almost 60% of the "37,000 Spanish citizens who left the country in 2010 . . . emigrated to countries *outside* the European Union."[30] If this trend continues, members of the EU 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 the 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 no universally recognized definition of distressed debt."[31] 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.[32] The major rating agencies use different labels to describe a ten-grade system that places bonds below a certain category as being "junk."[33] Ratings affect a company's ability to raise capital as ratings below a certain level prevent certain investors, such as pension and endow-

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28. *See id.*

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

30. Boudreaux & Prada, *supra* note 27, at A1 (emphasis added).

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

32. Organization for Economic Co-operation and Development [OECD], *Competition and Credit Ratings Agencies*, at 5–6, DAF/COMP (2010) 29 (Oct. 5, 2010), *available at* http://www.oecd.org/regreform/sectors/46825342.pdf. The three major rating agencies, which together control more than 90% of the market, include Standard & Poor (S&P), Moody's Investor Services, and Fitch IBCA. *Id.* at 12.

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

ment funds, from investing in the company's debt or equity securities. But the rating agencies have been severely 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.[34]

Unfortunately, without sufficient oversight, ratings may be driven—or at least delayed—by politics as much as financial strength.[35] For instance, the long-expected Eurozone downgrades in 2012 were received with little significant reaction in the markets.[36] S&P and Fitch lowered ratings across the Eurozone in January, and Moody's followed suit in February 2012, lowering the ratings of six European nations, and additionally warning that the United Kingdom may also face downgrades.[37] The downgrades continued throughout 2012 as major banks began to boost their cash reserves.[38]

Compared to the holistic purview of ratings, a liquidity approach considers discrete events that cause a company or a country to be unable to meet its financial obligations. Such situations may be created when "cheap credit, and not value-added products, drives a nation's economy or a company's production."[39] When market forces, trade partners, or critical decisions withdraw, or even simply interrupt, the means of immediate liquidity, debt becomes distressed due to a 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.[40]

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34. *See* Claire A. Hill, *Rating Agencies Behaving Badly: The Case of Enron*, 35 CONN. L. REV. 1145, 1145–46 (2003).

35. *Cf.* Randall D. Guynn, *The Global Financial Crisis and Proposed Regulatory Reform*, 2010 BYU L. REV. 421, 472–73 (2010) (discussing the political battle over reforming the ratings process).

36. 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. 14, 2012, at A1.

37. FitzGerald & Bernard, *supra* note 36; Gauthier-Villars & Forelle, *supra* note 36.

38. *E.g.*, David Enrich, *Large European Banks Stash Cash*, WALL ST. J., Nov. 13, 2012, at C1.

39. Wallis Interview, *supra* note 8.

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

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 and the company's debt exceeds 1000 basis points.[41] The "risk-free rate" is 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. According to this approach, the major Eurozone debts would have been nearing distressed levels as early as September 2009.[42] 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 *de minimis* equity value or debt trading at a significant discount.[43] Under this definition, Greece's sovereign debt would have qualified as distressed in December 2011 because estimated recovery for bondholders was thirty-two cents on the euro.[44]

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.[45] During this unannounced period of distress, several lucrative transactions closed. On one such occasion, Ireland's most wealthy citizen, Sean Quinn, chose to invest heavily in the Anglo Irish Bank

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41. MOYER, *supra* note 10, at 7 (citing Jean Helwege & Paul Kleiman, *Understanding Aggregate Default Rates of High Yield Bonds*, CURRENT ISSUES ECO. & FIN., May 1996, at 1, 5–6 (1996)).

42. *See* Richard Barley, *Europe Dodges Worst of Ratings Mess*, WALL ST. J., Sept. 4, 2009, at C10. The 10-Year T-Bill rate in September 2009 was between 3% and 3.5%, which would mean that distressed debt levels started at an approximately 13% yield. *See Daily Treasury Bill Rates*, U.S. DEP'T TREASURY, http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/default.aspx (last visited Apr. 19, 2013) (select "Daily Treasury Bill Rates" and use drop-down lists to select "2009").

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

44. *See* Greece Government Bond 10Y, TRADING ECONOMICS, http://www.tradingeconomics.com/greece/government-bond-yield (last visited Apr. 24, 2013).

45. *See* Barley, *supra* note 42; Gauthier-Villars & Forelle, *supra* note 36.

Corporation ("Irish Bank").[46] After the situation failed to improve, Mr. Quinn was left bankrupt,[47] and a number of international investors purchased Irish Bank's distressed assets.[48] 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.[49] U.S.-based State Street Global Advisors increased its assets under management by US$36 billion when it purchased Bank of Ireland Asset Management for €57 million.[50] Similarly, U.S.-based real estate giant CB Richard Ellis purchased ING Real Estate Investment Management from the ING Group of the Netherlands.[51]

Even for buyers within the Eurozone, distressed deals for state-owned assets created new opportunities. In June 2011, Germany-based Deutsche Telekom AG increased its ownership in Greece's Hellenic Telecommunications Organization SA by 10% for €400 (approximately US$590 million).[52] In comparison, Deutsch Telekom had spent nearly €4 billion since 2008 to acquire its existing 30% stake.[53] Likewise, Fraport AG, a German company that owns or manages twelve airports around the world, announced interest in acquiring a 55% stake in Athens International Airport.[54] Further, Czech power company CEZ AS indicated in April 2011 its interest in acquiring 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.[55]

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46. 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.

47. *Id.*

48. *See SPECIAL REPORT: End of an Eire*, PERE MAG., July–Aug. 2011.

49. *Id.*

50. *Id.*

51. In fairness to the analysis presented in Part III(B), CBRE likely requires only a traditional, and not extraterritorial, application of 11 U.S.C. § 541 for U.S. bankruptcy court jurisdiction.

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

53. *Id.*

54. *Id.*

55. *Id.*

II. 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 were to occur. First, the distressed party selling the assets would have to 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 could later result in a bankruptcy filing in U.S. courts under Chapters 11 or 15 of the Code. Second, the crisis that caused the opportunity reverses, and the market re-prices the asset at non-distressed levels. After such a recovery, the hindsight view of the original transaction appears significantly stilted—as if the distressed buyer pilfered the spoils of the unwilling seller and stole the crown jewels.

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."[56] 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."[57] 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.[58]

Fraudulent transfer laws would appear, at least initially, to allay these reservations.[59] The party seeking avoidance must

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56. *See* HILARY ROSENBERG, THE VULTURE INVESTORS 22 (1992).

57. *Id.*

58. *See* MOYER, *supra* note 10, at 201.

59. *See generally* 11 U.S.C. §§ 544(b), 548 (2006); UNIFORM FRAUDULENT TRANSFER ACT (UFTA) §§ 4–5 (1984). The UFTA serves as a reasonable proxy for most states' fraudulent transfer laws, while 11 U.S.C. § 548 provides the standard for federal courts.

show that the consideration exchanged did not constitute "reasonably equivalent value" under an actual, quasi, or constructive fraudulent transfer theory.[60] Each of these theories calculates "reasonably equivalent value" as it existed *at the time of the transfer*.[61] 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."[62] But the *potential* to recover valuable assets with successful avoidance actions provides an *incentive* to test the bounds of reasonably equivalent value.

The last three economic cycles have presented remarkably similar iterations of the situation described.[63] None is more indicative of the incentives behind avoidance actions than *ASARCO LLC v. Americas Mining Corporation*.[64] Before becoming what the Fifth Circuit described as "one of the most successful bankruptcies in the United States in history,"[65]

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60. 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). The other two theories require no such finding. Quasi-constructive fraud occurs when a transaction makes "the remaining assets of the debtor . . . unreasonably small in relation to the business or transaction." UFTA § 4(a)(2)(i). Similarly, constructive fraud requires strict 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).

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

62. *See id.* at 355–57.

63. "During the globalization era, [the] . . . three bubbles and bursts . . . were Reagan's junk-bond bubble, Clinton's dot-com bubble, and Bush's mortgage and housing bubble." Chih Kwan Chen, *The Rise and the Self-Destruction of the Globalization Scheme*, FORCASTGLOBALECONOMY.COM § 6 (last updated Feb. 16, 2013), http://forcastglobaleconomy.com/ReviewForecast01/ReviewForecast01.htm. Describing the events leading to the late 1980s correction, vulture investor Harry Freund said, "[p]rices had gone up, everybody was rushing into [restructuring], and the values that we were used to were not evident. Everything was just flooded with money, and ignorant money. Summer of 1989 there was an implosion . . . ." ROSENBERG, *supra* note 56, at 23.

64. *See ASARCO*, 396 B.R. at 278.

65. ASARCO L.L.C. v. Barclays Capital, Inc., 702 F.3d 250, 256 (5th Cir. 2012) (citations omitted).

Americas Smelting and Refining Company's ("ASARCO") bankruptcy case was perhaps the largest and most complex environmental reorganization to date.[66]

For much of the twentieth-century, ASARCO was the leading copper producer in the United States.[67] 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.[68] The centerpiece of the eventual "100-cent plan"[69] was ASARCO's successful fraudulent conveyance claim against its parent corporation, Grupo Mexico, S.A.B. de C.V. ("Grupo").[70] ASARCO's bankruptcy counsel, Baker Botts LLP, brought the avoidance action against Grupo to recover the "crown jewel" of ASARCO: a controlling equity interest in the Southern Peru Copper Company ("SPCC").[71] Low copper prices had depressed the value of the SPCC interest in 2001 after Grupo formed a no-asset company, Americas Mining Corporation ("AMC"), and pursued a leverage buyout of the interest.[72]

In short, the SPCC transaction was fraught with complications stemming from ASARCO's perilous financial condition and AMC's/Grupo's tactics to force a deal. Among these complications were that (1) ASARCO had stopped paying various creditors and had technically defaulted on its US$450 million revolver by October 2001;[73] (2) Grupo had maneuvered to prevent the advising investment banks from soliciting other offers

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66. *In re* ASARCO LLC, No. 05-21207, 2011 WL 2975882, at *6 (Bankr. S.D. Tex. July 20, 2011).

67. Judith Elkin, *Recent Cases and Strategies That Impact Distressed Business Sales: Is it Worth the Headache?*, *in* BUYING AND SELLING DISTRESSED BUSINESSES, *1, *15 (2010), *available at* 2010 WL 6425204.

68. *Id.*

69. A "100-cent" case is the rare case in bankruptcy where creditors receive full payment through the plan of reorganization. John Bittner et al., *Anatomy of the "100 Cent+" Case*, 25 ASS'N INSOLVENCY & RESTRUCTURING ADVISORS 1, 1 (Aug.–Sept. 2011). ASARCO was one of these rare cases. *See In re* ASARCO LLC, 2011 WL 2974957, at *4 (Bankr. S.D. Tex. July 20, 2011).

70. ASARCO LLC v. Americas Mining Corp., 396 B.R. 278, 297–300 (S.D. Tex. 2008).

71. *Id.* at 297–98, 304.

72. *Id.* at 302–03.

73. *Id.* at 305–06.

for the SPCC equity;[74] (3) certain ASARCO board members had been asked to resign after withdrawing their consent for the SPCC transaction;[75] and (4) valuation opinions from several investment banks were conflicted on the enterprise value of the transaction.[76] In fact, after one restructuring advisor attempted to withdraw its fairness opinion, ASARCO's pre-bankruptcy restructuring counsel predicted the eventual fraudulent transfer lawsuit.[77] Despite the myriad of complications, the SPCC transaction closed on March 31, 2003.[78]

During the period starting the day after the SPCC transaction closed until the time of the fraudulent transfer proceeding, copper prices improved dramatically, rising from approximately US$0.71 per pound to more than US$3.50 per pound.[79] The substantial improvement in copper prices buoyed the estimated value of the SPCC equity interest from an estimated US$811.4 or US$853 million, to well over US$3 billion.[80] 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.[81] Following a four-week bench trial, the district court entered a voluminous, 186-page opinion and order unwinding the SPCC transaction.[82] The court concluded that the price paid for the SPCC interest constituted "reasonably equivalent value," which defeated the constructive fraudulent transfer theory,[83] but that the SPCC

74. *Id.* at 308.

75. *Id.* at 313–14.

76. *Id.* at 307.

77. *Id.* at 312–13.

78. *Id.* at 313.

79. *Id.* at 303, 357.

80. *See id.* at 350, 355 (calculations made by author based on figures provided by the court).

81. *Id.* at 315.

82. *Id.* at 278–433.

83. *Id.* at 364. Over a span of forty pages, the court analyzed "reasonably equivalent value" extensively using three different common valuation methods: (1) Stock Price Valuation, (2) Market Transaction Multiples, and (3) Discounted Cash Flow. *Id.* at 342. A stock price valuation applies a premium or discount to the historical trading averages of a public equity, but requires an efficient market to serve as a viable value indication. *Id.* at 342–45. Although the transaction multiple method is a common industry practice, it was not a good indication of the SPCC equity value because the complexities of the case eliminated the field of comparable transactions. *Id.* at 352–57, n.68. The

transaction was still avoidable as an "actual" fraudulent transfer.[84]

In addition to the incentive for debtors in avoidance actions, *ASARCO* provides an example of the incentive for the *counsel* of the debtor in possession to bring avoidance proceedings or take other actions to augment the estate.[85] 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.[86] Based on the "significant hurdles" faced and the "rare and extraordinary" results produced,[87] the bankruptcy court in *ASARCO* awarded Baker Botts a US$4 million fee enhancement for its successful avoidance of the SPCC transaction.[88] Other firms received simi-

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court relied on the Discounted Cash Flow analysis, which considers the future cash flows of an investment, to arrive at a valuation and applied a discount rate to arrive at present value. *Id.* at 357–62.

84. *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 374–78.

85. *See In re* ASARCO LLC, No. 05-21207, 2011 WL 2974957, *35–37 (Bankr. S.D. Tex. July 20, 2011).

86. CRG Partners Grp., L.L.C. v. Neary (*In re* Pilgrim's Pride Corp.), 690 F.3d 650, 652–53 (5th Cir. 2012) (affirming a fee enhancement of 16%); Lawler v. Teofan (*In re* Lawler), 807 F.2d 1207, 1213–14 (5th Cir. 1987) (affirming fee enhancement at factor of 1.7 over the lodestar); Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088, 1092 (5th Cir. 1980) (enhancing fees by 16%); Wolf v. Frank, 555 F.2d 1213, 1218 (5th Cir. 1977) (enhancing fees by 33%); *but cf.* Perdue v. Kenny A. *ex rel.* Winn, 130 S. Ct. 1662, 1676–77 (2010) (denying "arbitrary" fee enhancement of 75% in an action brought under 42 U.S.C. § 1983). The bankruptcy court in *ASARCO* distinguished *Perdue*, saying that "a civil-rights case that does not even contain the word 'bankruptcy'" should not displace "decades of established bankruptcy jurisprudence." *In re ASARCO*, 2011 WL 2974957, at *36. The Fifth Circuit likewise rejected *Perdue* as an absolute bar to fee enhancements in bankruptcy, noting in another matter in the ASARCO case that "enhancements are possible in situations not delineated by *Perdue*." *Pilgrim's Pride*, 690 F.3d at 664.

87. *In re ASARCO*, 2011 WL 2974957, at *4, *7.

88. *Id.* at *37. Baker Botts' total fees for the *ASARCO* case, including the fee enhancement, exceeded US$117 million. *Id.* at *41. The court calculated the fee enhancement by applying a 10% increase to the 58,781.2 hours *alone* that Baker Botts' attorneys spent on the SPCC fraudulent transfer litigation.

lar fee enhancements for asbestos litigation in which claimants received a settlement of almost US$1 billion.[89] These fee enhancements were upheld by the district court[90] and were pending a decision on appeal to the Fifth Circuit at the time of publication.[91]

ASARCO demonstrates that foreigners facing litigation in U.S. courts may risk losing their sweetheart deal *and* having damages or fee enhancements assessed.[92] 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 rising copper prices did in *ASARCO*. Likewise, the size of the transactions discussed in *ASARCO*, presumably comparable to those in the Eurozone, provide significant incentives for debtors and their creditors to challenge the two and half hurdles.

III. THE TWO AND A HALF HURDLES TO U.S. ADJUDICATION OF FOREIGN FRAUDULENT TRANSFERS

Distressed Eurozone opportunities, counterparty failures, and improving economics may all serve to create incentives similar to those 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

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Id. at *37 n.103. The debtor in possession originally approved a fee enhancement for Baker Botts of US$22.64 million, but the bankruptcy court reduced the award upon challenge of the reorganized debtor. Sealed Brief for Baker Botts, LLP at 35, ASARCO LLC v. Jordan Hyden Womble Culbreth & Holzer, PC (*In re* ASARCO LLC), No. 12-40997 (5th Cir. Feb. 19, 2013).

89. *In re* ASARCO LLC, No. 05-21207, 2011 WL 2975882, at *12–13 (Bankr. S.D. Tex. July 20, 2011).

90. ASARCO LLC v. Baker Botts, LLP (*In re* ASARCO LLC), 477 B.R. 661, 665 (S.D. Tex. 2012); *Largest Fee Enhancement in U.S. Bankruptcy History Affirmed on Appeal*, BAKER BOTTS (Oct. 24, 2012), http://www.bakerbotts.com/largest-fee-enhancement-in-us-bankruptcy-history-affirmed-on-appeal-10-24-2012/.

91. *See* ASARCO LLC v. Jordan Hyden Womble Culbreth & Holzer, PC (*In re* ASARCO LLC), No. 12-40997 (5th Cir. filed Sept. 24, 2012).

92. *See In re ASARCO*, 2011 WL 2975882, *12–13.

insolvencies, contrary to statutory guidance.[93] Empirical evidence suggests this argument creates only a "half hurdle."[94]

After they prove 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.[95] As of yet, the Supreme Court has denied the opportunity to settle the dispute.[96] 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.

The final hurdle to adjudication in U.S. bankruptcy courts is whether these courts have constitutional authority to determine fraudulent transfer actions of foreign property. The Supreme Court's 2011 decision in *Stern v. Marshall*[97] revived a formalist approach to the separation of powers regarding bankruptcy courts' constitutional authority.[98] While litigants have struggled to reconcile its impact on *domestic* fraudulent trans-

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93. *See* 11 U.S.C. § 1525 (2006).

94. *See* Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, EXPRESSO 25 (2010), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jeremy_leong (characterizing Chapter 15 as a hypocritical "setback rather than a step forward for international cooperation in insolvency law").

95. *Compare* French v. Liebmann (*In re* French), 440 F.3d 145, 151–52 (4th Cir.), *cert. denied*, 549 U.S. 815 (2006) (applying § 541(a) and § 547 internationally), *with* Barclay v. Swiss Fin. Corp. (*In re* Bankr. Estate of Midland Euro Exch. Inc.), 347 B.R. 708, 717–18 (Bankr. C.D. Cal. 2006) (refusing to apply § 541(a) and § 548 internationally).

96. *See French*, 549 U.S. at 815.

97. 131 S. Ct. 2594 (2011).

98. *See* Tim S. Springer, *Supreme Court's Answer to the Anna Nicole Smith Saga in* Stern v. Marshall *Leaves Bankruptcy World Asking Questions*, BEHIND THE BENCH (Ass'n Bankr. Jud. Assistants), Sept. 2011, at 3 [hereinafter Springer, *Supreme Court's Answer*]. *See generally* Omar J. Alaniz, Navigating Through the Post-*Stern* World: A Comprehensive Survey of All Cases Meaningfully Discussing *Stern v. Marshall* (Nov. 8–9, 2012) [hereinafter Alaniz, Navigating Through the Post-*Stern* World] (presentation at 31st Annual Jay L. Westbrook Bankruptcy Conference), *available at* http://utcle.org/elibrary/get-asset-file/asset_file_id/44751/preview/1.

fer actions,[99] *Stern* also provides the final hurdle for U.S. bankruptcy courts to reach *foreign* transactions without offending Article III.

A. The Half Hurdle of Chapter 15 of Title 11.

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").[100] Among other significant changes to the Code, BAPCPA added the much-anticipated Chapter 15, which created new protocols for handling cross-border insolvency cases.[101] Chapter 15 integrated many of the changes proposed by the United Nations Commission on International Trade Law ("UNCITRAL") in its Model Law on Cross-Border Insolvency.[102] UNCITRAL's Model Law was intended to encourage a universalist approach to cross-board insolvencies and to promote continuity and predictability between courts in different countries.[103]

Before BAPCPA's passage, many U.S. bankruptcy scholars argued that international bankruptcies should not incorporate a universalist principle.[104] Professor Lynn LoPucki has advocated for a territorialist approach, which would limit a country's judicial powers to enforcement only within its territorial

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99. *See* Omar J. Alaniz, *A Survey of Cases Interpreting the Stern Decision (Part I)*, 17 BANKR. LITIG. (A.B.A. Bankr. & Insolvency Litig. Comm.), Feb. 15, 2012, at 21–34, *available at* http://apps.americanbar.org/litigation/committees/bankruptcy/articles/winter2012-survey-interpreting-stern.html [hereinafter Alaniz, *A Survey of Cases Interpreting the* Stern *Decision*] (listing cases with both narrow and expansive views of *Stern*).

100. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 801–02, 119 Stat. 23, 134–46.

101. *Id.*

102. *See* Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, Annex, art. 10, U.N. Doc. A/RES/52/158 (Jan. 30, 1998).

103. *Cf.* 11 U.S.C. § 1525 (2006) ("[T]he court shall cooperate to the maximum extent possible with a foreign court . . . ."). For further discussion of UNCITRAL's Model Law and its application in U.S. bankruptcies, see Timothy S. Springer, Note, *Paved with Good Intentions: Creditors Face a New Roadblock to Recovery in Mexican Bankruptcies*, 18 L. & BUS. REV. AM. 83, 90–93 (2012) [hereinafter Springer, *Paved with Good Intentions*].

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

borders.[105] While supporting a theory of universalism, another prominent U.S. bankruptcy scholar, Professor Jay L. Westbrook, has acknowledged that "it seems unrealistic to think that universalism will be accepted absent roughly similar laws."[106] UNCITRAL'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 might be forced to cooperate by cross-border insolvencies must have first adopted either the Model Law or laws otherwise comparable.[107] As of January 2012, only nineteen countries have adopted the Model Law, with China and India conspicuously absent from the list.[108]

The United States has begun harmonizing its bankruptcy procedures with other international jurisdictions,[109] but Chapter 15 does not provide a clear answer to U.S. courts' ability to reach distressed Eurozone transactions. BAPCPA and Chapter 15 improved U.S. recognition of proceedings and the ability of U.S. courts to apply foreign law to U.S. proceedings.[110] 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."[111]

Empirical evidence suggests that Chapter 15 may not be "as universalist as its proponents claim it to be."[112] 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."[113] In one sense, "Chapter 15 . . . does not significantly further cooperation because it applies only to

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105. *Id.*

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

107. *See id.*

108. *Status: 1997—UNCITRAL Model Law on Cross-Border Insolvency*, UNITED NATIONS COMM'N ON INT'L TRADE LAW [UNCITRAL], http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Apr. 19, 2013).

109. *See* Springer, *Paved with Good Intentions*, *supra* note 103, at 90.

110. *See Developments in the Law: VII. Chapter 15 and Cross-Border Bankruptcy*, 124 HARV. L. REV. 1292, 1293 (2011).

111. *Id.*

112. Leong, *supra* note 94, at 8.

113. *Id.* at 9.

debtors already subject to a foreign proceeding."[114] Chapter 15 also requires that a U.S. court determine whether its case is ancillary to a "foreign main proceeding,"[115] which the Code defines as "a foreign proceeding pending in the country where the debtor has the center of its main interests."[116] U.S. courts have "recognized foreign proceedings in almost every Chapter 15 case" since BAPCPA's passage in 2005,[117] but empirical data indicates the courts have still withheld jurisdiction over some assets even *after* recognition in a vast majority of cases—77.3% to be precise.[118] In only 9.1% of cases did the U.S. court entrust to foreign courts all distribution of estate assets where U.S. creditors were at stake.[119]

The Fifth Circuit recently affirmed one example of a U.S. bankruptcy court applying U.S. law in contradiction to foreign law. The bankruptcy court in *In re Vitro, S.A.B. de C.V.* refused to enforce a confirmed *concurso* plan from a Mexican court.[120] The Mexican plan would have paid equity classes before more senior debt classes—a clear violation of the Absolute Priority Rule[121]—and released from claims by Vitro's creditors several third party subsidiaries in the United States that were not a part of the bankruptcy case.[122] In affirming the bankruptcy

114. *Developments in the Law*, *supra* note 110, at 1300.

115. *See* 11 U.S.C. § 1515 (2006) (outlining process to apply for recognition of Foreign Main Proceeding).

116. *Id.* § 1502(4).

117. Leong, *supra* note 94, at 7.

118. *Id.* at 8, 14–15, fig.1. The 77.3% figure comes from two categories. First, Leong's findings show U.S. "courts granted entrustment in only 45.5% of cases where foreign proceedings were recognized." *Id.* at 7. Second, "[w]hen such entrustment was granted, 31.8% of cases were accompanied by qualifying factors," which included imposing U.S. priority laws or requiring assurances such priority distribution schemes would be followed. *Id.* at 1.

119. *Id.* at 14.

120. *See* Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (*In re* Vitro, S.A.B. de C.V.), 473 B.R. 117, 133 (Bankr. N.D. Tex. 2012), *aff'd sub nom.* Ad Hoc Group of Noteholders v. Vitro S.A.B. de CV, 701 F.3d 1031 (5th Cir. 2012).

121. The Absolute Priority Rule requires that claimants with higher priority in a Chapter 11 case must be paid in full before claimants with junior priority can be paid in a plan of reorganization. 11 U.S.C. § 1129(b)(2)(B)(i)–(ii) (2006).

122. *See Vitro, S.A.B. de C.V.*, 473 B.R. at 131–33.

court's denial of confirmation,[123] the Fifth Circuit has provided an example of U.S. courts applying U.S. law and shunning foreign law.

The empirical and substantive evidence of U.S. courts retaining control illustrate the inability of Chapter 15 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 that U.S. courts would not willingly part with jurisdiction without some baseline qualifications.[124] 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. But litigants must subsequently 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 the Extraterritorial Application of Title 11

Following the passage of BAPCPA and Chapter 15, U.S. courts have maintained the ability to apply U.S. law to issues involving foreign-based property. Courts are generally faced with two questions before they are able to apply 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?[125] For U.S. courts to reach distressed Eurozone transactions, litigants must prove both that Congress intended for the federal law to apply extraterritorially and that the intrusion into international affairs does not violate comity between U.S. law and Eurozone law.[126]

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123. *Ad Hoc Group of Noteholders*, 701 F.3d at 1069. The Fifth Circuit affirmed on the grounds that "the Bankruptcy Code precludes non-consensual, non-debtor releases," and thus did not reach the question of whether the *concurso* plan "would be manifestly contrary to the fundamental public policy of the United States." *Id.*

124. *See id.*

125. French v. Liebmann (*In re* French), 440 F.3d 145, 149 (4th Cir.), *cert. denied*, 549 U.S. 815 (2006).

126. *See id.*

1. Analysis of Statutory Jurisdiction

It is well settled that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."[127] In addition, 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."[128] A presumption thus exists "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[129] This presumption may be overcome by some "clearly expressed purpose" to apply the law extraterritorially,[130] demonstrated by the three-factor test the Supreme Court announced in *Foley Brothers, Inc. v. Filardo*.[131] This test provides that the courts must review the statutory language, the statute's legislative history, and any administrative interpretations of the statute.[132]

Section 541 of the Code defines what property and interests belonging to a debtor constitute the bankruptcy estate over which the court has custody.[133] Applying the *Foley Brothers* 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."[134] Congress amended § 70a of the Bankruptcy Act, the predecessor of § 541, in 1952 to include the phrase "wherever located."[135] The House Report connected with the amendment 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

127. 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)).
128. *Id.* at 258 (quoting Argentine Republic v. Amerado Hess Shipping Corp., 488 U.S. 428, 440 (1989)).
129. *Id.* at 248 (quoting *Foley Bros.*, 336 U.S. at 285).
130. *Foley Bros.*, 336 U.S. at 286.
131. *Id.* at 285–88.
132. *Id.*
133. *See* 11 U.S.C. § 541 (2006).
134. *Id.* § 541(a) (emphasis added).
135. *See* Frank R. Kennedy, *Bankruptcy Legislation of 1962*, 4 B.C. INDUS. & COM. L. REV. 241, 241, 247 (1963) (citing Pub. L. No. 82-456, 66 Stat. 420, 429–30 (1952)), *available at* http://lawdigitalcommons.bc.edu/bclr/vol4/iss2/1.

United States."[136] Legislative reports from the 1978 reforms give less specific guidance, seemingly incorporating by reference all property included under § 70a of the Bankruptcy Act.[137] Congress's failure to retreat from the 1952 report in either 1972 or any of the subsequent amendments would appear to indicate a tacit adoption. The third *Foley Brothers* factor does not apply in a § 541 analysis because no agency interpretations are available.[138]

Despite the apparent extraterritorial application of § 541 using the *Foley Brothers* factors, courts remain split as to whether § 541 may apply extraterritorially to incorporate foreign-based property.[139] The dispute centers around whether the widely recognized extraterritorial application of § 541 also includes the trustee's avoidance powers under § 548.[140] The academic community has articulated eloquent arguments for both sides of the debate.[141] Nonetheless, the Supreme Court has not

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136. H.R. REP. NO. 82-2320, at 15 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1960, 1976 (emphasis added).

137. *See* H.R. REP. NO. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323.

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

139. *Compare* French v. Liebmann (*In re* French), 440 F.3d 145, 151–52 (4th Cir.), *cert. denied*, 549 U.S. 815 (2006) (applying § 541(a) and § 547 internationally), *with* Barclay v. Swiss Fin. Corp. (*In re* Bankr. Estate of Midland Euro Exch. Inc.), 347 B.R. 708, 717–18 (Bankr. C.D. Cal. 2006) (refusing to apply § 541(a) and § 548 internationally).

140. *See, e.g.*, Hong Kong & Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 996, 999 (9th Cir. 1998) (holding § 541 applies extraterritorially); Lykes Bros. Steamship Co. v. Hanseatic Marine Serv. (*In re* Lykes Bros. S.S. Co.), 207 B.R. 282, 287 (Bankr. M.D. Fla. 1997) (holding the same); Nakash v. Zur (*In re* Nakash), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (holding the same).

141. *Compare* Lynn M. LoPucki, *supra* note 104 (advocating territorialist approach), *and* Welch, *supra* note 138, at 563–65 (also advocating territorialist approach), *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 Benzija, *Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code*, 10 AM. BANKR. INST. L. REV. 85, 109–10 (2002) (also advocating universalist approach).

yet spoken, instead rejecting the opportunity to settle the circuit split over the Code's extraterritorial application.[142]

As a result, courts remain split over whether the language of § 541 incorporates foreign transferred property pre-petition.[143] 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,[144] or because the estate *regains* an equitable interest in fraudulently transferred property following a § 550 recovery order.[145] Although the Fifth Circuit's logic has been criticized as circular,[146] at least one court has concluded that because fraudulent transfers involve transitory law, such actions may be brought wherever personal jurisdiction has been established.[147]

2. Analysis of International Comity

In addition to concerns about § 548 importing extraterritoriality from § 541, litigants must also address principles of inter-

142. *French*, 440 F.3d 145. 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 138, at 559 n.51. Also of note, the Supreme Court denied certiorari in *French* before deciding *Morrison v. National Bank of Australia*, 130 S. Ct. 2869 (2010), a case in which the Supreme Court "swiftly swept away a half-century of lower courts treating the issue of extraterritorial reach of the securities law as a question of subject matter jurisdiction." Jared L. Kopel et al., *Current Topics on Securities Litigation*, *in* 1850 PRACTISING L. INST., CORP. L. & PRAC. COURSE HANDBOOK SERIES 365, 391 (2010).

143. *Compare* Cullen Ctr. Bank & Trust v. Hensley (*In re* Criswell), 102 F.2d 1411, 1415–16 (5th Cir. 1997), *and* Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (*In re* MortgageAmerica Corp.), 714 F.2d 1266, 1273 & n.7, 1275–76 (5th Cir. 1983), *with* Welch, *supra* note 138, at 563 (citing *Barclay*, 347 B.R. at 718) ("Irrespective of the extraterritorial application of § 541, foreign transferred property is not within the estate.").

144. *See Cullen*, 102 F.3d at 1415–16.

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

146. *See* Welch, *supra* note 138, at 563–64 (stating that 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").

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

national comity. Courts look to factors such as, (1) the regulations and laws of the potentially conflicting foreign territory; (2) the connection and economic activities between the parties and this territory; (3) the likelihood of conflict of laws; and (4) the foreign territory's interest in regulating the transaction.[148] At least one court has required that an actual conflict between foreign and domestic law exist in order to violate international comity.[149] Moreover, Chapter 15 would appear to settle concerns about international comity and provide statutory cover for courts to reach Eurozone transactions, at least on its face, especially if the foreign jurisdiction has adopted UNCINTRAL's Model Law and embraced universalism.

3. Alternative Options to Overcoming the Extraterritoriality Hurdle

If litigants are unable to overcome the presumption against extraterritoriality using the *Foley Brothers* factors, one option remains—prove that the presumption never arose. First, the presumption does not arise if the transfer occurred in the United States.[150] As many transactions touch several territorial jurisdictions simultaneously, some courts avoid the presumption if the United States was the "center of gravity."[151] 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,[152] or by a convincing argument extending the inclusion date for the property before the petition date.[153]

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148. *See* French v. Liebmann (*In re* French), 440 F.3d 145, 153 (4th Cir.), *cert. denied*, 549 U.S. 815 (2006) (discussing the Restatement (Third) of Foreign Relations Law of the United States § 403 (1987)).

149. *Diaz-Barba*, 2010 WL 2079738, at *11.

150. *Id.* at *7 (citing Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 987 (9th Cir. 2008)).

151. *See* David B. Stratton, *Reflections on the Extraterritorial Application of the Bankruptcy Code*, AM. BANKR. INST. J., Sept. 2005, at 44, 73 (2005).

152. *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).

153. *See* West v. Freedom Med., Inc. (*In re* Apex Long Term Acute Care—Katy, L.P.), 465 B.R. 452, 464 (Bankr. S.D. Tex. 2011) (concluding that property transferred during the preference period was effectively property of the

Litigants may also argue that the presumption against extraterritoriality does not arise in bankruptcy proceedings because bankruptcy is materially different from other legal contexts and requires special consideration.[154] In *French*, one judge concurred to emphasize his view that the Supreme Court's "strong presumption against extraterritoriality" remained "intact" after the panel's decision.[155] 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."[156] As a result, litigants must argue that bankruptcy should be considered separately, and not be grounds "to set forth general pronouncements on extraterritoriality."[157]

Finally, litigants seeking to reach Eurozone transactions may be able to use the Affiliate Rule to file in a circuit willing to exercise jurisdiction extraterritorially. This rule allows a company to file either in the jurisdiction of its principal place of business,[158] or in that of an affiliated company.[159] Of course, the rule cannot be used offensively to establish business in a favorable jurisdiction solely for the purpose of filing bankruptcy,[160] but it "is the rare case, indeed, in which a debtor's business does not have *some* international aspect."[161] 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.

If successful in overcoming the hurdles of Chapter 15 and extraterritoriality, litigants will have gained access to, at the minimum, U.S. district courts. But the final hurdle will deter-

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estate, despite the transaction occurring as much as a year before bankruptcy in some cases).

154. French v. Liebmann (*In re* French), 440 F.3d 145, 154–55 (4th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006) (Wilkinson, J., concurring).

155. *Id.* at 155.

156. *Id.* (emphasis added).

157. *Id.*

158. 28 U.S.C. § 1408(1) (2006).

159. *Id.* § 1408(2).

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

161. Stratton, *supra* note 151, at 44 (emphasis added).

mine if litigants can obtain expedited treatment under the "rocket dockets" of U.S. bankruptcy courts.

C. Questions of Bankruptcy Courts' 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*[162] 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.[163] In fact, although *Stern* considers the authority of bankruptcy courts, the decision "is not really a bankruptcy decision at all; it is a constitutional separation of powers decision."[164]

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 from time to time ordain and establish."[165] Bankruptcy judges are not Article III judges; they lack the hallmark characteristics of life tenure and salary protection.[166] Instead, bankruptcy judges' powers come from Article I of the U.S. Constitution, which empowers Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[167] 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 branch, violating the separation of powers.[168] Although money and job security may appear to be insignificant reasons for such a dis-

162. 131 S. Ct. 2594 (2011).

163. *See id.* at 2608.

164. 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., no. 1, Jan. 2012, at 1.

165. U.S. CONST. art. III, § 1.

166. *Stern*, 131 S. Ct. at 2600–01.

167. U.S. CONST. art. I, § 8, cl. 4.

168. *See* INS v. Chadha, 462 U.S. 919, 974 (1983) (rejecting the one-house veto as unconstitutional because it aggrandized the powers of the legislative branch to the detriment of the executive branch, thus violating the separation of powers).

tinction, the Framers of the Constitution recognized that these two features protect the courts from tyranny.[169]

The *Stern* Court held a non-Article III court violated the separation of powers by entering a final order in a common law case reserved for Article III courts.[170] Although the holding in *Stern* was self-limiting,[171] "a maelstrom of opinions and articles have been written about the scope of *Stern*, ranging in tone from 'much ado about nothing' to 'the end of the bankruptcy world as we know it.'"[172] Caught squarely in the middle is whether bankruptcy courts have authority to enter final orders in fraudulent transfer actions.

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 empowers Congress to create laws regarding the debtor-creditor relationship in bankruptcy.[173] Congress exercised its Article I powers in 1978 to replace the then-existing Bankruptcy Act with the present Bankruptcy Code.[174] Like other federal courts, bankruptcy courts' jurisdiction is therefore "grounded in, and limited by, statute."[175] Following the Supreme Court's decision in *Northern Pipeline v. Marathon*,[176] Congress revisited the bankruptcy al-

169. *See* THE FEDERALIST No. 78 (Alexander Hamilton).

170. *See Stern*, 131 S. Ct. at 2609.

171. *See 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 . . . .").

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

173. U.S. CONST. art. I, § 8, cl. 4.

174. 11 U.S.C. §§ 101–1532 (2006).

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

176. *See* 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).

location scheme and restructured jurisdictional allocations under Title 28.[177]

Under the revised allocation framework, federal district courts have original and exclusive jurisdiction for all *cases* arising under Title 11.[178] Section 157(a) provides statutory authority for district courts to refer jurisdiction to the bankruptcy courts for those cases falling "under title 11 and *any or all proceedings* arising under title 11 or arising in or related to a case under title 11."[179] 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."[180] District courts supervise referrals with the ability to withdraw the reference at any time by their own motions.[181]

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."[182] 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 in [the 1984 Act]."[183] Moreover, the express "language of § 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."[184]

Congress allocated original jurisdiction to bankruptcy courts to hear and determine proceedings concerning estate property

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177. 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 of the U.S. Code).

178. 28 U.S.C. § 1334(a) (2006).

179. *Id.* § 157(a) (emphasis added).

180. *Id.* § 1334(e). *See also* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447–48 (2004) ("Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate.").

181. 28 U.S.C. § 157(d).

182. Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

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

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

that arise in a bankruptcy case or under Title 11.[185] "Arising in" jurisdiction pertains to matters that could only arise in a case under Title 11.[186] By comparison, "arising under" jurisdiction includes proceedings created by Title 11.[187] Taken together, actions "arising in" or "arising under" comprise core proceedings within bankruptcy courts' jurisdiction.[188] 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.[189]

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.[190] 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."[191] Put simply, "a civil proceeding is related to a [T]itle 11 case if the action's outcome might have *any conceivable effect* on the bankrupt estate."[192] "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.[193] Absent consent of the parties under § 157(c)(2), the statute at most authorizes bankruptcy courts in "related to" proceedings to submit proposed findings of fact and conclusions of law to the district court for a *de novo* review.[194]

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185. *See* 28 U.S.C. §§ 1334(b), 157(b)(1), 157(b)(2)(A).
186. *See* Wilborn v. Wells Fargo Bank (*In re* Wilborn), 609 F.3d 748, 752 (5th Cir. 2010).
187. 28 U.S.C. § 157(b)(1); Schatz v. Chase Home Fin. (*In re* Schatz), 452 B.R. 544, 551 (Bankr. M.D. Pa. 2011).
188. *See* Stern v. Marshall, 131 S. Ct. 2594, 2604–05 (2011).
189. *See id.* at 2604 (citing 28 U.S.C. § 158; BANKR. R. PROC. 8013).
190. *See Stern*, 131 S. Ct. at 2605.
191. Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.6 (1995) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).
192. Parmalat Capital Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572, 579 (2d Cir. 2011) (emphasis added) (internal quotation marks omitted).
193. *Cf. Stern*, 131 S. Ct. at 2605 (defining core proceedings as "arising in" or "arising under" Title 11).
194. 28 U.S.C. § 157(c)(1).

Stern involved a dispute over a considerable inheritance, and a widow's attempt to recover in bankruptcy court for a tort claim against her late husband's son.[195] 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.[196] Therefore, because of the conceivable effect on the estate, § 157(c) should have allocated jurisdiction over the purely state-law counterclaim under the "related to" or non-core framework.[197] But because Congress included counterclaims by the estate in the non-exhaustive list of core proceedings in the 1984 Act,[198] the bankruptcy court relied on this list to enter a final order.[199]

The *Stern* Court rejected the defunct label under § 157(b)(2)(C) for state law counterclaims as core proceedings, but declared only this narrow sub-provision to be unconstitutional.[200] Absent consent, which the Court determined was not given for the counterclaim,[201] the bankruptcy court's only authority under the § 157 allocation scheme was to submit proposed findings to the district court.[202] Even assuming that the Court's holding in *Stern* affected proceedings that did not invoke solely "related to" jurisdiction, a bankruptcy court may still hear and determine such matters after *Stern* with the consent of the parties.[203] Chief Justice Roberts defined "core proceedings [as] those that arise in a bankruptcy case or under Title 11."[204] Thus the Court is referring to the only remaining original bankruptcy jurisdiction—"related to"—when it states, "parties may consent to entry of final judgment by [a] bankruptcy judge in non-core case."[205] The Court neither rejected

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195. *See Stern*, 131 S. Ct. at 2601.
196. *Id.* at 2618; *see also* 28 U.S.C. § 157(a).
197. *See* 28 U.S.C. § 157(c)(1).
198. *Id.* § 157(b)(2)(C); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).
199. *See Stern*, 131 S. Ct. at 2602.
200. *See id.* at 2608, 2620.
201. *See id.* at 2614.
202. 28 U.S.C. § 157(c)(1).
203. *E.g.*, Mercury Cos. v. FNF Sec. Acquisition, Inc., 460 B.R. 778, 781–83 (D. Colo. 2011); *In re* Olde Prairie Block Owner, 457 B.R. 692, 699–700 (Bankr. N.D. Ill. 2011).
204. *Stern*, 131 S. Ct. at 2605.
205. *Id.* at 2607 (citing 28 U.S.C. § 157(c)(2)).

any other core proceeding under § 157(b), nor renounced bankruptcy courts' ability to hear and submit proposals and conclusions under the § 157(c)(1) allocation scheme.[206]

What the *Stern* decision *has* done is to revive arguments over significant dicta in the decision of *Granfinanciera, S.A. v. Nordberg*.[207] 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, not equitable, and because it closely mirrored a common law action.[208] Although it decided 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.[209] The opinion in *Granfinanciera* echoed many of the Supreme Court's earlier concerns in *Marathon* about non-Article III courts and the scope of public rights,[210] although it specifically rejected any limitation that would have mandated that the federal government be a party in all cases involving public rights.[211]

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206. *See, e.g.*, Gecker v. Flynn (*In re* Emerald Casino, Inc.), 459 B.R. 298, 300 n.1 (Bankr. N.D. Ill. 2011) (upholding § 157(c)(1)); Adams Nat'l Bank v. GB Herdon & Assocs., Inc. (*In re* GB Herdon & Assocs., Inc.), 459 B.R. 148, 160–66 (Bankr. D.D.C. 2011) (denying debtor's motion to reconsider removal after *Stern* because debtor had consented under § 157(c)(2)); *In re* Safety Harbor Resort & Spa, LLC, 456 B.R. 703, 715 (Bankr. M.D. Fla. 2011). *But see* Waldman v. Stone, 698 F.3d 910 (6th Cir. 2012) (determining that bankruptcy court lacked constitutional authority to enter judgment for fraud claims brought by the debtor, reasoning that the creditor's objection on appeal to bankruptcy court adjudication implicated private rights that could not be waived by a litigant).

207. 492 U.S. 33 (1989).

208. *Id.* at 46–47, 50.

209. *Id.* at 56.

210. *Compare id.* at 53–54 (discussing "whether Article III allows Congress to assign adjudication of [a common law] cause of action to a non-Article III tribunal"), *with* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–67 (1982) (discussing the same issue).

211. *Compare Granfinanciera,* 492 U.S. at 53–54, *with* Stern v. Marshall, 131 S. Ct. 2594, 2620–21 (2011) (Scalia, J., concurring) (suggesting that he would require the government to be a party for a fraudulent transfer to fit within the public rights exception).

3. How Lowers Courts Are Grappling with *Stern's* Implications

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.[212] In addressing *Stern*, lower courts of all levels have fallen into either the narrow, neutral, or expansive interpretive camps.[213] 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*."[214]

Within the context of fraudulent transfers brought under the Code, the expansive camp may have an argument that the progeny of *Marathon*, *Granfinanciera*, and *Stern* preclude adjudication in bankruptcy courts.[215]

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212. *See* Alaniz, Navigating Through the Post-*Stern* World, *supra* note 98, at 2–3; Springer, *Supreme Court's Answer*, *supra* note 98, at 1.

213. As of April 18, 2013, 1089 cases have cited *Stern*, including 480 discussing the decision. Of these 480 cases, 216 fall within the "narrow" camp, 145 within the "expansive" camp, and 119 remain "neutral." *See* Shepard's® Report for *Stern v. Marshall*, LEXIS (Dec. 26, 2012), http://advance.lexis.com (search "131 S. Ct. 2594"; click "Shepardize®" button; then select "Citing Decisions" tab and display by "Grid"). For a detailed case chart analyzing cases that discuss *Stern* in a "meaningful way" from September 1, 2011 through October 15, 2012, see chart accompanying Alaniz, *A Survey of Cases Interpreting the Stern Decision*, *supra* note 99, *available at* http://apps.americanbar.org/litigation/committees/bankruptcy/articles/winter2012-survey-interpreting-stern-chart.pdf.

214. Kuney, *supra* note 164, at 6 (emphasis added). Although the facts of *Stern* were limited to 28 U.S.C. § 157(b)(2)(C), the decision has broad implications on the other proceedings included in the non-exhaustive list under § 157(b)(2), including fraudulent conveyances. *See id.*

215. *Compare* Heller Ehrman LLP v. Arnold & Porter LLP (*In re* Heller Ehrman LLP), 464 B.R. 348, 360 (N.D. Cal. 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) (holding bankruptcy court could not determine § 548 proceeding), *with* Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 187 (Bankr. S.D.N.Y. 2011) (bankruptcy court could determine both § 544(b) and § 548

Several circuits have addressed *Stern* issues in bankruptcy and fraudulent transfer contexts.[216] The Fifth Circuit held that *Stern* does not affect the jurisdictional allocation for magistrate courts,[217] and later the circuit reemphasized its reasoning in a bankruptcy context.[218] Additionally, the Seventh Circuit rejected bankruptcy courts' authority in an "arising in" proceeding

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claims); Mercury Cos. v. FNF Sec. Acquisition, Inc., 460 B.R. 778, 783–84 (D. Colo. 2011) (bankruptcy court could determine only § 548 claims); *and* Goldstein v. Eby-Brown, Inc. (*In re* Universal Mktg., Inc.), 459 B.R. 573, 580 (Bankr. E.D. Pa. 2011) (bankruptcy court could determine § 544 and § 549 claims).

216. *See, e.g.*, Exclusive Benefits Ins. Agency v. Arkinson (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553, 561–65 (9th Cir. 2012) (holding "bankruptcy courts ha[d] [constitutional] authority [only] to hear and enter proposed findings of fact and conclusions of law in . . . fraudulent conveyance" claims against non-creditors under 11 U.S.C. § 548(a)(2) because such claims did not fall within the public rights exception); Waldman v. Stone, 698 F.3d 910, 920–23 (6th Cir. 2012) (holding bankruptcy court lacked constitutional authority to enter final judgment on state law fraud claims, but had authority to enter order disallowing and discharging the claims); Onkyo Eur. Elecs. GMBH v. Global Technovations Inc. (*In re* Global Technovations Inc.), 694 F.3d 705 (6th Cir. 2012) (determining that bankruptcy court had constitutional authority to rule on fraudulent transfer action and good faith transferee defense under state law where defendants had filed a proof of claim); Lovald v. Falzerano (*In re* Falzerano), 686 F.3d 885, 887 n.2 (8th Cir. 2012) (declining to address whether *Stern* prevented bankruptcy court from issuing final order in turnover adversary proceeding); Pfizer Inc. v. Law Offices of Peter G. Angelos (*In re* Quigley Co.), 676 F.3d 45 (2d Cir. 2012) (holding bankruptcy court had jurisdiction and constitutional authority to issue injunction over asbestos-related suits pursuant to 11 U.S.C. § 524(g)); DiVittorio v. HSBC Bank USA, NA (*In re* DiVittorio), 670 F.3d 273 (1st Cir. 2012) (concluding *Stern* did not affect constitutional authority of bankruptcy court to render decision in adversary proceeding involving failure to state a claim and waiver of rights under a loan agreement); Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 665 F.3d 906 (7th Cir. 2011) (holding bankruptcy court did not have constitutional authority to render final judgment in adversary proceeding for state law claims of improper medical patient disclosure because claims involved private rights).

217. *See* Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 409 (5th Cir. 2012). The statute allocating authority for magistrate courts is so similar to 28 U.S.C. § 157 in its application that a constitutional decision on one is often viewed as affecting the other. *See* Kuney, *supra* note 164, at 8; Alaniz, Navigating Through the Post-*Stern* World, *supra* note 98, at 20–22.

218. *See* CRG Partners Group, LLC v. Neary (*In re* Pilgrim's Pride Corp.), 690 F.3d 650, 666–67 (5th Cir. 2012).

seeking damages provided for by a state statute regarding the disclosures of confidential medical records.[219] And the Ninth Circuit recently issued an expansive reading of *Stern*, holding that a fraudulent conveyance claim against a non-creditor brought under 11 U.S.C. § 548 did not fall within the public rights exception[220] and that a bankruptcy court was authorized only to issue proposed findings of fact and conclusions of law.[221]

If bankruptcy courts can adjudicate fraudulent transfers after *Stern*, it will likely be through the public rights doctrine, a judicially created exception to Article III adjudication.[222] The exception is linked to Congress's Article I legislative powers.[223] Congress may except three types of powers from Article III determinations: (1) territorial courts, (2) courts martial, and (3) cases involving public rights.[224] Cases falling within these three categories "may be removed from [Article] III courts and delegated to legislative courts or administrative agencies for their determination."[225] Although the public rights doctrine was first applied to a dispute between the government and an individual,[226] it has since been recognized to include actions where the government is not a formal party.[227] Congress may create rights under a public regulatory scheme that bear "many of the characteristics of a public right," even when the right is

219. *See Ortiz*, 665 F.3d at 915.

220. *Exclusive Benefits*, 702 F.3d at 561.

221. *Id.* at 565.

222. *But see id.* at 564 (rejecting a public rights argument in a § 548 case).

223. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593–94 (1985).

224. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–67 (1982). Depending on the desired persuasion, parties may wish to describe public rights as a "doctrine" or "exception." *See id.* at 67–69.

225. *Id.* at 70.

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

227. *See Union Carbide*, 473 U.S. at 585–86. 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.* at 586 (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).

asserted between individuals.[228] 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."[229] 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."[230]

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."[231] But Article III would serve little "purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."[232] 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."[233] Thus, jury trial rights attach when suits—both "the mundane as well as the glamorous"[234]—involve the "stuff" of eighteenth-century common law actions, and Congress may not withdraw such suits from Article III judicial cognizance.[235]

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228. *Union Carbide*, 473 U.S. at 589 (internal quotation marks omitted).

229. *Id.* at 594.

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

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

232. *Id.* at 2609.

233. *Id.* (emphasis added) (citations omitted) (quoting *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment) (internal quotation marks omitted)).

234. *Id.* (quoting *Northern Pipeline*, 458 U.S. at 86 n.39 (plurality opinion)).

235. *See id.* (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856)).

4. 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."[236] 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, these parties will argue that Congress may not simply "'federalize' and inoculate against Article III challenge[s]" such traditional common law proceedings "by enacting [them] as part of the Bankruptcy Code."[237] Such arguments have been made successfully in the debate over fraudulent transfers and 11 U.S.C. § 548.[238]

In comparison, the "narrow" camp must argue that the multiparty nature of bankruptcy cases and proceedings,[239] as well as the fundamental differences between fraudulent transfer actions brought under § 544(b) and § 548 of the Code, provide a bright-line test.[240] One crucial development has reemerged amid the post-*Stern* developments in the bankruptcy, district, and circuit courts as the silver bullet to bankruptcy court authority—the target of a fraudulent conveyance action filing a proof of claim.[241] A proof of claim, in effect, tethers a defendant

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

237. Kuney, *supra* note 164, at 6 n.64 (internal quotation marks omitted).

238. *See, e.g.*, Exclusive Benefits Ins. Agency v. Arkinson (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553, 561–65 (9th Cir. 2012).

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

240. Section 548 gives a trustee standing to recover prepetition transfer under federal law. 11 U.S.C. § 548. In comparison, § 544(b) allows a trustee to avoid prepetition transfers using state law or other applicable non-bankruptcy law by stepping into the shoes of a creditor holding an allowable unsecured claim. *Id.* § 544(b). As a result, the trustee may invoke § 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 distinction between § 544 and § 549, but concluding bankruptcy court had final-order authority).

241. *See, e.g.*, Onkyo Eur. Elecs. GMBH v. Global Technovations Inc. (*In re* Global Technovations Inc.), 694 F.3d 705, 722–23 (6th Cir. 2012).

to the bankruptcy court through 11 U.S.C. § 502(d), supplying "the bankruptcy court with authority to rule on the fraudulent transfer claim because the fraudulent transfer action becomes part of the debtor-creditor adjustment."[242]

Both camps may have to wait until the next constitutional challenge reaches the Supreme Court for unresolved questions from *Stern* to be settled.[243] 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.[244] Bankruptcy courts are known for efficiently handling heavy dockets and, in a practical sense, things move faster in bankruptcy court.[245] 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."[246]

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;[247] more time for decisions

242. Alaniz, Navigating Through the Post-*Stern* World, *supra* note 98, at 10–11 (citing Katchen v. Landy, 382 U.S. 323, 329–30 (1966)).

243. *See* Springer, *Supreme Court's Answer*, *supra* note 98.

244. *See id.* at 1; *see also* Robin E. Phelan et. al., The Peoples and the Courts Get Confuseder and Confuseder: Recent Ridiculous Rulings from Bankruptcyland 10 (Aug. 3, 2011) (CLE presentation to Dallas Bar Association) (on file with author).

245. For a recent example of this reality, see *In re* Baldwin, 700 F.3d 122, 129 (3rd Cir. 2012). The Third Circuit refused to issue a writ of mandamus to overturn a bankruptcy court order that limited both parties' time to present evidence to 7.5 hours in a breach of fiduciary duty case, holding only "that a post-judgment appeal is adequate to assure meaningful review of the propriety of the time-limit order." *Id*. *See also* Kuney, *supra* note 164, at 6 n.69.

246. *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).

247. *See* Kuney, *supra* note 164, at 6–8.

to be appealed, references to be withdrawn, or judgments to be entered after the bankruptcy court's submission of proposed findings;[248] and demands for jury trials.[249] Although these additional steps were often simply assumed before *Stern*,[250] they will now cause foreign litigants to expend more time, money, and resources defending themselves in courts in which they never intended to litigate.

CONCLUSION: 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.[251] But arguments for and against adjudication that have been persuasive with many courts exist at each hurdle. Foreign counterparties must 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* its laws;[252] (2) domestic creditor interests are best protected in U.S. courts; or (3) express qualifications requiring that U.S. law be applied elsewhere are necessary.[253] Alternatively, counterparties may argue that distressed Eurozone transactions are so egregious as to invoke Chapter 15's exception for "manifestly contrary to the public policy of the United States,"[254] although this exception requires a high standard of proof.[255]

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248. *See* 28 U.S.C. § 157(c)(1), (d) (2006) (proposed findings and conclusions of law by bankruptcy courts require *de novo* review by district courts, and referrals to bankruptcy courts may be withdrawn at any time by the district court *sua sponte* "for cause shown").

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

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

251. *See* Kuney, *supra* note 164, at 9.

252. *See Developments in the Law*, *supra* note 110, at 1293.

253. Leong, *supra* note 94, at 15.

254. 11 U.S.C. § 1506 (2006).

255. *Compare In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 638 n.16 (Bankr. E.D. Ca. 2006) (quoting H.R. Rep. No. 109-31, pt. 1, at 109 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 183) (observing that this standard "has been narrowly interpreted by courts around the world" to mean violating "the

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.[256] Such litigants must argue that the presumption never arose or, alternatively, that it has been overcome using the *Foley Brothers* factors. Foreign counterparties must argue that the plain language of 11 U.S.C. § 541 and other statutes does 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 counterparties 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."[257] Courts will hear a melodic refrain that the *Granfinanciera* dicta indicates a right to Article III adjudication in fraudulent transfer proceedings.[258] 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.[259]

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most fundamental policies" of the host nation), *with* Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (*In re* Vitro, S.A.B. de C.V.), 473 B.R. 117, 133 (Bankr. N.D. Tex. 2012), *aff'd sub nom*. Ad Hoc Group of Noteholders v. Vitro S.A.B. de CV, 701 F.3d 1031 (5th Cir. 2012) (concluding that a Mexican plan of reorganization that violated the Absolute Priority Rule and that extinguished guarantee claims of non-debtor subsidiary entities "manifestly contravene[d] the public policy of the United States and [was] also precluded from enforcement . . . ").

256. For instance, although the Second Circuit has yet to rule on extraterritoriality, the Southern District of New York—one of the highest-volume bankruptcy dockets in the United States—has refused to apply 11 U.S.C. § 547 extraterritorially, which would tend to discourage the Second Circuit as a viable forum for an extraterritorial argument. *See* Maxwell Comm'n Corp. v. Barclays Bank PLC (*In re* Maxwell Comm'n. Corp.), 170 B.R. 800, 814 (Bankr. S.D.N.Y. 1994), *aff'd on other grounds*, *In re* Maxwell, 93 F.3d 1036 (2nd Cir. 1996).

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

258. *See id.* at 64.

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

Conversely, counterparties 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. Counterparties must argue that the multi-party aspects of bankruptcy[260] and the differences between federal and state fraudulent transfer laws signify that an action under § 548 is not of the "stuff" of 1789. Alternatively, counterparties may be forced to distinguish § 544(b) as having the "stuff" of 1789 and re-focus the argument on separating § 548. In either instance, counterparties will seek to silence the *Granfinanciera* hymn as inapposite dicta. U.S. courts are still in the midst of determining whether the Constitution permits adjudication of 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.

This extended analysis of distressed Eurozone deals 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 well 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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260. *See* Kirschner v. Agoglia (*In re* Refco Inc.), 461 B.R. 181, 187 (Bankr. S.D.N.Y. 2011).