OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GRANFINANCIERA, S. A., et al.,
Petitioners v.
PAUL C. NORDBERG, CREDITOR TRUSTEE FOR THE ESTATE OF CHASE & SANBORN CORPORATION, etc.

CASE NO: 87-1716

PLACE: WASHINGTON, D.C.

DATE: January 9, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

GRANFINANCIERA, S.A., et al., :

Petitioners :

v. : No. 87-1716

PAUL C. NORDBERG, CREDITOR :

TRUSTEE FOR THE ESTATE OF :

CHASE & SANBORN CORPORATION, etc. :

Washington, D.C.

Monday, January 9, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 o'clock a.m.

APPEARANCES:

ADAM LAWRENCE, ESQ., Miami, Florida; on behalf of the Petitioners.

LAURENCE TRIBE, ESQ., Cambridge, Massachusetts; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1716, Granfinanciera v. Nordberg.

You may proceed whenever you're ready.

ORAL ARGUMENT OF ADAM LAWRENCE

ON BEHALF OF THE PETITIONERS

MR. LAWRENCE: Thank you, Mr. Chief Justice. May it please the Court.

In the 1984 Bankruptcy Act, Congress has neither intended to nor has it in fact abrogated or modified any of the Petitioners' Seventh Amendment rights. We feel for this reason that this Court need not explore the limits or the margins or the interstices of Congress' power to legislate outside the Seventh Amendment.

This case can be resolved neatly and completely, we submit, with a consideration of just two matters. The first matter is the unified jurisdictional structure and court organizational system created in the 1984 Bankruptcy Act. The second consideration is the entirely legal nature of the cause of action asserted by the Trustee in his complaint and the type of relief he asked for.

Turning to the 1984 Act, what's significant,

highly significant, about the Act is that it does not create a separate jurisdictional or juridical entity called the bankruptcy court. What it does create are a group of bankruptcy judges who are denominated a "unit" of the district court invested with the power of judicial officers of that court.

What Congress has not done very specifically in the 1984 Act is create out of these -- out of these bankruptcy judges an administrative agency, a specialized court of equity or specialized court, a court of any type, or a legislative tribunal. Congress has specifically left these judges as dependent, non-autonomous adjuncts or units of the plenary United States district court.

Now, it wasn't always this way, and I think a historical look is instructive here.

QUESTION: Excuse me. My Constitution says that the Judges, both of the Supreme and Inferior courts, shall hold their offices during good behavior.

MR. LAWRENCE: Yes, sir.

QUESTION: And yet you say these bankruptcy officers who don't hold their offices during good behavior are members of an inferior court of the United States.

MR. LAWRENCE: Well, I -- the -- the intent of

Congress was to create these judges obviously not as Article III judges, but as adjuncts to an Article III court.

QUESTION: I'm saying that intent is unconstitutional if that was the intent.

MR. LAWRENCE: Well, if that is the -- if the Act is unconstitutional, I don't think that necessarily impacts on our right to a jury trial.

QUESTION: Or else it wasn't their intent. I mean, that's another alternative.

MR. LAWRENCE: Well, if the -- if the intent of Congress was to do an unconstitutional act, obviously an interpretation must be arrived at that permits a constitutional construction.

It seems to me, though, that the -- that the precedent of this Court allows Article III type issues or public rights issues or issues arising out of -- out of legislation that Congress enacts to be decided in an adjunct fashion.

QUESTION: By a non-Article III court, correct.

MR. LAWRENCE: Yes.

QUESTION: But you're saying it's being decided by an Article III court with non-Article III judges, as I understand your argument.

MR. LAWRENCE: Well, my argument is that

initially -- if I could develop it historically, the argument is -- and from the 1984 Act -- that Congress is investing jurisdiction initially and in the first instance in the United States district court judges and the United States district court. Under the 1984 Act, that jurisdiction need not be shared. The United States district court judges, in whom a proceeding is emplaced, may or may not choose to refer that proceeding on to their non-Article III adjuncts. They may retain jurisdiction completely within themselves and resolve this issue to completion.

In the 1978 Act, for example --

QUESTION: The -- the -- under your theory, the decision that these adjuncts make is a decision of a United States district court, as I understand your --your theory.

MR. LAWRENCE: I think that was the intent of Congress and that's -- yes, that's what I would have to argue here that I believe -- I believe that was the --the purpose.

QUESTION: I -- I don't see how that can be.

MR. LAWRENCE: Well, I think Congress intended, by creating a variety of supervisory techniques that are set forth in 28 157 and in 1334, to so control these adjuncts as to make their decisions

essentially fall within the decisions of this Court that -- allowing such -- such adjudications by judges who themselves are not Article III judges, but are so subject to the control of Article III judges as to meet the requirements of Article III.

The -- the 1984 Act created a bankruptcy system in which judges need not refer these proceedings. They may hear the concept of a plenary suit under the 1898, of a summary suit under the 1898 Act, to use those terms which I think will arise in this case.

QUESTION: When you say judges need not refer these things, you're referring to the bankruptcy judges.

MR. LAWRENCE: I'm referring to the United States district court judges.

QUESTION: You're referring to the district judges.

MR. LAWRENCE: Yes, sir. Under the 1898 Act and under the 1978 Act, there were distinct bankruptcy courts created, and they were invested with specific jurisdiction. Under the 1978 Act, all that jurisdiction was passed through to the bankruptcy court judges and not vested in the district court. Under the 1898 Act, United States district court judges were vested with what was called a plenary jurisdiction and bankruptcy

judges or referees with a summary jurisdiction, and there was very little cross-fertilization between the two.

Now, of course, all prior historical distinctions are erased. All that jurisdiction is vested, summary and plenary, in United States district court judges who may hear a -- a case and proceeding to completion. They may decide claims. They may distribute the last dollar of the estate, and they may decide traditional plenary actions such as avoidance actions.

QUESTION: Well, traditional plenary actions under the 1898 Act could be brought in state court.

MR. LAWRENCE: That's true too, yes.

QUESTION: So, it wasn't just a question of vesting federal -- federal district judges. They were just the kind of lawsuits that you try in courts of first instance, the same way we do lots of other lawsuits.

MR. LAWRENCE: That's absolutely correct, and that's my point that there were -- that there are ordinary civil or equitable proceedings, legal equitable proceedings, that fell under the rubric of -- of plenary and that there were summary or traditionally administrative type equitable proceedings that were

exclusively the realm of the bankruptcy judges or referees.

Now, of course, those distinctions -- I think it's critical to understand in the 1984 Act -- are erased. These cases may be -- proceedings may be referred to the bankruptcy judges, all or part of a proceeding, and a district court judge may withdraw all or part of a proceeding and choose to hear it himself.

Another important jurisdictional aspect of the 1984 Act is found in 28 1334(d). In that section, Congress has stripped from the bankruptcy court judges any power that they possess over the bankruptcy res, over the property of the debtor, over the property of the estate, and vested exclusive jurisdiction of that property in United States district court judges. By doing this I think Congress plainly manifested in its intent that the old concept of summary jurisdiction of the 1984 Act is no longer applicable here.

The basis of summary jurisdiction, as that term is used and as some people have equated it to core jurisdiction under the 1984 Act, is that a bankruptcy judge is precisely a judge of equity because of his ability to control the res, to control equitably the access to the res.

QUESTION: You're referring now to summary

jurisdiction as it existed at what -- under what act?

MR. LAWRENCE: Under the 1898 Act, Your Honor. The -- I think the -- the analogy is relevant and -- and it's necessary for me to -- to erase the -- the possibility that summary jurisdiction is the same as core jurisdiction because --

QUESTION: No. Summary jurisdiction under the 1898 Act was possession -- property that was in the possession of the trustee or where the -- the claimant has submitted a claim.

MR. LAWRENCE: That's -- that's correct, but the notion of summary jurisdiction went further than that I think under the 1898 Act. The idea of a bankruptcy referee or a bankruptcy court as a court of equity was based in large part on the -- on the conception that it had control, equitable control, over creditor and claimant access to the res. What the 1984 Act has done is eliminate that traditional power of bankruptcy judges and vest it entirely in a plenary court, the United States district court, a court of complete legal and equitable jurisdiction.

Now, the core distinction under the 1984 Act is a significant one. In the 1978 Act, Congress, as it did in the 1984 Act, vested entire jurisdiction initially in the United States district court and then

passed it through en masse to the bankruptcy judges. This Court in Marathon stated that that type of wholesale jurisdictional abdication was -- was impermissible, that at least as to state-based causes of action, that type of investiture of jurisdiction in non-Article III judges without the consent of the parties, with only normal appellate review as -- as an Article III control over those judges, was -- was insufficient.

Congress, it seems to me, responded to Marathon and to that -- to that Article III criticism by creating the core/non-core distinction, and in the core/non-core distinction, Congress placed in the -- in the non-core category all those cases which were of concern to this Court under Article III, that is, cases with state-based causes of action. By default, Congress had to create a second category, which it labeled core, in which it placed all other types of proceedings, including the types of avoidance actions for preferences and fraudulent transfers that -- the latter of which is the subject of this proceeding.

The -- the point I think here is significant, and that is that the core/non-core distinction was not an Amendment 7 driven distinction. There is nothing in the response of Congress in the core/non-core category

that -- that suggests any intention to affect the right of jury trial of litigants in bankruptcy-related disputes in Seventh Amendment matters, to abrogate the right, to modify the right, to touch it in any way.

And you can see in the legislative history of the 1984 Act, to the extent there is a legislative history, that the history is rife with statements about Marathon, about whether bankruptcy judges should be Article I judges or Article III judges. There's no apparent discussion in the legislative history of -- of Amendment 7 or of an intent to affect Amendment 7 rights or of a desire to limit access to a jury in traditionally plenary or common law causes of action, such as the one we're dealing with here.

(Inaudible).

QUESTION: Well, can a non-Article -- a non-Article III court can provide a party with the party's Seventh Amendment right, can it not?

MR. LAWRENCE: Yes, I think it can, and I think this Court, for instance, in Pernell assumed that it could. That was a District of Columbia court in -- in a Seventh Amendment case. This Court had no apparent difficulty with a non-Article III judge providing an Article VII jury trial. And I suspect there are other precedents as well.

QUESTION: In -- in this case did you object to the transfer of the case to the bankruptcy court?

MR. LAWRENCE: No, sir. No. The case commenced, of course, as Your Honor knows, in United States district court.

QUESTION: Was the bankruptcy -- was that on the understanding that the bankruptcy court would conduct a jury trial?

MR. LAWRENCE: I don't know if there was any understanding at that time.

QUESTION: Because the rules prevent that.

MR. LAWRENCE: Well, at that time, the rules didn't. At that time Rule 9015, which was only abrogated in August 1987, envisioned jury trials in bankruptcy, and there was an in-place mechanism. There would have been no reason for the litigant -- and there was none in this case -- to suspect that a transfer to district court -- I mean, to the United States -- to the United States bankruptcy judge would have divested him of a right of access to a jury. It was later that that question was raised and the mechanism was removed from the -- from the bankruptcy scheme.

QUESTION: So, you don't say that -- you don't -- you don't say that there's any independent bar to a non-Article III court hearing this issue?

MR. LAWRENCE: As I read the decisions of this Court, no, sir, I don't.

QUESTION: You just say that -- so, your jury trial is your only focus.

MR. LAWRENCE: Yes, it is. And whether this Court decides that under the setup that Congress created a bankruptcy judge could not hear this matter with a jury, at least in the Seventh Amendment sense, is not of particular importance to us since we're entitled to a jury trial, and presumably if this matter was remanded, reference could be withdrawn and the matter could be heard before the United States district court judge with a jury.

QUESTION: Well, what -- I don't -- I don't uncerstand what's left of the Seventh Amendment then which says "in suits at common law, the right of trial by jury is preserved." You're saying -- you're saying it's still a suit at common law even though you -- you give it to -- to a non-Article III forum.

MR. LAWRENCE: Well --

QUESTION: And you can willy-nilly give suits at common law to non-Article III forums.

MR. LAWRENCE: Well, I have to repeat my -- my last response was that with sufficient control, such as the controls that this Court suggested and which

Congress implemented in state-related causes of action, certainly in congressional-related causes of action, the same type of oversight by an Article III court over a non-Article III court would satisfy Article III concerns. The --

QUESTION: I don't understand. What kind of oversight are you talking --

MR. LAWRENCE: The oversight is, A, the ability not to refer the case at the inception; B, the ability to refer all or part of the proceeding; three, the ability to withdraw all or part of the proceeding; four, the ability to make rules and regulations governing procedure in the bankruptcy adjuncts and coupled with the right of appeal. I think that package of controls by an Article III court over its non-Article III adjunct is sufficient --

QUESTION: To enable all common law suits to be referred to non-Article III adjuncts.

MR. LAWRENCE: Certainly bankruptcy-related suits, yes. We're dealing here with an action created under Title 11 of the bankruptcy laws. It's -- to the extent it was a congressional creation, I -- I don't see any conceptual difficulty or at least absolute impediment in this -- in a referral and in a sustained --

QUESTION: This then is not like the action

that was involved in the Minnesota trial in the Marathon case.

MR. LAWRENCE: No, completely distinguishable, Your Honor. That was a state-based cause of action. One must, I suppose, be concerned about the various dichotomies this Court drew, public and private rights and the like. We're dealing here with a -- with a congressional enactment and presumably the power of Congress to have something to say about the forum in which it -- it will allow that right to be adjudicated.

QUESTION: Well, of course, we were dealing with a congressional enactment in Marathon too.

MR. LAWRENCE: The -- the suit by the litigant there was, of course, a state-based cause of action.

QUESTION: So, you mean here we're dealing with a cause of action created by Congress.

MR. LAWRENCE: That's correct.

QUESTION: Preference.

QUESTION: Well, suppose that the parties just proceeded uncer the Statute of Elizabeth and under state law in a federal court. That would have to under your analysis then remain on the Article III side of the court?

MR. LAWRENCE: Well, I'm not -- I'm not sure I follow a distinction between an Article III side and a

non-Article III side. Do you mean -- by side, do you mean remain in the United States district court --

QUESTION: Yes.

MR. LAWRENCE: -- as opposed to being referred on?

To the extent that there's no federal codification of the Statute of Elizabeth that forms the underlying cause of action, yes.

QUESTION: So -- so, anytime that the federal statute codifies the common law, there's --

MR. LAWRENCE: I'd say arguably that --

QUESTION: -- there's no jury right?

MR. LAWRENCE: I --

QUESTION: It seems to me you would be arguing the opposite.

MR. LAWRENCE: No. I'd say anytime a -- a non-bankruptcy-related -- that is, in the -- in the -- in the mold of the types of causes of action that states have jurisdiction to create -- is presented to a bankruptcy court, that that would fall under the non-core --probably non-core jurisdiction and be subject to the --the particular procedural constraints of the non-core category; that is, that bankruptcy judges could make findings of fact and recommendations and the ultimate, final decision would have to be made by a -- a

United States district court judge.

I would have -- if there was a -- I have difficulty I guess with the idea of an independent codification of a -- of a state law right, but ultimately I think they may amount to the same thing in terms of bankruptcy district court control. Whether it initially starts out or ends up as a non-core proceeding or whether it starts -- or whether it ends up as a core proceeding is of less importance, it seems to me, under the 1984 Act where everything has to start with the United States district court judge and then is parceled out or withdrawn after reference appropriately.

QUESTION: Mr. Lawrence, if we view this cause of action as an equitable one, there is no Seventh Amendment right I suppose.

MR. LAWRENCE: If you do view it equitably --as an equitable cause of action, that's correct. But I don't see how, without overruling Schoenthal which specifically addresses this question, this Court could conceivably either view the demand for relief or the judgment entered or the cause of action as -- as an equitable one. Schoenthal speaks directly to this issue in a preference matter which is now under 547. We're under 548 of Title 11, but for Seventh Amendment purposes, we'd suggest that these two monetary -- that

monetary avoidance actions under either section are indistinguishable.

Schoenthal clearly referred back to pre -- to 18th century English common law, found that assignees under bankruptcy acts at that period of time were suing for monetary preferences under well-recognized common law forms of actions, such as indebitatus assumpsit, a cause of action for money had and received, and that this tradition has persisted, and that the Seventh Amendment requires a trial by jury of a money judgment where only a money judgment is asked for in an avoidance action. So, I'd say Schoenthal is directly dispositive of the equitable or legal nature of this cause of action.

The distinction between core and summary I think is necessary to be alluded to again. Core actions are not the same as summary actions, and I think that the circuit court decision improperly confused the two, and I think that the Respondent is perpetuating that type of an approach.

Core actions were not in their inception deemed to be the same as summary actions, and I think, first, there is no stronger indication of that than Congress stripped the bankruptcy judges under Section 1334(d) of authority over the property of the res.

Secondly, the idea of summary jurisdiction only has meaning when there's plenary jurisdiction and summary and plenary jurisdiction only have meaning when there are -- when there's a bifurcated or fractionalized jurisdictional scheme in bankruptcy. There is no longer a fractionalized scheme. It's as -- as metaphysically irrelevant as speaking of the concept of lightness when there is no concept of darkness. Everything today is in a unified district court judge.

Let me -- let me allude to another factor, Justice O'Connor, in the legal versus equitable area. I perceive the Respondent is having difficulty with the --with the power and directness of Schoenthal, and he suggests several things as a way of circumventing that decision.

He first suggests that really what we're dealing with here is a restitutionary cause of action, not a compensatory cause of action. Well, I think historically the distinction is a meaningless one since, first of all, the causes of action for money had and received was precisely a restitutionary remedy which 18th century English courts adopted as their own and provided for a jury trial for. It was, in essence, a cause of action for money had and received that this Court was dealing with in Schoenthal and found no

difficulty in looking through that -- that apparent definition and saying, well, it's a money judgment that's sought, and that's sufficient to activate the Seventh Amendment.

QUESTION: How do you deal with the case of Katchen v. Landy?

MR. LAWRENCE: Katchen v. Landy, Your Honor, had relevance at a time when bankruptcy jurisdiction was bipartite jurisdiction. There was, prior to the 1978 Act and certainly prior to the 1984 Act, a real possibility when faced with facts such as those unique to Katchen that the bankruptcy scheme could be dismembered or dismantled, that a -- that an equity plaintiff who was both a -- a creditor, against whom a preference objection was imposed and who also might be a litigant in -- in an independent plenary action to recover the preference, had a right to have a continuous and fair proceeding not punctuated by having to cross the hall or having to cross the street to invoke or be subject to a judge with different jurisdiction. So, there was a chance at that time of an unfair result, and I -- I view the Katchen doctrine as a product of that equitable regime in an attempt to avoid that statutory dismantlement.

But just as plainly, Congress has not created

that -- that bifurcated jurisdiction under the 1984 Act. Everything could be accomplished now.

QUESTION: But Katchen did say the bankruptcy court without a jury could adjudicate that preference.

MR. LAWRENCE: Yes, sir, it did. Yes. We, of course, don't have the --

QUESTION: And you don't -- you don't -- you don't suggest that Katchen rested on a waiver, do you?

MR. LAWRENCE: No, sir. No.

QUESTION: Well, that was a case, though, where the creditor had submitted his claim --

MR. LAWRENCE: That's true.

QUESTION: -- to the trustee.

MR. LAWRENCE: Yes. I think this Court recognized the difficulty of a waiver of consent argument in that lengthy footnote. We don't base our view of Katchen on waiver or non-waiver.

QUESTION: Well, where did the Court get the power to adjudicate the preference without a jury?

MR. LAWRENCE: Precisely in what Section 1334(d) now takes away and that is the power of a court of equity over the res. It's in that power that this Court has equitable jurisdiction to control access to --

QUESTION: So, then you say that the source of it was -- the statute gave -- clearly gave the Court the

statutory right to adjudicate that, and you say that because it was equitable, no jury trial.

MR. LAWRENCE: That's -- that's true.

QUESTION: Katchen doesn't depend, at least as I read the opinion, on the fact that there was a res in the possession of the trustee. The -- there was simply a submission of a claim, was there not?

MR. LAWRENCE: Well, Katchen I think depends on two things. It depends on the underlying supposition that a bankruptcy referee exercising summary jurisdiction is essentially sitting as a court of equity which leads back to the idea of what makes a bankruptcy judge, at least for preference and avoidance actions and fraudulent transfer actions, a court of -- a court of equity. It's precisely the control over the res. A bankruptcy referee or judge with no control over the res could not avoid --could not call himself a judge possessing summary jurisdiction in the historical bankruptcy since -- since he would have no control over those causes of action.

QUESTION: Wasn't the claim submitted in Katchen one where there was property -- based on one where there was property in the possession of the trustee?

QUESTION: Yes, yes.

QUESTION: Justice White says the --

MR. LAWRENCE: Well, it's -- it's a --

QUESTION: Well, he filed his claim.

MR. LAWRENCE: That's true.

QUESTION: And he wanted a piece of the res.

MR. LAWRENCE: That's true.

QUESTION: Well, what res?

MR. LAWRENCE: The res -- bankruptcy -- the Bankruptcy Act I believe at that time, as it does today, defines the inchoate right to recover a preference or avoidance as a form of property of the estate. And so, it's not I suppose strictly accurate to call it property within the jurisciction of the court, but constructive --

QUESTION: No, but under the 1898 Act, had there been no claim filed, the creditor could have told the trustee to go whistle and bring a plenary action.

MR. LAWRENCE: That's true.

QUESTION: Still can.

MR. LAWRENCE: Yes, yes. That's true.

The -- I'd like to reserve, if I may, the balance of my time for rebuttal.

QUESTION: Just one -- one more question so I uncerstand you. Section -- Subsection H of 157 in your view is then void?

MR. LAWRENCE: Excuse me, Your Honor.

QUESTION: Which says proceeding -- the bankruptcy courts can try proceedings to determine, avoid, or recover fraudulent conveyances.

MR. LAWRENCE: That that's void because of 1334(d)?

QUESTION: Yes.

MR. LAWRENCE: No.

QUESTION: Well, it's void because there's no jury trial. There's no jury trial permitted by a rule.

MR. LAWRENCE: Well, I -- I hadn't articulated the argument that way. I -- I -- I don't know that I could object to that whether it's void or not. I --

QUESTION: But you have to say that, don't you, if -- if no jury trial is permitted in the bankruptcy court and this statute permits that action to be tried in the bankruptcy court, then the statute is void.

MR. LAWRENCE: Well, there is a way I suppose of avoiding that construction by saying that this is the type of case that shouldn't be referred in the first place. I know that renders perhaps irrelevant a section of the Act, but there is a role for bankruptcy -- for district judges to be sensitive to what can and can't be tried in bankruptcy. Of course, with 9015 in place at that time, I don't think anyone's attention was

specifically directed to the Article III issue of what could or could not be heard by an non-Article III judge, the bankruptcy judge.

QUESTION: Mr. Lawrence, I'm just curious. Is Medex an instrumentality of the Colombian government?

MR. LAWRENCE: No, sir, it's not.

QUESTION: What is it?

MR. LAWRENCE: It's, as far as I know, a private Colombian banking institution. That was not nationalized.

QUESTION: Incorporated where?

MR. LAWRENCE: I think Colombia, but I'm not sure, Your Honor. It has been referred to as a Latin American banking institution. I know its headquarters were in Bogota, and so it might be reasonable to assume it's Colombian, but I don't know that.

QUESTION: It's like referring to a corporation as a North American corporation.

MR. LAWRENCE: I know.

QUESTION: Very well, Mr. Lawrence.

Mr. Tribe, we'll hear from you now.

ORAL ARGUMENT OF LAURENCE TRIBE

ON BEHALF OF THE RESPONDENTS

MR. TRIBE: Thank you, Mr. Chief Justice, and may it please the Court.

There is, of course, no Marathon issue here because there was no objection of a timely kind to the reference to the district court. And by the time that objection had been made and when it was rejected, they did not appeal to the Eleventh Circuit on that issue so that whatever question the Court might some day have about the limits of power under the 1984 Act to refer matters for binding decision under Section 157 by these bankruptcy judges who, as Justice Scalia says, are of course Article I entities, is not here.

And it is important to recognize that this decision against Granfinanciera was not, despite their effort to reconstrue it, rendered by the district court in drag, as it were, sitting as a kind of Article I body in violation of the Constitution -- the decision was rendered by the bankruptcy Judge or referee subject only to review by the Article III court.

And the question really is whether they are entitled under the Seventh Amendment to jury trial. They would have that question, even if it had, indeed, been decided by the Article III court, but then they would, as Justice Scalia suggests, be in quite a different position because then at least one could understand what they meant by saying that this had been a suit at common law.

The reason that they want to make it look as though the decision was rendered by an Article III court is somehow to bring the Seventh Amendment in closer proximity to their client. So, I think the puzzle posed by the case is how the Seventh Amendment comes to apply at all.

I do think it's useful to go back for a moment to the Chief Justice's question about Katchen because, as I understand their position -- and this makes it in a way more puzzling -- if the Petitioners had been among Chase & Sanborn's actual creditors and if the $1.7 million transferred to them on the eve of bankruptcy had been a partial repayment, then they concede they'd have no right to a jury trial about the facts surrounding the transfer. But, you see, they concede they were not creditors. They say it was nonetheless appropriate to shift this money to Granfinanciera because of favors that it had done for the father of the principal officer of the bankrupt corporation, an officer who incidentally is serving now 15 years in the federal penitentiary for bank fraud.

So, it appears that their position is that because they make no claim on the assets of Chase & Sanborn, they fall outside the bankruptcy claims jurisdiction and therefore they're entitled to a jury

before being ordered to turn the $1.7 million over. So, the paradox is that because they have no legal claim, they're entitled to more process, not less.

Now, of course, sometimes Congress or the Constitution mandates odd results. But I do not think that a persuasive argument has been made that that result is mandated here.

QUESTION: How do you distinguish Schoenthal?

MR. TRIBE: Well, we believe, Mr. Chief Justice, that Schoenthal was simply a decision under the 1898 Act which said that when Congress chooses, as it did in the 1898 Act, by requiring the bringing of a plenary suit in an ordinary common law court -- when it chooses to do that, to force the trustee to sue for damages at law on the law side of the district court, then as long as there existed a common law analogue, you're entitled under the Seventh Amendment to jury trial. We think that that's entirely correct.

But we do not think that Schoenthal stood for the proposition that the Seventh Amendment entitles you to the kind of forum that Congress happened to provide in that case. That is, the real question is whether there is in the Seventh Amendment a constitutional rule preventing Congress from placing matters of the kind that Justice Kennedy asked about, namely, 157(b)(2)(H),

fraudulent conveyance matters, in the decision power of a bankruptcy judge who is not an Article III court. That's the question in this case. And the statutory scheme in Schoenthal is not before us. But I will --

QUESTION: It's also the issue in Katchen.

MR. TRIBE: And in Katchen, the Court clearly held I think that there is no Seventh Amendment right in that circumstance.

One odd way of reading Katchen --

QUESTION: In that -- in that case, in Katchen, the creditor had to file the claim and submit it himself in a way -- at least to the trustee, in a way that was not done here.

MR. TRIBE: That's right. But I suppose, Mr. Chief Justice, the question would be what alternative choice did the creditor have.

In Kras v. United States, the Court elaborated the debtor/creditor situation by stressing the giving the debtor a means of discharging the bankruptcy is a kind of privilege, and you take the bitter with the sweet. If there's a filing fee, you may have to pay it.

But the Court went out its way in Kras to say that the situation of the creditor is really quite different. The creditor has no alternative, given the

automatic stay of Section 362. The creditor's property interest or contract interest can be vindicated only by submitting. And it would be an odd regime in which you say, well, you have a -- a right to a Seventh Amendment forum, but you must give that right up in order to protect your property. The Court avoided that reading in Katchen.

QUESTION: (Inaudible) very well-accepted regime under the 1898 Act, at least in my own practice. You know, if -- if you wanted to file a claim in bankruptcy and, you know, get part of the assets --

MR. TRIBE: Uh-hum.

QUESTION: -- in the hands of the trustee, you submitted yourself to the jurisdiction of the bankruptcy court. If you thought your security of it wasn't --

MR. TRIBE: Right.

QUESTION: -- possessed by the trustee was more valuable, you just stayed out of the bankruptcy court. But no one doubted that you had to fish or cut bait.

MR. TRIBE: Oh, I agree, Mr. Chief Justice. You had to fish or cut bait, but that was because you didn't have a constitutional right to the fish. That is, there was no constitutional right to a Seventh Amendment forum and, therefore, Congress could put you

to the choice. If you want a jury trial on the fraudulent conveyance claim or the preferential transfer claim, then don't file here. But that was --

QUESTION: (Inaudible) some of the reasoning in Schoenthal suggests a fraudulent conveyance claim was the type of thing that was tried to juries at common law.

MR. TRIBE: Well, Mr. Chief Justice, it was tried concurrently at common law both in law and in equity, but before I think we need to reach that issue, which is an alternative ground for supporting the result in this case -- before we need to reach it, there is the anterior question of whether in the forum that was involved in this case, which was a specialized bankruptcy forum, whether in that forum there is a Seventh Amendment right to jury trial.

QUESTION: Well, suppose the district judge had just kept the case for himself or herself.

MR. TRIBE: It would be perhaps a harder case, but we believe that Congress in 1984 still created with respect to the bankruptcy core, the matters listed in 157 -- the matters listed in Section 157(b)(2), a specialized equitable jurisdiction. It was not crucial to that specialized equitable jurisdiction that there be physical control of a res. That really isn't the point.

The point is that the bankruptcy jurisdiction,

the jurisdiction to reassemble the estate and ratably distribute it is one that Congress could, under the Bankruptcy Clause, constitutionally entrust to a specialized equitable procedure.

QUESTION: Would you --

QUESTION: Well, it seems --

QUESTION: Would you -- go ahead.

QUESTION: It seems to give very little force to the Seventh Amendment to say that the district court can, by deciding either to retain the action itself or submit it to the bankruptcy court, affect the jury trial right. That gives very little content, it seems to me, to the Seventh Amendment.

MR. TRIBE: Justice Kennedy, that's why I'm inclined -- that's one of the reasons why I'm inclined to think that neither by statute nor under the Seventh Amendment would there be a right to jury trial on this fraudulent conveyance matter even if it had been retained. We don't think there's any evidence in the statute or in the legislative history to suggest --

QUESTION: So, then it is the nature of the action and not the nature of the forum that controls.

MR. TRIBE: Well, in this case we have both. In this case the nature of the forum and the nature of the action point away from a jury trial.

QUESTION: Would you say that in the Tull case that Justice Brennan wrote a couple years ago Congress could have referred that sort of a dispute to the EPA and if the EPA decided it wouldn't have to give a jury trial and then simply go to the Court of Appeals on appeal?

MR. TRIBE: Well, under the Atlas Roofing case, it seems to me the Court suggested that as long as Congress acts within its substantive power with respect to matters of either environment or employee safety -- in that case, it was an OSHA regulation -- the power of Corgress --

QUESTION: Tull was going to be acting within its substantive power or its actions are invalid for another reason.

MR. TRIBE: Well, that's right, but when you look, Mr. Chief Justice, at all of the cases in which this Court has said that cases that used to be brought at common law can be transferred to an agency, landlord-tenant disputes in Block v. Hirsh in 1921 --

QUESTION: Well, how about Curtis v. Loether?

MR. TRIBE: In Curtis v. Loether, Congress hadn't decided -- and therefore the issue wasn't presented there and isn't -- and wasn't presented in many of these other cases -- to create a specialized

jurisdiction.

But the question that's presented -- since their brief concedes that Congress has not by statute preserved the jury trial right, the question that's presented is whether Congress' power -- and I admit you can put extreme cases that test its limits, but whether Congress' power under the Bankruptcy Clause extends to the provision of equitable bankruptcy jurisdiction without juries as fact finders, whether in a specialized Article I body or as in Katchen in the Article III court itself, to the process of recovering a bankrupt estate's improper eve-of-bankruptcy transfers as well as to the process of ratably distributing the reassembled assets.

And it seems to me that nothing is more closely related to the effective functioning of a system of resolving the problem of a failed business than as Congress recognized, first to reassemble the assets and then to distribute them.

Indeed, in 1983 in a unanimous decision called U.S. v. Whiting Pools, this Court stressed that Congress in the 1978 Act, which in this respect hasn't changed, was eager to make sure that the trustee would be able to get a turnover order for property that ought to have been in the possession of the estate, whether it happens to be now in the possession of a custodian and therefore

reachable under 543, or whether it is out of the estate because of a preferential transfer and therefore reachable under 547, or as a result of a fraudulent conveyance and thereby reachable under 548.

QUESTION: Mr. Tribe, can I -- I'm not sure what your -- your colleague's position on this is. I think, though, that his position is that the Seventh Amendment right to a jury goes together with the Seventh Amendment right to an Article III court. Is that your -- do you concede that you can have a jury trial right even though you're in a -- in a non-Article III forum?

MR. TRIBE: Well, the -- the Court in Bombola suggested in dictum that if you were in an Article I ordinary territorial court -- and in Pernell it held that in a District of Columbia court, as long as it's an ordinary court of law, the Seventh Amendment right may apply although the Court has never settled on whether you can ever have a Seventh Amendment right clearly in something that is an -- is nothing like an Article III court without life tenure.

But the two inquiries are really quite different. That is, in cases like Katchen, there was no question that Article III was complied with. The question was whether the Seventh Amendment is complied with.

It is also quite possible to violate the --violate Article III while providing a jury trial. The whole point in Marathon is that one of the tasks that perhaps should not have been given to these Article I bankruptcy referees was the task of presiding over a jury trial so that the two issues are quite separate.

But in this case, we have really both elements. We have a forum that does not use and has not traditionally, historically used juries as its fact-finding arm. Under the rules applicable at the time of the trial, as Justice Kennedy says, there was no provision for a jury trial. So, what they're really asking for through the back door is a reference back to the district court, exactly the same kind of dismemberment of the statutory scheme that the Court objected to in Katchen. And in Katchen it is true --

QUESTION: (Inaudible) proceeded to carry out in Marathon.

MR. TRIBE: Well, there was some dismemberment I think in Marathon, but it was a very different kind of case, a garden variety contract action created by state law. And whether or not the refinements of Marathon in CFTC v. Schor and Thomas v. Union Carbide leave that in place is unclear. But what does seem clear is that the restructuring of debtor/creditor relations which the

Supreme Court ever since Barton v. Barbour in 1881 has recognized as a central exercise of congressional power to put matters in the specialized authority of a special tribunal that does collective justice and not necessarily piecemeal justice -- what is clear is that that I think does not raise grave Article III questions even if the issue had been properly preserved here, which it is not.

But if we are right that, for example, in Katchen it was within the power of the Congress, despite the 1898 scheme that was at issue in Schoenthal -- within the power of Congress to force a creditor to submit the preference claim, as well as his own claim as a creditor, to non-jury resolution, we don't think that it would make any sense to read the Seventh Amendment to point to a different result when one is a fraudulent transferee rather than the recipient of a preferential payment as a creditor. That is, the two go hand in hand.

Indeed, one of the more remarkable things is that the Petitioners in their brief at page 12 and again in the oral argument stress that for Seventh Amendment purposes there is no justification for treating differently the situation of a preferential transfer or the situation of a fraudulent conveyance. They make the point -- and I think it's quite right, and it has been

recognized all the way back to Chancellor Kent and to Justice Story -- that the basic policy of nondiscriminatory distribution that underlies the bankruptcy law is equally frustrated -- the basic public purposes of the bankruptcy law equally frustrated by both kinds of transfer.

And, therefore, the constitutional power of Congress to place in the hands of a specialized non-jury utilizing tribunal the authority to undo the eve-of-calamity wrongs that were done is really coextensive with respect to the kind of preferential treatment of a favored creditor that was involved in Katchen and the kind of out-and-out gift, as it were, that's involved in -- in this case.

In fact, it's quite interesting to take a historical perspective. In all of the bankruptcy laws Congress has passed, it has never distinguished for purposes of whether something falls within the central bankruptcy process or whether one must bring a plenary action -- it has never distinguished preferential transfer claims from fraudulent conveyances. That is, during the 1890 -- under the 1898 regime in both of those cases, there was a requirement by statute that you go to the law side of an ordinary court and bring a lawsuit as the trustee although I think a careful

reading of the statutes of 1800 and 1841 and 1867 suggests that that was not always so.

But Congress has never created the anomaly that the Petitioners' reading of Katchen would create, an anomaly which says that you have a Seventh Amendment right to a jury trial if you simply receive a completely unjustified, under-the-table payment on the eve of bankruptcy, but no Seventh Amendment right to jury trial if you are a creditor and must go into bankruptcy in order to collect the remainder of the debt, part of which was preferentially paid on the eve of bankruptcy. It would make no sense in terms of the Bankruptcy Clause or the Seventh Amendment to reach any such conclusion.

But let me suppose for the moment, to go back to Justice Kennedy's question -- let me suppose that we were in the district court and we didn't have any additional mileage out of the fact that this was decided by a specialized tribunal of the sort, Mr. Chief Justice, that in your Park Lane dissent you stressed Congress could set up, despite the Seventh Amendment, to resolve bankruptcy and other kinds of special claims.

Suppose we were in the district court. And suppose we did not want to make the existence of a Seventh Amendment right to jury trial turn on the decision of the district court to refer the matter for

final decision to an Article I body. Even there it is simply not the case, as the Petitioners suggest, that an action to recover a fraudulent transfer is somehow inherently legal and therefore jury triable.

In their brief, they make the following quite remarkable statement about late 18th century English law. They say equity would not entertain an action for the return of fraudulently transferred money or goods, and they cite principally two cases: Hobbs from 1788 and Scudamore from 1796. And what's remarkable about those cases is they show the very opposite. In those cases the chancellor said equity will entertain such actions if it's equitable to do so. And in both cases on the facts the chancellor sent the creditor to the law side saying it would not be equitable in this particular case to grant that relief.

That's why Judge Friendly --

QUESTION: Well, may I interrupt right there?

MR. TRIBE: Certainly.

QUESTION: Isn't it always not equitable to do so if there's an adequate remedy at law?

MR. TRIBE: Well, in the regime --

QUESTION: Isn't that --

MR. TRIBE: -- pre-1938, Justice Stevens, before law and equity merged in the federal district

courts, and certainly under Section 267 of the Judicial Code which was in force at the time of Schoenthal --

QUESTION: And that's what Schoenthal relied on.

MR. TRIBE: -- Schoenthal -- there was a kind of preference for law. And Congress has a right to --

QUESTION: Well, it's more than a preference. It was a rule of law that there is no equity jurisdiction if there's an adequate remedy at law.

MR. TRIBE: In that case a statutory rule. And when --

QUESTION: But was that also not a common law rule?

MR. TRIBE: Well, the -- under the Statutes of Elizabeth going back to 1571, the fraudulent conveyance situation was much more, should I say, agnostic on the ordinary choice. That is, in most areas it is true that in the choice between law and equity, there was an overwhelming preference for law with equity being seen as a last resort.

But the observation was made by Chancellor Kent, quoted then by Justice Story in 1836, that when it comes to fraudulent conveyances, since it may so often be the case that an execution at law will not quite do, there ought to be a generally available equitable remedy

to order a return of the assets or of the property.

And even though there is some historical dispute about the various periods in which the preferences went one way or the other, what is clear is that in Section 550 of the Bankruptcy Code and in 551, Congress in codifying the law with respect to fraudulent conveyances did not put the preference on the law side. It said that you should get a turnover order or, if necessary, an award in the amount of value involved.

QUESTION: Mr. Tribe, is what was referred to as 267 of the Judicial Code in Schoenthal -- is that still in effect?

MR. TRIBE: It's current analogue. I don't know what the number is, but it's still in effect. When you seek an injunction, for example, you have to show that there is no adequate legal remedy. But under the substantive statutes governing bankruptcy, if you seek a turnover of property, you do not have to show that money might not go.

In this case the reason the decree was as broad as it was and the reason it said shall turn over the $1.7 million is that, of course, Granfinanciera and Medex commingled the assets. It would have been pointless to insist, as I guess, Justice Scalia, you suggested in --in a -- in a footnote in Bowen v. Mass,

maybe these were peculiar coins or something and you really need these very ones back and therefore law won't do.

The regime in fraudulent conveyance law doesn't operate in that way. The regime in fraudulent conveyance law, going back to 1571, did not have the requirement that when you want to return something to the res or to the estate, that you show that money won't be sufficient. But in any event that wouldn't be a fruitful inquiry here because it is the duty of the trustee in bankruptcy ultimately in a situation like this where it is a liquidating trustee to reduce everything to money.

And what I think is happening is that the Petitioners are engaged in a kind of play on words. They are suggesting that because one couldn't find the particular wire transfer that had gone to Granfinanciera or the particular checks that had gone to Medex that it, therefore, follows that because one was ordering restitution of money, that that was the same as money damages.

Now, there may be some contexts as the dissenters, the three dissenters in Bowen v. Massachusetts, suggested where the play on words is the other way and where it's just a cute thing to describe

something as restitution where really one is getting the payment of a past due sum, as you suggested in that case, Justice Scalia.

But here it is as clear as anything could be that the Respondent was not asking for the payment of a past due sum. The Respondent was asking for a restoration of the status quo, for a reversal of an improper eve-of-bankruptcy transfer that ought never to have occurred.

QUESTION: Of course, that was a factual question, wasn't it, that would have been decided either by the jury or by the court?

MR. TRIBE: Well, I suppose the ultimate decision by the bankruptcy judge in April of 1986 to fashion the remedy as he did and not to issue or to refer the matter back to the district court so that it could issue an injunction did rest on the bankruptcy judge's factual determination of what was practical.

QUESTION: If you're right, anytime the trustee claims that there was an improper payment from -- to someone, that will not -- that person will not be entitled to a jury trial. Now, in some cases uncoubtedly there was an improper payment; in some cases there won't have been. But the question here is however it comes out on the merits, do you get a jury trial.

MR. TRIBE: Certainly, Mr. Chief Justice. I don't intend to bootstrap anything on what we know after the fact, but it is the case that the underlying nature of the action, both the remedy sought and the nature of the action, focus on an attempt to get back what you allege was wrongly taken from an estate that ought not to have been dismembered piecemeal on the eve of bankruptcy.

Of course, if that allegation is rejected, and if all you have left is a claim that somehow the way you were treated caused damage, that would be an ordinary legal claim to which the jury trial right might attach. But I'm suggesting that independent of the forum that an attempt under the Statutes of Elizabeth or their successors to -- to reverse a fraudulent transfer has long been treated as cognizable in equity.

Let me just say --

QUESTION: May I just interrupt?

MR. TRIBE: Sure.

QUESTION: I'm -- you're kind of fast for me. I want to be sure I stay with you.

Are you saying that if the trustee had made a claim, he spelled it out in detail in his allegation and said this money was fraudulently transferred, it was placed into a bank account and commingled with millions

of dollars and transferred to another bank account, so it would be impossible to trace the particular funds and therefore he asks for a money judgment in the equivalent number of dollars, he would then have a jury trial right?

MR. TRIBE: No, no, Justice Stevens.

QUESTION: Then what are you arguing?

MR. TRIBE: That is -- the point really is that unlike some other cases where one is using a sort of an equitable request as a way of circumventing a jury trial -- take Beacon Theaters or Dairy Queen or Ross v. Bernhard where a trick of pleading and of sequencing evades jury trial. What I'm suggesting is that's not involved here.

The decision to commingle was Granfinanciera and Medex' decision, not that of the trustee or of the bankrupt corporation. The fact, in other words, that predictably in a case of this kind one might be able at best to get the equivalent value should not be a reason to treat this as a legal action in disguise.

QUESTION: No, but would it not be clear that in 18th century England it would therefore have been a clear action at law, and there would not have been an equitable remedy?

MR. TRIBE: Actually, Justice Stevens, the way the chancellor analyzed the matter in Hobbs in

particular doesn't confirm that. What the chancellor in Hobbs said was that there would be peculiar hardships attending an equitable decree and therefore you ought to go to law.

That's why Judge Friendly in Damsky v. Zavatt in 1981 cited the Hobbs case which the Petitioners use to prove that an action will not lie in equity, cited it to precisely the opposite effect to show that an action to avoid a fraudulent conveyance and to rescind it is quintessentially equitable in character even if in the end the particular relief has to be dollars.

In Katchen, this Court said that equity courts generally have power to decree complete relief and for that purpose may accord what would otherwise be legal remedies.

That's really all we have here with the fact that it was an award of a specific amount of money so that it's stretching a great deal to treat this as an action at law. It's stretching even more to treat this command to disgorge as though it were somehow a legal rather than an equitable remedy.

And every circuit that has construed the matter has seen turnover orders as essentially injunctive, enforceable in appropriate cases by contempt if one has personal jurisdiction. And so the fact that

in this particular case what one has is a judgment for money does not make it an action at law.

QUESTION: Of course, turnover orders aren't always for money. I mean, there are chattels and things like that.

MR. TRIBE: That's right although sometimes bank accounts have been subject to them.

QUESTION: Yes.

MR. TRIBE: But it seems to us that there are two independent reasons apart from the nationalization of Granfinanciera, which as to that Petitioner, pretty clearly eliminates a right to jury trial -- two independent reasons for saying that the effort by Congress to comply with Marathon, whatever else may be said about it, did not violate the Seventh Amendment either on its face or as applied in this case. And we, therefore, believe that the judgment which was entered against the Petitioners, not by an Article III court which affirmed the bankruptcy judge's decree, but by a specialized bankruptcy tribunal is not infirm on the ground that they were denied a jury which, by the way, they would never have been able to claim had they been in the more equitable position of a creditor.

Thank you.

QUESTION: Thank you, Mr. Tribe.

Mr. Lawrence, you have two minutes remaining.

REBUTTAL ARGUMENT OF ADAM LAWRENCE

MR. LAWRENCE: Thank you, Mr. Chief Justice.

On the issue of money damages, there are certain similarities here between compensatory remedies and what was sought and achieved in this case.

First of all, the -- the award under 548-550 is not a discretionary remedy. If you prove the criteria for avoidance which isn't a separate, independent equitable action in and of itself, you're entitled to that amount of dollars without any intercession of a --of the discretionary mind of a jury or a -- or a judge.

The -- the payment here was of sums which will go to compensate creditor claimants for common law torts committed against them, for common law breaches of contract committed against them. In a very real sense the use to which these -- this judgment will be put, if it's recovered, is to compensate those who have state law claims who are essentially, I gather, unsecured creditors for a variety of state law claims that characterize claimants in bankruptcy.

To the extent the trustee recovers money in avoidance actions, he -- he pays off people who are seeking damages in the classical legal sense. To the

extent he doesn't recover dollars, these people go uncompensated in a classical legal sense.

I think it's deceptive to speak of the dollars in dispute here as not being compensatory at least in the final analysis.

Secondly, I think it's -- it's unnecessary and unwise to base the Seventh Amendment jurisprudence on the arcane distinctions between a compensatory dollar and --and a restitutionary dollar when those terms, as we all know, can be intermingled and -- and -- and converted from one to the other.

Seemingly, in response to Justice Stevens' questions, I think the proper basis of equity jurisdiction and legal jurisdiction is still -- is the judgment -- is to relieve something that's uniquely within the power of a court of law to grant. Money judgments and whether the dollar composing the judgment is a compensatory dollar or a restitutionary dollar is still a traditionally legal cause of action. And I think that's the basis on which a Seventh Amendment jurisprudence should -- should rest, not this confusion definition between compensatory and restitutionary.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lawrence.

The case is submitted.

(Whereupon, at 12:01 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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GRANFINANCIERA, S.A., et al., vs. PAUL C. NORDBERG, CREDITOR TRUSTEE FOR THE ESTATE OF CHASE & SANBORN CORPORATION, et c.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

(REPORTER)