Client Alert.

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Stern v. Marshall: A Jurisdictional Game Changer?

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During her lifetime, Vickie Lynn Marshall, publicly known as Anna Nicole Smith ("Vickie"), was hardly a stranger to the prying eyes of the media. Today, the late Vickie is again the subject of media coverage, this time in the context of a fifteen-year legal saga that has twice reached the United States Supreme Court.

On June 23, 2011, the Court, in a 5-4 decision,[2] held unconstitutional a provision of a bankruptcy jurisdiction statute that authorizes bankruptcy judges to hear and decide counterclaims by the estate against persons filing claims against the estate.[3] Because bankruptcy judges, as judges created under Article I of the Constitution, do not have the protections of life tenure guaranteed by Article III of the Constitution, the Court affirmed the holding of the Ninth Circuit Court of Appeals and ruled that the bankruptcy court "lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."[4]

PRACTITIONERS OUGHT TO CONSIDER EMPLOYING SEVERAL STRATEGIES AS MEANS OF ADDRESSING *STERN*'S POTENTIAL EFFECTS.

The Court's decision effectively overturned an earlier bankruptcy court award to Vickie that at one point exceeded $400 million. Vickie had asserted that her husband's son, E. Pierce Marshall ("Pierce"), had wrongfully interfered with a gift Vickie expected from Pierce's father, the late octogenarian J. Howard Marshall II ("J. Howard").

Other than ending a protracted and high-profile legal dispute, what does the holding of *Stern v. Marshall* mean for debtors, creditors, bankruptcy courts, and bankruptcy practitioners? Is it a jurisdictional game changer with grave practical consequences, or is it a narrow ruling that fails as a practical matter to meaningfully change the extent of a bankruptcy court's power?

After describing the facts leading up to *Stern*—our modern-day *Jarndyce*[5]—we conclude that although there are equally sound arguments on both sides, the answer to this question depends largely on a number of potential actions by courts in the future. In the interim, practitioners ought to consider employing several strategies as means of addressing *Stern's* potential effects.

I. HISTORICAL BACKGROUND

A. Texas Probate Proceeding

The legal dispute at the heart of *Stern v. Marshall* began almost sixteen years ago, after Vickie's marriage to wealthy oil executive J. Howard. Vickie later learned that J. Howard had excluded her from both his living trust and his will (estimated to be worth in excess of $300 million). Vickie believed that J. Howard had intended to give her a substantial *inter vivos* gift, and that Pierce, who was an heir under his father's living trust, had, through undue influence and fraud, caused J. Howard to execute the estate planning documents that excluded Vickie.

In April 1995, Vickie filed suit in Texas Probate Court (the "Probate Proceeding"), which had jurisdiction over (i) guardianship proceedings for J. Howard; (ii) issues involving the validity of J. Howard's final estate plan; and (iii) a tortious interference claim brought by Vickie against Pierce, which averred that Pierce had tortiously interfered with Vickie's right to recover from her husband's estate. Pierce then filed a defamation suit against Vickie and her two attorneys as part of the Probate Proceeding.[6]

J. Howard died shortly thereafter, leaving nothing to Vickie and prompting a legal battle that would unfold across multiple legal forums for well over a decade.

B. California Bankruptcy Proceeding

In January 1996, while J. Howard's will was being probated in the Texas Probate Court, Vickie filed a chapter 11 bankruptcy petition (the "Bankruptcy Case") in the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court").[7] Five months later, Pierce responded to Vickie's tortious interference claim in the Probate Proceeding by suing Vickie and her lawyers in the Bankruptcy Case (the "Defamation Claim").

Because of the imposition of the automatic stay in the Bankruptcy Case, Pierce dismissed Vickie from his defamation suit in the Probate Proceeding. Instead, in May 1996, Pierce filed a complaint in the Bankruptcy Case to determine the dischargeability of any debt owed to Pierce based on earlier instances of alleged defamation.[8] In sum, Pierce alleged that Vickie and her attorneys had made defamatory statements about Pierce and his family during the pendency of the Probate Proceeding.

One month later, Pierce filed a proof of claim in the Bankruptcy Court seeking unliquidated damages arising from the alleged defamation, and attaching his earlier filed complaint. Vickie subsequently filed counterclaims against Pierce in the adversary proceeding, alleging, among other things, that Pierce had tortiously interfered with her rights to receive an inheritance or *inter vivos* gift from J. Howard's estate (the "Counterclaim").[9]

On November 5, 1999, the Bankruptcy Court granted summary judgment for Vickie on Pierce's Defamation Claim.[10] Following trial, the Bankruptcy Court also ruled in Vickie's favor on the Counterclaim. The Bankruptcy Court concluded that (i) by filing a proof of claim, Pierce had voluntarily submitted to the Bankruptcy Court's jurisdiction to enter a final judgment on the Counterclaim and (ii) the Counterclaim did not fall within the "probate exception" that would have barred its jurisdiction over such Counterclaim.[11] Accordingly, the Bankruptcy Court ultimately awarded Vickie nearly $475 million in damages and entered a judgment against Pierce on December 29, 2000.[12] Believing that the Bankruptcy Court's judgment (the "Bankruptcy Court Judgment") constituted a final judgment, Vickie withdrew her tortious interference claim in the Probate Proceeding.[13] Shortly thereafter, Pierce appealed the Bankruptcy Court Judgment to the United States District Court for the Central District of California (the "District Court").

Meanwhile, the Probate Proceeding—which was not stayed by the commencement of the Bankruptcy Case—continued. Following a five-month jury trial, in March 2001, a jury unanimously found that J. Howard's living trust and will were valid and that he had not been a victim of fraud or undue influence in preparing his estate plan.[14] The Probate Court further found that J. Howard had not intended to give Vickie a gift from the assets that passed through his will or that were held in his living trust.[15] Pursuant to the Probate Court's final judgment in favor of Pierce in December 2001 (the "Probate Court Judgment"), Vickie had no legal claim to J. Howard's sizable estate[16]—directly conflicting with the earlier-entered Bankruptcy Court Judgment.

C. District Court Proceeding

In his appeal of the Bankruptcy Court Judgment, Pierce challenged the Bankruptcy Court's jurisdiction to enter final judgment on Vickie's behalf on the Counterclaim. Pierce argued that the Bankruptcy Court did not have jurisdiction over the Counterclaim because (i) the probate exception to federal jurisdiction generally barred its jurisdiction; and (ii) the proceeding was not a "core proceeding" within the meaning of 28 U.S.C. § 157(b)(1), the statute providing a bankruptcy court with jurisdiction to hear a dispute and enter a final judgment. In this first stage of the appeal, the District Court agreed that the dispute was a "non-core" proceeding because of, among other things, the attenuated factual nexus between Pierce's Defamation Claim and Vickie's Counterclaim, even if they arguably arose out of the same facts.[17]

Accordingly, because bankruptcy courts may issue only proposed findings of fact and conclusions of law in non-core matters (absent the parties' consent),[18] the District Court vacated the Bankruptcy Court Judgment and reviewed the case *de novo*, treating the Bankruptcy Court Judgment as proposed findings of fact and conclusions of law.[19]

In the second stage of the appeal, Pierce moved to dismiss Vickie's Counterclaim, or alternatively for summary judgment, on the grounds that the Counterclaim was precluded by the prior Probate Court Judgment.[20] The District Court denied Pierce's motion[21] and conducted its *de novo* review of the case. In March 2002, the District Court affirmed the Bankruptcy Court's findings regarding Pierce's liability[22] but reduced Vickie's award for damages to approximately $89 million, the amount the District Court believed Vickie would have received as a gift from J. Howard absent the purported interference, plus punitive damages.[23]

D. Ninth Circuit Proceeding

In 2004, the United States Court of Appeals for the Ninth Circuit vacated the District Court's judgment and remanded with instructions to the Bankruptcy Court.[24] The Ninth Circuit held that the "probate exception" to federal subject matter jurisdiction binds all federal courts, including bankruptcy courts.[25] Under the probate exception, federal courts have no jurisdiction over matters relating to the probate of wills or the administration of a probate estate.[26] Consequently, the Bankruptcy Court was barred from considering Pierce's Defamation Claim and Vickie's Counterclaim, which the Ninth Circuit held to constitute state law probate matters.[27]

E. The First Supreme Court Proceeding

In 2005, the Supreme Court granted Vickie's petition for certiorari and reversed the Ninth Circuit's decision. The Court held that the "probate exception" was inapplicable to Vickie's Counterclaim and that the District Court had properly asserted jurisdiction over that counterclaim.[28] The issues of (i) whether Vickie's Counterclaim was a "core proceeding" and (ii) whether the Probate Court's ruling precluded the Bankruptcy Court's ruling were remanded for consideration by the Ninth Circuit.[29]

F. Ninth Circuit (Remand) Proceeding

On remand, the Ninth Circuit concluded, among other things, that Vickie's Counterclaim was not a "core proceeding" within the meaning of 28 U.S.C. § 157(b)(1) because its resolution was not necessary to resolve Pierce's Defamation Claim.[30] Therefore, the Bankruptcy Court was not empowered to enter a final judgment under 28 U.S.C. § 157(c). Not affording preclusive effect to the Probate Court Judgment was erroneous, and, therefore, Pierce was entitled to judgment as a matter of law on the tortious interference claim litigated in the Probate Proceeding.[31]

II. *STERN V. MARSHALL*: THE (SECOND) SUPREME COURT DECISION

The Court affirmed the Ninth Circuit's decision and agreed that the Bankruptcy Court lacked jurisdiction to enter a final judgment on Vickie's Counterclaim, thereby rendering the Probate Court Judgment the *first* final judgment entitled to preclusive effect. Justice Roberts, writing for the majority, held that although the Bankruptcy Court had the *statutory* authority to adjudicate the Counterclaim under 28 U.S.C. § 157(b)(2)(C), it lacked the *constitutional* authority to do so. Because bankruptcy courts are not Article III courts, they "lack[ ] the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."[32]

A. Counterclaim Is "Core Proceeding" under 28 U.S.C. § 157(b)

ALTHOUGH THE BANKRUPTCY COURT HAD THE *STATUTORY* AUTHORITY TO ADJUDICATE THE COUNTERCLAIM UNDER 28 U.S.C. § 157(B)(2)(C), IT LACKED THE *CONSTITUTIONAL* AUTHORITY TO DO SO.

The Court noted that bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11," pursuant to 28 U.S.C. § 157(b)(1). Under the Court's reading, "core proceedings are those that arise in a bankruptcy case or under Title 11."[33] If a proceeding is not a core proceeding but is "related to a case under title 11," then the bankruptcy judge may submit only proposed findings of fact and conclusions of law to the district court, pursuant to 28 U.S.C. § 157(c)(1), which the district court reviews *de novo* if a party objects to the entry of a final judgment by the bankruptcy court.

The Counterclaim was properly treated as a "core proceeding" under the plain text of 28 U.S.C. § 157(b)(2)(C), which includes as core proceedings "counterclaims by the estate against persons filing claims against the estate." As a statutory matter, this section expressly permitted the Bankruptcy Court to enter a final judgment on the Counterclaim.[34] Additionally, the Court held that "[g]iven Pierce's course of conduct before the Bankruptcy Court," Pierce had consented to the Bankruptcy Court's resolution of the Defamation Claim, waiving any arguments to the contrary.[35]

B. Entry of "Final Judgment" Deemed Unconstitutional

However, although the Bankruptcy Court had a *statutory* basis upon which to enter a final judgment on the Counterclaim,[36] the Court ruled that in this case, Article III of the Constitution prohibited entry of a final judgment by the Bankruptcy Court.

Noting that Article III requires the federal judicial branch to determine suits at "common law, or in equity, or admiralty,"[37] the Court considered the "public rights" exception detailed in its seminal *Northern Pipeline*[38] decision, pursuant to which Congress could constitutionally assign certain categories of cases to "legislative" courts for resolution.[39] According to the Court, the "public rights" exception to the normal requirement that a case be entrusted to an Article III court extends "'only to matters arising between' individuals and government 'in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those' branches."[40]

Ultimately, the Court found that the "public rights" exception did not apply to the Counterclaim, reasoning that the Counterclaim is a state law action independent of the federal bankruptcy law and "not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy."[41] The Counterclaim was not one historically determined by other branches, it did not flow from a federal statutory scheme or depend on adjudication of a federal claim,[42] nor was the authority to

decide the Counterclaim limited to a "particularized area of the law."[43] Instead, the Court found that the Counterclaim involved a state common law cause of action between two private parties, thereby rendering the exception inapplicable.[44]

Unfortunately, in its analysis of *Northern Pipeline*, the Court left open the question of whether "the restructuring of debtor-creditor relations is in fact a public right," thereby fostering a far broader conundrum: what is the nature of the "public rights" exception as it applies to bankruptcy (indeed, is there really any such thing)?

C. No Consent to Jurisdiction of Counterclaim Simply by Filing a Proof of Claim

Despite the Court's earlier holdings in *Katchen* and *Langenkamp*,[45] the Court rejected the argument that Pierce effectively had consented to the Bankruptcy Court's jurisdiction over the Counterclaim by filing a proof of claim in the Bankruptcy Case. Although Pierce had consented to the Bankruptcy Court's resolution of the Defamation Claim, he did not "truly consent" to the Bankruptcy Court's resolution of the Counterclaim. "He had nowhere else to go if he wished to recover from Vickie's estate."[46]

UNFORTUNATELY, IN ITS ANALYSIS OF *NORTHERN PIPELINE*, THE COURT LEFT OPEN THE QUESTION OF WHETHER "THE RESTRUCTURING OF DEBTOR-CREDITOR RELATIONS IS IN FACT A PUBLIC RIGHT," THEREBY FOSTERING A FAR BROADER CONUNDRUM: WHAT IS THE NATURE OF THE "PUBLIC RIGHTS" EXCEPTION AS IT APPLIES TO BANKRUPTCY (INDEED, IS THERE REALLY ANY SUCH THING)?

The Court acknowledged that although there was some overlap between the Counterclaim and the Defamation Claim, the process of adjudicating Pierce's proof of claim would not necessarily resolve the Counterclaim.[47] Pierce could not have, therefore, consented to jurisdiction over the adjudication of the Counterclaim.

D. "[W]hy the fuss?"[48]

The majority concluded that the practical consequences of its decision would not be material, thereby rejecting the notion that restricting bankruptcy courts' ability to resolve compulsory counterclaims would "create significant delays and impose additional costs."[49] In support, the Court mentioned that the current bankruptcy system already requires a district court to review *de novo* and enter final judgment on any matters that are "related to" the bankruptcy proceedings. The system also permits withdrawal of the reference as well as abstention in any proceeding in the interest of comity with state courts.[50] In short:

> We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a "narrow" one.[51]

E. Breyer's Dissent: Inviting Jurisdictional Ping-Pong

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, disagreed with the majority's broad reading of Article III, arguing, in part, that the opinion overstated the meaning of the plurality opinion in *Northern Pipeline*. Instead, the dissent favored a more pragmatic approach to the constitutional issue by relying on other precedent that commanded a clear majority.[52] Adopting this approach, the dissent's view was that a grant of authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle embedded in Article III.

The dissent's final remarks predicted the possibility of various adverse consequences. Raising the example of typical state-law counterclaims arising under landlord/tenant law, the dissent noted that going forward, a federal district judge, not a bankruptcy judge, would be required to hear and resolve these counterclaims.[53] The result?

> [A] constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.[54]

III. POTENTIAL IMPLICATIONS

While the majority downplays *Stern's* impact on the current system of bankruptcy proceedings, the inefficiency, delay, and increased costs cited in the dissent are real concerns, though even if *Stern* effectively reads 28 U.S.C. § 157(b)(2)(C) out of the Bankruptcy Code in specific cases, bankruptcy courts may still continue to exercise jurisdiction over counterclaims under 28 U.S.C. § 157(c)(1). Thus, if a state-law counterclaim is not a "core proceeding," but is otherwise related to a case under title 11, a bankruptcy judge may still enter proposed findings of fact and conclusions of law to the district court. In this respect, our bankruptcy system may not be so significantly affected.

REGARDLESS OF THE FACTS, THIS DUAL-COURT DYNAMIC IS ALMOST CERTAIN TO INVOLVE A LONGER AND MORE EXPENSIVE PROCESS FOR ALL PARTIES, NOT TO MENTION THE CONCOMITANT ADMINISTRATIVE BURDEN ON DISTRICT COURTS.

A. Time Is Money

Regardless of one's view, *Stern* will, in certain cases, put an efficient (single adjudicator) claims-allowance process at risk. As courts begin grappling with *Stern*'s implications, we can expect significantly more litigation over the question of which courts get to "decide" counterclaims. Some parties, in the face of uncertainty and the prospect of prolonged litigation, may simply settle their counterclaims in bankruptcy court. Those with deeper pockets, and/or those who would rather face a district court judge than a bankruptcy court judge and a trustee, may find that it makes strategic sense to prolong the legal process even further and steer a case toward the district court.

Regardless of the facts, this dual-court dynamic is almost certain to involve a longer and more expensive process for all parties, not to mention the concomitant administrative burden on district courts.

Yet, as a practical matter, bankruptcy courts may still be the ultimate decision- makers on these issues, particularly to the extent district courts remain overburdened, and therefore more prone to "rubber stamping" bankruptcy courts' conclusions. Whether (i) counterclaim adjudication takes place in two stages (merit adjudication at the bankruptcy court and final judgment at the district court level) or (ii) bankruptcy courts abstain from adjudicating counterclaims altogether, the added delay and cost associated with concurrent proceedings may leave many debtors without a realistic chance of rehabilitation, thereby thwarting one of the bedrock policies of the Bankruptcy Code.

B. Forum Shopping Concerns

The stark contrast between the Bankruptcy Court Judgment and the Probate Court Judgment in *Stern* highlights how dramatically results can vary depending on the chosen forum. Perhaps now the jurisdictional formula will shift the balance of power in forum shopping from debtors seeking to have bankruptcy courts decide claims to nondebtors seeking to have

any court *but* a bankruptcy court handle them.

Stern also notes the consequences associated with conflicting judgments. Here, the Texas Probate Court ruled in Pierce's favor in December 2001, just several months before the District Court ruled against Pierce and affirmed the Bankruptcy Court Judgment in March 2002. If the District Court had simply granted preclusive effect to the Probate Court Judgment (thereby adopting it as its own), the ultimate arbiter of Vickie's tortious interference claim would have been the Texas Probate Court—arguably the forum best suited for deciding the state law issues in the case. Affording the Probate Court Judgment preclusive effect would have also saved additional court time and costs, and potentially could have minimized the likelihood of subsequent appeals in the federal courts.

Both the Ninth Circuit and the Supreme Court disapproved of the District Court's failure to give the Probate Court Judgment preclusive effect, thereby highlighting some of the risks attendant with litigating in multiple forums. Will *Stern* encourage more federal courts to grant preclusive effect to state court judgments or, at a minimum, abstain until such state courts arrive at a final judgment? This is just one of a number of questions that will likely play out in future cases.

C. Flight to District Court?

Post-*Stern*, bankruptcy courts may be more inclined to abstain altogether from matters involving compulsory counterclaims, particularly where such counterclaims will not necessarily be resolved by the resolution of the underlying proof of claim. To the extent that a bankruptcy court may enter only proposed findings of fact and conclusions of law, which remain subject to the district court's *de novo* review, the question arises: why would a bankruptcy court bother to take its precious time for such an exercise? Perhaps the answer is that many bankruptcy courts find that the equally busy district courts rarely probe very deeply in their *de novo* review of bankruptcy court decisions, so that as a practical matter in many cases the bankruptcy court's decision at least substantially influences the district court's ruling, and may often effectively be the district court's ruling.

WILL *STERN* ENCOURAGE MORE FEDERAL COURTS TO GRANT PRECLUSIVE EFFECT TO STATE COURT JUDGMENTS OR, AT A MINIMUM, ABSTAIN UNTIL SUCH STATE COURTS ARRIVE AT A FINAL JUDGMENT?

This situation implicates another one of *Stern*'s unanswered questions: how will compulsory counterclaims and claim objections be resolved procedurally? Will debtors be successful in bringing compulsory counterclaims along with their claim objections in one forum? Or will they now need to request that the district court withdraw the reference as a matter of course? And if the latter, will they also ask the district court to withdraw the reference of the creditor/defendant's claim against them, which the bankruptcy court still has the jurisdiction to hear and decide? Or will the debtor try to retain both matters in the bankruptcy court, leading perhaps to the district's *de novo* review of the noncore matter and appellate review of the core matter?

D. RIP: Jurisdiction by Consent

Stern also casts significant doubt on the viability of "bankruptcy jurisdiction by consent." Under *Stern*, Pierce's decision to file a proof of claim was insufficient to constitute consent to the Bankruptcy Court's jurisdiction over the Counterclaim.[55] In this regard, the Court's conclusion appears to be inconsistent with its own precedent set forth in *Langenkamp v. Culp* and *Granfinanciera, S.A. v. Nordberg*—cases that historically have stood for the proposition that a claimant submits herself to the equitable jurisdiction of a bankruptcy court for the adjudication of her claim and any counterclaims through the filing of a proof of claim (even if such claimant potentially loses the ability to demand a jury trial in certain cases).[56]

The *Stern* majority claims that those two cases are still good law under their analysis—to be read more narrowly than historically—but the fact remains: there is a good chance that jurisdiction by consent may become virtually vestigial. *Stern's* erosion of this well-settled principle highlights the majority's underlying message: Congress may have given too much power to bankruptcy judges.

THERE IS A GOOD CHANCE THAT JURISDICTION BY CONSENT MAY BECOME VIRTUALLY VESTIGIAL.

E. The "Public Rights Exception": Looming Shadows for Bankruptcy?

Finally, even if *Stern* has a limited administrative impact on the bankruptcy process, what does its dictum portend for the future? Buried in footnote 7 is the majority's sweeping comment regarding whether "the restructuring of debtor-creditor relations is in fact a public right." In turn, the Court's query raises a much larger concern: what is the nature of the "public rights" exception as it applies to bankruptcy? If pushed, would the Court find that despite *Northern Pipeline*, the framework for bankruptcy no longer fits within the Court's own "public rights" exception?

IV. STRATEGIC CONSIDERATIONS

Stern raises more questions than it answers. In the meantime, here are four practical strategies to consider:

1. ***Think Twice About Filing a Proof of Claim.*** In determining whether to file a proof of claim in bankruptcy court, consider the likelihood of a subsequent counterclaim that is sufficiently related to the proof of claim to create possible core jurisdiction in the bankruptcy court to hear and determine the counterclaim. As noted earlier, such counterclaims could be more than preference or fraudulent conveyance claims even after *Stern*. After performing a cost/benefit analysis, decide whether the risk of delay and cost involved in litigating a potential counterclaim outweighs the benefit of potential recovery on the underlying proof of claim.

2. ***Carefully Consider Settlement.*** Given the prospect of protracted litigation and increased costs on any counterclaim adjudication, consider settlement via the claims administration process or Bankruptcy Rule 9019 as a potentially viable solution.

3. ***Develop a Strategy for Litigating in Multiple Forums.*** In the wake of new uncertainty regarding procedure, timelines, cost, and strategy, bankruptcy litigants and their respective counsel should think carefully about the prospect of "jurisdictional ping-pong." Until a clearer picture of post-*Stern* process emerges, it will be critical to develop a course of action that takes into account the variety of potential scenarios described herein. Additionally, parties should consider whether the heightened prospect of litigating counterclaims in district court could provide them with a strategic advantage, particularly in light of the often substantial economic advantage that a nondebtor has over a debtor in litigating in multiple forums and for a long time.

4. ***Analyze Pending Litigation.*** Depending on the strategic considerations of the particular case, parties that are currently in the midst of litigating claims or counterclaims in bankruptcy court should consider whether it is in their best interest to object to the final adjudication of the case by a bankruptcy judge. In this regard, as to currently pending litigation, objections to subject matter jurisdiction are, in theory, never waived. However, there is case law holding that under certain circumstances, an objection to subject matter jurisdiction can become stale if not asserted.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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[2] *Stern v. Marshall*, Case No. 10-179, 2011 WL 2472792 (U.S. June 23, 2011) (hereinafter "*Stern*").

[3] 28 U.S.C. § 157(b)(2)(C).

[4] *Stern*, 2011 WL 2472792 at *27.

[5] *Stern*, 2011 WL 2472792 at *5 (citing C. Dickens, *Bleak House*, in 1 *Works of Charles Dickens* 4–5 (1891)).

[6] *Marshall v. Stern (In re Marshall)*, 600 F.3d 1037, 1043 n. 10 (9th Cir. 2010).

[7] *In re Marshall*, No. LA 96-12510 (Bankr. C.D. Cal. Jan. 25, 1996).

[8] *See* 11 U.S.C. § 523(a)(6).

[9] Vickie's other counterclaims included fraudulent transfer, injunction, conversion, tortious interference, breach of fiduciary duty, abuse of process, fraud, promissory estoppel, breach of contract (third-party beneficiary), imposition of constructive trust, accounting, indemnity, and contribution. *See Marshall v. Marshall (In re Marshall)*, 275 B.R. 5, 9 (C.D. Cal. 2002).

[10] *See id.*

[11] *See Marshall v. Marshall (In re Marshall*), 257 B.R. 35, 36 (Bankr. C.D. Cal. 2000).

[12] *See id.* at 40.

[13] *See Marshall v. Marshall (In re Marshall)*, 392 F.3d 1118, 1128 (9th Cir. 2004).

[14] *See Marshall v. MacIntyre (Estate of Marshall)*, prob. juris. noted, no. 276,815-402 (Harris Cnty., Tex. Mar. 7, 2001).

[15] *See Marshall v. MacIntyre (Estate of Marshall)*, prob. juris. noted, no. 276,815-402 (Harris Cnty., Tex. Dec. 7, 2001).

[16] *See id*.

[17] *See Marshall v. Marshall (In re Marshall)*, 264 B.R. 609, 631-32 (C.D. Cal. 2001).

[18] *See* 28 U.S.C. § 157(c)(1), providing that in non-core matters, bankruptcy courts can only make proposed findings and conclusions that are subject to

de novo review by the district courts, discussed *infra* Parts I(C), II(A), II(D), and III(C).

[19] *Marshall*, 264 B.R. at 631-32.

[20] *See Marshall v. Marshall (In re Marshall)*, 271 B.R. 858, 862 (C.D. Cal. 2001).

[21] *Id.* at 867.

[22] *See Marshall*, 275 B.R. at 53-58.

[23] *See id.*

[24] *See Marshall*, 392 F.3d at 1137-38.

[25] *See id.* at 1136-37.

[26] *Id.* at 1137.

[27] *See id*.

[28] *Marshall v. Marshall*, 547 U.S. 293, 314 (2006).

[29] *See id.* at 315.

[30] *See Marshall*, 600 F.3d at 1059.

[31] *See id.* at 1064-65.

[32] *Stern*, 2011 WL 2472792 at *27.

[33] *Id.* at *10.

[34] *Id.* at *9. In so ruling, the Court rejected Pierce's arguments that the Counterclaim constituted a "personal injury tort" within the meaning of 28 U.S.C. § 157(b)(5), which provides that such claims are to be tried in the District Court. Rather, the Court held that 28 U.S.C. § 157(b)(5) did not create a jurisdictional bar to the Bankruptcy Court's hearing the matter.

[35] *Id.* at *11-13. The Court also held, however, that Pierce did not "truly consent" to resolution of Vickie's Counterclaim in the Bankruptcy Case (see *infra* Part III(D)).

[36] *Id.* at *14.

[37] *Id.* (internal citation omitted).

[38] *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-72 (1982)(discussing "public rights" exception).

[39] *Stern*, 2011 WL 2472792 at *15.

[40] *Id.* (quoting *Northern Pipeline Constr. Co.*, 458 U.S. at 67-68).

[41] *Id.* at *16.

[42] *Id.* at *21.

[43] *Id.* at *24 (citing *Northern Pipeline Constr. Co.*, 458 U.S. at 85).

[44] *Id.* at *21.

[45] *Katchen v. Landy*, 382 U.S. 323 (1966); *Langenkamp v. Culp*, 498 U.S. 42 (1990).

[46] *Stern*, 2011 WL 2472792 at *20 (internal citations omitted). This fact has historically led to a concern by some courts over bankruptcy "jurisdiction by ambush." *See J.T. Moran Fin. Corp. v. American Consol. Fin. Corp. (In re J.T. Moran Fin. Corp.)*, 124 B.R. 931, 940 (S.D.N.Y. 1991) (cautioning against condonation of "jurisdiction by ambush" and noting examples where defendants have no acceptable alternatives to protect their rights other than asserting their counterclaims in a bankruptcy case or filing a proof of claim) (internal citation omitted); *cf. Piombo Corp. v. Castlerock Props. (In re Castlerock Props.)*, 781 F.2d 159, 162-63 (9th Cir. 1986) (creditor's filing of a proof of claim after debtor's assertion of related counterclaims did not constitute implied consent to jurisdiction of the bankruptcy court over the related counterclaims).

[47] *Stern*, 2011 WL 2472792 at *23.

[48] *Id.* at *26.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at *32 (Breyer, J., dissenting).

[53] *Id.* at *37 (Breyer, J., dissenting).

[54] *Id.*

[55] *Id.* at *21.

[56] *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58 (1989) and *Langenkamp*, 498 U.S. at 44-45.