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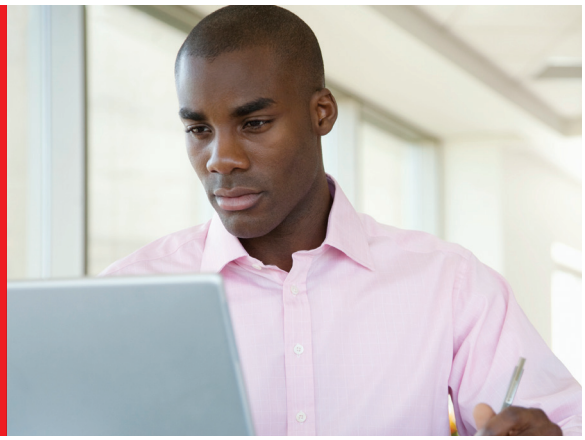

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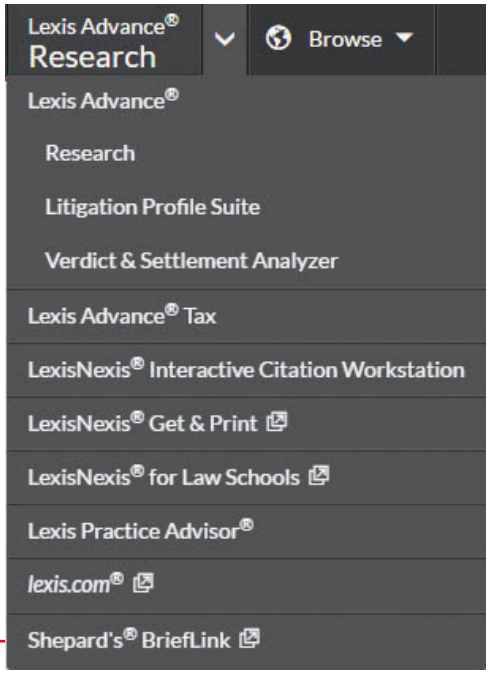

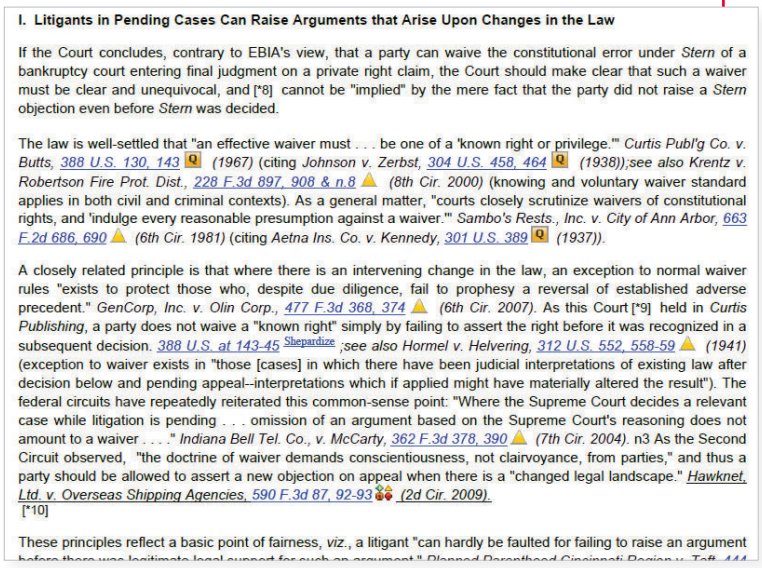

I. Litigants in Pending Cases Can Raise Arguments that Arise Upon Changes in the Law

If the Court concludes, contrary to EBIA's view, that a party can waive the constitutional error under *Stern* of a bankruptcy court entering final judgment on a private right claim, the Court should make clear that such a waiver must be clear and unequivocal, and [*8] cannot be "implied" by the mere fact that the party did not raise a *Stern* objection even before *Stern* was decided.

The law is well-settled that "an effective waiver must . . . be one of a 'known right or privilege.'" *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938));*see also Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 897, 908 & n.8 (8th Cir. 2000) (knowing and voluntary waiver standard applies in both civil and criminal contexts). As a general matter, "courts closely scrutinize waivers of constitutional rights, and 'indulge every reasonable presumption against a waiver.'" *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981) (citing *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937)).

A closely related principle is that where there is an intervening change in the law, an exception to normal waiver rules "exists to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007). As this Court [*9] held in *Curtis Publishing*, a party does not waive a "known right" simply by failing to assert the right before it was recognized in a subsequent decision. 388 U.S. at 143-45 Shepardize ;*see also Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941) (exception to waiver exists in "those [cases] in which there have been judicial interpretations of existing law after decision below and pending appeal--interpretations which if applied might have materially altered the result"). The federal circuits have repeatedly reiterated this common-sense point: "Where the Supreme Court decides a relevant case while litigation is pending . . . omission of an argument based on the Supreme Court's reasoning does not amount to a waiver . . . ." *Indiana Bell Tel. Co., v. McCarty*, 362 F.3d 378, 390 (7th Cir. 2004). n3 As the Second Circuit observed, "the doctrine of waiver demands conscientiousness, not clairvoyance, from parties," and thus a party should be allowed to assert a new objection on appeal when there is a "changed legal landscape." *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92-93 (2d Cir. 2009).
[*10]

These principles reflect a basic point of fairness, *viz.*, a litigant "can hardly be faulted for failing to raise an argument

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