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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 EBLA’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 Pub’g Co. v. Butts, 598 U.S. 139, 143 (1967) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); see also Kretz 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.” 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 propely a refusal of established adverse precedent.” GenCorp, Inc. v. Olin Corp., 477 F.3d 368, 374 (6th Cir. 2007). As this Court [*9] held in Kretz Publishing, a party does not waive a “known right” by failing to assert the right before it was recognized in a [*6] subsequent decision. 388 U.S. at 149-45 *impassive, see also *Horner 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, [*7] “the doctrine of waiver demands consciousness, 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.” *Hoknet, Ltd. v. Overseas Shipping Agencies, 596 F.3d 87, 92-92 (2d Cir. 2009).

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