Procrastinators’ Programs™

Insolvency and Death in Louisiana

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Course Number: 0200121219
1 Hour of CLE

December 19, 2012
10:10 – 11:10 a.m.
ALBERT J. DERBES IV is a founding member and is co-manager of The Derbes Law Firm, L.L.C., a nine attorney firm, where he practices primarily in the areas of bankruptcy, commercial litigation, entity startup and contract law. Mr. Derbes is licensed to practice law in the states of Louisiana and Texas, as well as authorized to practice in numerous federal courts, including Tax Court. He earned his B.A. degree from Rice University and J.D. degree from Tulane Law School. He has spoken at numerous CLEs and CPEs, covering topics which include bankruptcy, contract law, real estate, and ethics. He has taught the Louisiana Notary Public preparation course at Delgado Community College. Mr. Derbes is a member of the New Orleans, Louisiana State, Federal and Jefferson bar associations and the Bar Association of the 5th Federal Circuit. Mr. Derbes currently serves as chair of the New Orleans Bar Associations’ Bankruptcy Committee.

BEAU P. SAGONA is a member of The Derbes Law Firm, L.L.C. in Metairie, Louisiana. He is certified by the Louisiana Board of Legal Specialization as an estate planning and administration specialist. A significant portion of his practice involves handling successions which require administration - whether contested or uncontested. He obtained a B.S. in finance with a concentration in risk and insurance from L.S.U. in 1987. He obtained his law degree from L.S.U. in 1990 and has been in private practice since then. He is a member of the Louisiana State Bar Association, past president of the Jefferson Bar Association, and an active volunteer with the Pro Bono Project (New Orleans location).
A. Introduction & Definitions

This quip lightens the heart when contemplating death in the probate attorney’s office. However, perfect prescience is rare regarding the timing of one’s own death. Spending more than “all” causes insolvency coupled with death. This unhappy combination increasingly occurs for those handling the aftermath of death. The purpose of this CLE is to explain the interaction of Louisiana Successions law and Federal Bankruptcy law.

1. Different Types of Insolvency

Insolvency exists in at least two ways. First, compare assets to liabilities. If one were to liquidate all ones assets, would enough money exist to pay off all the liabilities? This can be considered a balance sheet test of insolvency. In a succession, the assets (or at least some of them) are often liquidated to pay off the liabilities. This is more likely true when more than one heir/legatee\(^1\) exists. Liquidation is even more likely desirable when one or more of the heirs does not wish to co-own an asset with one or more of the other heirs. A mortgage on an asset is a concern in such circumstances, again leading to liquidation.

A second type of insolvency exists when income\(^2\) is insufficient to pay liabilities as they come due. This can be considered cash flow insolvency, or in the spirit of understatement, a cash flow

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\(^1\) For simplicity’s sake, hereinafter heir or legatee shall be simply “heir,” unless the context requires otherwise.

\(^2\) Humans are usually cash basis, not accrual basis, so income is usually coextensive with cash.
problem. This is the sort of insolvency which usually precipitates the filing of bankruptcy by the living. People who might be insolvent from a balance sheet test but who do not have a cash flow problem will often await events to see if their asset (say their home) appreciates. In a practical example, merely because a debtor is temporarily upside down on his home because of declining home values, the debtor is not as likely to file bankruptcy as a person whose monthly payments have increased pursuant to an adjustable rate mortgage.

2. Insolvency and Bankruptcy Distinguished

Insolvency is thus an economic or accounting status. Contrast bankruptcy, which is a legal condition. Bankruptcy is an equitable remedy, protecting debtors from their creditors’ rights at law. Bankruptcy laws are federal. U.S. Constitution, Article 1, Section 8, Clause 4; 11 USC 101 et seq.

3. Debtors, Persons & Understanding Who May File for Bankruptcy Protection

A debtor is simply someone who owes money. However, in order to be a debtor in bankruptcy, one must be a person. 11 USC 109. While corporate legal fiction allows that a corporation is a person, the dead are not persons. The term person does not include probate estates. In re Georg, 844 F.2d 1562, 1566 (“Based on these indicia, we conclude that the Code’s definition of “person,” and therefore its definition of “debtor,” excludes insolvent decedents’ estates.”) Furthermore, a trust for family purposes, whether created in a will or otherwise, may not be a debtor. 11 U.S.C. § 109; see also In re Pace Trustee....

B. The Insolvent Decedent

1. Claims Against Successions

A creditor may not merely sue a succession. Instead, the claims of creditors in Louisiana successions are controlled by LaCCP Arts. 3241 – 3249 (set forth in the attached Appendix 2). As one circuit court has explained:

[i]n order to provide for an orderly administration, the Code of Civil Procedure prescribes the procedures to be followed by an unliquidated creditor seeking to judicially enforce his claim. Under these procedures, the creditor cannot sue to reduce his claim to judgment until the succession representative has rejected the claim....

Lagniappe

Capitalism without bankruptcy is like Christianity without hell.
- Frank Borman

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3 Upside down means the mortgage balance exceeds the home value.
4 Contrast, for example, the Massachusetts business trust.
5 Claims in bankruptcy are controlled by 11 USC 501 (Filing proofs of claim or interests), 11 USC 502 (Allowance of claims or interests), 11 USC 509 (Claims of co-debtors), Bankruptcy Rules 3001 – 3008, and Official Form 10.
[The] right to seek . . . remedy could only be exercised by opposition to the succession representative’s account or by an ordinary action following a rejection of the claim presented by the documents.

_Aker v. Griffith_, 415 So.2s 670, 675-76 (LaApp 5 Cir 1982). (citations omitted).

No “per se” deadline exists for the filing of proofs of claim in a Louisiana succession. La.C.C.P. art. 3241 et seq. ⁶However, once a claim is submitted to the succession representative, the succession representative has 30 days to accept or reject the claim. La.C.C. art. 3242. A lack of response is deemed a rejection. _Id._ If rejected, then the creditor may seek judicial enforcement (i.e. sue). La.C.C.P. art. 3246. If the debt is acknowledged by the succession representative, among other advantages, the running of prescription is suspended as long as the succession is under administration. Also, a formal proof of claim may be submitted under La.C.C.P. art. 3245 (see form in Appendix 1 to these materials). Such a submission suspends the running of prescription for up to 10 years.

Also, limitations on a creditor’s ability to sue heirs remain in Louisiana law, despite the concept of seizin. The current law with respect to the old concept of “benefit of inventory” is set forth in La.C.C. art. 1416, which reads as follows:

(A) Universal successors are liable to creditors for the payment of the estate debts in proportion to the part which each has in the succession, but each is liable only to the extent of the value of the property received by him, valued as of the time of receipt.

(B) A creditor has no action for payment of an estate debt against a universal successor who has not received property of the estate.

La.C.C. art. 1416.

2. **Judgment Creditors & Mortgagees**

Judgment creditors may not proceed to collect except as set forth in accordance with the claims process set forth above.

Execution shall not issue against any property of a succession under administration to enforce a judgment against the succession representative, or one rendered against the deceased prior to his death.

La. C.C. art. 3247 (emphasis supplied). However, this does

... not prevent mortgage holders from enforcing their mortgage, either via executiva or via ordinaria, without reference to the succession proceedings. See _Succession of Guillory_, 167 So. 901 (La.App.1936).

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⁶ A practical deadline exists if the succession is closed, and the thirty year liberative prescription deadline of La.C.C. art. 3197 remains.
Official Revision Comments to Articles 3247 and 3248 (1960). The plain language of La.C.C. art. 3247 would seem to prohibit a judicial mortgage holder from foreclosing, while the comment makes clear that a conventional mortgage holder may proceed in rem. Procedurally, La. C.C.P. art. 5091(A)(2)(a) allows a mortgages holder by motion to have an attorney appointed to represent the succession in an in rem proceeding where no representative has yet been appointed.

As many mortgages in Louisiana make death an event of default (i.e. the “due on death clause”), the ability of a lender to foreclose may result in a loss of equity to the heirs. A succession cannot file for bankruptcy protection in order to protect the heirs. However, as a practical matter, lenders have business reasons to allow for orderly liquidation, including avoiding a reputation for harming widows, as well as avoiding the costs of foreclosure. While a bank will wish to avoid foreclosing because of the technical default of a due on death clause, failure to pay monthly payments by a succession representative might force the hands of a bank in these troubled times.

3. The Bankrupt Who Then Dies

Occasionally someone dies while in bankruptcy. Often these are persons with medical problems, whose mounting bills forced them into bankruptcy. Sometimes the stress of bankruptcy and its underlying cause (divorce, unemployment, substance abuse, gambling or business failure), might exacerbate a medical condition such as a weak heart. The Bankruptcy Rules provide guidance.

Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

Bankruptcy Rule 1016. There exists very little jurisprudence on this topic, and even less since the adoption of this rule. Some thoughts on how the different chapters of bankruptcy can lead to varying results are as follows.

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7 “Louisiana Code of Civil Procedure article 3248 expressly allows the holder of a conventional mortgage or pledge of movable or immovable property to enforce his rights in a separate suit outside the succession proceedings. Apparently, all other creditors, even the holder of a judicial mortgage resulting from recordation of a final, unappealable judgment, are deemed unsecured creditors.” Problems in the Law of Succession: Creditors’ Rights, K. Cavanaugh, 48 La.L.Rev. 1099, 1113 (May 1988).

8 The number one cause of bankruptcy is medical expense. The American Journal of Medicine, Volume 122, Issue 8, Pages 741-746, August 2009.
a. Chapter 7 Bankrupt Who Dies

For the Chapter 7 bankrupt, absent community property issues, the analysis is simple. The bankruptcy estate is administered by the Chapter 7 trustee. If the decedent earned anything following bankruptcy, then the succession representative would deal with such assets. If the bankruptcy trustee disclaims any assets, then again the succession representative handles such assets. If the bankruptcy trustee disclaims all assets, then the succession representative would handle all assets. If the bankruptcy estate is solvent, then the succession representative will receive the assets the bankruptcy trustee distributes after all distributions to creditors of the bankruptcy estate. Note that an old case does hold that an involuntary chapter 7 debtor’s death does not abate bankruptcy. In re Meek, 45 S.Ct. 560 (1925).

b. Chapter 13 Bankrupt Who Dies

For the Chapter 13 bankrupt, the plan, if it remains feasible, can proceed; otherwise the case is dismissed. At least one court has ruled that conversion to chapter 7 is not an option. In re Spiser, 232 B.R. 669 (N.D. Texas (Bankr.) 1999). Usually the case is a joint one, with spouses’ primary motivation being an attempt to keep their house. A surviving spouse could choose to amend the plan to reflect any changed income capability, which may impact feasibility. If the plan has been confirmed, the debtor may seek to decrease the plan payments.

c. Chapter 11 Bankrupt Who Dies

The individual chapter 11 debtor’s death has the same analysis. Filing individual chapter 11 bankruptcy in contemplation of death to avoid foreclosure can fail. See In re Tikijian, 76 B.R. 304 (S.D.N.Y. (Bankr.) 1987). The requirement since 2005 that the individual chapter 11 bankrupt’s estate includes all property which the debtor acquires post-petition under 11 USC §1115(a)(1) does yet have much case law, much less in the dead debtor context. In chapter 11, a Chapter 11 Trustee can be appointed if such appointment is in the best interest of the creditors. 11 USC §1104(a)(2). While there has been some discussion of the constitutionality under the 13th Amendment of such an appointment for an individual chapter 11 debtor, no constitutional limitation exists for a dead chapter 11 bankrupt.

C. The Insolvent Heir

1. Renunciation and the Rights of an Heir’s Creditors

An heir may renounce his succession rights. La.C.C. arts. 947 & 963. However, [a] creditor of a successor may, with judicial authorization, accept succession rights in the successor’s name if the successor has renounced them in whole or in part to the prejudice of his creditor’s rights. In such a case, the renunciation may be annulled in favor of the creditor to the extent of his claim against the successor, but it remains effective against the successor.
La.C.C. art. 967. A failure by a creditor to act can impact rights. As the Official Comments to Civil Code article 967 explains,

[one]ne problem that perhaps should be addressed is the ranking among the creditors. If there are three creditors but only one accepts, then that one may receive payment in full of his claim whereas the other two creditors receive nothing. Since no single rule could be designed to cover all instances, and the problem has not been a serious one for the last hundred and seventy years, it was concluded that the effects of such acceptances ought to be viewed on an ad hoc basis. The creditor who accepts may or may not actually receive the inheritance, and indeed the proper results may be instead that the inheritance is seized and sold at a public auction, with the proceeds then distributed by the Sheriff. If there are sufficient assets in the inheritance to pay all creditors, then the questions of ranking and procedure are irrelevant. If there are not sufficient assets, then the court should be able to fashion an appropriate remedy under the general law.

Revision Comments (1997) to La.C.C. art. 967.

2. **Spendthrift Trusts**

Prospective decedents occasionally prepare for their demise with full cognizance of the limitations of the creditworthiness of their progeny.

The Louisiana Trust Code has a provision that allows the settlor to prohibit the beneficiary from the voluntary or involuntary alienation of his beneficial interest. When this provision is included in the trust instrument, the trust is known as a “spendthrift trust.” Accordingly, a spendthrift trust is a trust under which alienation by a beneficiary of an interest in income or principal is restricted to the full extent permitted by the Louisiana Trust Code.

No special language is necessary to create a spendthrift trust. All that is necessary is a declaration in the trust instrument that the interest of a beneficiary is held subject to a “spendthrift trust.”

A spendthrift trust also protects the beneficiary’s interest in income and principal from seizure by his creditors ...


3. **The 180 Day Reach-back Provision of the Bankruptcy Code**

One limitation upon planning to circumvent the creditors of an heir lies in the bankruptcy code, which defines the property of a bankruptcy estate to include property of a debtor acquired through death of another. As the Bankruptcy Code states, in pertinent part:
(a) The commencement of a case under section 301 [voluntary cases], 302 [joint cases], or 303 [involuntary cases] of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

... 

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) ... ; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.


Lagniappe When Bob [who was often very indebted] found out he was going to inherit a fortune after his sickly father died, he decided he needed a woman to enjoy it with. So one evening he went into a singles’ bar where he spotted the most beautiful woman he had ever seen. Her natural beauty took his breath away. “I may look like just an ordinary guy,” he said as he walked up to her, but in just a week or two my father will die, and I’ll inherit twenty million dollars.” Impressed, the woman went home with him that evening. Three days later, she became his stepmother.


D. The Jurisdictional Interplay of Bankruptcy and Successions

1. The Probate Exception to Bankruptcy Court Jurisdiction

The plain language of 11 U.S.C. § 541(a)(5) states that the bankruptcy court has jurisdiction over property of the estate whether it is inherited prior to or within 180 days after the filing of the bankruptcy. However, there is an exception to this rule, which you will not find in the statute. Supreme Court decisions “have recognized a ‘probate exception,’ kin to the domestic relations exception, to otherwise proper federal jurisdiction.” See Markham, 326 U.S., at 494, 66 S.Ct. 296; see also Sutton v. English, 246 U.S. 199, 38 S.Ct. 254, 62 L.Ed. 664 (1918); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 30 S.Ct. 10, 54 L.Ed. 80 (1909). Like the domestic relations exception, the probate exception has been linked to language contained in the Judiciary Act of 1789.” Marshall v. Marshall, 547 U.S. 293, 308; 126 S.Ct. 1735, 1746 (2006). The “probate exception” is not all encompassing; federal courts do not cede all aspects of successions to the state courts. The probate exception

reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate; it also precludes federal courts from endeavoring
to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

*Id.* at 312, 1748. Thus the exception seems to lie in comity.

Federal courts may properly exercise *in personam* jurisdiction, but not *in rem* jurisdiction, “so long as the federal court does not attempt to adjudicate the property that is in the custody of a probate court.” *Ochsner Clinic Foundation v. Nicholas*, 2007 W.L. 2088303, *n*4, n.5 (E.D.La. 2007)(Fallon, J.). The bankruptcy court can thus rule on the ownership if the action is not *in rem* and the property is not under adjudication in a state court proceeding. As the U.S. Supreme Court has explained:

It is true that a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789, 1 Stat. 73, and s 24(1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters. [citations omitted]. But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court [Citations omitted].

Similarly while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, ... it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. [Citations omitted].

*Markham v Allen*, 66 S.Ct. 296, 494 (1945). These boundaries are regularly litigated, including the following example.

2. **Bankruptcy Proofs of Claim** and Counterclaims

Some claims against decedents are subject to counterclaims, as some claims against bankrupts are likewise subject to counterclaim. In the final chapter of the Anna Nicole Smith litigation, the U.S. Supreme Court has recently had the opportunity to discuss litigation over such issues. In *Stern, Executor of the Estate of Marshall v. Marshall, Executrix of the Estate of Marshall*, 131 S.Ct. 2594 (2011), the U.S. Supreme Court ruled that bankruptcy judges are excluded from entering final judgments on any “state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.” *Id.* at 2620.

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9 A copy of Official Form 10, the bankruptcy Proof of Claim form, with instructions, is attached as Appendix 3.
In *Stern*, the Supreme Court ruled that because one side of the litigation, to wit the proof of claim, had been settled, the bankruptcy court lost the authority to rule on the counterclaim.

The impact of this decision is likely to be less than many believe. First, bankruptcy trustees are unlikely to settle litigated proofs of claim without simultaneously resolving the counterclaim. Second, federal jurisdiction still exists in the federal district court. To explain, the *Stern* case could have still proceeded in the bankruptcy court forum because, pursuant to 28 U.S.C. § 157(c)(1), a case which is not a core proceeding may still be tried by the bankruptcy court. However, the bankruptcy court may not enter “final” findings of fact and conclusions of law in a case that is not a core proceeding. *Stern*, 131 S.Ct. at 2604. The bankruptcy court’s findings of fact and conclusions of law are proposals, which may be adopted, rejected, or modified by the district court after *de novo* review. *Id.* A more detailed discussion of *Stern v Marshall* is set forth in Appendix 4.

### E. Comparing and Contrasting Bankruptcy and Succession Law

<table>
<thead>
<tr>
<th>Topic REPESNTATIVE(S)</th>
<th>Bankruptcy</th>
<th>Successions</th>
</tr>
</thead>
<tbody>
<tr>
<td>•Title(s)</td>
<td>Trustee; Debtor in Possession.</td>
<td>Administrator, Administratrix; Executor, Executrix; Independent Executor-/trix; Independent Administrator/-trix; Dative ...</td>
</tr>
<tr>
<td>•Remuneration</td>
<td>25% of the first $5,000; 10% of the next $45,000; 5% of the next $950,000; and 3% of the balance; 11 USC §326</td>
<td>2½ % of the amount of the inventory, but court may increase upon motion. LA C.C. art 3351</td>
</tr>
<tr>
<td>•Removal</td>
<td>Very rare</td>
<td>May occur for any lawful reason; shall be removed for non-performance of duty La C.C.P. Art. 3173</td>
</tr>
<tr>
<td>THE ESTATE</td>
<td>Always</td>
<td>Usually not needed</td>
</tr>
<tr>
<td>•Administration</td>
<td>Property of Estate (11 USC 541), including bequests and insurance 180 days following filing</td>
<td>Meaning of Estate, La.C.C. Art 872; but consider, Seizin, La.C.C.Art. 935</td>
</tr>
<tr>
<td>•Contents of estate</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Returning property to the estate</strong></td>
<td>Avoidance Actions, including preferences (11 USC 547), fraudulent conveyence (11 USC 548); Revocatory action (La.C.C.art. 2036); Oblique action (La.C.C.art 2044)</td>
<td></td>
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<tr>
<td><strong>CLAIMS</strong></td>
<td>Collation (La. C.C. arts 1227 et seq); Revocatory action (La.C.C.art. 2036); Oblique action (La.C.C. art 2044); Revocation of donations La.C.C. art 1558</td>
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</tr>
<tr>
<td><strong>Creditors Claims</strong></td>
<td>11 U.S.C. §501 &amp; 502; B.R 3001 &amp; 3002; Official Form 10</td>
<td></td>
</tr>
<tr>
<td><strong>Priorities</strong></td>
<td>Domestic support obligations; administrative claims; certain tax obligations. 11 USC §507</td>
<td></td>
</tr>
<tr>
<td><strong>Secured Creditors</strong></td>
<td>Need to Lift the Automatic Stay to take action against property of the estate, 11 U.S.C. § 362</td>
<td></td>
</tr>
<tr>
<td><strong>Information</strong></td>
<td>Conventional Mortgages can be enforced <em>in rem</em>, La.C.C.P. Art. 3248</td>
<td></td>
</tr>
<tr>
<td><strong>Info on Assets &amp; Liabilities</strong></td>
<td>Bankruptcy Schedules; Statement of Financial Affairs</td>
<td></td>
</tr>
<tr>
<td><strong>Discovery</strong></td>
<td>Sworn Descriptive List, La. C.C. Art. 3136</td>
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</tr>
<tr>
<td><strong>MISC.</strong></td>
<td>§341 Meeting of Creditors; B.R. 2004 Deposition; B.R. 7026 <em>et seq.</em></td>
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</tr>
<tr>
<td><strong>Related Litigation</strong></td>
<td>Rejection of claim prerequisite for Judicial Enforcement of the claim, LA.C.C.P. 3246</td>
<td></td>
</tr>
<tr>
<td><strong>Speed of Closure</strong></td>
<td>Adversaries (B.R. 7001 <em>et seq.</em>); Contested Matters (B.R. 9014)</td>
<td></td>
</tr>
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<td></td>
<td>Rule to Show Cause &amp; Motions La.C.C.P. 961 &amp; 963 Motion to Transfer &amp; Consolidate La.C.C.P. 253.2 &amp; 1561</td>
<td></td>
</tr>
<tr>
<td></td>
<td>&quot;close such estate as expeditiously as is compatible with the best interests of parties in interest&quot; 11 USC § 704(a)(1)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Duty to close as soon as advisable, La.C.C. Art 3197</td>
<td></td>
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</tbody>
</table>
Appendix 1

Form of Proof of Claim in Louisiana Succession

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO.: 2012-xxxxx  DIVISION “?”  SECTION NO.: ?

SUCCESION OF [Debtor]

FILED: ______________________________  ______________________________

DEPUTY CLERK

PROOF OF CLAIM OF BANK

NOW INTO COURT, through undersigned counsel, comes Bank to submit a formal proof of
claim, as allowed pursuant to the provisions of LA C.C.P., Arts. 3241 and 3245, as follows:

1. The name and address of the creditor is as follows:
   Bank
   Attn: Mr. Veep, Sr. Vice President
   Creditor Lane
   New Orleans, LA  70112
   Telephone: 504-xxx-xxxx
   Facsimile: 504-xxx-xxxx
   mrveep@bank.com

2. Bank’s total claim, as of November __, 2012, is $1,234,567.98. The basis for the claim is the
   promissory note that the decedent, Debtor, executed in favor of Bank, which is more specifically
   described below.

3. The Promissory Note was executed by Mr. Debtor on January 2, 2010 in the principal amount of
   $3,000,000.00 and is further identified as:

<table>
<thead>
<tr>
<th>Loan No.</th>
<th>Borrower Name</th>
<th>Origination Date</th>
<th>Current Payoff (11/03/2010)</th>
<th>Per Diem</th>
<th>Maturity Date</th>
<th>Payoff at DOD</th>
</tr>
</thead>
<tbody>
<tr>
<td>98765</td>
<td>Mr. Debtor</td>
<td>02/02/2010</td>
<td>$1,234,567.98</td>
<td>$543.21</td>
<td>11/12/2013</td>
<td>$1,200,555.99</td>
</tr>
</tbody>
</table>

Attached as Exhibit “A” is a copy of the Promissory Note.
4.

Pursuant to the conditions set forth in the promissory note, Mr. Debtor’s death constitutes an event of default under the note.

5.

Pursuant to the conditions set forth in the promissory note, the Lender, Bank, shall have the right to declare the note to be in default and to accelerate the maturity and insist upon immediate payment in full of the unpaid principal balance then outstanding under the note.

6.

Bank hereby declares that the above described note is in default. Further, Bank hereby accelerates the maturity of each of the note and insists upon immediate payment in full of the unpaid balance currently outstanding under each note.

Respectfully submitted,
Collecting, Creditor & Smith, L.L.C.

____________________________
Mr. Attorney (99,999)
Lawyer Lane
New Orleans, LA 70115
Telephone: 504-xxx-xxxx
Facsimile: 504-xxx-xxxx
lawyer@collectinglaw.com
Counsel for Bank

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been forwarded to all counsel of record by facsimile, e-mail or by U.S. Mail, postage prepaid on this __________ of December, 2012.

____________________________
Mr. Lawyer
Appendix 2

LA.CCP. Arts 3241 - 3249

Art. 3241. Presenting claim against succession

A creditor of a succession under administration may submit his claim to the succession representative for acknowledgment and payment in due course of administration.

Except for the purposes of Article 3245, no particular form is required for the submission of a claim by a creditor of the succession other than that it be in writing.

Art. 3242. Acknowledgment or rejection of claim by representative

The succession representative to whom a claim against the succession has been submitted, within thirty days thereof, shall either acknowledge or reject the claim, in whole or in part. This acknowledgment or express rejection shall be in writing, dated, and signed by the succession representative, who shall notify the claimant of his action. Failure of the succession representative either to acknowledge or reject a claim within thirty days of the date it was submitted to him shall be considered a rejection thereof.

Art. 3243. Effect of acknowledgment of claim by representative

The acknowledgment of a claim by the succession representative, as provided in Article 3242, shall:

(1) Entitle the creditor to have his claim included in the succession representative's petition for authority to pay debts, or in his tableau of distribution, for payment in due course of administration;

(2) Create a prima facie presumption of the validity of the claim, even if it is not included in the succession representative's petition for authority to pay debts, or in his tableau of distribution; and

(3) Suspend the running of prescription against the claim as long as the succession is under administration.

Art. 3244. Effect of inclusion of claim in petition or in tableau of distribution

The inclusion of the claim of a creditor of the succession in the succession representative's petition for authority to pay debts or in his tableau of distribution creates a prima facie presumption of the validity of the claim; and the burden of proving the invalidity thereof shall be upon the person opposing it.

Art. 3245. Submission of formal proof of claim to suspend prescription

A. A creditor may suspend the running of prescription against his claim for up to ten years:

(1) By delivering personally or by certified or registered mail to the succession representative, or his attorney of record, a formal written proof of the claim.
(2) By filing a formal written proof of the claim in the record of the succession proceeding, if the succession has been opened and no person has been appointed or confirmed as succession representative and no judgment of possession has been signed.

(3) By filing a formal written proof of the claim in the mortgage records of the appropriate parish as provided in Article 2811, in the absence of a proceeding to open the succession.

B. Such proof of claim shall be sworn to by the claimant and shall set forth:

(1) The name and address of the creditor;
(2) The amount of the claim, and a short statement of facts on which it is based; and
(3) If the claim is secured, a description of the security and of any property affected thereby.

C. If the claim is based on a written instrument, a copy thereof with all endorsements must be attached to the proof of the claim. The original instrument must be exhibited to the succession representative on demand, unless it is lost or destroyed, in which case its loss or destruction must be stated in the claim.

D. The submission of this formal proof of claim, even though it be rejected subsequently by the succession representative, shall suspend the running of prescription against the claim as long as the succession is under administration or, if the succession has been opened and no person has been appointed or confirmed as succession representative and no judgment of possession has been signed, submission of the formal proof of claim shall suspend the running of prescription against the claim as long as no judgment of possession has been signed. In the absence of a proceeding to open the succession, submission of the formal proof of claim shall suspend the running of prescription against the claim for five years, commencing from the date of submission of the proof of claim.

**Art. 3246. Rejection of claim; prerequisite to judicial enforcement**

A creditor of a succession may not sue a succession representative to enforce a claim against the succession until the succession representative has rejected the claim.

If the claim is rejected in whole or in part by the succession representative, the creditor to the extent of the rejection may enforce his claim judicially.

**Art. 3247. Execution against succession property prohibited**

Execution shall not issue against any property of a succession under administration to enforce a judgment against the succession representative, or one rendered against the deceased prior to his death.

**Art. 3248. Enforcement of conventional mortgage or pledge**

The provisions of Articles 3246 and 3247 shall not prevent the enforcement of a conventional mortgage on or a pledge of movable or immovable property of the succession in a separate proceeding.

**Art. 3249. Succession representative as party defendant**

The succession representative shall defend all actions brought against him to enforce claims against the succession, and in doing so may exercise all procedural rights available to a litigant.
# Appendix 3

## UNITED STATES BANKRUPTCY COURT

<table>
<thead>
<tr>
<th>Name of Debtor:</th>
<th>Case Number:</th>
</tr>
</thead>
</table>

**NOTE:** Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.

| Name of Creditor (the person or other entity to whom the debtor owes money or property): |
| Name and address where notices should be sent: |
| Name and address where payment should be sent (if different from above): |
| Telephone number: | email: |

☐ Check this box if the claim amends a previously filed claim.

| Court Claim Number: |
| Filed on: |

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. **Amount of Claim as of Date Case Filed:** $_____________________________
   
   If all or part of the claim is secured, complete item 4.
   
   If all or part of the claim is entitled to priority, complete item 5.
   
   ☐ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. **Basis for Claim:**
   
   (See instruction #2)

3. **Last four digits of any number by which creditor identifies debtor:**

   3a. Debtor may have scheduled account as:

   (See instruction #3a)

   3b. Uniform Claim Identifier (optional):

   (See instruction #3b)

4. **Secured Claim** (See instruction #4)

   Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

<table>
<thead>
<tr>
<th>Nature of property or right of setoff:</th>
<th>Basis for perfection:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real Estate</td>
<td>Other</td>
</tr>
<tr>
<td>Motor Vehicle</td>
<td></td>
</tr>
</tbody>
</table>

   Value of Property: $________________

   Annual Interest Rate_____% ☐ Fixed or ☐ Variable

   (when case was filed)

   Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

   $________________

   Amount of Secured Claim: $________________

   Amount Unsecured: $________________

5. **Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a).** If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.


   ☐ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor’s business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).


   Amount entitled to priority:

   $________________

   ☐ Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).

   ☐ Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(__).

   *Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

6. **Credits.** The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)
7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached. (See instruction #7, and the definition of "redacted").

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

☐ I am the creditor.  ☐ I am the creditor’s authorized agent.  (Attach copy of power of attorney, if any.)  ☐ I am the trustee, or the debtor, or their authorized agent.  (See Bankruptcy Rule 3004.)  ☐ I am a guarantor, surety, indorser, or other codebtor.  (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _________________________________________________

Title: _______________________________________________________

Company: ___________________________________________________ 

Address and telephone number (if different from notice address above):

______________________________________________________________

______________________________________________________________

Telephone number: email: ________________________________________

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor’s full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor’s Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor’s account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor’s name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer’s address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.
**DEFINITIONS**

**Debtor**
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

**Creditor**
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

**Claim**
A claim is the creditor’s right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

**Proof of Claim**
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

**Secured Claim Under 11 U.S.C. § 506 (a)**
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

**Unsecured Claim**
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

**Claim Entitled to Priority Under 11 U.S.C. § 507 (a)**
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

**Redacted**
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual’s tax-identification, or financial-account number, only the initials of a minor’s name, and only the year of any person’s date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

**Evidence of Perfection**
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

**INFORMATION**

**Acknowledgment of Filing of Claim**
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court’s PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

**Offers to Purchase a Claim**
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.), and any applicable orders of the bankruptcy court.
On June 23, 2011, in *Stern, Executor of the Estate of Marshall v. Marshall, Executor of the Estate of Marshall*, 131 S.Ct. 2594 (2011), the United States Supreme Court struck down a portion of 28 U.S.C. § 157(b) on constitutional grounds. This provision concerns when bankruptcy judges may hear and enter final judgments in “all core proceedings arising under title 11, or arising in a case under title 11.” §157(b)(1). “Core proceedings include, but are not limited to” 16 different types of matters, including “counterclaims by [a debtor’s] estate against persons filing claims against the estate.” §157(b)(2)(C). Parties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards. See § 158(a); Fed. Rule Bkrtc. Proc. 8013.

When a bankruptcy judge determines that a referred “proceeding … is not a core proceeding but … is otherwise related to a case under title 11,” the judge may only “submit proposed findings of fact and conclusions of law to the district court.” §157(c)(1). It is the district court that enters final judgment in such cases after reviewing de novo any matter to which a party objects.

*Stern, 131 S.Ct. at 2603-4* (internal footnotes omitted). The *Stern v. Marshall* decision specifically involved the constitutionality of a portion of 28 U.S.C. § 157(b)(2)(O), which is one of the enumerated 16 core proceedings.

**Holding in Stern v. Marshall**

In *Stern*, Vickie Lynn Marshall (“Vickie” aka Anna Nicole Smith) filed for bankruptcy protection. Vickie’s stepson, Pierce Marshall (“Pierce”), filed a proof of claim in the bankruptcy asserting defamation. Vickie filed a counterclaim asserting that Pierce fraudulently induced his father to draft a living trust which excluded Vickie. On November 5, 1999, the bankruptcy court granted summary judgment in favor of Vickie, dismissing the proof of claim. On September 27, 2000, after a trial, the bankruptcy court granted a judgment in favor of Vickie on her counterclaim. *Stern*, 131 S.Ct. at 2601.

Pierce appealed the bankruptcy court’s decision. The district court ruled that Vickie’s counterclaim was not a core proceeding and, therefore, was not a final judgment. *Id.* In the meantime, a Texas state court conducted a jury trial in which Pierce won. *Id.* The federal district court declined to give the Texas judgment preclusive effect and ruled in Vickie’s favor on the merits of the case. *Id.* at 2602. The U.S. Ninth Circuit Court of Appeals reversed the district court on different grounds. The Supreme Court reversed the court of appeals and remanded the case to the court of appeals. *Id.* at 2602. The Ninth Circuit ruled that since the bankruptcy court decision was not a final judgment and the district court ruled after the Texas state court decision, the district court should have given preclusive effect to the Texas state court decision. *Id.* at 2602-03. The 2011 Supreme Court decision is based on a grant of a *writ of certiorari* following the remand. *Id.* at 2603. The Supreme Court affirmed the Ninth Circuit’s decision. *Id.* at 2620.


(2) Core proceedings include, but are not limited to —

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims ....

The majority of the Supreme Court held that the exception stated in subsection (O) is not broad enough to meet Constitutional requirements. *Id.* at 2608. Bankruptcy judges are not only excluded from ruling on “personal injury tort claims [and] wrongful death claims”, but are also precluded from entering final judgments on any “state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.” *Id.* at 2620. The state law counterclaim, which was determined a year after the proof of claim was dismissed constituted a
non-core proceeding, required that the final judgment be entered by the district court pursuant to 28 U.S.C. § 157(c)(1). *Id.* at 2604. The majority of the Court held that the decision is not jurisdictional. *Id.* at 2607. Vickie lost in the Supreme Court because of *res judicata*. Since the counterclaim was not a core proceeding, it had no preclusive effect. Since the federal district court decision came after the Texas state court decision, the district court should have given full faith and credit to the Texas decision. Thus, the Stern Court ruled that Congress was unconstitutionally broad in its examination of core proceedings under 28 U.S.C. § 157(b)(2)(O).

Even though it was not a core proceeding, the case could have still proceeded in the bankruptcy court forum because, pursuant to 28 U.S.C. § 157(c)(1), a case which is not a core proceeding may still be tried by the bankruptcy court. However, the bankruptcy court may not enter “final” findings of fact and conclusions of law in a case that is not a core proceeding. Stern, 131 S.Ct. at 2604. The bankruptcy court’s findings of fact and conclusions of law are proposals, which may be adopted, rejected, or modified by the district court after de novo review. *Id.*

Conclusion

Many members of the bankruptcy judiciary and bar are concerned that *Stern v. Marshall* may have a profound impact on the practice of bankruptcy. Delay in the litigation of bankruptcy cases may result if further provisions or portions of provisions of 28 U.S.C. § 157 are held non-core. Absent consent of the parties, items might be forced to be sent to district court for final decisions. As the Stern dissent quantified the potential problem:

... the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases ...

*Stern*, 131 S.Ct. at 2630 (Breyer, J., dissenting). Technically, however, the *Stern* opinion is narrow, holding that Congress may not pass to bankruptcy judges the power to decide a state court tort claim which is unrelated to a still pending proof of claim.

FOOTNOTE

1. The parties may consent to a final determination being entered by the bankruptcy judge in a non-core proceeding. *Stern*, 131 S.Ct. at 2607. *Citing*, 28 U.S.C. § 157(c)(2). However, the effect of *Stern* on the ability of parties to consent to bankruptcy court judges making final decisions on various matters remains open to debate.

ABOUT THE AUTHOR

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