By **Jay W. Freiberg** & **Hillary A. Frommer**

The Probate Exception: We're Not Just in State Court Anymore

When federal diversity jurisdiction is possible

The probate exception to federal diversity jurisdiction historically had been an effective bar to keeping estate and trust practitioners out of the federal courts. In the 1946 landmark decision of *Markham v. Allen*,[1] the U.S. Supreme Court held that the federal courts couldn't "interfere with the probate proceedings."[2] For the next six decades, the federal courts broadly interpreted that language to decline to exercise jurisdiction in cases that seemed to touch on estate matters. That is, until 2006, when the Supreme Court revisited *Markham* and narrowed the scope of the then-60-year-old doctrine. In *Marshall v. Marshall*,[3] the Supreme Court moved away from the "interference" language of *Markham* and warned that the federal courts could no longer reject diversity jurisdiction merely because the claims presented are of the type more aptly addressed in the state courts or might touch a decedent's estate.

Narrowing of the Probate Exception

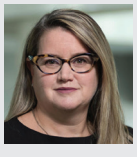
Attempting to clarify the probate exception, the *Marshall* court articulated the three specific, and exclusive, instances when the probate exception applies to bar federal courts from exercising diversity jurisdiction: (1) the probate or annulment of a will; (2) the administration of an estate; and (3) when the federal court "is endeavoring to dispose of property that is in the custody of the state probate court."[4] The first two categories are fairly self-explanatory (having existed since *Markham*) and haven't sparked much analysis or debate. But the third category has been the subject of much litigation across the country.[5]

While *Marshall* certainly narrowed the probate exception, it by no means created a black-and-white rule. Indeed, the case law developing since *Marshall* shows that federal courts are scrutinizing complaints that don't involve the probate or annulment of a will (the first *Marshall* category) and struggling to determine if they nonetheless fall within either of *Marshall's* other two categories. A few Latin terms learned in first year law school—in personam, in rem and res—seem to guide this determination.

In Personam vs. In Rem

As one of the defining factors of *Marshall* was that Vickie Lynn sought an in personam judgment against Pierce Marshall, a key inquiry is whether an action is in personam—meaning it's "brought against a person rather than property"[6]—or is in rem, in that it determines "the title to property and the rights of the parties."[7] The federal courts have, since *Marshall*, fairly consistently exercised jurisdiction over in personam claims that seek compensatory damages from a fiduciary of an estate.[8] But merely labeling a claim as in personam isn't necessarily indicative or dispositive and might not suffice to keep a plaintiff in federal court. As the U.S. Court of Appeals for the 11th Circuit stated in *Stuart v. Hatcher*, "[i]n determining whether the probate exception applies, we look past the plaintiff's theory of relief and consider the effect a judgment would have on the jurisdiction of the probate court."[9]

After all, an action fashioned as one seeking damages in personam, might, in actuality, seek to recover property that's subject to the state probate court, thereby falling within *Marshall's* third



Jay W. Freiberg is a partner and **Hillary A. Frommer** is counsel, both at Elman Freiberg PLLC in New York City

category and triggering the probate exception. Several cases are instructional.

In *McKie v. Estate of Dickenson*,[10] the Eastern District of New York found that what the plaintiff really sought was to recoup estate assets by holding the defendant personally liable for acts taken in his fiduciary capacity. It stated:

> even though plaintiff styles his claims as seeking *in personam* damages from defendants in their individual capacities, the court concludes that the gravamen of plaintiff's claims in Counts IV-IX is that defendants obtained assets based on defendant Charles Kornegay's illegitimate designation as administrator of the decedent's estate and defendant Kornegay's actions as administrator of the estate…. [P]laintiff ultimately seeks to disgorge funds from the decedent's estate, not recover damages from defendants personally and, in doing so, undo actions already taken by the Surrogate's Court.[11] [Italics in original.]

Accordingly, the federal court declined to exercise jurisdiction.

Similarly, in *Three Keys Ltd. v. SR Utility Holding Co.*,[12] the Third Circuit, citing *Marshall*, determined that, at its core, the complaint didn't ask the court to determine whether a particular asset belonged to an estate, but rather, a specific determination of the plaintiff's interest in estate property and a distribution of those assets. The court stated:

> On the surface, these claims seek to impose liability against the Defendants as legal persons, which would call for *in personam* jurisdiction. However, not only does [plaintiff] seek as relief the distribution of probate property, [plaintiff] also seeks a determination that its interest in SR Utility shares and dividends is superior to the interest of the Estate. Each of these claims, whether characterized as an *in personam* action or not, requires the District Court to 'endeavor[ ] to dispose of property that is in the custody of the state probate court,' which is prohibited by the probate exception.[13] [Italics in original.]

The Third Circuit therefore affirmed the lower court's rejection of jurisdiction.

McKie and *Three Keys* demonstrate how the federal courts will look behind a pleading—that is, elevating substance over form—to ensure compliance with the probate exception. In short, the probate exception precludes the federal court from determining a party's specific interest in estate property (which is in rem), but *not* from determining *whether* specific property is part of an estate (which is in personam).[14]

Whether there's any ongoing activity in the state probate court becomes a relevant factor.

"Res" Issues

Another critical inquiry is what it means for the "res" to be "in the custody of the state probate court." Many courts have answered this by looking to whether the property at issue belongs to an estate (or testamentary trust), because an asset belonging to an estate is under the control of an executor who receives from the probate court itself their authority to take control over property.[15] As only those assets are subject to probate, the federal courts have consistently rejected the probate exception when the property at issue is owned by an inter vivos trust[16] or is itself a nonprobate asset, such as a joint account with the right of survivorship.[17] Although application of the probate exception is clearer in the context of estate assets, even then the analysis isn't straightforward.

Whether there's any ongoing activity in the state probate court becomes a relevant factor. Consider *Mercer v. Bank of New York Mellon, N.A.*,[18] in which the Second Circuit affirmed the district court's application of the probate exception and dismissal of the action. The plaintiffs sued two testamentary trustees, alleging that they had breached a contract and several fiduciary duties by making improper distributions. The complaint sought punitive damages, attorney's fees and a restoration to the

trust of the allegedly improper distributions. Two years before the plaintiffs brought that in personam action in federal court, however, they had petitioned the New York Surrogate's Court to remove the defendants as executors and testamentary trustees and to enjoin them from making further distributions. The Surrogate's Court had denied summary judgment and found that a trial on the removal petition was warranted. Noting the "extensive powers" of the Surrogate's Court, the Second Circuit determined that the trust property was indeed under the control of the Surrogate's Court, which precluded the district court from exercising jurisdiction.

> Claims against an executor for breach of fiduciary duty, fraud and undue influence that had been routinely rejected by the federal courts could now possibly see the inside of a federal courtroom.

And recently, in *Glassie v. Doucette*,[19] the district court for the District of Rhode Island determined that the plaintiff's specific allegations against the estate's executor all boiled down to alleged mismanagement in the administration of the estate, which, the plaintiff claimed, diminished the estate's value and deprived her of the full value of her 10% share. Notwithstanding that the plaintiff brought claims against, and sought damages directly from, the executor, the court held that the probate exception applied because

> . . . any calculation of damages requires precisely the kind of valuation and accounting that is within the exclusive province of the probate court, especially as probate remains open and there has been no final accounting. It is impossible to determine whether and to what extent [plaintiff's] ten percent share of the residual estate has been diminished without determining the present value of the estate and what the monetary impact has been of the various transgressions.[20]

In contrast, in *Wolfram v. Wolfram*,[21] the district court for the Northern District of Illinois declined to apply the probate exception and dismiss a complaint against an executor alleging breach of fiduciary duty, fraud, constructive trust and an accounting because the probate of the decedent's estate was closed and there was no other state court proceeding involving the property at issue. In fact, the court determined that the defendant's dismissal motion was "doom[ed]" by the principle that "if there never was a state court proceeding over the *res* or all state court proceedings involving the *res* have ended, then there is nothing to interfere with and the probate exception is inapplicable."[22] (Italics in original.)

In short, a federal court is more likely to apply the probate exception if there's ongoing activity in the state probate court and less likely to apply it if an estate has already been closed.

Pros and Cons

As a result of *Marshall*, claims against an executor for breach of fiduciary duty, fraud and undue influence that had been routinely rejected by the federal courts could now possibly see the inside of a federal courtroom. But just because you *can* go to federal court (assuming you have complete diversity jurisdiction), should you? That, too is a fact-intensive inquiry that practitioners must undertake. There are pros and cons to litigating these issues in the federal court.

The speed with which the litigation will move might be an important consideration. Federal courts notoriously have tight discovery schedules and move cases quickly (the "rocket docket"). A fast-paced litigation might be just what you want in certain situations, such as when one of the parties is aged or in rapidly declining health. Another factor that could tip the scale toward federal court is the quality of the judges. Although it's true that

the probate court judges are very familiar with the types of disputes that cross their benches, district court and magistrate judges are very knowledgeable when it comes to state law and generally issue well-reasoned decisions on issues such as breach of fiduciary duty and fraud.

On the other hand, a seasoned probate court practitioner will likely be more familiar and comfortable with the rules and unique practices of the state probate court than with the Federal Rules of Civil Procedure and local federal court rules. This might be particularly true when it comes to discovery. In New York, for example, the Federal Rules of Civil Procedure, and particularly the local rules of the Southern District of New York, have specific guidelines for initial disclosures, interrogatories, expert witnesses and depositions that don't exist in the New York Surrogate's Court. A lack of familiarity with these practices, or an affirmative desire to proceed with the less stringent discovery practices of the Surrogate's Court, might well be reasons to want to remain in state court.

Endnotes

1. *Markham v. Allen,* 326 U.S. 490 (1946).
2. *Ibid.*, at p. 494.
3. *Marshall v. Marshall,* 547 U.S. 293 (2006). This was the infamous case involving Vickie Lynn Marshall, otherwise known as Anna Nicole Smith, against Pierce Marshall, the son of Vickie's late husband, J. Howard Marshall, in the Federal Bankruptcy Court.
4. *Ibid.*, at pp. 311-312.
5. This third category isn't necessarily new. Indeed, seven years before *Markham*, the U.S. Supreme Court held, in *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), that the federal court lacked jurisdiction over an action concerning the administration of a trust that had been previously brought in the state court and that sought the same relief. The court stated "[t]he Common Pleas Court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the

trust funds. Its proceedings are, as the court below held, quasi in rem, and the jurisdiction acquired upon the filing of the trustees' account is exclusive. The District Court for the Western District of Pennsylvania is without jurisdiction of the suit substantially brought for the same relief." While it may seem that the Supreme Court was simply stating the well-known "first to file" doctrine, several courts had interpreted *Princess Lida* as barring federal court jurisdiction when the requested relief requires the federal court to "exercise control over the property in dispute and such property is already under the control of the [state] court"—that is, the third category from *Marshall*. *See Dyno v. Dyno*, No. 20-3302, at *3 (3d Cir. Aug. 5, 2021) (quoting *Daily v. Nat'l Hockey League*, 987 F.2d 172, 176 (3d Cir. 1993)).

6. *Chevalier v. Estate of Barnhart*, 803 F.3d 789, 801-802 (6th Cir. 2015) (citing *Black's Law Dictionary*).
7. *Ibid.*, at p. 802.
8. *See Lefkowitz v. Bank of New York*, 528 F.3d 102 (2d Cir. 2007) (claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty and fraud seeking money damages directly from the defendant and not distributions from an estate weren't subject to the probate exception, but a claim to impose a constructive trust on estate assets was barred); *Mandell v. Dolloff*, No. 3:17-CV-01282-MPS, (D. Conn. July 24, 2018) (money damages claim for tortious interference wasn't subject to the probate exception).
9. *Stuart v. Hatcher,* 757 F. App'x. 807, 809-10 (11th Cir. 2018).
10. *McKie v. Estate of Dickenson,* No. 20-CV-2973 (KAM)(CLP), (E.D.N.Y. Aug. 2, 2021).
11. *Ibid.*, at *8.
12. *Three Keys Ltd. v. SR Utility Holding Co.,* 540 F.3d 220 (3d Cir. 2008).
13. *Ibid.*, at pp. 229-230.
14. *Ibid.*; *see also Jimenez v. Rodriguez-Pagan*, 597 F.3d 18 (1st Cir. 2010).
15. *See Architectural Body Research Foundation v. Reversible Density Foundation*, 335 F. Supp. 2d 621, 634 (S.D.N.Y. 2018) (citing *Byers v. McAuley*, 149 U.S. 608 (1893)).
16. In *Curtis v. Brunsting*, 704 F.3d 406 (5th Cir. 2013), the U.S. Court of Appeals for the Fifth Circuit reversed the district court's dismissal of claims by a beneficiary of an inter vivos trust against the trustee for breach of fiduciary duty that sought damages, a temporary restraining order and an injunction that compelled an accounting. The court's decision turned on the fact that the assets at issue belonged to an inter vivos trust which, the court stated, "generally avoid probate, since such assets are owned by the trust, not the decedent, and therefor are not part of the decedent's estate." Because the trust "is not in the custody of the probate court," the "probate exception is inapplicable to disputes concerning administration of the trust." *Ibid.*, at p. 410. *See also Matter of Nolan*, No. 21-55204, 2022 WL 327927 (9th Cir. Feb. 3, 2022) (probate exception didn't apply to an action in bankruptcy concerning a living trust); *Lee Graham Shopping Center LLC v. Estate of Kirsch*, 777 F.3d 678 (4th Cir. 2015) (probate exception didn't preclude the federal court from determining the validity of a transfer to an inter vivos trust); *Oliver v. Hines*, 943 F. Supp. 2d 634 (E.D. Va. 2013) ("Moreover, a suit to invalidate an inter vivos trust does not require a federal court to assume in rem jurisdiction over property subject to the jurisdiction of a state probate court .... Accordingly, a federal court may properly exercise jurisdiction over a diversity suit that seeks to invalidate an *inter vivos* trust without running afoul of the probate exception; indeed, to apply the probate exception to such a suit would impermissibly expand the scope of the probate exception.")
17. In *Fisher v. PNC Bank, N.A.*, 2 F.4th 1352 (11th Cir. 2021), the Eleventh Circuit reversed the district court's application of the probate exception. The plaintiff sued PNC Bank for damages for removing her from a joint account with her mother and alleged that the bank's conduct was part of a scheme to deplete that account and cause the plaintiff to lose all of her investments therein. The plaintiff's mother subsequently died, and the Florida district court dismissed the action on concluding that the plaintiff "was ultimately attempting to circumvent the normal probate process by bringing an individual claim against PNC Bank." The Eleventh Circuit reversed. After chastising the district court for applying *Markham* rather than the standard articulated in *Marshall*, the court then held that the plaintiff wasn't asking the court to dispose of property in her mother's estate. Rather, the plaintiff alleged that the events at issue occurred before her mother died, and the funds at issue were "never properly subject to probate proceedings" and, therefore, "never became part of [the] estate." Similarly, in *Bartone v. Podbela*, No. 17-cv-03039 (ADS) (GRB) (E.D.N.Y. Feb. 23, 2018), the court rejected the probate exception when the claim alleged that the defendant unduly influenced the decedent to list only himself as the owner of a joint account. The court's determination rested on the fact, as clarified by the plaintiff, that the claims related solely to the joint bank account, which wasn't part of the estate.
18. *Mercer v. Bank of New York Mellon, N.A.*, 609 F. App'x. 677 (2d Cir. 2015).
19. *Glassie v. Doucette*, No. 1:20-cv-00493-MSM-PAS, (D.R.I. Sept. 14, 2021).
20. *Ibid.*, at *7.
21. *Wolfram v. Wolfram,* 78 F. Supp. 3d 758 (N.D. Ill. 2015).
22. *Ibid.*, at p. 765 (citing *Struck v. Cook Cnty. Pub. Guardian*, 508 F.3d 858 (7th Cir. 2007)). *See also Kennedy-Jarvis v. Wells*, 113 F. Supp. 3d 144 (D.D.C. 2015) (probate exception didn't apply because there was no ongoing activity in the probate court).