An Ounce of Prevention: Perspectives on a Civil Plaintiff
Filing Bankruptcy From Both Sides of the 'V'

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Bankruptcy Overview

A bankruptcy filing generally provides the bankruptcy court with jurisdiction over the filing debtor's *assets* and debts. A bankruptcy court's original and exclusive jurisdiction over matters under Title 11 of the United States Code, 11 U.S.C. §§ 101-1330 ("Bankruptcy Code"), is set forth in 28 U.S.C. § 1334. Specifically, under section 1334(a), bankruptcy courts have original jurisdiction over petitions for relief under the Bankruptcy Code referred by the district court. While, under § 1334(b), bankruptcy courts have jurisdiction over other civil proceedings "arising under," "arising in," or "related to" cases filed under the Bankruptcy Code.

The timeline of events in a bankruptcy case starts with the filing of the bankruptcy petition. Upon the filing of the petition, a bankruptcy estate is automatically created by the bankruptcy court. The bankruptcy estate consists of all legal or equitable interests of the debtor in property at the time of the bankruptcy filing. Section 541 of the Bankruptcy Code defines what property is included in the bankruptcy estate. Importantly, the bankruptcy estate includes all property in which the debtor has an interest, even if it is owned or held by another person. In fact, the scope of the bankruptcy estate as defined in the Bankruptcy Code is very broad and includes almost every imaginable kind of property that a debtor owns at the time the bankruptcy petition is filed, including intangible assets, such as the right to file a lawsuit for a plethora of claims.

To obtain an inventory of the bankruptcy estate, section 521(a)(1) of the Bankruptcy Code requires that debtors promptly file detailed information regarding their creditors, assets, liabilities, income, expenses and general financial condition. 11 U.S.C. § 521(a)(1)(B)(i). The bankruptcy court may dismiss a bankruptcy case if the information is not filed with the court within the deadlines set by the Bankruptcy Code, the Bankruptcy Rules, and the local court rules. Additionally, a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury, either orally or in writing, in connection with a bankruptcy case, is subject to a fine, imprisonment, or both. Moreover, all information supplied by a debtor in a bankruptcy case is subject to examination by the Attorney General acting through the Office of the United States Trustee, the Office of the United States Attorney, and the Department of Justice. Thus, it is essential that a debtor precisely provide all required information and make timely amendments, as necessary.

Once the bankruptcy estate is created, the assets of the estate are legally controlled by the bankruptcy trustee. The trustee is appointed by the court to represent the debtor's estate in the

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proceeding. The trustee is responsible for "administering" the estate's assets, which basically means managing those assets for the estate. But a trustee cannot act without approval from the bankruptcy court. In Chapter 7 bankruptcies, the trustee is primarily responsible for liquidating any unprotected assets and distributing the sale proceeds to creditors. In Chapter 12 and 13 bankruptcies, the bankruptcy trustee is primarily responsible for managing the bankruptcy payment plan, including collecting the payments and distributing the proceeds to creditors.

Employment claims, filed or potential, if not disclosed in the bankruptcy proceeding can negatively impact the debtor's future rights and litigation. Notably, a potential claim is an asset of the bankruptcy estate that will be administered by the bankruptcy trustee. 11 U.S.C. § 522. This is the case even where the debtor has not even filed an administrative charge or litigation as of the time of the bankruptcy filing. As such, the failure to disclose employment claim may preclude recovery of damages in employment litigation.

Standing Issues Raised By Bankruptcy

The intersection of bankruptcy proceedings and civil litigation presents interesting issues with which courts must grapple, including standing issues. Generally speaking, standing is the ability to commence litigation in a court of law. It is a threshold jurisdictional issue such that a court must determine whether a litigant has the legal capacity to pursue claims before the court and which it can adjudicate. Where standing is lacking, the pending matter must be dismissed. Relevant here, the Bankruptcy Code determines who has the legal capacity to commence litigation concerning claims and causes of action that belonged to the debtor prior to filing for bankruptcy.

When an individual files a bankruptcy petition, the property that the person owns at the time of filing becomes property of a bankruptcy estate. 11 U.S.C. § 541(a) (1). As mentioned, the Bankruptcy Code defines property of the bankruptcy estate very broadly. Notably, the estate encompasses any lawsuits in which the debtor is currently a plaintiff. It also includes legal claims and causes of action that the debtor could bring, but has not yet filed. Specifically, pre-petition legal claims not exempted by the debtor may be administered and liquidated by the trustee. 11 U.S.C. § 704(a) (1). In Chapter 7 bankruptcy proceedings, the trustee, not the debtor, has exclusive standing to pursue any cause of action that is property of the estate. 11 U.S.C. § 323. Pursuant to section 323 of the Code, the trustee is the legal "representative of the estate" and is the proper party in interest "to sue and be sued." As such, the trustee has the right to litigate, settle, or sell the legal claim for the benefit of creditors. For instance, bankruptcy proceedings under Chapter 7 or liquidation bankruptcies, which are the most common form of individual bankruptcy, do not require a repayment plan but rather requires liquidation or sale of non-exempt assets to pay creditors.

A debtor may gain control over his pre-bankruptcy legal claims and pursue it while in bankruptcy in two different ways. One such way is where the debtor seeks to exempt the legal claim from the bankruptcy proceeding. In order to do so, the debtor must list the legal claim as an item of personal property of the debtor and give it an estimated or "unknown" value. The debtor must also designate an available exemption for the legal claim. If the exemption claim is properly asserted and no one objects, the exemption is allowed and the debtor has standing to

pursue the claim in a separate legal proceeding as its legal owner. 11 U.S.C. § 522(l); *see also Cusano v. Klein*, 264 F.3d 936 (9th Cir. 2001).

Alternatively, the cause of action listed on the debtor's schedules may be "abandoned" by the bankruptcy trustee. Abandonment in a bankruptcy proceeding occurs: (1) if, on request by the trustee and after notice and hearing, the court finds that the property is "burdensome" or of "inconsequential value and benefit to the estate"; or (2) automatically when the bankruptcy case is closed. 11 U.S.C. § 554(b)-(c); *Barletta v. Tedeschi*, 1990 WL 194478 (N.D.N.Y. Dec. 3, 1990) (denying debt collector's motion to dismiss Fair Debt Collection Practices Act claim based upon consumer's lack of standing when bankruptcy trustee acknowledged his intention to abandon the consumer's claim but never formally did so). The debtor has the choice of either seeking formal abandonment of the scheduled legal claim by filing a motion while the bankruptcy case is open, or simply waiting until the case is closed. *See, e.g., Radford v. U.S. Bank Nat'l Assoc*., 2011 WL 4054863 (D. Haw. Sept. 9, 2011) (bankruptcy court's order approving trustee's request for abandonment gives debtor standing to pursue TILA and other pre-bankruptcy claims in district court during pendency of bankruptcy). After the bankruptcy case has been closed, the debtor may pursue any lawsuit that was listed in the bankruptcy schedules and not liquidated by the trustee. *See e.g. Just Film, Inc. v. Merchant Servs., Inc*., 873 F. Supp. 2d 1171, 1176 (N.D. Cal. 2012) (abandonment as a matter of law at closing of case under § 554(c) gives borrower standing to pursue scheduled cause of action).

Exemption or abandonment are two ways through which a pre-bankruptcy legal claim ceases to be part of the Chapter 7 bankruptcy estate and becomes the debtor's property. However, neither option can occur if the debtor did not list the pre-petition legal claim as an asset in the bankruptcy schedules. It is this "scheduling" of the asset that allows the bankruptcy trustee to make an informed decision about whether to liquidate the legal claim. The trustee cannot administer an undisclosed asset.

The post-bankruptcy "standing" problem typically arises when a debtor did not list a pre-bankruptcy legal claim in his bankruptcy filings. The consequences of failing to do so can be severe. The problem is when a pre-bankruptcy asset is unscheduled, it is never administered, exempted, or abandoned by the bankruptcy trustee. Instead, if the bankruptcy case is closed after entry of a discharge, the unscheduled property remains part of the bankruptcy estate. It is not the property of the debtor. Instead, it rests with the bankruptcy estate in a state of perpetual suspense. 11 U.S.C. § 554(d); *Tyler v. DH Capital Mgmt., Inc*., 736 F.3d 455, 465 (6th Cir. 2013) (unscheduled debt collection claim was not "abandoned" and trustee retained exclusive authority to pursue it); *Parker v. Wendy's Int'l, Inc*., 365 F.3d 1268, 1272 (11th Cir. 2004) (failure to list an interest in bankruptcy schedules leaves that interest in the bankruptcy estate); *In re Riazuddin*, 2007 WL 441772 (10th Cir. Feb. 12, 2007). Accordingly, as the representative of the bankruptcy estate, only the Chapter 7 trustee has standing to pursue the unscheduled legal claim after the bankruptcy proceeding is closed. *See, e.g., Biesek v. Soo Line R Co*., 440 F.3d 410 (7th Cir. 2006) (trustee, not debtor, is real party in interest to prosecute unscheduled prepetition claim); *In re Riazuddin*, 2007 WL 441772 (same).

Unlike in Chapter 7, the Chapter 13 debtor remains in possession of all property of the

estate. Thus, in normal circumstances, the debtor has the sole right to fully control any litigation. 11 U.S.C. §§ 1303, 1306(b); *Foronda v. Wells Fargo Home Mortgage, Inc.*, 2014 WL 6706815 * 4 (N.D. Cal. Nov. 26, 2014) (summarizing decisions). Accordingly, courts routinely hold that a Chapter 13 debtor has standing to pursue pre-petition legal claims. *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337 (4th Cir. 2013) (debtor has standing to bring pre-petition claim for violation of Americans with Disabilities Act in the district court while his Chapter 13 case is pending); *Smith v. Rockett*, 522 F.3d 1080 (10th Cir. 2008) (Chapter 13 debtor can pursue pre-petition debt collection case in own name on behalf of estate); *Olick v. Parker & Parsley Petroleum Co*., 145 F.3d 513 (2d Cir. 1998); *Looney v. Hyundai Motor Mfg. Ala., L.L.C*., 330 F. Supp. 2d 1289 (M.D. Ala. 2004) (Chapter 13 debtor had standing to litigate employment discrimination action which was property of bankruptcy estate).

The debtor should also have the right to dictate the terms of any settlement, though the bankruptcy court must normally approve the settlement. The debtor should advise the Chapter 13 trustee of any recovery, which depending upon the terms of the confirmed Chapter 13 plan and allowed exemptions, may be distributed in full or in part to creditors. *See* 11 U.S.C. §§ 1306(a), 1325(c), 1329. The Chapter 13 bankruptcy estate, unlike the Chapter 7 counterpart, may include property the debtor acquires after filing the initial petition for relief. 11 U.S.C. § 1306(a). The plan itself may stipulate otherwise, but the Bankruptcy Code provides that upon confirmation of the plan the estate's property vests in the debtor. 11 U.S.C. § 1327(b); *In re Jones*, 2009 WL 4687590 (9th Cir. Nov. 24, 2009), *aff'd* 657 F.3d 921 (9th Cir. 2011). Thus, the debtor should also have standing to pursue legal claims that arise during the pendency of the bankruptcy proceeding.

Judicial Estoppel

- **Background and History**

Courts regularly apply the equitable doctrine of judicial estoppel to dismiss litigation brought by a person that had filed for bankruptcy. In such cases, the typical factual scenario is generally as follows: a party files for bankruptcy, the debtor fails to disclose a potential or actual claim in his bankruptcy disclosures, the bankruptcy is completed, the debtor files a subsequent litigation not disclosed in his bankruptcy schedules. The party defendant in the civil action asserts the plaintiff-debtor should be estopped from continuing with the action due to the non-disclosure in his bankruptcy proceeding. Based on this factual scenario, courts have dismissed the undisclosed claims relying on the doctrine of judicial estoppel. In that regard, "[i]n the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a . . . plan [or petition] or otherwise mentioned in the debtor's schedules or disclosure statements." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001).

A civil litigant will likely come across a situation where the party plaintiff failed to disclose the cause of action in bankruptcy. In such instances, as explained above, the equitable defense of judicial estoppel may relieve the defendant of total liability or serve to reduce the amount of damages. Judicial estoppel is intended to protect the integrity of the courts, not to punish adversaries or to protect litigants. *In re Coastal Plains*, 179 F.3d 197, 213 (5th Cir. 1999). The purpose of the judicial estoppel doctrine is to prevent a plaintiff-debtor from "playing fast and loose with the courts." *Matter of Cassidy*, 892 F.2d 637, 641(7th Cir. 1990);

see also Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982) (judicial estoppel is intended to "'to protect the integrity of the judicial process"); *see also Browning Mfg. v. Mims* (*In re Coastal Plains, Inc.*), 179 F.3d 197, 205 (5th Cir. 1999) ("[T]he doctrine is intended to protect the judicial system, rather than the litigants. . . ").

Courts are concerned about protecting the integrity of the judicial system and use judicial estoppel to prevent a party from gaining an unfair advantage through misrepresentations to the court. However, there is no uniform standard for applying judicial estoppel under federal law. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (declining to "establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel" because it is "probably not reducible to any general formulation of principle."). But there are certain recognized factors to guide the analysis: (1) whether the debtor party is taking distinct inconsistent positions, (2) whether the debtor party was successful in having first tribunal adopt the position in the prior proceeding, and (3) whether the debtor party would obtain an unfair advantage if not estopped. *See, e.g., Patriot Cinemas, Inc. v. Gen. Cinema Corp*., 834 F.2d 208, 212 (1st Cir. 1987); *see also New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (courts have observed that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.") (citing *Allen v. Zurich Ins. Co*., 667 F.2d 1162, 1166 (4th Cir. 1982)).

Courts have held that the failure to disclose a pre-petition claim can establish a "clearly inconsistent" position. *Hamilton v. State Farm Fire& Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001) (filing suit against defendant for claims that were undisclosed in bankruptcy schedules constitutes assertion of inconsistent positions); *In re Coastal Plains, Inc.*, 179 F.3d at 210. The bankruptcy court can "adopt" or "accept" the non-disclosure of claims by discharging debt, as well as "accept" an undisclosed claim by utilizing its judicial authority in other ways such as approving the reorganization plan. *Hamilton*, 270 F.3d at 784 (holding that discharge of debt constitutes judicial acceptance); *Donaldson v. Bernstein*, 104 F.3d 547, 555-56 (3rd Cir. 1997) (approval of debtor's reorganization plan satisfied judicial acceptance prong); *In re Coastal Plains, Inc.*, 179 F.3d at 210 (lifting a stay based on debtor's reorganization non-disclosure and stipulation equated to judicial acceptance). The final prong - whether the debtor party would obtain an unfair advantage if not estopped – is concerned with the plaintiff-debtor's intent and, in some courts, the extent bad faith is shown.

❖ Evolution of Judicial Estoppel

Generally, judicial estoppel will be applied where the plaintiff-debtor had (1) "knowledge of the factual basis of the undisclosed claims; and (2) had a motive know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset." *Hamilton*, 270 F.3d at 784; *In re Coastal Plains, Inc.*, 179 F.3d at 210 (failure to disclose claim is only inadvertent if the debtor lacks knowledge or has no motive for concealment). Courts place great weight on the statutory duty for full disclosure and ignorance of the duty to disclose will not prevent imposition of judicial estoppel. *See, e.g., In re Coastal Plains, Inc.*, 179 F.3d at 212 (debtor's lack of awareness of statutory duty to disclose claims not relevant to consideration of whether to impose

judicial estoppel). Non-disclosure is considered "inadvertent" only if the party lacked knowledge of the claims or had no motive for concealment. Conversely, federal courts recognize that judicial estoppel should not apply when the failure to reveal the claim was a result of a mistake or inadvertent failure. But courts disagree to what constitutes "inadvertence" and what showing of bad faith is necessary to judicially estop the plaintiff-debtor. *Total Petroleum Inc. v. Davis*, 822 F.2d 734, 737 n. 6 (8th Cir. 1987) (because the purpose of judicial estoppel is to protect the integrity of the judicial process, it does not apply unless there was a "knowing misrepresentation to" or "fraud on the court").

Federal courts generally fall within three approaches in applying judicial estoppel. First, the majority rule in the federal courts is that the failure to list a potential or pending lawsuit on bankruptcy schedules and statement of financial affairs is inadvertent only "when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Browning Mfg.*, 179 F.3d at 210. To determine whether the plaintiff-debtor had motive to conceal a claim, the majority of the courts apply an "objective test for motive." For example, *In Re Flugrence*, the plaintiff-debtor's personal injury claim was barred via the application of judicial estoppel. 738 F.3d 126, 130-31 (5th Cir. 2013). The court was not persuaded by the contention the plaintiff-debtor did not understand the need to disclose her claim. *Id.* at 131. The majority view is that the motive to conceal a claim from the bankruptcy court is "nearly always present." *Ah Quin v. Cnty. of Kauai Dep't of Transp*., 733 F.3d 267, 271 (9th Cir. 2013) (citation omitted). These courts do not consider intent to determine whether the plaintiff-debtor is judicially estopped. *See Ashmore v. CGI Grp., Inc*., 923 F.3d 260, 277 (2d Cir. 2019); *Flugence*, 738 F.3d at 128–29; *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1094 (10th Cir. 2013); *Kimble v. Donahoe*, 511 Fed. App'x 573, 575 (7th Cir. 2013); *Moses v. Howard Univ. Hosp*., 606 F.3d 789, 799 (D.C. Cir. 2010); *Payless Wholesale Distribs. Inc. v. Alberto Culver, Inc.*, 989 F.2d 570, 571 (1st Cir. 1993).

Other courts have adopted a divergent, flexible approach from the strict test used by the majority. *See Eubanks v. CBSK Fin. Grp., Inc*., 385 F.3d 894, 895 (6th Cir. 2004). For instance, the Sixth Circuit will not invoke judicial estoppel where the plaintiff-debtor's omission in bankruptcy filings was due to "mistake or inadvertence" even if the plaintiff-debtor asserts contradictory positions. *Browning v. Levy*, 284 F.3d 761, 776 (6th Cir. 2002). In determining if the omission was a result of a "mistake or inadvertence," courts in the Sixth Circuit consider whether: (1) the plaintiff-debtor did not have "knowledge of the factual basis of the undisclosed claims; (2) she had a motive for concealment; and (3) the evidence indicates an absence of bad faith." *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 478 (6th Cir. 2010). In regards to the last prong, "absence of bad faith," the Sixth Circuit looks to see if the plaintiff-debtor attempted to advise the court of the omitted claim. *White*, 617 F.3d at 476. Specifically, a court will look at the timing of the correction of the omission; however, the plaintiff-debtor may not be able to overcome the assumption of bad faith if he does not attempt to correct the omission until after a dismissal action based on judicial estoppel. *Id.* These courts will not invoke the doctrine of judicial estoppel and will allow the plaintiff-debtor to pursue the claim if the plaintiff-debtor is able to show a lack of bad faith. *Id.* (quoting *Eubanks*, 385 F.3d at 895); *Javery v. Lucent Techs. Inc. Long Term Disability Plan for Mgmt. or LBA Emps*., 741 F.3d 686, 688 (6th Cir. 2014). This is because these courts adopt find the "application of judicial estoppel to be an inappropriate resolution, rather than a necessary judicial measure to protect the court's interest" where there is a lack of bad faith by the plaintiff-debtor. *Eubanks*, 385 F.3d at 898.

Likewise, the Ninth Circuit also applies an arguably more flexible approach using a subjective analysis looking to the plaintiff-debtor's actual intent. *Ah Quin*, 733 F.3d at 271. In this *Ah Quin*, after the district court granted summary judgment based on judicial estoppel arising out of the plaintiff-debtor's failure to disclose her employment claim in bankruptcy, the Ninth Circuit remanded the matter for factual findings concerning whether the claim was not disclosed due to a "mistake and inadvertence, or of deceit." *Ah Quin*, 733 F.3d at 277. It stated that where a "bankruptcy omission was mistaken, the application of judicial estoppel . . . would do nothing to protect the integrity of the courts." *Id.* at 276. "[R]ather than applying a *presumption* of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood." *Id.* at 276; *see also Martineau v. Wier*, 934 F.3d 385, 396 (4th Cir. 2019); *In re Kane,* 628 F.3d 631, 639 (3d Cir. 2010); *Stallings v. Hussmann Corp.,* 447 F.3d 1041, 1049 (8th Cir. 2006).

Similar to the Third, Fourth, Sixth, Eighth, and Ninth Circuits, the Eleventh Circuit adopted a flexible approach to judicial estoppel considering the totality of the circumstances and applying the plain meaning of the terms "mistake and inadvertence." *Slater v. U.S. Steel*, 871 F.3d 1174 (11th Cir. 2017). It has affirmed its holding that judicial estoppel may bar a plaintiff's civil claim if the court finds the plaintiff intended to make a mockery of the judicial system on several occasions. *Id.* at 1176. The *Slater* decision was a pivotal decision issued by the Eleventh Circuit, conflicting with prior decisions holding that that the application of the doctrine of judicial estoppel was almost automatic. *Dunn v. Advanced Med. Specialties Inc. (In re Tronge-Knoepffler)*, 556 Fed. App'x 785, 788–89 (11th Cir. 2014) (affirming summary judgment based on judicial estoppel in discrimination action even in face of evidence plaintiff-debtor informed her attorney and creditors of her claim but attorney failed to list action due to oversight). In *Slater*, the Eleventh Circuit concluded that in finding whether inconsistent statements were calculated to make a mockery of the judicial system, a court should look at a variety of facts and circumstances that reflected the plaintiff-debtor's intent and state of mind. *Id.* at 1176-77. It rejected the application of an automatic inference that a plaintiff-debtor intended to make a mockery of the judicial system by failing to disclose a civil claim and held rather a court should evaluate "all the facts and circumstances of the particular case," and provided a non-exhaustive list of facts for consideration. *Slater*, 871 F.3d at 1185.

More recently, in *Smith v. Haynes & Haynes P.C.*, 940 F.3d 635 (11th Cir. 2019), the district court granted summary judgment on Smith's overtime claim to the defendant on the basis that the plaintiff-debtor's failure to schedule a claim in her bankruptcy case was a bar to her pursuing the claim due to judicial estoppel. The district court decision had preceded the Eleventh Circuit's *Slater* decision. In *Smith*, the Eleventh Circuit stated that the previously-employed presumption of deceit produced perverse results and defendants, such as employers, were the only party that benefited because judicial estoppel barred the omitted lawsuit without showing the plaintiff intended to deceive. It then reversed in part and held that following its *Slater* decision an evidentiary hearing is required to determine whether the debtor's failure to list the claim was intended to make a mockery of the courts. *Smith*, 940 F.3d 635.

The evolution of the application of judicial estoppel in the bankruptcy context appears to be shifting from an automatic application of judicial estoppel to a more factual-intensive analysis considering the totality of the circumstances including subjective considerations. But even in the federal circuits identified as applying a quasi-automatic application of judicial estoppel the courts may not in practice be "'as rigid as one would expect' in practice." *See Marshall v. Honeywell Tech. Sys. Inc*., 828 F.3d 923, 932 (D.C. Cir. 2016) (quoting *Ah Quin*, 733 F.3d at 277) (explaining that this alleged circuit split is artificial because "[i]n practice, even those courts of appeals that have followed the Fifth Circuit's lead have not been 'as rigid as one would expect' in practice"); *Anderson v. Seven Falls Co*., 696 Fed. Appx. 341 (10th Cir. 2017).

- **<u>Practical Impacts and Strategy Considerations</u>**

In response to a defendant asserting judicial estoppel, a plaintiff-debtor will respond in a variety of ways to attempt to defeat judicial estoppel of his claims. The following provides a snapshot and potential response to a plaintiff-debtor's arguments against the application of judicial estoppel.

No Privity in the Bankruptcy Proceeding: A plaintiff- debtor may argue that a defendant was not a creditor or a party to the bankruptcy proceeding; therefore, the defendant cannot rely on the doctrine of judicial estoppel because the defendant lacks privity.

- <u>Defense counter-argument</u>: A defendant may defeat this argument by highlighting the purpose of judicial estoppel. The doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, numerous courts have concluded that while the party arguing for judicial estoppel often is in privity, judicial estoppel does not require that privity. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 214 (1st Cir. 1987); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982).
- <u>Plaintiffs' perspective</u>: Arguments, though often well-founded, pointing out the unfairness of a defendant being the only one to benefit from the application of judicial estoppel are not always well received. *But see Snowden v. Fred's Stores of Tenn., Inc.,* 419 F. Supp. 2d 1367, 1374–75 (M.D. Ala. 2006) ("Judicial estoppel exists to protect the integrity of courts, not the parties' interests, and it is certainly not intended as an offensive weapon available to defeat plaintiffs' claims."

No Prejudice: A plaintiff- debtor also may argue that a debtor was not personally prejudiced by the omission of the claim.

- <u>Defense counter-argument</u>: Again, the doctrine of judicial estoppel is not designed to protect litigants but rather the integrity of the judicial system. Therefore, judicial estoppel does not require detrimental reliance. *Ryan*, 81 F.3d at 360 (explaining that judicial estoppel does not require detrimental reliance); *Matter of Cassidy*, 892 F.2d 637, 641 n. 2 (7th Cir. 1990) (same).
- <u>Plaintiffs' perspective</u>: Best practical approach, if the Trustee is maintaining an interest in the claim, is to argue that the Plaintiff's creditors will be prejudiced because they have an interest in the claim being administered rather than dismissed.

No Intent to Mislead the Bankruptcy Court: The most common defense against the doctrine of judicial estoppel is that a plaintiff- debtor did not have the requisite intent to mislead the bankruptcy court so judicial estoppel should not apply. Judicial estoppel only applies in situations involving intentional contradictions not simple errors or inadvertent errors: the doctrine "does not apply when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court." *Matter of Cassidy*¸ 892 F.2d at 642.

- Defense counter-argument: Several circuits have concluded that a court can infer deliberate or intentional manipulation from the record. For example, the Fifth Circuit has held that a court can characterize a plaintiff- debtor's failure to disclose as "inadvertent" only if the debtor plaintiff "lacks knowledge of the undisclosed claims or has no motive for their concealment." *In re Costal Plains, Inc*., 179 F.3d 197, 210 (5th Cir. 1999).
- Plaintiffs' perspective: Timing is critical on this point. The key is to maintain credibility that any omission was an honest mistake and that immediate action was taken to address it when the problem was identified.

Right to a Cure: A plaintiff- debtor may ultimately argue that the plaintiff- debtor should have the right to reopen a bankruptcy case to amend the bankruptcy schedules to reflect a claim or the "true" value of a claim.

- Defense counter-argument: Courts have often disagreed with this argument and held that allowing this would suggest to other debtors that they only need to disclose if someone catches them concealing the causes of action. This remedy would only "diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtor's assets." *Billups v. Pemco Aeroplex, Inc*., 1282 F.3d 1282, 1288 (11th Cir. 2002). *See also Traylor v. Gene Evans Ford, LLC*, 185 F. Supp. 2d 1338, 1340 (N.D. Ga. 2002) (denying a debtor's request to back up and disclose a previously undisclosed claim to the bankruptcy court); *Chandler v. Samford University*, 35 F. Supp. 2d 861, 863–865 (N.D. Ala. 1999) (applying the doctrine of judicial estoppel to bar a plaintiff from asserting a previously undisclosed tort claim even though she eventually informed her attorney and the bankruptcy court of the claim).
- Plaintiffs' perspective: Again, timing is critical on this point. It is hard to find more-recent cases declining to apply judicial estoppel when the debtor took no action on her own. Pro-active attention to an inconsistent bankruptcy pleading is the best preventative to judicial estoppel.

Motion Practice and Timing:

- Potential motions: A defendant should run searches for bankruptcy filings throughout the litigation as well as propounded discovery seeking information concerning whether the plaintiff filed bankruptcy. If a defendant finds that a plaintiff did file for bankruptcy and did not schedule a claim properly, the defendant should consider filing a motion to dismiss the proceeding for lack of standing. Or, conversely, if the plaintiff- debtor did schedule the claim, the defendant may want to consider filing a motion to limit damages or a motion *in limine* to exclude any evidence concerning damages above the scheduled amount. Plaintiffs can respond to such motions arguing that Schedule B calls for the Fair Market Value of all property, *i.e.*, what it could be sold for in a short-term, open market, rather than the maximum possible value under ideal, long-term, market conditions.

- Strategic Timing: Prior to raising the equitable defense of judicial estoppel, a defendant will want to ensure that the plaintiff-debtor in a Chapter 7 case receives a bankruptcy discharge first. In a Chapter 13 case, the critical date is the confirmation of the Chapter 13 plan. If these dates have not passed, an early motion will put the plaintiff-debtor on notice and attempt to cure his omission.

Defense Practice Pointers

- Propound discovery inquiring whether a plaintiff has filed for bankruptcy, whether plaintiff failed to disclose or discounted other assets in the bankruptcy, and seeking evidence of intent surrounding a non-disclosure of his claim(s);
- Conduct a docket search for bankruptcy petition(s) filed by the opposing party throughout the pendency of the litigation;
- Research and consider forum challenges;
- Review filed bankruptcy schedules, statement of financial affairs, transcript of the 341-A hearing and the status or disposition of the bankruptcy;
- Research circuit authority addressing judicial estoppel; and
- Assert the affirmative defense of lack of standing and equitable defenses.

Plaintiff Practice Pointers

- Ask client about prior bankruptcy filings in initial interviews;
- Send early letter to client instructing client to discuss any potential bankruptcy filing with plaintiffs' counsel;
- If a bankruptcy filing is discovered, immediately take steps to amend the Schedule B as soon as possible, even if it requires reopening a closed bankruptcy case;
- If the bankruptcy is still open, get permission from the client to talk to the Trustee about how he or she wants to proceed with the claim;
- Do not forget that the claim may covered by an exemption and thus capable of being retained despite the Trustee;
- Do not forget about opt-in, FLSA plaintiffs for whom you may have more limited information; and
- Do not wait until defendants' motion to dismiss to address bankruptcy issues.