Judicial Estoppel and the Early End to Lawsuits

The consistency with which the equitable doctrine of judicial estoppel effects a prompt end to lawsuits involving assets omitted from bankruptcy schedules serves to underscore that accurate and complete bankruptcy pleadings are a fundamental underpinning of our bankruptcy system. Debtors who fail to disclose assets face serious potential repercussions, including dismissal of any subsequent lawsuit based on an undisclosed cause of action, pursuant to judicial estoppel principles. Recently, the U.S. Court of Appeals for the District of Columbia again weighed in on the application of judicial estoppel.1 In a split decision, the majority suggested that the perceived uneven application of judicial estoppel among the circuits might be more due to the “channel of discretion...narrow[ing] organically” than an actual split of the circuits with discrete sides.2 However, the court did take note of a further division within the circuits over the appropriate standard of review in cases in which the circuit court is reviewing a decision involving the application of judicial estoppel.

Judicial Estoppel

The U.S. Supreme Court described judicial estoppel in New Hampshire v. Maine as the rule that “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.”3 The Court further noted that “where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may, consistently therewith, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”4

The rule “is an equitable doctrine invoked by a court at its discretion” to protect the integrity of the judicial process.5 According to the Supreme Court, several factors typically inform the decision of whether to apply the doctrine in a particular case.6

First, a party’s later position must be “clearly inconsistent” with its earlier position.7 Second, courts inquire as to whether the party has succeeded in persuading a court to accept that party’s earlier position, such that taking an inconsistent position in a later proceeding would create the “the perception that either the first or the second court was misled.”8 A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.9 Finally, the Court stated that “[w]e do not question that it may be appropriate to resist application of judicial estoppel ‘when a party’s prior position was based on inadvertence or mistake.”10

Judicial Estoppel in a Case Involving a Prior Bankruptcy Filing

In cases involving a debtor, the New Hampshire factors are regularly applied as follows:

1. When a debtor fails to list a cause of action in her bankruptcy case and later tries to pursue that claim, courts view her position in the bankruptcy case and her position in later litigation as inconsistent (i.e., she implicitly denies that a claim exists by failing to list it on her schedules and then contradicts that position by later pursuing that same claim);
2. The debtor succeeds in getting the first court (i.e., the bankruptcy court) to accept that there was no claim by virtue of the failure to disclose it; and
3. By obtaining a discharge without disclosing the lawsuit, the debtor gains an unfair advantage by pursuing an asset with no benefit to her creditors.11

Existing Division Within the Circuits

It has been observed elsewhere that the Fifth,12 Tenth13 and Eleventh14 Circuits apply a “nearly irrefutable”15 presumption of bad faith regarding a debtor’s nondisclosure in bankruptcy schedules — unless the debtor can show that she either lacked (1) the knowledge of the facts relevant to the undis-
closed lawsuit or (2) motive to conceal. Alternatively, the Sixth, Seventh and Ninth Circuits seem inclined to give more leeway to debtors who correct (or attempt to correct) prior nondisclosures, and by doing so, they are sometimes permitted to continue with subsequent lawsuits.

**Another Circuit Weighs In Again**

In *Marshall v. Honeywell Technology Systems Inc.*, the U.S. Court of Appeals for the District of Columbia held in a split decision that an employee who orally disclosed one of three pending Equal Employment Opportunity Commission (EEOC) charges to a bankruptcy trustee at the meeting of creditors, but did not include any of the charges in her bankruptcy petition prevented prosecution of the claim under judicial estoppel principles.

On appeal, the majority determined that the district court appropriately exercised its discretion when it rejected the debtor’s argument that judicial estoppel should not apply because she orally disclosed one of her claims to the trustee, reasoning that “[f]or one thing, oral disclosure does not meet the requirements of the Bankruptcy Code.” The majority also supported the district court’s rejection of the debtor’s contention that her failure to list the pending administrative claims was a mistake in light of the evidence that she listed other cases and administrative proceedings in which she was a defendant (rather than a plaintiff).

Both the majority and dissent joined in the determination that even though a circuit court ordinarily reviews a grant of summary judgment *de novo*, it would join the “large majority” of courts of appeals and adopt an abuse-of-discretion standard when summary judgment was granted on the basis of judicial estoppel because judicial estoppel is an equitable doctrine, but it also noted that the circuits are not unanimous on the appropriate standard. Nonetheless, the D.C. Circuit was split on whether this debtor’s oral disclosure at the meeting of creditors created a triable factual dispute as to whether she lied or made a mistake on her bankruptcy petition. “[a]nd because judicial estoppel is inappropriate in cases of mistake, whether she lied or made a mistake is material.”

Citing the majority’s view that the district court’s determination should not be disturbed on appeal, the dissent disagreed and opined that the debtor’s oral disclosure of the lawsuit created a triable factual dispute as to whether she lied or made a mistake on her bankruptcy petition.

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