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Judicial Estoppel and the Early End to Lawsuits

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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 not thereafter, simply because his interests have changed, 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] Tenth[13] and Eleventh[14] Circuits apply a "nearly irrebuttable"[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-

1 *Marshall v. Honeywell Tech. Sys. Inc.*, ___ F.3d. ___, No. 14-7190, 2016 WL 3726039 (D.C. Cir. July 12, 2016) ("*Marshall*").
2 *Id.* at *8 (quoting Henry J. Friendly, "Indiscretion about Discretion," 31 *Emory L.J.* 747, 771-72 (1982)).
3 *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)).
4 *Id.* (citing *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).
5 *Id.* at 749.
6 The New Hampshire court noted that "[i]n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." *New Hampshire v. Maine*, 532 U.S. 742 (2001).
7 *New Hampshire*, 532 U.S. at 750.
8 *Id.* at 750-51.
9 *Id.* at 751.
10 *Id.* at 753 (citing *John S. Clark Co. v. Faggert & Frieden PC*, 65 F.3d 26, 29 (4th Cir. 1995)).
11 *See, e.g., Guay v. Burack*, 677 F.3d 10, 15-16 (1st Cir. 2012) (applying factors).
12 *In re Coastal Plains Inc.*, 179 F.3d 197, 207-08 (5th Cir. 1999).
13 *Eastman v. Union Pac. Ry. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007).
14 *Barger v. City of Cartersville*, 348 F.3d 1289, 1295 (11th Cir. 2003).
15 *See, e.g.*, William H. Burgess, "Dismissing Bankruptcy-Debtor Plaintiffs' Cases on Judicial Estoppel Grounds," *Fed. Law.*, May 2015, at 54, 56.

closed lawsuit *or* (2) motive to conceal.[16] Alternatively, the Sixth,[17] Seventh[18] and Ninth[19] 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.[20]

Another Circuit Weighs In Again

In *Marshall v. Honeywell Technology Systems Inc.*,[21] 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 schedules and statements until she was faced with a motion to dismiss from the defendant years after her bankruptcy case had been closed, was judicially estopped from pursuing her lawsuit.[22] The majority deliberately avoided "taking sides" in the perceived existing circuit-level split regarding inadvertence or mistake and suggested that there may not be "discrete sides at all" because "even those courts of appeals that have followed the Fifth Circuit's lead have not been 'as rigid as one would expect' in practice."[23]

The facts of *Marshall* are typical of a judicial estoppel bankruptcy case: Despite the requirement to disclose "all suits and administrative proceedings" to which she "is or was a party within one year" preceding her bankruptcy petition, the debtor failed to disclose three administrative proceedings in which she was a plaintiff alleging discrimination against certain defendants.[24] She did, however, list two other lawsuits and an administrative proceeding in which she was a defendant.[25] After questioning by the chapter 7 trustee at the meeting of creditors, the debtor orally disclosed that a claim existed against the defendant, but she did not amend her schedules to accord with her oral testimony.[26]

Several years later, when faced with the initial motion to dismiss her complaint based on the undisclosed lawsuit remaining property of the bankruptcy estate over which the trustee had the exclusive control (*i.e.*, she was not the real party in interest),[27] the debtor reopened her case and disclosed the lawsuit.[28] After the trustee could not find counsel willing to take the matter on a contingency-fee basis (nor able to reach a compromise with the defendant),[29] the bankruptcy case was closed a second time and the lawsuit was re-vested in the debtor.[30] Thereafter, the defendants moved for summary judgment, successfully arguing to the district court that the debtor's failure to list the lawsuits in her original bankruptcy petition prevented prosecution of the claim under judicial estoppel principles.[31]

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.'"[32] 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).[33] Accordingly, it was the majority's view that the district court's determination should not be disturbed on appeal.[34] However, 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, "[a]nd because judicial estoppel is inappropriate in cases of mistake, whether she lied or made a mistake is material."[35]

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.[36] Nonetheless, the D.C. Circuit was split on whether this debtor's oral disclosure at the meeting of creditors created a triable issue such that the grant of a summary judgment was an abuse of this considerable discretion. One does wonder how much of this situation could have been avoided had the debtor consulted with an attorney — rather than a bankruptcy petition preparer — for her initial filings, but at the very least, this decision helps to narrow the "channel of discretion" for this equitable tool. abi

16 *In re Coastal Plains Inc.*, 179 F.3d 197, 210 (5th Cir. 1999) (emphasis supplied).
17 *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002).
18 *Spaine v. Community Contacts Inc.*, 756 F.3d 542, 544 (7th Cir. 2014).
19 *Ah Quin v. Cnty. of Kauai*, 733 F.3d 267, 281-86, 292-93 (9th Cir. 2013).
20 *See* Burgess, *supra* n.15, at 54.
21 2016 WL 3726039 at *8.
22 *Id.* at *8.
23 *Id.* (quoting *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 277 (9th Cir. 2013)).
24 *Id.* at *2. The court's opinion noted that the debtor had used a "bankruptcy petition preparer" who charged her $185. A mere three months after she failed to disclose the existence of the administrative proceeds on her schedules, the debtor, through counsel, filed a suit seeking more than $2 million in damages.
25 *Id.*
26 *Id.*
27 *See* 11 U.S.C. § 554(c) ("Unless the court orders otherwise, any property *scheduled under section 521(a)(1) of this title* not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.") (emphasis supplied).
28 *Marshall*, 2016 WL 3726039, at *3-4.
29 Many courts, even those applying a rigid formulation of judicial estoppel, will not apply it against a bankruptcy trustee, since, among other reasons, application against a trustee would only serve to punish the debtor's creditors since the trustee would be seeking to recover for the benefit of the estate, rather than for the debtor individually. *See, e.g., In re Parker v. Wendy's Int'l*, 365 F.3d 1268 (11th Cir. 2004).
30 *Marshall*, 2016 WL 3726039, at *6.
31 *Id.* at *8.
32 *Id.* at *6 (quoting *Guay v. Burack*, 677 F.3d 10, 20-21 (1st Cir. 2012)).
33 *Id.* at *7.
34 *Id.* at *8-9.
35 *Id.* at *9 (Griffith, J. dissenting).
36 *Id.* at *4 (citing to, among others, *Guay v. Burack*, 677 F.3d 10, 15-16 (1st Cir. 2012); *Jethroe v. Omnova Sols. Inc.*, 412 F.3d 598, 599-600 (5th Cir. 2005); *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1155-56 (10th Cir. 2007); *but see Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002) (reviewing application of judicial estoppel *de novo*); *United States v. Hook*, 195 F.3d 299, 305 (7th Cir. 1999) (same)).