

FILED  
Court of Appeals  
Division II  
State of Washington  
1/11/2018 3:26 PM

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

YEN-VY VAN,  
Plaintiff/Appellant,

v.

ASSOCIATED ENVIRONMENTAL GROUP, LLC. & MICHAEL  
CHUN.,  
Defendants/Respondents.

APPEAL FROM THE THURSTON COUNTY SUPERIOR COURT  
Honorable Carol Murphy, Judge

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REPLY BRIEF OF APPELLANT

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## 1. INTRODUCTION

AEG has several misconceptions. First, AEG clings to the belief that Ms. Van's property is trapped in the closed bankruptcy estate. Second, AEG suddenly believes Ms. Van is asserting a contractual right to buy into AEG. Third, AEG believes the Court should take a wholly objective approach to analyzing Ms. Van's conduct.

## 2. ARGUMENTS IN REPLY

### 2.1 Property of a debtor's Chapter 13 bankruptcy estate reverts in the debtor at confirmation.

AEG cites the wrong statute, 11 U.S.C. § 541(d), for the proposition that Ms. Van's claim is trapped and "remains the property of the Estate." CP at 267. AEG doubles down on appeal by claiming that Ms. Van's interest "remains in the bankruptcy estate until the bankruptcy trustee takes some action..." RB at 13, 17. Section 541 defines property of all bankruptcy estates at the time of filing. However, 11 U.S.C. 1327(b) reverts "all of the property of the estate in the debtor" upon Chapter 13 confirmation.

In Cal. Franchise Tax Bd. v. Kendall (In re Jones), the court was tasked with determining whether Debtor Jones' property was protected from tax collection by an automatic stay. 657 F.3d 921, 926 (9th Cir. 2011).<sup>1</sup> The automatic stay of collection against property of the bankruptcy estate could

<sup>1</sup> Jones had previously filed under Chapter 13, then sought to protect property in a subsequent Chapter 7 filing by invoking the prior, Chapter 13, stay. Kendall, 657 F.3d 921, 923-25. The 'look-back' bankruptcy analysis from Kendall is omitted from this brief for brevity.

not, of course, be invoked to protect any property outside the estate. Id. at 927.

In deciding that Jones' property was unprotected by the stay, the court held "that under the plain language of § 1327(b), the property of the estate reverts in the debtor upon plan confirmation, unless the debtor elects otherwise in the plan." Id. at 928. In summary, Jones did not prevail on the argument that her property was quarantined within the Chapter 13 estate after confirmation. Post-confirmation, Ms. Jones and Ms. Van once again owned the property that had previously been vested in their respective estates.

## **2.2 Ms. Van's stock option is not in issue.**

AEG has raised Ms. Van's stock purchase option for the first time on appeal. RB at 14. Ms. Van has never sought to enforce this worthless option, it was not the basis for judicial estoppel, and it should not be subjected to merits-adjudication in the Court of Appeals.<sup>2</sup>

AEG cites In re Allen, for the proposition that Ms. Van's claim was a "contractual right to purchase stock at a given price" and thus "property of the estate at the commencement of the bankruptcy case." 226 B.R. 857, 863-64 (Bankr. N.D. Ill. 1998); RB at 14-16. Ms. Van may have possessed a stock option, but she does not seek to exercise it, nor has she ever. Her

<sup>2</sup> The UGSA did provide, in *addition* to automatic membership accrual, the option to buy into AEG each year. AEG 'stock' is not public and there is no assigned value or price guarantee. Much like the rest of the UGSA, the stock purchase option is a fraudulent security. CP at 219.

pledged future vestment of membership in AEG, on the other hand, is a horse of another color.<sup>3</sup>

Allen asserted that his stock options should not be considered property, or if considered property, should not be included in his bankruptcy estate. Id. at 862. Allen possessed extremely valuable options to buy thousands of discounted, publicly traded, shares in his employer, multi-billion-dollar oil corporation, Amoco. Id. at 860-61.

Ms. Van was fraudulently offered a pledge of future membership in a tiny LLC, the value of which would depend directly upon her ability to grow the company in the following years. Allen could have exercised his options, paid off his creditors, and continued to receive a six figure Amoco salary. Ms. Van could only obtain her interest by retirement, dissolution, or death.

AEG now argues that Ms. Van's interest "was already vested when she filed her bankruptcy petition." RB at 15. AEG cites the divorce case, In re Marriage of Harrington, which applied the dissolution statute to define a preferred stock buyback option as property. 85 Wn. App. 613, 624 (1997).

The Harrington divorce should have included the buyback option as community property. However, "[a] mere expectancy is not a right and as such is not property." Id. Ms. Van's fraudulent security was nothing more than an expectancy that if someday she quit, was dissociated, died, or AEG

<sup>3</sup> Neither the unexercised option to purchase unmarketable and unvalued stock, nor the pledge of future vestment in issue before the Court, could have yielded "proceeds [to] pay...creditors" as AEG proclaims. RB at 12. Even the bankruptcy court judge stated, "I don't think there's any way this benefits the creditors," of Ms. Van's attempt to tender her amorphous claim to the trustee. CP at 612-13.

wound up, a value or debt -depending on AEG's success or failure- would vest in her or her heirs or assigns.

AEG's attempt to bootstrap Ms. Van's claim into 'stock option' legal analysis is unsurprising.<sup>4</sup> AEG first asserted in the trial court that Van had no property, then told the bankruptcy court that Van's interest had vested and was property of the estate. Then AEG asserted at summary judgment that her property had vested but was not scheduled, so her claim should be judicially estopped. Had the case proceeded to trial, AEG would have then argued that Ms. Van never acquired the property.

### **2.3 Though not an element, Intent should be considered.**

AEG makes two interrelated false assertions. First, AEG asserts that Ms. Van's disclosure of the UGSA to her sanctioned bankruptcy attorney carries "no legal significance." RB at 18. Second, AEG asserts that Ms. Van's "subjective intent is irrelevant." RB at 19.

The precedent emanating from the Ninth Circuit and Washington State only rules out "intent" as an "element of judicial estoppel." Cunningham v. Reliable Concrete, 126 Wn. App. 222, 234 (2005); see also OBA at 22-24 (discussing opinions on mental state). First off, there are no 'elements' to judicial estoppel; only factors and other considerations. See OBA at 11-12. Therefore, intent may well be a factor or 'other consideration.' In other words, the only conclusive revelation is that AEG need not meet the high

<sup>4</sup> For the same reasons, AEG should not be heard to argue that Van possessed or misrepresented the value of anything resembling the \$400,000 promissory note in Harris v. Fortin, 183 Wn. App. 522 (2014); RB at 19-20.

burden of proving elemental ill intent to succeed on judicial estoppel grounds. This conclusion does not altogether foreclose consideration of the mental state of the debtor within judicial estoppel analysis.

Second, intent (or a very close relative) is inherent in the various descriptors courts use to flesh out the ‘lack of inadvertence’ prong. See OBA at 23 (surveying such terms as “‘fast and loose’..., duplicity..., manipulation” etc.). Our precedent even goes so far as to recognize the inculpatory effects of a ‘deliberate’ mental state and the exculpatory effects of being “without intent to conceal.” See e.g. Ah Quin v. County of Kauai DOT, 733 F.3d 267, 271-76 (quoting the Eastman v. Union Pac. R.R. Co., observation that “[w]here a debtor has both knowledge of the claims and a motive to conceal them, courts routinely, albeit at times sub silentio, infer deliberate manipulation.” 493 F.3d 1151, 1157 (10th Cir. 2007)).

In similar fashion, even the boldest statement found in our precedent (“Blaming the attorney does nothing to avoid judicial estoppel on this record”) does not foreclose the possibility that disclosure to bankruptcy counsel affects the analysis on the *instant* record or in any other case. Cunningham, 126 Wn. App. 222, 235. No binding authority precludes consideration of Ms. Van’s disclosure to her bankruptcy counsel as evidence that the omission of the UGSA from her bankruptcy filings was inadvertent. Certainly, the disclosure should stand for a lack of chicanery and militate in favor of inadvertence.

A recent 11<sup>th</sup> Circuit opinion persuasively contends with these same overlapping issues. Slater v. United States Steel Corp., 871 F.3d 1174 (11<sup>th</sup> Cir. 2017). It should be noted that the 11<sup>th</sup> Circuit has taken the logical step of equating a lack of “inadvertence” with intent “to make a mockery of the judicial system.” Id. at 1184. The temptation to draw an objective/subjective distinction between our precedent and that of the 11<sup>th</sup> Circuit should be resisted, given that the underlying components are identical and interchangeable.

The Ninth Circuit and Washington State cases find ‘inadvertence’ where debtor’s knowledge or motive are lacking. See e.g. OBA at 23 (quoting Mcfarling v. Evaneski, 141 Wn. App. 400, 405 (2007)). The 11<sup>th</sup> Circuit ascribes a lack of ‘intent’ to the debtor who lacks the exact same attributes: either a motive or knowledge. See e.g. Slater, 871 F.3d 1174, 1178-79, 84-85, 89, n.18 (citing both 10<sup>th</sup> and Fifth Circuit opinions). To borrow from the transitive property of geometry, which says if A = B and B = C, then A = C: If ‘intent’ consists of ‘knowledge plus motive,’ and ‘knowledge plus motive’ equates with ‘advertence’ (i.e. lack of inadvertence) then a local court finding inadvertence must be very similar to an 11<sup>th</sup> Circuit finding a debtor did not intend to mislead.

The 11<sup>th</sup> Circuit had, prior to Slater, produced a jumble of ‘mindset’ opinions similar to our local precedent. Id. at 1182-85. Previously, the district courts had been permitted to infer a lack of inadvertence/ill intent

where a claim went undisclosed and concealment would benefit the debtor, irrespective of additional considerations. Id.

Noting that Chapter 13 debtors almost always<sup>5</sup> have a motive to conceal (because such debtors retain ownership of their claims), the Slater court ruled that district courts could no longer infer lack of inadvertence/ill intent from mere omission and motive. Id. at 1185. Though not binding precedent,<sup>6</sup> the “Totality of the Facts and Circumstances” analytical framework unveiled in Slater is instructive:

When the plaintiff’s inconsistent statement comes in the form of an omission in bankruptcy disclosures, the court may consider such factors as the plaintiff’s level of sophistication, whether and under what circumstances the plaintiff corrected the disclosures, whether the plaintiff told his bankruptcy attorney about the civil claims before filing the bankruptcy disclosures, whether the trustee or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosures, whether the plaintiff identified other lawsuits to which he was party, and any findings or actions by the bankruptcy court after the omission was discovered.

Slater v. United States Steel Corp., 871 F.3d 1174, 1185 (11th Cir. 2017). Ms. Van does not request the Court adopt an intent element. However, Ms. Van has no legal or business training, did inform her bankruptcy counsel of the UGSA, and successfully moved to reopen her

<sup>5</sup> Indeed, it is difficult to imagine a Chapter 13 debtor lacking such motive. Unless, of course, the unscheduled asset had no marketable value, no liquidity or fungibility, and could only become valuable property upon the death or retirement of the debtor, or dissolution of the debtor’s company.

<sup>6</sup> Eleventh Circuit opinions are often cited in local authority. See e.g. Cunningham v. Reliable Concrete, 126 Wn. App. 222, 227 n.10 (2005); Arp v. Riley, 192 Wn. App. 85, 95 n.23 (2015); Urbick v. Spencer Law Firm LLC, 192 Wn. App. 483, 490 n.15 (2016); McFarling v. Evaneski, 141 Wn. App. 400, 405 (2007); Ah Quin v. Cty. of Kauai DOT, 733 F.3d 267, 273 (9th Cir. 2013) etc.

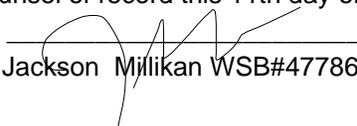
bankruptcy. Ms. Van's trustee elected not to even appear in the reconvened bankruptcy court, which closed her case for lack of interest in the claim. Certainly it can be said that -in light of the totality of the facts and circumstances- the omission was inadvertent and gave no appearance of chicanery.

Finally, AEG argues that Ms. Van's disclosure of her claims to her bankruptcy attorney is "negated by the July 11, 2013 letter from AEG's counsel...." RB at 18. The proposition that Ms. Van should have taken the advice of opposing counsel over that of her own bankruptcy attorney and subsequent civil attorney, Mr. Snyder, is ludicrous. The author of the letter was the same person who crafted the illusory contract or fraudulent security giving rise to the lawsuit in the first place.

### 3. CONCLUSION

Ms. Van is a respected scientist who was misled by AEG's fraudulent security and Chun's misrepresentations. She never misled or intended to mislead any person or court. The only detriment alleged by AEG is that it is now imperiled by the possibility of court-ordered performance of its contractual duties and compliance with the law. Judicial Estoppel is an equitable doctrine and the equities favor Ms. Van.

I, Jackson Millikan hereby swear under penalty of perjury by Washington State law that I served this document on counsel of record this 11th day of January, 2018 by email per agreement of the parties

  
Jackson Millikan WSB#47786

**January 11, 2018 - 3:26 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50426-0  
**Appellate Court Case Title:** Yen-Vy Van, Appellant v. Associated Environmental Group, LLC, & Michael Chun, Respondents  
**Superior Court Case Number:** 16-2-00632-6

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