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SUPREME COURT NO. 80276-9
COURT OF APPEALS NO.: 56736-5-I

STATE OF WASHINGTON

ESTATE OF PAT W. CAMPBELL, by and through its Personal Representative CHARLES W. CAMPBELL,

Petitioner,

v.

MICHAEL JAMES MILLER,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER CHARLES W. CAMPBELL

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Of Attorneys for Petitioner

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I. INTRODUCTION

At issue is whether, in the absence of mistake, the trial court abused its discretion in ruling that Miller is estopped from pursuing a claim of childhood sexual abuse where, while knowing that he was injured by the abuse, he failed to disclose the claim in his bankruptcy. The substitution of the bankruptcy trustee as the real party in interest does not affect the application of judicial estoppel as to Miller which the Court should affirm.

II. STATEMENT OF RELEVANT FACTS

Petitioner Charles Campbell, as personal representative of the Estate of Patrick Campbell, incorporates by reference the statements of the case provided in his petition for review, in his response brief and in his amicus response brief, in his motion for reconsideration, and in his answer to Mr. Miller's motion for substitution, copies of which are attached.

A. Miller is making a claim for the same injuries he knew about but failed to disclose to his trustee in bankruptcy.

The Court of Appeals reached the following conclusion:

> Miller's assertion of a claim against Campbell in 2003 is not clearly inconsistent with his failure to mention a claim based on childhood sexual abuse in his schedule of assets in 1998 . . . Miller is not attempting to revive a known pre-petition claim. He is pursuing a different claim, a claim for more serious injuries that he did not know about during his bankruptcy . . .

Miller v. Campbell, 137 Wn. App. 762, 773, 155 P.3d 154 (2007). The Court's conclusion that Miller's claim is a different claim than the sex abuse claim he failed to disclose in bankruptcy is wrong for the following reasons. First, this is a fundamental error because Miller commenced this civil action asserting his entire claim. Miller placed this limitation upon his damages only **after** Charles Campbell moved for judicial estoppel. Although he argued in 2004 that his claim had not accrued under RCW 4.16.340 until 2003 Miller **never** limited his claim his claim to injuries suffered after 2002 **until** Charles Campbell moved for estoppel. CP 18, 272; *cf.* CP 343-345, 333-335, 414-418, 617-618, 673-683. Second, Miller discovered no new injuries after 1998; he discovered his diagnosis of PTSD which primarily gave a name to the symptoms he associated all his adult life with sexual abuse by Pat Campbell. Third, the symptoms he experienced on his stepfather's death were the same symptoms that he had experienced for years, and there is no evidence that he remembered additional incidents of abuse that were qualitatively different. CP 334-335, 414-417. Even if Miller had developed new symptoms they still arose from the original injury. Fourth, the record shows that Miller did not file his claim in March 2003 because he discovered new injuries. CP 417-418. Fifth, the Court of Appeal's conclusion is contrary to the broad definition of a claim under bankruptcy law, and contrary to Washington law against claim-splitting that prohibits filing two lawsuits arising from the same event. *Landry v. Luscher,* 95 Wn. App. 779, 780-81, 976 P.2d 1274 (1999); § IV.C.D. *infra.* Finally, the Court's conclusion conflicts with its ruling that Miller had a duty to disclose the claim in 1998 when he opted to obtain the benefits of a voluntary bankruptcy. *Miller,* 137 Wn. App, at 771. Even if it were not contrary to bankruptcy law and the law against claim-splitting, there is no scientific basis for dividing his claim into two claims based on pre- and post- March 2003 psychological injuries. Miller's claim that he "did not discover his most serious injuries, including [PTSD], until after he saw the forensic psychologist in March 27, 2003" is not borne out by the undisputed record. CP 18, 272; *cf.* CP 343-345, 333-335, 414-418, 673-683. In 1998, Miller had long been aware that the childhood sexual abuse caused him to have "anger, problems sleeping and intrusive memories;" that it caused him to feel frightened, ashamed and isolated and that it caused nightmares. *Miller,* 137 Wn. App, at 765-66, 770-71; CP 267, 331, 333, 335, 416-417. Since his twenties he was unable to have sex because of intrusive memories of sexual abuse by Pat Campbell. CP 416-417. A year before he filed for bankruptcy, his second marriage became strained due to deteriorating sexual relations and his fears and feelings about Pat Campbell, his memories of him and the things he "did to me." *Id.*; CP 238, 306. The injuries Miller "discovered" after March 2003 are not new injuries but diagnostic labels for the injuries he always related to Pat Campbell's conduct, with the possible exception of disassociation. CP 331-335, 389. Until he received treatment in 2003 he was unaware that the intrusive feelings were called "flashbacks" and that his symptoms were symptoms of PTSD. CP 335. Miller cannot abandon claims based on nightmares and intrusive thoughts or feelings of shame and worthlessness, yet maintain claims for "PTSD" or Depression as if their bases are independent from the label. Although the Court of Appeals stated that Miller did not "begin to become aware of" his current claim "until the death of his stepfather triggered a new flood of memories and crippling symptoms" there is no admissible evidence to support this theory. By his own account, his symptoms were the same (nightmares, shame, intrusive thoughts, and feelings of worthlessness) as those he always experienced and associated with the abuse. CP 334-335, 414-417. There is no evidence that he has remembered additional incidents of sexual abuse that are significantly different in nature or degree. CP 333-334. In any event, the recent symptoms were caused by the same events (his childhood sexual abuse) as the pre-bankruptcy symptoms. *Id.* If, as Miller now contends, his claim is limited to his "new injuries" the court faces the question what these new injuries consist of. Are these limited to the symptom of disassociation that he may not have connected earlier to the abuse, and additional incidents that he now remembers? Or, is he permitted to claim all his injuries because he can now name a diagnosis? In either event, he did not bring this claim because of a new-found understanding as to his injuries: he only went to see Dr. Adriance for a psychological assessment ***after*** signing a creditor's claim valued at

$500,000, an essential requirement for filing this action. CP 331, 334, 417-418, 617-618, 673-683; RCW 11.40.051 *et seq*. Nowhere in the claim or the complaint did he limit his claim to post-2002 injuries. *Id.* In 2004 Miller testified why he brought his claim in 2003: he was no longer afraid of Pat Campbell whose reputation he wanted to damage after his death. CP 417-418. He was also about to become a father: he wanted to bring the claim before his child was old enough to hear of it. *Id.*

B. In the absence of mistake, this claim is clearly inconsistent with Miller's denial of its existence.

Miller has not produced evidence that he inadvertently failed to disclose this claim to the bankruptcy court; on the contrary, he **denied** that it was inadvertent (CP 274), and admitted that he knew many injuries were caused by the abuse. CP 267, 333. He has not denied understanding that he was required to disclose in the bankruptcy any "possible" cause of action, or that he knew he had a potential claim. CP 266-274, 297.

C. Miller had several motives for not disclosing this claim.

Miller had several motives for concealment. Aside from the shame of disclosure, disclosure could have resulted in his bankruptcy discharge being delayed, or the trustee might have brought a law action when Campbell was alive, an outcome he dreaded because he was frightened of Campbell who might have produced compelling evidence to disprove his allegations. CP 334, 417-418. Equally compelling, his creditors might have recovered most, if not all, of any money judgment. CP 282-323.

D. The record contains other inconsistencies by Miller.

Contrary to its holding that intent is not an element of judicial estoppel, the Court of Appeals commented that "the flavor of manipulation" is not readily discernible. *Miller,* 137 Wn. App, at 772. However, a plain review of the record demonstrates other inconsistencies by Miller to suit "the exigencies of the moment". In addition to denying knowledge of sex abuse to obtain a bankruptcy discharge, Miller abandoned the claim for injuries he knew of before 2003, only when confronted with the omission in his bankruptcy schedules. CP 18, 266-74, 333-35, 617-618, 673-83. Also in 2005, he denied knowledge of his injuries, in direct contradiction to his earlier testimony and to statements he previously made to Dr. Adriance, when meeting with social worker Dr. Conte whose report "was based largely on self-report data of Mr. Miller." *See* Resp. Br. at 12-13; CP 72-74, CP 331, 366, 369-370, 388-389, 414-417. In 2005, Miller explained the omission from his bankruptcy schedules by saying that in 1998 there was "simply no claim to list" (CP 274), a position that the Court of Appeals accepted when it allowed his appeal because "Miller … is pursuing a different claim…" *Miller,* 137 Wn. App. at 773. Miller contends now that the bankruptcy trustee is "the real person in interest in this matter." Mot. for Subst. at 2. Miller seeks to distance himself from his decision by saying that this was the trustee's conclusion. Reply re Subst. at 5. However, it was **Miller not** the trustee who moved for substitution. Further, Miller's counsel accepted appointment as counsel to the trustee, a position that would give rise to a conflict of interest if Miller disputed the bankruptcy trustee's interest. RPC 1.7. In short, there is substantial evidence of other manipulation.

III. ISSUES PRESENTED

(1) Whether the superior court abused its discretion by ruling that plaintiff's claim was barred by judicial estoppel. (2) Whether, in the absence of mistake or inadvertence, a sex abuse plaintiff is judicially estopped from recovering damages where the current claim arises from the same cause of action that he failed to disclose in his bankruptcy. (3) Whether a plaintiff who is barred under principles of judicial estoppel is barred from personally sharing in any recovery where the bankruptcy trustee is substituted as the real party in interest. (4) Whether the substitution of the trustee relates back to the filing of this lawsuit.

IV. STANDARD OF REVIEW

While the appellate courts review summary judgment de novo, considering the facts in a light most favorable to the nonmoving party, they review a trial court's application of judicial estoppel to those facts for abuse of discretion. *Cunningham v. Reliable Concrete,* 126 Wn. App. 222, 227, 108 P.3d 147 (2005); *Bartley-Williams v. Kendall,* 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). Appellate courts should defer to the trial court's personal and exhaustive contact with the issue, and should only overturn the trial court's opinion where the exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *DeAtley v. Barnett*, 127 Wn. App. 478, 485, 112 P.3d 540 (2005). The appellate court may affirm on any ground the record adequately supports. *Skinner v. Holgate,* 141 Wn. App. 840, 849, 173 P.3d 300 (2007).

V. SUMMARY OF ARGUMENT

The trial court properly exercised its discretion by ruling that Miller is estopped from pursuing his claim, and this court should affirm that ruling as to Miller where the undisputed record shows that (1) in 1998 Miller believed that sex abuse by Pat Campbell had injured him; (2) the non-disclosure was not inadvertent; and (3) Miller had motives for concealment. Even though the Court of Appeals found that Miller had breached his duty to disclose his claim, the court misapplied the principle of accrual for limitation purposes and wrongly concluded that he was pursuing a different claim. This claim splitting argument is contrary to law because the pre- and post- injuries arose from the same conduct. There are no legal or factual grounds for holding that Miller was under a disability in 1998. Finally, the substitution of the trustee does not end this court's jurisdiction to affirm the trial court's ruling as to Mr. Miller.

VI. ARGUMENT

Charles Campbell incorporates the arguments set forth in his petition for review, in his response brief, his amicus response brief and his motion for reconsideration to the Court of Appeals, in his answer to the motion for substitution and in his answer to the amicus supplemental brief.

A. In the absence of mistake, the trial court did not abuse its discretion.

The Bankruptcy Code and rules "impose upon bankruptcy debtors an express, affirmative duty to disclose **all** assets, including contingent and unliquidated claims." *Cunningham,* 126 Wn. App. at 225 citing *Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778, 785 (9th Cir. 2001). Possible causes of action should be listed, even if the likelihood of success is unknown. *Id.* at 230. The Court of Appeals agreed that Mr. Miller breached his duty to disclose the claim:

> The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information prior to confirmation to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed"...In order to obtain relief from his outstanding debts, Miller voluntarily chose to enter a forum where full disclosure of potential and contingent assets was required, even though the potential for success was doubtful or unknown. He knew that Campbell had harmed him. Even if he thought the claim was stale, and even though he felt so ashamed of his memories that he had never discussed them with anyone, his duty under bankruptcy law was to disclose.

Miller, 137 Wn. App, at 771. A party is judicially estopped from asserting a claim not raised in the debtor's schedules or disclosures in bankruptcy.

Cunningham, 126 Wn. App. at 228. Judicial estoppel which precludes a party from asserting one position in a proceeding and later seeking an advantage by taking an inconsistent position in another court, is particularly well suited to protect the integrity of the bankruptcy process which depends on full and honest disclosure by debtors of all their assets. *McFarling v. Evaneski,* 141 Wn. App. 400, 403, 171 P.3d 497 (2007). Judicial estoppel turns on three core factors: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) 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. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 541, 160 P.3d 13 (2007); *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). By omitting the claims from his schedules, a debtor represents that none exists, and the inconsistent positions prong is satisfied. *Cunningham,* 126 Wn. App. at 230. The debtor derives a benefit by preserving the claim for his own use. *Skinner*, 141 Wn. App. at 853. The superior court made findings that all three elements of judicial estoppel were met. CP 46-49. Miller knew that he was injured by Pat Campbell's sexual abuse in 1998 even if he did not know the full extent of his injuries, and his failure to disclose this at bankruptcy, resulting in a no asset discharge, clearly conflicted with the current claim. *Id.* at CP 37-38, 42, 47-48. Specifically, it considered and rejected the claims splitting argument that was raised by Miller. *Id.* Miller's conduct was unfair to both his bankruptcy estate, and to Charles Campbell. *Id.* at CP 47-48. The superior court's ruling is entirely consistent with the law. Application of the doctrine may be inappropriate when a party's prior position was based on inadvertence or mistake. *Id.* However, Miller denied inadvertence and, instead, displayed further inconsistency by saying that his claim was limited. CP 266-274. (Even if inadvertence were claimed, failure to list an asset is "inadvertent" only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for concealment. *McFarling,141 Wn. App.* at 405 *citing Cunningham,* 126 Wn. App. at 234; *In re Coastal Plains*, 179 F.3d 197, 210 (5th Cir. 1999). It is undisputed that Miller had knowledge of his claim and compelling personal and financial motives to conceal it. *Miller,* 137 Wn. App, at 770; § II. A. C., *supra.*) The Court of Appeals wrongly looked for bad faith which is not an element of judicial estoppel in Washington. *Cunningham,* 126 Wn. App. at 234 ("intent to mislead is not an element of judicial estoppel"); *DeAtley*, 127 Wn. App. at 481 (plaintiff alleged only "a vague recollection" of the undisclosed asset); *McFarling,* 141 Wn. App. at 405. The doctrine's purposes are to preserve respect for judicial proceedings; to bar statements by a party which would be contrary to testimony in prior proceedings; and to avoid inconsistency, duplicity, and . . . waste of time. *Cunningham*, 126 Wn. App. 225. In Washington, the focus is upon the inconsistent position. *DeAtley,* 127 Wn. App. at 484. Generally, a bankruptcy debtor is bound by his own representations, no matter why they were made. *Cannon-Stokes v. Potter,* 453 F.3d 446, 449 (7th Cir. 2006). The Court of Appeals relied on cases from jurisdictions where bad faith is an element of judicial estoppel, all of which can be distinguished. *See* Pet. For Review at 13-15; *In re Okan's Foods*, 217 B.R. 739 (Bankr. D. Pa. 1998); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996); *Chaveriat v. Williams Pipe Line Co.,* 11 F.3d 1420 (7th Cir. 1993); *cf. Krystal Cadillc-Oldsmobile v. GMC*, 337 F.3d 314, 321 (3d Cir. 2003). Even where this rule applies, a rebuttable inference of bad faith arises when the record reveals both **knowledge** of a claim and a **motive** to conceal the claim in the face of a duty to disclose: all are present here. *Id.*; *Okan's Foods,* 217 B.R. at 756. Finally, Miller's inconsistent conduct is not limited to his filing of this lawsuit; the "flavor of manipulation" is present. §II.D. *supra.* Judicial estoppel plainly applies to Miller and the court should enforce it to preserve the integrity of its process. The trial court's order should not be disturbed "except on a **clear** showing of abuse of discretion that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The Court of Appeals erred in reversing the trial court because even if the bankruptcy omission was the only inconsistency the court's decision was neither untenable nor manifest abuse.

B. There are no issues of material fact.

There are no issues of material fact that might preclude upholding the exercise of the trial court's discretion. After defendant introduced facts showing that Miller knew more than enough to advise the bankruptcy court that he was the victim of sex abuse, the burden shifted to Miller to introduce facts to reasonably explain the differing positions. *Garrett v. Morgan,* 127 Wn. App. 375, 379, 112 P.3d 531 (2005); CR 56. Miller denied a mistake, admitted knowledge of injury, and offered no evidence of lack of motive for concealment. CP 266-274. Nor did he dispute that his omission was detrimental to defendant (for example, Pat Campbell cannot testify) and his creditors, or that the discharge of his "no-asset" bankruptcy constituted court acceptance. It is speculative to assert that his claim was time-barred in 1998 and there is no evidence that this crossed his mind. The court should not take into account unsupported speculation in order to view facts in a light favorable to the non-moving party. *Chamberlain v. D.O.T.*, 79 Wn. App. 212, 901 P.2d 344 (1995); CR 56.

C. Washington cases prevent claim splitting.

Miller will have to present the same evidence (sexual abuse, intrusive thoughts, nightmares, sleep problems, dissociation, feelings of lack of self-worth, shame, sexual dysfunction) as he would have presented in 1998. As a legal matter, asserting that Miller's later injuries constitute a different claim, is nothing more than impermissible claim splitting. Filing two separate lawsuits based on the same event--claim splitting--is precluded in Washington. *Landry,* 95 Wn. App. at 780 *citing Sprague v. Adams*, 139 Wn. 510, 515, 247 P. 960, 47 A.L.R. 529 (1926). An injured party is limited to one lawsuit for property or personal injury damage resulting from a single tort alleged against the wrongdoer. *Id.* at 782. This is in accord with the general rule that if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim. *Id.* A related reason for prohibiting claim splitting are the principles of *res judicata. Id. See also Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 418-19 (3d Cir. 1988). Thus, in *McFarling,* 141 Wn. App. at 405, the plaintiff's request to allow his claim to go forward for only those damages he sustained after he declared bankruptcy was denied because the "cause of action" is the act which occasioned the injury not the damage that flows from the wrong. *Id. citing Sprague,* 139 Wash. at 519. *Cf. Coastal,* 179 F.3d at 203, 215 (tortious interference claim was not subject to judicial estoppel because it arose out of different "conduct …and occurrences"). Further, he has clearly abandoned the argument that he is pursuing a different claim. His assertion that the bankruptcy trustee is now the real party in interest is an admission that these claims existed at the date of his bankruptcy. Mot. For Subst. at 2. Otherwise, his counsel's appointment as counsel to the trustee would represent a conflict of interest. RPC 1.7.

D. The standard of knowledge for disclosure in bankruptcy is legally distinct from the standard of knowledge for accrual under RCW 4.16.340

The Court of Appeals upheld the trial court's ruling that Miller violated his duty to disclose his potential claim in bankruptcy. *Miller,* 137 Wn. App. at 771. In the absence of a new injury arising from **different** circumstances it was contrary to Washington and bankruptcy law, to permit Miller to pursue later-discovered injuries arising from the same conduct. The court made a fundamental error by holding that Miller was under "a disability" in 1998 and in applying the accrual standard of RCW 4.16.340 to judicial estoppel. *Id.* at 773.[1] The standard of knowledge of a potential claim that triggers the duty of disclosure in bankruptcy under federal rules for the benefit of creditors is legally distinct from the standard of knowledge required for accrual of a mature cause of action under RCW 4.16.340. The limitations statute establishes the *last* date by which a claim must be brought; in bankruptcy, the debtor must disclose a

[1] The Court of Appeals cited *Cloud v. Summers* 98 Wn. App. 724, 735, 991 P.2d 1169; (1999) which concerns the discovery rule **not** judicial estoppel. Cloud is also inapposite because, in *Cloud* there was undisputed evidence Cloud did not, by reason of mental illness, connect his psychological injuries to sexual abuse until two months before filing proceedings (*id.* at 732, 735, 737). However, Miller understood that serious injuries were caused by Campbell's sexual abuse when he filed for bankruptcy.

claim even where the extent of his injuries are unknown. *Garrett,* 127 Wn. App. at 379; 11 U.S.C. §101(5)(A); *Hamilton*, 270 F.3d at 784; *Hay v. Kalispell, N.A.*, 978 F.2d 555, 556 (9th Cir. 1992); *In re A.H. Robins Co.*, 63 B.R. 986, 988 (Bankr. D. Va. 1986).

> The debtor's position collapses into one analysis several distinct concepts of law. While state law defines the nature of a debtor's interest in property, whether this interest is property of the estate is a matter of federal bankruptcy law. The assets of the bankruptcy estate include "all legal or equitable interests of the debtor in property as of the commencement of the case." Bankruptcy Code 541(a)(1). Legislative history states that the scope of this paragraph is intended to be very broad. **To attempt to define when the debtor's interest in the subject cause of action arose based on when it accrued for purposes of a state's statute of limitation is conceptually flawed.**

Ellwanger v. Budsberg, 140 B.R. 891, 897 (Bankr. D. Wash. 1992) (emphasis added). The *Ellwanger* court rejected the California Court of Appeal's holding that "if the cause of action did not accrue until after the date of filing of bankruptcy, it did not exist and is not property of the estate." *Id.* at 898. *See also, In re Ryerson*, 739 F.2d 1423 (9th Cir. 1984).

> [I]t is not necessary to know immediately the type and extent of that injury....Recent cases applying these rules have muddied the waters, however. The basic problem is that the issue of accrual of a cause of action rarely occurs apart from the issue of when the statute of limitations begins to run for a particular cause of action. These are two separate and distinct issues aimed at very different problems. ...

State Farm Life Ins. Co. v. Swift, 129 F.3d 792, 795 (5th Cir. 1997). Washington's policy toward sexual abuse, as set forth in RCW 4.16.340, should not blind the court to the need to protect the integrity of its process by a strained interpretation of the law and of the record, *in this case*, where the trial court properly exercised its discretion. The application of estoppel to Miller does not conflict with the principles of RCW 4.16.340 and the legislature's intent to preserve a litigant's right to bring a claim where he later discovers more serious injuries. (Nor did the legislature express an intent to do more than extend the limitation date for a mature claim.) Miller and WSTLA essentially argue that judicial estoppel should never apply until a plaintiff fully understands all his injuries, and that a sex abuse claimant can ignore federal court rules with impunity. As discussed in Campbell's response briefs to WSTLA, such a rule would deprive the trial court of its discretion, however egregious the circumstances. It is not inequitable on these facts to apply the doctrine. Miller voluntarily chose to enter the federal forum where he was required to disclose a contingent immature claim. Had Miller no knowledge of an injury, judicial estoppel would not preclude his claim. However, on the undisputed facts, he understood that he suffered significant injuries that were caused by sexual abuse by Pat Campbell and untruthfully gave sworn testimony to the federal court omitting those injuries, in breach of that court's rules.

E. This Court should affirm judicial estoppel as to Miller.

Permitting substitution by the trustee does not render moot review of judicial estoppel as to Miller. This court retains authority to affirm the trial court's ruling. Any suggestion to the contrary defies logic because, whoever owns the claim, it is the trial court to whom the inconsistent representation was made and the court that retains adjudication of the claim. *In re Dewberry*, 266 B.R. 916, 920 (Bankr. S.D. Ga. 2001).

> We affirm the application of the doctrine of judicial estoppel to the Williamses so as to bar them from receiving any benefit from the suit in the event of a recovery.

Bartley-Williams, 134 Wn. App. at 102. The re-opening of Miller's bankruptcy does not relieve the trial court of its authority to estop him from personal recovery. *Id.; Arkison,* 160 Wn.2d at 540; *Skinner*, 141 Wn. App. at 852. The court where the case is pending has exclusive jurisdiction to conclude whether the debtor's conduct warrants imposition of judicial estoppel in the case before it. *Skinner*, 141 Wn. App. at 852 citing *Garrett,* 127 Wn. App. at 382 and *Dewberry*, 266 B.R. at 920.

> … when Debtor … filed his bankruptcy petition and failed to schedule the claim … no judicial estoppel argument arose. Only when the subsequent representation was made (in the … District Court case) did the estoppel issue arise. It seems self-evident that if the principle is invoked to protect the integrity of the judiciary, then it must be invoked in the Court in which the apparent self-serving contradiction occurred and in which the defense is first asserted.

Dewberry, 266 B.R. at 920; *see also Maxwell v. MGM Grand Detroit, LLC*, LEXIS 51056 (E.D. Mich. 2007). "The trial court may apply judicial estoppel against debtor as former litigator." *Arkison,* 160 Wn.2d at 540 citing *In re Lopez,* 283 B.R. 22, 30 (B.A.P. 9th Cir. 2002). The bankruptcy court may determine whether a debtor remains entitled to a claimed exemption. *Id.* In *Lopez,* 283 B.R. at 30, the Ninth Circuit ruled that the court where the case was pending should decide whether the debtor was estopped from recovering anything above the limit to pay creditors. *Id. citing In re Lewis,* 273 B.R. 748 (Bankr. N.D. Ga. 2001); *In re Barger*, 279 B.R. 900 (Bankr. N.D. Ga. 2002) ("Whether the doctrine of judicial estoppel is applicable … appears to be a question for the tribunal in which the claim is being asserted."). *Accord, In re Upshur,* 317 B.R. 446, 453 (Bankr. N.D. Ga. 2004). Miller should not be permitted to evade estoppel by his last minute application for substitution. Generally, a party will not avoid estoppel by later disclosure to the bankruptcy court. *E.g. Cunningham,* 126 Wn. App at 224; *Bartley-Williams*, 134 Wn. App. at 97. Any other rule will encourage litigants to conceal assets and evade estoppel by disclosing them only after the omission is revealed.

F. The substitution of the trustee should not relate back to the filing of this law action.

Charles Campbell incorporates the argument contained within his answer to the motion for substitution at § V.E. Answer at 16-19.

VII. CONCLUSION

There was no abuse of discretion by the trial court in ruling that judicial estoppel barred all Miller's claim where he knew of serious injuries when he filed for bankruptcy. The whole of his claim is barred because he had a duty to disclose even a contingent claim if he wished to obtain the voluntary benefit of a discharge. Existing precedent treat a debtor's decision to withhold a claim as inconsistent with his later assertion of the claim. The facts of this case warrant no other treatment.

RESPECTFULLY SUBMITTED this 12 day of May, 2008.

LEE SMART, P.S., INC.

By: Rosemary Moore

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Of Attorneys for Petitioner

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CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on May 12, 2008, I caused service of *Supplemental Brief of Charles W. Campbell* to the following:

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LEXSEE 270 F.3D 778, 782

LAWRENCE HAMILTON, Plaintiff-Appellant, v. STATE FARM FIRE & CASUALTY COMPANY, an Illinois Corporation; DAVID'S RESTAURANT SUPPLY, Defendants-Appellees.

No. 00-55530

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

270 F.3d 778; 2001 U.S. App. LEXIS 23875; 2001 Cal. Daily Op. Service 9457; 2001 Daily Journal DAR 11851

October 10, 2001, Argued and Submitted, Pasadena, California November 5, 2001, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-99-00440-VAP. Virginia A. Phillips, Magistrate Judge, Presiding.

Hamilton v. State Farm Fire & Casuality Ins. Co., 2000 U.S. Dist. LEXIS 2564 (C.D. Cal. Feb. 18, 2000)

COUNSEL: Bruce Adelstein, Los Angeles, California, for the appellant.

John T. Brooks, Luce, Forward, Hamilton & Scripps LLP, San Diego, California, for the appellees.

JUDGES: Before: Melvin Brunetti, Pamela Ann Rymer, and Kim McLane Wardlaw, Circuit Judges. Opinion by Judge Brunetti.

OPINION BY: Melvin Brunetti

OPINION

[*780] BRUNETTI, Circuit Judge.

Plaintiff-appellant Lawrence Hamilton appeals the district court's grant of summary judgment for Defendant-appellee State Farm Fire and Casualty Company on Hamilton's bad faith and breach of contract claims. We hold that Hamilton is judicially estopped from asserting these claims, and affirm.

FACTS

This action arises out of a claim that Hamilton filed under his State Farm homeowners' insurance policy. Hamilton purchased a house in Los Angeles in 1992 and insured the house with State Farm. Pursuant to California Insurance Code § 2070, the insurance policy contained a "concealment or fraud" provision, which renders coverage null and void if the policyholder should intentionally conceal [**2] or misrepresent any material fact or circumstance relating to the insurance policy. In January 1996, Hamilton completed an ambitious and expensive remodel of the house. He then rented the house to Dr. Edwin Floyd and family.

The Floyds experienced financial difficulties and stopped paying Hamilton rent in February 1997. Hamilton initiated eviction proceedings against the Floyds, and they vacated the house on May 28, 1997. On the morning of May 29, 1997, Hamilton reclaimed possession of the house and performed an inspection accompanied by a Sheriff's deputy, finding the house to be in good condition. Hamilton then left the house and claimed that he did not return until the following morning.

At 6:22 a.m. on May 30, 1997, Westec Security Company responded to a short-circuit signal from the alarm system in the house, and found that the house was partially flooded because several second floor water supply lines had been disconnected. Hamilton made a claim to State Farm for the water damage and the loss of numerous items he claimed were stolen from the house, including: 1) four uninstalled Viking and Sub-Zero brand appliances; 2) uninstalled marble counter-tops; and 3) various installed [**3] fixtures, including four valuable "Strauss" brand chandeliers. From the outset of the claim, Hamilton blamed the Floyds for vandalizing the house and stealing his property.

State Farm was apparently suspicious of the claim and conducted an investigation to determine its validity. A State Farm adjuster toured the house with Hamilton and took his recorded statements on both June 18, 1997 and July 1, 1997. State Farm also interviewed and took statements from many other witnesses in June through September 1997. During the time State [*781] Farm was investigating Hamilton's claim, Hamilton was experiencing his own financial difficulties. He had been unable to make his mortgage payments on the house without the rent income from the Floyds, and had also accumulated significant credit card debt. Because of Hamilton's mortgage default, the house was set to be sold at a trustee's sale on November 10, 1997.

Hamilton needed the insurance money from State Farm in order to keep the house, and enlisted the help of several lawyers to put pressure on State Farm to pay his claim. Hamilton's lawyers wrote letters to State Farm on August 4, 1997 and October 16, 1997; both letters emphasized the importance [**4] of prompt settlement to avoid foreclosure, claimed that State Farm might be handling the claim in bad faith, and threatened litigation if the claim were not quickly paid. State Farm made no attempt to pay Hamilton's claim in response to the letters. The investigation of the circumstances surrounding the claim had convinced State Farm that Hamilton was probably responsible for the vandalism and theft, and that he had at least violated the policy's concealment or fraud provision, voiding coverage. On October 31, 1997, Hamilton filed for Chapter 7 bankruptcy. State Farm denied the claim and voided coverage under the policy's concealment or fraud provision only a few days after Hamilton filed for bankruptcy. In a November 3, 1997 letter, State Farm advised Hamilton that the claim was denied on the basis that Hamilton had failed to produce documents in support of his claim, that Hamilton had misrepresented the extent of his financial difficulties, his whereabouts on May 29, 1997, and the existence or location of the allegedly stolen appliances.

Hamilton filed his bankruptcy schedules on November 14, 1997, listing a $ 160,000 residential vandalism *loss* against his estate in his Chapter [**5] 7 Financial Statement, but failing to list the corresponding claims against State Farm as *assets* of the estate. On Schedule B, Question 20, under the heading "Other contingent and nonliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims," Hamilton listed "None," ignoring his insurance and bad faith claims against State Farm as assets of the bankruptcy estate. The bankruptcy court discharged Hamilton's debts on April 6, 1998 based on the false information he provided in his Chapter 7 schedules and Financial Statement.

The bankruptcy trustee noticed that Hamilton had listed a large vandalism loss and wrote Hamilton a May 30, 1998 letter to determine whether Hamilton was pursuing any insurance claims to recover the amount of the loss. The trustee requested "correspondence or other writings concerning said vandalism, including any correspondence with insurance companies to recover the amount of the vandalism." The trustee sent Hamilton another letter on April 21, 1998 requesting information regarding the vandalism loss. Hamilton wrote a letter in return, but did not provide any additional information about the vandalism [**6] loss or claims against State Farm.

Consequently, the trustee filed a motion to dismiss Hamilton's bankruptcy. The trustee's motion listed bad faith, lack of truthfulness under oath, and failure to cooperate as the bases for dismissal. In July 1998, the court dismissed Hamilton's Chapter 7 bankruptcy and vacated the discharge of his debts.

On October 27, 1998, Hamilton filed suit against State Farm in Los Angeles County Superior Court, alleging breach of the covenant of good faith and fair dealing and breach of contract, and State Farm removed the action to the district court. [*782] State Farm filed a motion to dismiss for summary judgment on December 29, 1999, arguing that it was entitled to summary judgment because Hamilton had misrepresented numerous material facts, several of which voided Hamilton's coverage under the concealment or fraud provision. State Farm also argued that Hamilton's claim was barred by the doctrine of judicial estoppel, because he had failed to list his insurance claim and pending lawsuit against State Farm on his Chapter 7 Bankruptcy schedules, and the bankruptcy court had discharged Hamilton's debts because of his omissions.

The district court granted State [**7] Farm's motion, finding that Hamilton had failed to raise a genuine issue of material fact as to the falsity of his representations. The court also held that Hamilton's claim was barred by the doctrine of judicial estoppel because Hamilton took contradictory positions by first failing to amend his bankruptcy schedules to include his insurance claim and pending bad faith action against State Farm, and then persisting in his attempts to recover on the claims against State Farm.

STANDARD OF REVIEW

We review the district court's grant of summary judgment *de novo*. *Clicks Billiards Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). We will only affirm if, viewing that evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the district court correctly applied the relevant substantive law. *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). We review the district court's application of the doctrine of judicial estoppel to the facts of this case for an abuse of discretion. *Broussard v. University of California*, 192 F.3d 1252, 1255 (9th Cir. 1999). [**8]

DISCUSSION

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Rissetto v. Plumbers & Steamers Local 343*, 94 F.3d 597, 600-601 (9th Cir. 1996); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). This court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of "general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings," and to "protect against a litigant playing fast and loose with the courts." *Russell*, 893 F.2d at 1037.

The United States Supreme Court recently listed three factors that courts *may* consider in determining whether to apply the doctrine of judicial estoppel:

> Several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook*, 195 F.3d 299, 306 (C. A. 7 1999); [**9] *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (C. A. 5 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (C. A. 8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (C. A. 2 1997). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces [*783] no "risk of inconsistent court determinations," *United States v. C.I.T. Constr. Inc.*, 944 F.2d 253, 259 (C. A. 5 1991), and thus no threat to judicial integrity. *See Hook*, 195 F.3d at 306; *Maharaj*, 128 F.3d at 98; *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 939. 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. *See Davis v. Wakelee*, 156 U.S. 680 at 689, 39 L. Ed. 578, 15 S. Ct. 555; [**10] *Philadelphia, W., & B.R. Co. v. Howard*, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1851); *Scarano v. Central R. Co.*, 203 F.2d 510 at 513 (judicial estoppel forbids use of intentional self-contradiction ... as a means of obtaining unfair advantage"); *see also* 18 Wright § 4477, p. 782. In 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. In this case, we simply observe that the factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

New Hampshire v. Maine, 532 U.S. 742, 149 L. Ed. 2d 968, 121 S. Ct. 1808, 1815 (2001).

This court has restricted the application of judicial estoppel to cases where the court relied on, or "accepted," the party's previous inconsistent position. *Interstate Fire & Casualty Co. v. Underwriters at Lloyd's, London*, 139 F.3d 1234, 1239 (9th Cir. 1998); *Masayesva v. Hale*, 118 F.3d 1371, 1382 (9th Cir. 1997). The application of judicial estoppel is not [**11] limited to bar the assertion of inconsistent positions in the same litigation, but is also appropriate to bar litigants from making incompatible statements in two different cases. *Rissetto*, 94 F.3d at 605 ("We now make it explicit that the doctrine of judicial estoppel is not confined to inconsistent positions taken in the same litigation"); *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990) (estoppel is even more appropriate where the incompatible statements are made in two different cases, since "inconsistent positions in different suits are much harder to justify" than inconsistent pleadings within one suit). In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements. *Hay v. First Interstate Bank of Kalispell, N. A.*, 978 F.2d 555, 557 (9th Cir. 1992) (failure to give notice of a potential cause of action in bankruptcy schedules and Disclosure Statements estops the debtor from prosecuting that cause of action); *In re Coastal Plains*, 179 F.3d 197, 208 (5th Cir. 1999), [**12] *cert. denied*, 528 U.S. 1117, 145 L. Ed. 2d 814, 120 S. Ct. 936 (2000) (holding that a debtor is barred from bringing claims not disclosed in its bankruptcy schedules); *Payless Wholesale Distributors, Inc. v. Alberto Culver (P. R.) Inc.*, 989 F.2d 570, 572 (1st Cir.), *cert. denied*, 510 U.S. 931, 126 L. Ed. 2d 309, 114 S. Ct. 344 (1993) (debtor who obtained relief on the representation that no claims existed cannot resurrect such claims and obtain relief on the opposite basis); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3rd Cir.), *cert. denied*, 488 U.S. 967, 102 L. Ed. 2d 532, 109 S. Ct. 495 (1988) (debtor's failure to list potential claims against a creditor "worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect," and debtor is estopped by reason of such failure to disclose).

[*784] Hamilton clearly asserted inconsistent positions. He failed to list his claims against State Farm as assets on his bankruptcy schedules, and then later sued State Farm on the same claims. Hamilton argues that the trustee was fully aware of his pending claims against [**13] State Farm, but the trustee denied having knowledge of the claims. Regardless, notifying the trustee by mail or otherwise is insufficient to escape judicial estoppel. 11 U.S.C. § 521(1) provides that, "the debtor shall file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." Hamilton is required to have amended his disclosure statements and schedules to provide the requisite notice, because of the express duties of disclosure imposed on him by 11 U.S.C. 521(1), and because both the court and Hamilton's creditors base their actions on the disclosure statements and schedules. *See In re Coastal Plains*, 179 F.3d at 206.

Hamilton also argues that the bankruptcy court did not "accept" his prior assertion for the purposes of judicial estoppel. Hamilton concedes that the bankruptcy court relied on his failure to include his claims against State Farm as assets when it discharged his debts, but that the court's subsequent dismissal of his bankruptcy vacated the discharge of debt, [**14] and that the discharge must have been permanent to satisfy the judicial acceptance requirement of judicial estoppel. We reject this argument. This court has held that a debtor who failed to disclose a pending claim as an asset in a bankruptcy proceeding where debts were *permanently* discharged was estopped from pursuing such claim in a subsequent proceeding. *Hay*, 978 F.2d at 557.

We now hold that Hamilton is precluded from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings, and that a discharge of debt by a bankruptcy court, under these circumstances, is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated. Our holding does not imply that the bankruptcy court must actually discharge debts before the judicial acceptance prong may be satisfied. The bankruptcy court may "accept" the debtor's assertions by relying on the debtor's nondisclosure of potential claims in many other ways. *See, e.g., In re Coastal Plains*, 179 F.3d at 210 (finding that judicial acceptance was satisfied when the bankruptcy court lifted a stay based in part on the debtor's nondisclosure [**15] in its bankruptcy schedules and in a liftstay stipulation); *Donaldson v. Bernstein*, 104 F.3d 547, 555-56 (3rd Cir. 1997) (holding that judicial acceptance was satisfied when the court approved the debtor's plan of reorganization).

It is immaterial that Hamilton did not file this action against State Farm for one year after filing for bankruptcy. Judicial estoppel will be imposed when the debtor has knowledge of enough facts to 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. *Hay*, 978 F.2d at 557 ("We recognize that *all* facts were not known to Desert Mountain at that time, but enough was known to require notification of the asset to the bankruptcy court."); *In re Coastal Plains*, 179 F.3d at 208 (quoting *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F. Supp. 859, 867 (E.D. Tex. 1996) ("If the debtor has enough information ... prior to confirmation to suggest that it may have a possible cause of action, then that is a [*785] known cause of action such that it must be [**16] disclosed") (internal quotations omitted). Hamilton knew of all the material facts surrounding the damage to the house and State Farm's investigation and denial of his claim at the time he filed his bankruptcy schedules and for many months before pursuing legal action. Hamilton's knowledge that a cause of action against State Farm existed at the time he filed for bankruptcy and completed his bankruptcy schedules and disclosure statements is clearly evidenced by the letters that his lawyers wrote to State Farm on August 4, 1997 and October 16, 1997, both of which contained threats of litigation.

In this case, we must invoke judicial estoppel to protect the integrity of the bankruptcy process. The debtor, once he institutes the bankruptcy process, disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets. The Bankruptcy Code and Rules "impose upon the bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims.*" *In re Coastal Plains*, 179 F.3d at 207-208; *Hay*, 978 F.2d at 557; 11 U.S.C. § 521(1). The debtor's duty to disclose [**17] potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding. *In re Coastal Plains*, 179 F.3d at 208; *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F. Supp. at 867; Fed. R. Bankr. P. 1009(a) (schedules may be amended as a matter of course before the case is closed). Hamilton's failure to list his claims against State Farm as assets on his bankruptcy schedules deceived the bankruptcy court and

Hamilton's creditors, who relied on the schedules to determine what action, if any, they would take in the matter. Hamilton did enjoy the benefit of both an automatic stay and a discharge of debt in his Chapter 7 bankruptcy proceeding. *See New Hampshire v. Maine*, 121 S. Ct. at 1815 (noting that courts may consider whether the party seeking to assert an inconsistent position would derive an unfair advantage if not estopped). However, it is his failure to disclose assets on his bankruptcy schedules that provides the most compelling reason to bar him from prosecuting claims against State Farm. *In re Coastal Plains*, 179 F.3d at 208.

We agree with [**18] the Fifth Circuit's analysis in *In re Coastal Plains* when it said, "It is very important that a debtor's bankruptcy schedules and statement of affairs be as accurate as possible, because that is the initial information upon which all creditors rely." *Id.* The *Coastal* court further defined the essence of judicial estoppel in this bankruptcy context:

> The rationale for ... decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that the *integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets*. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure* [**19] *provided by the debtor is incomplete.*

Id. (alteration in original) (quoting *Rosenshein v. Kleban*, 918 F. Supp. 98, 104 (S.D.N.Y. 1996). We agree completely with this analysis.

[*786] Accordingly, Hamilton is judicially estopped from pursuing claims against State Farm, and we do not address any other issues raised in this appeal.

AFFIRMED.

LEXSEE 121 S. CT. 1808, 1815

STATE OF NEW HAMPSHIRE v. STATE OF MAINE

No. 130, Orig.

SUPREME COURT OF THE UNITED STATES

532 U.S. 742; 121 S. Ct. 1808; 149 L. Ed. 2d 968; 2001 U.S. LEXIS 3981; 69 U.S.L.W. 4393; 2001 Cal. Daily Op. Service 4303; 2001 Daily Journal DAR 4303; 14 Fla. L. Weekly Fed. S 283

April 16, 2001, Argued
May 29, 2001, Decided

PRIOR HISTORY: ON MOTION TO DISMISS COMPLAINT.

DISPOSITION: Motion to dismiss complaint granted.

DECISION:

Doctrine of judicial estoppel held to bar New Hampshire from asserting claim that--inland of boundary consented to in prior litigation--Piscataqua River boundary between New Hampshire and Maine ran along Maine shore.

SUMMARY:

The Piscataqua River flows between the states of New Hampshire and Maine, until the river reaches the sea at Portsmouth Harbor, also known as Piscataqua Harbor. During the colonial period, a 1740 decree by King George II of England included a provision that "the Dividing Line" between New Hampshire and Maine (the latter then a part of Massachusetts) would "pass up thro the Mouth of Piscataqua Harbour and up the Middle of the River." Subsequently, in original litigation in the 1970's between the states of New Hampshire and Maine, the United States Supreme Court eventually approved a consent judgment or decree, which (1) fixed the precise location of the "lateral marine boundary" of the two states in the waters off the coast, from the closing line of Portsmouth Harbor 5 miles seaward to a harbor in some offshore islands; and (2) provided, among other matters, that the words "Middle of the River," as used in the 1740 decree, meant the middle of the main channel of navigation of the Piscataqua River (decision approving entry of decree at 426 US 363, 48 L Ed 2d 701, 96 S Ct 2113; decree entered at 434 US 1, 54 L Ed 2d 1, 98 S Ct 42). In 2000, the Supreme Court granted New Hampshire leave to file an original complaint against Maine (530 US 1272, 147 L Ed 2d 1003, 120 S Ct 2764). This complaint claimed, with respect to the states' boundary inland of the partial one consented to in the 1970's litigation, that (1) the Piscataqua River boundary ran along the Maine shore, and (2) the entire river and all of Portsmouth Harbor belonged to New Hampshire. Maine then filed a motion to dismiss the complaint.

The Supreme Court granted Maine's motion. In an opinion by Ginsburg, J., expressing the unanimous view of the eight participating members of the court, it was held that the doctrine of judicial estoppel equitably barred New Hampshire from asserting its claim that, inland, the Piscataqua River boundary ran along the Maine shore, for (1) New Hampshire, in the consent decree approved in the 1970's, agreed without reservation that the words "Middle of the River," as used in the 1740 decree, meant the middle of the Piscataqua River's main channel of navigation; (2) the pertinent factors firmly tipped the balance of equities in favor of barring New Hampshire's complaint; and (3) there was no broad interest of public policy that gave New Hampshire the prerogative, notwithstanding this balance of equities, to construe the words "Middle of the River" differently than the state had in the 1970's.

Souter, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

ESTOPPEL WAIVER §9

-- state -- boundary -- inconsistent position in prior litigation

Headnote:[1A][1B][1C][1D][1E][1F][1G]

In 2001, the doctrine of judicial estoppel equitably bars the state of New Hampshire from asserting a claim, in an original United States Supreme Court complaint against the state of Maine, that--with respect to the two states' boundary inland of a partial one consented to in some 1970's Supreme Court litigation between the two states--the Piscataqua River boundary between the two states allegedly runs along the Maine shore, because New Hampshire, in a consent decree approved in the 1970's litigation, agreed without reservation that the words "Middle of the River," as used in a 1740 colonial-period decree in which King George II of England announced the "Dividing Line" between New Hampshire and Maine, meant the middle of the Piscataqua River's main channel of navigation; the pertinent factors firmly tip the balance of equities in favor of barring New Hampshire's complaint, as (1) New Hampshire's present claim is clearly inconsistent with the state's interpretation of the words "Middle of the River" during the 1970's litigation, (2) an interpretation of these words was necessary to fix the northern endpoint of the boundary then at issue, which was the "lateral marine boundary" between the two states in the waters off the coast, from the closing line of Portsmouth Harbor 5 miles seaward to a harbor in some offshore islands, (3) the record of the 1970's litigation makes it clear that (a) the Supreme Court accepted New Hampshire's agreement with Maine that the "Middle of the River" meant the middle of the main navigable channel, and (b) New Hampshire benefited from this interpretation, (4) it is incorrect to imply that the parties settled the 1970's dispute without judicial endorsement of this interpretation, (5) the prior consent decree was not entered without a searching historical inquiry by New Hampshire into what the words in question meant, (6) New Hampshire, in the 1970's, lacked neither the opportunity nor the incentive to locate the river boundary at Maine's shore, and (7) the Supreme Court cannot interpret the words "Middle of the River" to mean two different things along the same boundary line without undermining the integrity of the judicial process; moreover, there is no broad interest of public policy that gives New Hampshire the prerogative, notwithstanding this balance of equities, to construe the words "Middle of the River" differently than the state did in the 1970's, for (1) the present proceeding is not a case where (a) estoppel would compromise a governmental interest in enforcing the law, or (b) the shift in the government's position is the result of a change in public policy, (2) instead, the proceeding is a case between two states, where each owes the other a full measure of respect, (3) what has changed is New Hampshire's interpretation of the historical evidence concerning the 1740 decree, (4) New Hampshire advances its new interpretation not to enforce the state's own laws within its borders, but to adjust the border itself, and (5) Maine has a countervailing interest in the location of the boundary.

[***LEdHN2]

SUPREME COURT OF THE UNITED STATES §67

-- boundary between states -- estoppel -- prior litigation

Headnote:[2A][2B][2C]

In 2001, with respect to an original complaint by the state of New Hampshire against the state of Maine, the United States Supreme Court will grant a motion by Maine to dismiss the complaint, where (1) the Piscataqua River flows between the two states, until the river reaches the sea at Portsmouth Harbor, also known as Piscataqua Harbor, (2) New Hampshire's complaint claims--with respect to the two states' boundary inland of a partial one fixed in some 1970's original litigation between the two states, which litigation ended in a consent decree--that (a) the Piscataqua River boundary runs along the Maine shore, and (b) the entire river and all of Portsmouth Harbor belong to New Hampshire, (3) the Supreme Court decides that under the unusual circumstances presented, the discrete doctrine of judicial estoppel best fits the controversy, and (4) the Supreme Court holds that the doctrine of judicial estoppel equitably bars New Hampshire from asserting this Piscataqua River boundary claim, which is contrary to the state's position in the 1970's litigation; in such circumstances, the Supreme Court will pretermit the two states' (1) competing historical contentions, and (2) arguments on the application of the res judicata doctrines commonly called claim and issue preclusion.

[***LEdHN3]

JUDGMENT §76

-- claim preclusion

Headnote:[3]

The res judicata doctrine commonly called claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, regardless of whether relitigation of the claim raises the same issues as the earlier suit.

[***LEdHN4]

JUDGMENT §76

-- issue preclusion

Headnote:[4]

The res judicata doctrine commonly called issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, regardless of whether the issue arises on the same or a different claim.

[***LEdHN5]

ESTOPPEL WAIVER §78

-- inconsistent position -- prior legal proceeding

Headnote:[5]

Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, the party may not thereafter, simply because the party's 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 the first party; this rule, known as judicial estoppel, 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; because this rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion.

[***LEdHN6]

ESTOPPEL WAIVER §78

-- inconsistent position -- prior judicial proceeding

Headnote:[6A][6B]

Several factors typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case; the first such factor is that a party's later position must be clearly inconsistent with the party's earlier position; with respect to a second such factor, courts regularly inquire whether a party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; this inquiry is made because in the absence of success in a prior proceeding, a party's later inconsistent position (1) introduces no risk of inconsistent court determinations, and (2) thus, poses little threat to judicial integrity; a third such factor or 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; in enumerating these factors, the United States Supreme Court will not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel, as additional considerations may inform the doctrine's application in specific factual contexts.

[***LEdHN7]

ESTOPPEL WAIVER §78

-- judicial -- prior position

Headnote:[7]

It may be appropriate to resist the application of judicial estoppel when a party's prior inconsistent position was based on inadvertence or mistake.

SYLLABUS

New Hampshire and Maine share a border that runs from northwest to southeast. At the border's southeastern end, New Hampshire's easternmost point meets Maine's southernmost point. The boundary in this region follows the Piscataqua River eastward into Portsmouth Harbor and, from there, extends in a southeasterly direction into the sea. In 1977, in a dispute between the two States over lobster fishing rights, this Court entered a consent judgment setting the precise location of the States'"lateral marine boundary," *i.e.*, the boundary in the marine waters off the coast, from the closing line of Portsmouth Harbor five miles seaward. *New Hampshire* v. *Maine*, 426 U.S. 363, 48 L. Ed. 2d 701, 96 S. Ct. 2113; *New Hampshire* v. *Maine*, 434 U.S. 1, 2, 54 L. Ed. 2d 1, 98 S. Ct. 42. The Piscataqua River boundary was fixed by a 1740 decree of King George II at the "Middle of the River." See 426 U.S. at 366-367. In the course of litigation, the two States proposed a consent decree in which they agreed, *inter alia*, that the descriptive words "Middle of the River" in the 1740 decree refer to the middle of the Piscataqua River's main navigable channel. Rejecting the Special Master's view that the quoted words mean the geographic middle of the river, this Court accepted the States' interpretation and directed entry of the consent decree. Id. at 369-370. The final decree, entered in 1977, defined "Middle of the River" as "the middle of the main channel of navigation of the Piscataqua River." 434 U.S. at 2. The 1977 consent judgment fixed only the lateral marine boundary and not the inland Piscataqua River boundary. In 2000, New Hampshire brought this original action against Maine, claiming on the basis of historical records that the inland river boundary runs along the Maine shore and that the entire Piscataqua River and all of Portsmouth Harbor belong to New Hampshire. Maine has filed a motion to dismiss, urging that the earlier proceedings bar New Hampshire's complaint.

Held: Judicial estoppel bars New Hampshire from asserting that the Piscataqua River boundary runs along the Maine shore. Pp. 5-13.

(a) Judicial estoppel is a doctrine distinct from the res judicata doctrines of claim and issue preclusion. Under the judicial estoppel doctrine, 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. *Davis* v. *Wakelee*, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555. The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Courts have recognized that the circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation. Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask 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. In enumerating these factors, this Court does 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. Pp. 5-8.

(b) Considerations of equity persuade the Court that application of judicial estoppel is appropriate in this case. New Hampshire's claim that the Piscataqua River boundary runs along the Maine shore is clearly inconsistent with its interpretation of the words "Middle of the River" during the 1970's litigation to mean either the middle of the main navigable channel or the geographic middle of the river. Either construction located the "Middle of the River" somewhere other than the Maine shore of the Piscataqua River. Moreover, the record of the 1970's dispute makes clear that this Court accepted New Hampshire's agreement with Maine that "Middle of the River" means middle of the main navigable channel, and that New Hampshire benefited from that interpretation. Notably, in their joint motion for entry of the consent decree, New Hampshire and Maine represented to this Court that the proposed judgment was "in the best interest of each State." Were the Court to accept New Hampshire's latest view, the risk of inconsistent court determinations would become a reality. The Court cannot interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process. Pp. 8-9.

(c) The Court rejects various arguments made by New Hampshire. The State urged at oral argument that the 1977 consent decree simply fixed the "Middle of the River" at an arbitrary location based on the parties' administrative convenience. But that view is foreclosed by the Court's determination that the consent decree proposed a wholly permissible final resolution of the controversy both as to facts and law, 426 U.S. at 368-369. The Court rejected the dissenters' view that the decree interpreted the middle-of-the-river language "by agreements of convenience" and not "in accordance with legal principles," id. at 369. New Hampshire's contention that the 1977 consent decree was entered without a searching historical inquiry into what "Middle of the River" meant is refuted by the pleadings in the lateral marine boundary case and by this Court's independent determination that nothing suggests the location of the 1740 boundary agreed upon by the States is wholly contrary to relevant evidence, *ibid.* Nor can it be said that New Hampshire lacked the opportunity or incentive to locate the river boundary at Maine's shore. In its present complaint, New Hampshire relies on historical materials that were no less available in the 1970's than they are today. And New Hampshire had every reason to consult those materials: A river boundary running along Maine's shore would have resulted in a substantial amount of additional territory for New Hampshire. Pp. 9-11.

(d) Also unavailing is New Hampshire's reliance on this Court's recognition that the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is ordinarily not applied to States, *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. 362, 369, 91 L. Ed. 348, 67 S. Ct. 340. This is not a case where estoppel would compromise a governmental interest in enforcing the law. Cf. *Heckler* v. *Community Health Services of Crawford Cty., Inc.*, 467 U.S. 51, 60, 81 L. Ed. 2d 42, 104 S. Ct. 2218. Nor is this a case where the shift in the government's position results from a change in public policy, cf. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601, 92 L. Ed. 898, 68 S. Ct. 715, or a change in facts essential to the prior judgment, cf. *Montana* v. *United States*, 440 U.S. 147, 159, 59 L. Ed. 2d 210, 99 S. Ct. 970. Instead, it is a case between two States, in which each owes the other a full measure of respect. The Court is unable to discern any substantial public policy interest allowing New Hampshire to construe "Middle of the River" differently today than it did 25 years ago. Pp. 11-13.

Motion to dismiss complaint granted.

COUNSEL: Paul Stern argued the cause for defendant.

Jeffrey P. Minear argued the cause for the United States, as amicus curiae, by special leave of court.

Leslie J. Ludtke argued the cause for plaintiff.

JUDGES: GINSBURG, J., delivered the opinion of the Court, in which all other Members joined, except SOUTER, J., who took no part in the consideration or decision of the case.

OPINION BY: GINSBURG

OPINION

[**1812] [***974] [*745] JUSTICE GINSBURG delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A]The Piscataqua River lies at the southeastern end of New Hampshire's boundary with Maine. The river begins at the headwaters of Salmon Falls and runs seaward into Portsmouth Harbor (also known as Piscataqua Harbor). On March 6, 2000, New Hampshire brought this original action against Maine, claiming that the Piscataqua River boundary runs along the Maine shore and that the entire river and all of Portsmouth Harbor belong to New Hampshire. Maine has filed a motion to dismiss on the ground that two prior proceedings -- a 1740 boundary determination by King George II and a 1977 consent judgment entered by this Court -- definitively fixed the Piscataqua River boundary at the middle of the river's main channel of navigation.

[***975] The 1740 decree located the Piscataqua River boundary at the "Middle of the River." Because New Hampshire, in the 1977 proceeding, agreed without reservation that the words "Middle of the River" mean the middle of the Piscataqua River's main channel of navigation, we conclude that New Hampshire is estopped from asserting now that the boundary runs along the Maine shore. Accordingly, we grant Maine's motion to dismiss the complaint.

I

New Hampshire and Maine share a border that runs from northwest to southeast. At the southeastern end of the [*746] border, the easternmost point of New Hampshire meets the southernmost point of Maine. The boundary in this region follows the Piscataqua River eastward into Portsmouth Harbor and, from there, extends in a southeasterly direction into the sea. Twenty-five years ago, in a dispute between the two States over lobster fishing rights, this Court entered a consent judgment fixing the precise location of the "lateral marine boundary," *i.e.*, the boundary in the marine waters off the coast of New Hampshire and Maine, from the closing line of Portsmouth Harbor five miles seaward to Gosport Harbor in the Isles of Shoals. *New Hampshire* v. *Maine*, 426 U.S. 363, 48 L. Ed. 2d 701, 96 S. Ct. 2113 (1976); *New Hampshire* v. *Maine*, 434 U.S. 1, 2, 54 L. Ed. 2d 1, 98 S. Ct. 42 (1977). This case concerns the location of the Maine-New Hampshire boundary along the inland stretch of the Piscataqua River, from the mouth of Portsmouth Harbor westward to the river's headwaters at Salmon Falls. (A map of the region appears as an appendix to this opinion.)

[**1813] In the 1970's contest over the lateral marine boundary, we summarized the history of the interstate boundary in the Piscataqua River region. See *New Hampshire* v. *Maine*, 426 U.S. at 366-367. The boundary, we said, "was in fact fixed in 1740 by decree of King George II of England" as follows:

"'That the Dividing Line shall pass up thro the Mouth of Piscataqua Harbour and up the Middle of the River . . . . And that the Dividing Line shall part the Isles of Shoals and run thro the Middle of the Harbour between the Islands to the Sea on the Southerly Side . . . .'" Id. at 366 (quoting the 1740 decree).

In 1976, New Hampshire and Maine "expressly agreed . . . that the decree of 1740 fixed the boundary in the Piscataqua Harbor area." Id. at 367 (internal quotation marks omitted). "Their quarrel was over the location . . . of the 'Mouth of Piscataqua River,' 'Middle of the River,' and 'Middle of the Harbour' within the contemplation of the decree." [*747] *Ibid.* The meaning of those terms was essential to delineating the lateral marine boundary. See Report of Special Master, O. T. 1975, No. 64 Orig., pp. 32-49 (hereinafter Report). In particular, the northern end of the lateral marine boundary required a determination of the point where the line marking the "Middle of the [Piscataqua] River" crosses the closing line of Piscataqua Harbor. Id. at 43.

In the course of litigation, New Hampshire and Maine proposed a [***976] consent decree in which they agreed, *inter alia*, that the words "Middle of the River" in the 1740 decree refer to the middle of the Piscataqua River's main channel of navigation. Motion for Entry of Judgment By Consent of Plaintiff and Defendant in *New Hampshire* v. *Maine*, O. T. 1973, No. 64 Orig., p. 2 (hereinafter Motion for Consent Judgment). The Special Master, upon reviewing pertinent history, rejected the States' interpretation and concluded that "the geographic middle of the river and not its main or navigable channel was intended by the 1740 decree." Report 41. This Court determined, however, that the States' interpretation "reasonably invested imprecise terms" with a definition not "wholly contrary to relevant evidence." *New Hampshire* v. *Maine*, 426 U.S. at 369. On that basis, the Court declined to adopt the Special Master's construction of "Middle of the River" and directed entry of the consent decree. Id. at 369-370. The final decree, entered in 1977, defined "Middle of the River" as "the middle of the main channel of navigation of the Piscataqua River." *New Hampshire* v. *Maine*, 434 U.S. at 2.

The 1977 consent judgment fixed only the lateral marine boundary and not the inland Piscataqua River boundary. See Report 42-43 ("For the purposes of the present dispute, . . . it is unnecessary to lay out fully the course of the boundary as it proceeds upriver . . . ."). In the instant action, New Hampshire contends that the inland river boundary "runs along the low water mark on the Maine shore," Complaint 49, and asserts sovereignty over the entire river [*748] and all of Portsmouth Harbor, including the Portsmouth Naval Shipyard on Seavey Island located within the harbor just south of Kittery, Maine, id. at 34. * Relying on various historical records, New Hampshire urges that "Middle of the River," as those words were used in 1740, denotes the main branch of the river, not a mid-channel boundary, Brief in Opposition to Motion to Dismiss 12-16, and that New Hampshire, not Maine, exercised sole jurisdiction over shipping and military activities in Portsmouth [**1814] Harbor during the decades before and after the 1740 decree, id. at 17-19, and nn. 35-38.

> * According to New Hampshire, the Federal Government in recent years has taken steps to close portions of the shipyard and to lease its land and facilities to private developers. Complaint 34. New Hampshire and Maine assert competing claims of sovereignty over private development on shipyard lands. *Ibid.*

While disagreeing with New Hampshire's understanding of history, see Motion to Dismiss 9-14, 18-19 (compiling evidence that Maine continually exercised jurisdiction over the harbor and shipyard from the 1700's to the present day), Maine primarily contends that the 1740 decree and the 1977 consent judgment divided the Piscataqua River at the middle of the main channel of navigation -- a division that places Seavey Island within Maine's jurisdiction. Those earlier proceedings, according to Maine, bar New Hampshire's complaint under principles of claim and issue preclusion as well as judicial estoppel.

[***LEdHR1B] [1B] [***LEdHR2B] [2B] [***LEdHR3] [3] [***LEdHR4] [4]We pretermit the States' competing historical claims along with their arguments on the application *vel non* of the res judicata doctrines commonly called claim and issue preclusion. Claim preclusion generally refers to the effect of a [***977] prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually [*749] litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim. See Restatement (Second) of Judgments §§ 17, 27, pp. 148, 250 (1980); D. Shapiro, Civil Procedure: Preclusion in Civil Actions 32, 46 (2001). In the unusual circumstances this case presents, we conclude that a discrete doctrine, judicial estoppel, best fits the controversy. Under that doctrine, we hold, New Hampshire is equitably barred from asserting -- contrary to its position in the 1970's litigation -- that the inland Piscataqua River boundary runs along the Maine shore.

II

[***LEdHR5] [5]"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." *Davis* v. *Wakelee*, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555 (1895). This rule, known as judicial estoppel, "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." *Pegram* v. *Herdrich*, 530 U.S. 211, 227, n. 8, 147 L. Ed. 2d 164, 120 S. Ct. 2143 (2000); see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory") (hereinafter Wright).

Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," *Edwards* v. *Aetna Life Ins. Co.*, 690 F.2d 595, 598 (CA6 [*750] 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States* v. *McCaskey*, 9 F.3d 368, 378 (CA5 1993). See *In re Cassidy*, 892 F.2d 637, 641 (CA7 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1166 (CA4 1982) (judicial estoppel "protects the essential integrity of the judicial process"); *Scarano* v. *Central R. Co.*, 203 F.2d 510, 513 (CA3 1953) (judicial estoppel prevents [**1815] parties from "playing 'fast and loose with the courts'" (quoting *Stretch* v. *Watson*, 6 N.J. Super. 456, 469, 69 A.2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis* v. *Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (CADC 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," [***978] *Russell* v. *Rolfs*, 893 F.2d 1033, 1037 (CA9 1990) (citation omitted).

[***LEdHR6A] [6A] Courts have observed that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *Allen*, 667 F.2d at 1166; accord *Lowery* v. *Stovall*, 92 F.3d 219, 223 (CA4 1996);*Patriot Cinemas, Inc.* v. *General Cinema Corp.*, 834 F.2d 208, 212 (CA1 1987).Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. *United States* v. *Hook*, 195 F.3d 299, 306 (CA7 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (CA5 1999); *Hossaini* v. *Western Mo. Medical Center*, 140 F.3d 1140, 1143 (CA8 1998); *Maharaj* v. *Bankamerica Corp.*, 128 F.3d 94, 98 (CA2 1997). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d at 599. Absent success [*751] in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States* v. *C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See *Hook*, 195 F.3d at 306; *Maharaj*, 128 F.3d at 98; *Konstantinidis*, 626 F.2d at 939. 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. See *Davis*, 156 U.S. at 689; *Philadelphia, W., & B. R. Co.* v. *Howard*, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1852); *Scarano*, 203 F.2d at 513 (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage"); see also 18 Wright § 4477, p. 782.

[***LEdHR1C] [1C] [***LEdHR6B] [6B]In 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. In this case, we simply observe that the factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

[***LEdHR1D] [1D]New Hampshire's claim that the Piscataqua River boundary runs along the Maine shore is clearly inconsistent with its interpretation of the words "Middle of the River" during the 1970's litigation. As mentioned above, *supra*, at 3-4, interpretation of those words was "necessary" to fixing the northern endpoint of the lateral marine boundary, Report 43. New Hampshire offered two interpretations in the earlier proceeding -- first agreeing with Maine in the proposed consent decree that "Middle of the River" means the middle of the main channel of navigation, and later agreeing with the Special Master that the words mean the geographic middle of the river. Both constructions located the "Middle of the River" somewhere other than the Maine shore of the Piscataqua River.

[*752] Moreover, the record of the 1970's dispute makes clear that this Court [***979] accepted New Hampshire's agreement with Maine that "Middle of the River" means middle of the main navigable channel, and that New Hampshire benefited from that interpretation. New Hampshire, it is true, preferred the interpretation of "Middle of the River" in the Special Master's report. See Exceptions and Brief for Plaintiff in *New Hampshire* v. *Maine*, O. T. 1975, No. [**1816] 64 Orig., p. 3 (hereinafter Plaintiff's Exceptions) ("the boundary now proposed by the Special Master is more favorable to [New Hampshire] than that recommended in the proposed consent decree"). But the consent decree was sufficiently favorable to New Hampshire to garner its approval. Although New Hampshire now suggests that it "compromised in Maine's favor" on the definition of "Middle of the River" in the 1970's litigation, Brief in Opposition to Motion to Dismiss 24, that "compromise" enabled New Hampshire to settle the case, see id. at 24-25, on terms beneficial to both States. Notably, in their joint motion for entry of the consent decree, New Hampshire and Maine represented to this Court that the proposed judgment was "in the best interest of each State." Motion for Consent Judgment 1. Relying on that representation, the Court accepted the boundary proposed by the two States. *New Hampshire* v. *Maine*, 434 U.S. 1, 54 L. Ed. 2d 1, 98 S. Ct. 42 (1977).

At oral argument, New Hampshire urged that the consent decree simply fixed the "Middle of the River" at "an arbitrary location based on the administrative convenience of the parties." Tr. of Oral Arg. 37. To the extent New Hampshire implies that the parties settled the lateral marine boundary dispute without judicial endorsement of their interpretation of "Middle of the River," that view is foreclosed by the Court's determination that "the consent decree . . . proposes a wholly permissible final resolution of the controversy both as to facts and law," *New Hampshire* v. *Maine*, 426 U.S. at 368-369. Three dissenting Justices agreed with New Hampshire that the consent decree interpreted [*753] the middle-of-the-river language "by agreements of convenience" and not "in accordance with legal principles." Id. at 371 (White, J., dissenting, joined by Blackmun and STEVENS, JJ.). But the Court concluded otherwise, noting that its acceptance of the consent decree involved "nothing remotely resembling 'arbitral' rather than 'judicial' functions," id. at 369. The consent decree "reasonably invested imprecise terms with definitions that give effect to [the 1740] decree," *ibid.*, and "[did] not fall into the category of agreements that we reject because acceptance would not be consistent with our Art. III function and duty," *ibid.*

[***LEdHR1E] [1E] [***LEdHR7] [7]New Hampshire also contends that the 1977 consent decree was entered without "a searching historical inquiry into what that language ['Middle of the River'] meant." Tr. of Oral Arg. 39. According to New Hampshire, had it known then what it knows now about the relevant history, it would not have entered into the decree. *Ibid.* We 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." *John S. Clark Co.* v. *Faggert & Frieden, P. C.*, 65 F.3d 26, 29 [***980] (CA4 1995); see *In re Corey*, 892 F.2d 829, 836 (CA9 1989);*Konstantinidis*, 626 F.2d at 939.We are unpersuaded, however, that New Hamsphire's position in 1977 fairly may be regarded as a product of inadvertence or mistake.

[***LEdHR1F] [1F]The pleadings in the lateral marine boundary case show that New Hampshire did engage in "a searching historical inquiry" into the meaning of "Middle of the River." See Reply Brief for Plaintiff in *New Hampshire* v. *Maine*, O. T. 1975, No. 64 Orig., pp. 3-9 (examining history of river boundaries under international law, proceedings leading up to the 1740 order of the King in Council, and relevant precedents of this Court). None of the historical evidence cited by New Hampshire remotely suggested that the Piscataqua River boundary runs along the Maine shore. In fact, in attempting to place the boundary at the geographic middle of the [*754] river, New Hampshire acknowledged that its agents in 1740 understood the King's order to "adjudge *half of the river* to" the portion of Massachusetts that is now Maine. Id. at 6 (emphasis in original) (quoting *N. H. State Papers*, XIX, pp. [**1817] 591, 596-597); see id. at 4 ("*The intention of those participating in the proceedings leading to the [1740 decree] was to use 'geographic middle' as the Piscataqua boundary.*" (emphasis in original)). In addition, this Court independently determined that "there is nothing to suggest that the location of the 1740 boundary agreed upon by the States is wholly contrary to relevant evidence." *New Hampshire* v. *Maine*, 426 U.S. at 369.

Nor can it be said that New Hampshire lacked the opportunity or incentive to locate the river boundary at Maine's shore. In its present complaint, New Hampshire relies on historical materials -- primarily official documents and events from the colonial and postcolonial periods, see Brief in Opposition to Motion to Dismiss 12-19 -- that were no less available 25 years ago than they are today. And New Hampshire had every reason to consult those materials: A river boundary running along Maine's shore would have placed the northern terminus of the lateral marine boundary much closer to Maine, "resulting in hundreds if not thousands of additional acres of territory being in New Hampshire rather than Maine," Tr. of Oral Arg. 48 (rebuttal argument of Maine). Tellingly, New Hampshire at the time understood the importance of placing the northern terminus as close to Maine as possible. While agreeing with the Special Master that "Middle of the River" means geographic middle, New Hampshire insisted that the geographic middle should be determined by using the banks of the river, not low tide elevations (as the Special Master had proposed), as the key reference points -- a methodology that would have placed the northern terminus 350 yards closer to the Maine shore. Plaintiff's Exceptions 3.

[*755] In short, considerations of equity persuade us that application of judicial estoppel is appropriate in this case. Having convinced this Court to accept one interpretation of "Middle of the River," and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense. Were we to accept New Hampshire's latest view, the "risk of inconsistent court determinations," *C. I. T. Construction*, [***981] 944 F.2d at 259, would become a reality. We cannot interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process.

Finally, notwithstanding the balance of equities, New Hampshire points to this Court's recognition that "ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states," *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. 362, 369, 91 L. Ed. 348, 67 S. Ct. 340 (1946). Of course, "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests." 18 Wright § 4477, p. 784. But this is not a case where estoppel would compromise a governmental interest in enforcing the law. Cf. *Heckler* v. *Community Health Services of Crawford Cty., Inc.*, 467 U.S. 51, 60, 81 L. Ed. 2d 42, 104 S. Ct. 2218 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."). Nor is this a case where the shift in the government's position is "the result of a change in public policy," *United States* v. *Owens*, 54

F.3d 271, 275 (CA6 1995); cf. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601, 92 L. Ed. 898, 68 S. Ct. 715 (1948) (collateral estoppel does not apply to Commissioner where pertinent statutory provisions or Treasury [*756] regulations have changed between the first and second proceeding), or the result of a change in facts essential to the prior [**1818] judgment, cf. *Montana* v. *United States*, 440 U.S. 147, 159, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979) ("changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues"). Instead, it is a case between two States, in which each owes the other a full measure of respect.

What has changed between 1976 and today is New Hampshire's interpretation of the historical evidence concerning the King's 1740 decree. New Hampshire advances its new interpretation not to enforce its own laws within its borders, but to adjust the border itself. Given Maine's countervailing interest in the location of the boundary, we are unable to discern any "broad interest of public policy," 18 Wright § 4477, p. 784, that gives New Hampshire the prerogative to construe "Middle of the River" differently today than it did 25 years ago.

* * *

[***LEdHR1G] [1G] [***LEdHR2C] [2C]For the reasons stated, we conclude that judicial estoppel bars New Hampshire from asserting that the Piscataqua River boundary runs along the Maine shore. Accordingly, we grant Maine's motion to dismiss the complaint.

It is so ordered.

JUSTICE SOUTER took no part in the consideration or decision of this case.

[**1819] [***982] APPENDIX TO OPINION OF THE COURT

[Graphic Omitted; see Printed Opinion].

REFERENCES

28 Am Jur 2d, Estoppel and Waiver 74, 75, 138-143, 146; 32 Am Jur 2d, Federal Courts 578, 599-601

L Ed Digest, Estoppel and Waiver 9; Supreme Court of the United States 67

L Ed Index, Boundaries; Consent Judgment or Decree

Annotation References:

Original jurisdiction of United States Supreme Court in suits between states. 68 L Ed 2d 969.

State or federal law as governing applicability of doctrine of res judicata or collateral estoppel in federal court action. 19 ALR Fed 709.

LEXSEE 179 F.3D 197, 206

In The Matter of: COASTAL PLAINS, INC., Debtor. BROWNING MANUFACTURING, Appellant/Cross-Appellee, versus JEFFREY H. MIMS, Trustee for the Bankruptcy Estate of Coastal Plains, Inc.; INDUSTRIAL CLEARINGHOUSE, INC., Appellees/Cross-Appellants. INDUSTRIAL CLEARINGHOUSE, INC., Successor in interest to Coastal Plains Inc.; JEFFREY H. MIMS, Trustee of The Estate of Coastal Plains, Inc., Appellees/Cross-Appellants, versus BROWNING MANUFACTURING, formerly known as Emerson Electric Company, formerly known as Emerson Power Transmission Corporation, Appellant/Cross-Appellee. In The Matter Of: COASTAL PLAINS, INC., Debtor. INDUSTRIAL CLEARINGHOUSE, INC.; JEFFREY H. MIMS, Trustee of The Estate of Coastal Plains, Inc., Appellees-Appellants, versus BROWNING MANUFACTURING, formerly a Division of Emerson Electric Company, Appellant-Appellee. In The Matter Of: COASTAL PLAINS, INC., Debtor. BROWNING MANUFACTURING, Appellant, versus JEFFREY H. MIMS, Trustee for the Bankruptcy Estate of Coastal Plains, Inc.; INDUSTRIAL CLEARINGHOUSE, INC., Appellees. INDUSTRIAL CLEARINGHOUSE, INC., Successor in interest to Coastal Plains, Inc.; JEFFREY H. MIMS, Trustee for the Bankruptcy Estate of Coastal Plains, Inc., Appellees, versus BROWNING MANUFACTURING, formerly known as Emerson Electric Company, formerly known as Emerson Power Transmission Corporation, Appellant.

No. 97-11118, No. 97-11119, No. 98-10246

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

179 F.3d 197; 1999 U.S. App. LEXIS 13412; Bankr. L. Rep. (CCH) P77,947; 13 Tex. Bankr. Ct. Rep. 305

June 18, 1999, Decided

SUBSEQUENT HISTORY: [**1] Rehearing and Rehearing En Banc Denied August 4, 1999, Reported at: 1999 U.S. App. LEXIS 21593.

Certiorari Denied January 18, 2000, Reported at: 2000 U.S. LEXIS 595.

Writ of certiorari denied Mims v. Browning Mfg., 528 U.S. 1117, 145 L. Ed. 2d 814, 120 S. Ct. 936, 2000 U.S. LEXIS 595 (2000)

Adversary proceeding at, Judgment entered by, Costs and fees proceeding at, Motion denied by, Dismissed by Indus. Clearinghouse, Inc. v. Mims (In re Coastal Plains, Inc.), 2005 Bankr. LEXIS 888 (Bankr. N.D. Tex., Mar. 11, 2005)

PRIOR HISTORY: Appeals from the United States District Court for the Northern District of Texas. 3:94-CV-1325-P. 3:94-CV-1955-P. 3:88-CV-2542-P. Jorge A Solis, US District Judge.

Browning Mfg. v. Mims (In re Coastal Plains), 192 F.3d 128, 1999 U.S. App. LEXIS 21593 (5th Cir. Tex., 1999)

DISPOSITION: REVERSED and RENDERED.

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JUDGES: Before REYNALDO G. GARZA, POLITZ, and BARKSDALE, Circuit Judges.

OPINION BY: RHESA HAWKINS BARKSDALE

OPINION

[*201] RHESA HAWKINS BARKSDALE, Circuit Judge:

For all but one of the claims at hand, the overarching issue is whether the bankruptcy court abused its discretion by not [*202] judicially estopping plaintiffs Industrial Clearinghouse and the Trustee for the bankruptcy estate of Coastal Plains from pursuing claims against Browning, Coastal's largest unsecured creditor; the linchpin being whether nondisclosure of those claims in Coastal's bankruptcy schedules or its stipulation for lifting the automatic bankruptcy stay to allow Coastal's largest secured creditor to foreclose on Coastal's assets, later purchased by Industrial Clearinghouse (formed by Coastal's CEO), falls under the exception to judicial estoppel advanced by plaintiffs, Coastal's successors -- that, even though Coastal had knowledge of the claims, the nondisclosure was nevertheless "inadvertent". For plaintiffs' one claim not subject to judicial estoppel (tortious interference), the key issue is whether it is time-barred. [**2] Browning appeals the $ 5.2 million judgment on a jury verdict in favor of plaintiffs; plaintiffs cross-appeal the substantial post-verdict reduction in damages. We **REVERSE** and **RENDER** judgment for Browning.

I.

Coastal Plains, Inc., an equipment distributor, was purchased by Bill Young in 1984 for approximately $ 9 million. The business plan included making Browning Manufacturing, formerly a division of Emerson Electric Company, Coastal's leading supplier.

In January 1986, Coastal acknowledged its financial problems to its creditors and implicitly threatened bankruptcy if they did not agree to a workout plan, pursuant to which Coastal would return to its creditors inventory they had sold on credit to Coastal; the creditors would pay Coastal 50 percent of the inventory's cost and write off Coastal's debt; and the money so raised would be paid to Coastal's secured lender, Westinghouse Credit Corporation. Many creditors rejected the proposal.

The next month, owed $ 1.3 million by Coastal, Browning agreed to a transaction which tracked Coastal's earlier proposed workout plan. In late February 1986, Coastal began returning inventory to Browning; this was soon discontinued [**3] because Browning's parent, Emerson, wanted to postpone the transaction until the next quarter. Accordingly, in mid-March, Coastal and Browning agreed that, if the transaction was not completed by 3 April, Browning would transfer the returned-inventory back to Coastal. The inventory-return to Browning was completed by the end of March.

Nevertheless, becoming more concerned about Coastal's potential bankruptcy, Browning did not complete the transaction (payment, etc.) by 3 April. Therefore, Coastal demanded that Browning return the inventory not later than 20 April.

But, on 16 April, Young, for Coastal, signed a voluntary Chapter 11 bankruptcy petition, which was filed on 22 April. Coastal advised its creditors that bankruptcy had become necessary because all of them had not accepted its proposed workout plan. Coastal owed in excess of $ 8.5 million to Westinghouse, and approximately $ 8 million to other creditors. Browning was Coastal's largest unsecured creditor.

A week after filing its petition, Coastal initiated an adversary proceeding against Browning, seeking an order both enjoining it from disposing of the returned-inventory and directing its transfer to Coastal. Coastal also [**4] claimed conversion; interference with contracts and/or business relationships because of Browning's failure to return inventory; punitive damages; and violation of the automatic stay.

The complaint did not specify the amount of damages sought, and there were no allegations that Browning's actions caused the failure of Coastal's pre-bankruptcy workout plan. (Concerning this critical point for judicial estoppel purposes, discussed *infra*, Coastal's bankruptcy attorney testified at a bankruptcy hearing seven years later that *the primary purpose* [*203] *of the adversary proceeding was the inventory-return.*)

Shortly after the adversary proceeding was filed, the bankruptcy court found that Browning had violated the automatic stay and ordered the inventory returned to Coastal; the other claims were not addressed. Browning completed the inventory-return before the end of May.

Soon thereafter, on 6 June, Wayne Duke, Coastal's CEO, executed sworn bankruptcy schedules for Coastal. But, although he believed that Coastal had claims of up to $ 10 million against Browning, they were *not* disclosed in the bankruptcy schedules and statement of financial affairs. And, although Coastal's $ 1.3 [**5] million debt to Browning was listed in the schedule of liabilities, it was *not* specified as contingent, disputed, or subject to setoff. Three months later, on 9 September, in moving for relief from the automatic stay so that it could foreclose on Coastal's assets, Westinghouse (secured lender) asserted that it was owed in excess of $ 8 million by Coastal; that this debt was nearly equal to the value of the collateral; and that reorganization was not possible. On 18 September, Westinghouse and Coastal submitted in support of the lift-stay motion a stipulation, prepared by Westinghouse, that included estimates of the value of Coastal's assets, including that its general intangible assets consisted of computer software programs, customer lists, and vendor lists, with a total worth less than $ 20,000. *No mention was made of any claims against Browning.* The stipulation showed more than a $ 5 million shortfall between the value of Coastal's assets and its debt to Westinghouse.

Browning withdrew its objection to lifting the stay. On 19 September, the day after the stipulation was filed, Westinghouse's lift-stay motion was granted; it foreclosed on Coastal's assets, conducting an [**6] auction on 7 October. *No mention of Coastal's claims against Browning was made in the foreclosure notices or advertisements, or at the auction.*

A Browning representative attended the auction and bid on the inventory. The highest bid on Coastal's general intangibles (*which, again, were not described as including its claims against Browning*) was $ 2,000. Westinghouse was the successful bidder, purchasing the assets for $ 3.25 million.

On 8 October, the day after the auction, and pursuant to negotiations the preceding month prior to executing the lift-stay stipulation, Westinghouse entered into a consignment agreement with Industrial Clearinghouse, Inc. (IC), to sell the assets Westinghouse had purchased at the auction. IC had been formed by Coastal's CEO, Duke, who was also IC's CEO; that same day, all of Coastal's employees became IC employees; and it used the same computer software and customer lists that had been used by Coastal. In February 1987, IC purchased the remaining Coastal assets from Westinghouse for $ 1.24 million. Those assets expressly included the previously undisclosed "potential cause of action against Browning".

The Chapter 11 reorganization was converted [**7] to a Chapter 7 liquidation that April. After the Trustee filed a no-asset report and applied for closing the bankruptcy case, it was closed in February 1988.

But, the case was re-opened that March, to address issues unrelated to Browning. That April, after IC advised the Trustee that it wanted the claims against Browning prosecuted, and the Trustee refused, because a successful conclusion would benefit only IC, IC advised it would pursue the adversary proceeding. In October 1988, IC was substituted for Coastal in the long dormant (since May 1986) adversary proceeding against Browning.

IC filed its first amended complaint in March 1989, alleging that Browning's breach of the return-inventory agreements and return-delay caused Coastal's bankruptcy [*204] and demise; and asserting claims for breach of contract, conversion, interference with contracts and/or business relationships, fraud, and violation of the automatic stay. A second amended complaint was filed in late 1989; a third, in early 1992.

In September 1992, the Trustee again moved to close the case and for his discharge. IC filed its fourth amended complaint that December.

The adversary proceeding was set for trial in May 1993 in [**8] the district court, which had withdrawn the reference from the bankruptcy court. But, on the eve of trial, the Trustee moved to intervene, claiming that Coastal's bankruptcy estate owned the claims being pursued against Browning. The district court referred the case to the bankruptcy court for the ownership determination.

In bankruptcy court, Browning asserted, *inter alia*, that, based on Coastal's nondisclosure in its bankruptcy schedules and the lift-stay stipulation, IC and the Trustee were equitably *and* judicially estopped. Regarding judicial estoppel, IC responded that the claims had been omitted through counsel's oversight.

Following a July 1993 hearing, the bankruptcy court ruled that the estate owned the tort claims; IC, those in contract. Contemporaneously, IC and the Trustee agreed to share any recovery against Browning, with IC to receive 85 percent.

In May 1994, following a hearing that January, the bankruptcy court approved the Trustee/IC (plaintiffs) sharing agreement and, *inter alia*, rejected judicial estoppel. Browning appealed to the district court, which affirmed; and to our court, which affirmed approval of the sharing agreement, but dismissed Browning's [**9] appeal as to judicial estoppel, holding that the ruling was interlocutory. (Most unfortunately, Browning did *not* seek certification from the district court that, pursuant to 28 U.S.C. § 1292(b), the judicial estoppel ruling "involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation".)

At trial in district court in early 1996 (ten years after the adversary proceeding was filed), the jury found against plaintiffs' fraud claim; but, *inter alia*, awarded them $ 5 million for breach of contract, $ 2.5 million for conversion, $ 1.75 million for breach of fiduciary duty, $ 1.3 million for tortious interference, and $ 7.5 million in punitive damages.

Browning's new trial motion was denied; its motion for judgment as a matter of law, granted in part. The court found insufficient evidence for breach of fiduciary duty; ordered plaintiffs to elect a recovery from among the three remaining substantive awards; reduced punitive damages to $ 4 million; granted Browning a $ 1.4 million setoff; denied its motion to set aside the bankruptcy [**10] court's judicial estoppel ruling; and limited prejudgment interest.

Plaintiffs elected, under protest, to recover for breach of contract (concomitantly, no punitive damages). The final judgment awarded damages of $ 3.6 million ($ 5 million for contract breach less $ 1.4 million setoff), and $ 1.6 million for attorney's fees and costs.

II.

Among numerous issues presented, Browning claims judicial estoppel, except for the tortious interference claim. Plaintiffs cross-appeal. We hold that plaintiffs are judicially estopped, except for the interference claim; it is time-barred.

A.

Although we are the second court to review the bankruptcy court's judicial estoppel ruling, we review it "as if this were an appeal from a trial in the district court". ***Phoenix Exploration, Inc. v. Yaquinto (Matter of Murexco Petroleum, Inc.)***, 15 F.3d 60, 62 (5th Cir. 1994). [*205] Because judicial estoppel is an equitable doctrine, and the decision whether to invoke it within the court's discretion, we review for abuse of discretion the bankruptcy court's rejection of the doctrine. *See, e.g.,* ***Ergo Science, Inc. v. Martin***, 73 F.3d 595, 598 (5th Cir. 1996).

"An abuse of discretion standard does [**11] not mean a mistake of law is beyond appellate correction", because "[a] district court by definition abuses its discretion when it makes an error of law". ***Koon v. United States***, 518 U.S. 81, 100, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996). Accordingly, "the abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions". ***Id.*** *See also* ***Latvian Shipping Co. v. Baltic Shipping Co.***, 99 F.3d 690, 692 (5th Cir. 1996) ("We will not find an abuse of discretion unless the district court's factual findings are clearly erroneous or incorrect legal standards were applied"); ***Meadowbriar Home for Children, Inc. v. Gunn***, 81 F.3d 521, 535 (5th Cir. 1996) (court "abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence").

Because judicial estoppel was raised in the context of a bankruptcy case, involving Coastal's express duty under the Bankruptcy Code to disclose its assets, we apply federal law. *See* ***Johnson v. Oregon Dept. of Human Resources***, 141 F.3d 1361, 1364 (9th Cir. 1998) (action under Americans with Disabilities [**12] Act; "federal law governs the application of judicial estoppel in federal courts").

Judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position". ***Brandon v. Interfirst Corp.***, 858 F.2d 266, 268 (5th Cir. 1988). [1] The purpose of the doctrine is "to protect the integrity of the judicial process", by "preventing parties from playing fast and loose with the courts to suit the exigencies of self interest". ***Id.*** (internal quotation marks, parentheses, and citation omitted). [2] Because the doctrine is intended to protect the judicial system, *rather than the litigants*, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary. *See* ***Matter of Cassidy***, 892 F.2d 637, 641 & n.2 (7th Cir.), *cert. denied*, 498 U.S. 812, 112 L. Ed. 2d 24, 111 S. Ct. 48 (1990). [3]

1 *See also* ***Data General Corp. v. Johnson***, 78 F.3d 1556, 1565 (Fed. Cir. 1996) ("The doctrine of judicial estoppel is that where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed"); ***Reynolds v. Commissioner of Internal Revenue***, 861 F.2d 469, 472-73 (6th Cir. 1988) (internal quotation marks and citations omitted) ("Courts have used a variety of metaphors to describe the doctrine, characterizing it as a rule against playing fast and loose with the courts, blowing hot and cold as the occasion demands, or having one's cake and eating it too. Emerson's dictum that a foolish consistency is the hobgoblin of little minds cuts no ice in this context").

[**13]

2 *See also* ***United States v. McCaskey***, 9 F.3d 368, 379 (5th Cir. 1993) (purpose of doctrine is "to protect the integrity of the judicial process and to prevent unfair and manipulative use of the court system by litigants"), *cert. denied*, 511 U.S. 1042, 128 L. Ed. 2d 211, 114 S. Ct. 1565 (1994); ***McNemar v. Disney Store, Inc.***, 91 F.3d 610, 616 (3d Cir. 1996) ("The doctrine of judicial estoppel serves a consistently clear and undisputed jurisprudential purpose: to protect the integrity of the courts."), *cert. denied*, 519 U.S. 1115, 136 L. Ed. 2d 845, 117 S. Ct. 958 (1997); ***Matter of Cassidy***, 892 F.2d 637, 641 (7th Cir.), *cert. denied*, 498 U.S. 812, 112 L. Ed. 2d 24, 111 S. Ct. 48 (1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process"); ***Reynolds***, 861 F.2d at 472 (internal quotation marks and citation omitted) ("The purpose of the doctrine is to protect the courts from the perversion of judicial machinery").

3 *See also* ***McNemar***, 91 F.3d at 617 (rejecting contention that party seeking estoppel must show that it would be prejudiced unless opponent is estopped); ***Ryan Operations G.P. v. Santiam-Midwest Lumber Co.***, 81 F.3d 355, 360 (3d Cir. 1996) ("While privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required"); ***Data General***, 78 F.3d at 1565; ***Fleck v. KDI Sylvan Pools, Inc.***, 981 F.2d 107, 121-22 (3d Cir. 1992), *cert. denied*, 507 U.S. 1005 (1993).

[**14] [*206] "The policies underlying the doctrine include preventing internal inconsistency, precluding litigants from playing fast and loose with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment." ***United States v. McCaskey***, 9 F.3d 368, 378 (5th Cir. 1993). The doctrine is generally applied where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice". ***Scarano v. Central R. Co.***, 203 F.2d 510, 513 (3d Cir. 1953). [4]

4 *See also* ***Taylor v. Food World, Inc.***, 133 F.3d 1419, 1422 (11th Cir. 1998) (internal quotation marks and citation omitted) ("Judicial estoppel is applied to the calculated assertion of divergent sworn positions ... and is designed to prevent parties from making a mockery of justice by inconsistent pleadings"); ***Ryan***, 81 F.3d at 358 ("The basic principle ... is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory"). "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." ***Davis v. Wakelee***, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555 (1895).

[**15]

Most courts have identified at least two limitations on the application of the doctrine: (1) it may be applied only where the position of the party to be estopped is clearly inconsistent with its previous one; and (2) that party must have convinced the court to accept that previous position. *See* ***United States for use of American Bank v. C.I.T. Construction Inc. of Tex.***, 944 F.2d 253, 258 (5th Cir. 1991) ("The 'judicial acceptance' requirement minimizes the danger of a party contradicting a court's determination based on the party's prior position and, thus, mitigates the corresponding threat to judicial integrity"); ***Matter of Cassidy***, 892 F.2d at 641; ***Folio v. City of Clarksburg, W.V.***, 134 F.3d 1211, 1217-18 (4th Cir. 1998). [5]

> 5 *Cf.* ***McNemar***, 91 F.3d at 617 (rejecting contention that party seeking estoppel must show that prior statement was accepted by a judicial tribunal); ***Ryan***, 81 F.3d at 361 (doctrine of judicial estoppel contains no requirement that "a party must have benefitted from her prior position in order to be judicially estopped from subsequently asserting an inconsistent one"; but, obviously, "threat to the integrity of the judicial process from subsequent assertion of an incompatible position is more immediate" when tribunal has acted in reliance on party's initial assertion).

[**16] The Sixth Circuit has explained that the "judicial acceptance" requirement "does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits. Rather, judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition". ***Reynolds v. Commissioner of Internal Revenue***, 861 F.2d 469, 473 (6th Cir. 1988).

Some courts have imposed additional requirements. For example, the Fourth Circuit holds that the position must be one of fact instead of law. ***Folio***, 134 F.3d at 1217-18. *Contra*, ***Matter of Cassidy***, 892 F.2d at 642 ("the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact").

And, many courts have imposed the additional requirement that the party to be estopped must have acted intentionally, *not* inadvertently. *E.g.*, ***Johnson***, 141 F.3d at 1369 ("If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply"); ***Folio***, 134 F.3d at 1217-18; [**17] ***McNemar v. Disney Store, Inc.***, 91 F.3d 610, 618 (3d Cir. 1996) (internal quotation marks and citation omitted) (part of threshold inquiry for application of judicial estoppel is whether party to be estopped "asserted either or both of the inconsistent positions in bad faith-*i.e.*, with intent [*207] to play fast and loose with the court"); ***Ryan Operations G.P. v. Santiam-Midwest Lumber Co.***, 81 F.3d 355, 358, 362 (3d Cir. 1996) (internal quotation marks and citation omitted) (judicial estoppel doctrine "not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from playing fast and loose with the courts"; 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"; inconsistency "must be attributable to intentional wrongdoing"); ***Matter of Cassidy***, 892 F.2d at 642 (judicial estoppel should not be applied "where it would work an injustice, such as where the former position was the product of inadvertence or mistake"); ***Johnson Serv. Co. v. Trans-America Ins. Co.***, 485 F.2d 164, 175 (5th Cir. 1973) (applying [**18] Texas law on judicial estoppel; "the rule looks toward cold manipulation and not an unthinking or confused blunder").

Browning maintains that, because of the nondisclosure in Coastal's bankruptcy schedules and its lift-stay stipulation, plaintiffs, as Coastal's successors, are judicially estopped (except for the tortious interference claim).

Despite the undisputed facts that Coastal was aware of, but did not disclose, the claims, the bankruptcy court rejected judicial estoppel, stating that, from the inception of Coastal's adversary proceeding, Browning, the Trustee, and Westinghouse were aware of that action. That statement, however, is in the section of the opinion addressing *equitable estoppel* (which, of course, requires detrimental reliance; that defense is no longer at issue). Because the nondisclosure is not discussed in the part on judicial estoppel, it is unclear whether, in rejecting such estoppel, the court relied on the parties' awareness of the adversary proceeding. With respect to the lift-stay stipulation, the bankruptcy court noted that it was prepared by Westinghouse's attorneys and reviewed by Coastal's attorney, who "checked it with his client for accuracy" [**19] when it was signed. The court stated that Westinghouse and Coastal's attorneys "overlooked" the adversary proceeding in arriving at the $ 20,000 figure for Coastal's general intangibles; but ruled that it was not their "intent to omit mention of the Browning lawsuit"; and concluded that "such omission appears to have been inadvertent, as opposed to any outright conspiracy, or intentional self-contradiction being used as a means to obtain unfair advantage". In this regard, the court concluded that the lift-stay stipulation was not intended to be an "exhaustive listing of assets".

The bankruptcy court found that when the stipulation was signed and the stay lifted, Duke, Coastal's CEO and later IC's, believed that Browning's actions had damaged Coastal in the $ 10 million range. The bankruptcy court stated that "it appears that such lawsuit did have value, but such value did not approach the projected deficiency of approximately $ 5 million that [Westinghouse] anticipated would exist after" it sold Coastal's assets.

Accordingly, the bankruptcy court held that Coastal's tort claims were not foreclosed upon and were not affected by judicial estoppel. Likewise, the court concluded that [**20] there was "insufficient factual or legal justification to show that [IC] should be judicially estopped ... from asserting ... contract claims of Coastal ... [greater than] $ 20,000"; and that there was insufficient proof that Coastal, IC, or Westinghouse participated in a fraud on the court or creditors with respect to listing assets on Coastal's schedules, the lift-stay stipulation, or lifting the stay.

On appeal, the district court summarily "agreed with the Bankruptcy Court's findings [, especially concerning inadvertence,] and [held] that judicial estoppel should not be applied".

It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative [*208] duty to disclose all assets, *including contingent and unliquidated claims*. 11 U.S.C. § 521(1) ("The debtor shall-(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs"). "The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action". ***Youngblood*** [**21] ***Group v. Lufkin Fed. Sav. & Loan Ass'n***, 932 F. Supp. 859, 867 (E.D. Tex. 1996). "'The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information ... prior to confirmation to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed'". ***Id.*** (brackets omitted; quoting ***Union Carbide Corp. v. Viskase Corp. (In re Envirodyne Indus., Inc.)***, 183 B.R. 812, 821 n.17 (Bankr. N.D. Ill. 1995)). "*Any claim with potential must be disclosed*, even if it is 'contingent, dependent, or conditional'". ***Id.*** (quoting ***Westland Oil Dev. Corp. v. MCorp Management Solutions, Inc.***, 157 B.R. 100, 103 (S.D. Tex. 1993)) (emphasis added).

Viewed against the backdrop of the bankruptcy system and the ends it seeks to achieve, the importance of this disclosure duty cannot be overemphasized. *See generally* ***Oneida Motor Freight, Inc. v. United Jersey Bank***, 848 F.2d 414 (3d Cir.) (discussing importance of disclosure to creditors and to bankruptcy court), *cert. denied*, 488 U.S. 967, 102 L. Ed. 2d 532, 109 S. Ct. 495 (1988). [**22]

> The rationale for ... decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that the *integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets*. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete.*

Rosenshein v. Kleban, 918 F. Supp. 98, 104 (S.D.N.Y. 1996) (emphasis added). [6]

6 *See also* ***Ryan***, 81 F.3d at 362 ("disclosure requirements are crucial to the effective functioning of the federal bankruptcy system"); ***Louden v. Federal Land Bank of Louisville (In re Louden)***, 106 B.R. 109, 112 (Bankr. E.D. Ky. 1989) ("without ... disclosure [required by 11 U.S.C. § 521], the basic system of marshalling of assets and the resulting distribution of proceeds to creditors would be an impossible task").

[**23] As Coastal's bankruptcy attorney admitted at the July 1993 bankruptcy court hearing, it is very important that a debtor's bankruptcy schedules and statement of affairs be as accurate as possible, because that is the initial information upon which all creditors rely. The significance of the undisclosed claims was underscored by the testimony of Westinghouse's counsel at that same hearing. When asked why the claims against Browning were not included with the assets described in the lift-stay stipulation, he testified that it was not intended to be an exhaustive list of Coastal's assets; that, in order to determine Coastal's assets, creditors should have looked instead at, *inter alia*, Coastal's schedules and statement of financial affairs. (Of course, such claims/assets were not there disclosed.)

Courts in numerous cases have precluded debtors or former debtors from pursuing claims about which the debtors had knowledge, but did not disclose, during the debtors' bankruptcy proceedings. *See, e.g.*, ***Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.***, 989 F.2d 570 [*209] (1st Cir.), *cert. denied*, 510 U.S. 931, 126 L. Ed. 2d 309, 114 S. Ct. 344 (1993); [**24] ***Oneida***, 848 F.2d 414. [7] It is along this line that Browning takes its stand. It maintains that the bankruptcy court applied an incorrect standard of law and, therefore, abused its discretion; that, rather than basing its decision on lack of knowledge *vel non*, the court improperly based it on self-serving claims of lack of intent to conceal. Browning maintains that "inadvertence" should preclude judicial estoppel only when the inconsistent positions result from a lack of knowledge. We need not agree entirely with Browning's contention, in order to conclude, as discussed below, that the bankruptcy court abused its discretion.

7 *See also* ***Chandler v. Samford University***, 35 F. Supp. 2d 861 (N.D. Ala. 1999); ***Youngblood Group***, 932 F. Supp. 859; ***Rosenshein***, 918 F. Supp. 98; ***Okan's Foods, Inc. v. Windsor Associates Ltd. Partnership (In re Okan's Foods, Inc.)***, 217 B.R. 739 (Bankr. E.D. Pa. 1998); ***Welsh v. Quabbin Timber, Inc.***, 199 B.R. 224 (D. Mass. 1996); ***Freedom Ford, Inc. v. Sun Bank & Trust Co. (Matter of Freedom Ford)***, 140 B.R. 585 (Bankr. M.D. Fla. 1992); ***State of Ohio, Dept. of Taxation v. H.R.P. Auto Center, Inc. (In re H.R.P. Auto Center, Inc.)***, 130 B.R. 247 (Bankr. N.D. Ohio 1991); ***Sure-Snap Corp. v. Bradford Nat'l Bank***, 128 B.R. 885 (D. Vt.), *aff'd*, 948 F.2d 869 (2d Cir. 1991); ***Pako Corp. v. Citytrust***, 109 B.R. 368 (D. Minn. 1989); ***Louden***, 106 B.R. 109; ***Hoffman v. First Nat'l Bank of Akron, IA (In re Hoffman)***, 99 B.R. 929 (N.D. Iowa 1989); ***Galerie Des Monnaies of Geneva v. Deutsche Bank, A.G. (In re Galerie Des Monnaies of Geneva, Ltd.)***, 55 B.R. 253 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986). *Cf.* ***Donaldson v. Bernstein***, 104 F.3d 547 (3d Cir. 1997) (debtors' principals judicially estopped from asserting that one of them had terminated relationship with debtor because debtor did not disclose alleged resignation prior to bankruptcy court's approval of plan of reorganization); ***Cullen Center Bank & Trust v. Hensley (Matter of Criswell)***, 102 F.3d 1411 (5th Cir. 1997) (Chapter 7 trustee judicially estopped from asserting that creditor was not transferee of oil and gas properties that debtor fraudulently conveyed to children, because trustee succeeded in preference action based on assertion that creditor's lien was a transfer); ***Eubanks v. F.D.I.C.***, 977 F.2d 166 (5th Cir. 1992) (res judicata effect of order confirming plan of reorganization barred debtors from asserting undisclosed claims); ***County Fuel Co., Inc. v. Equitable Bank Corp.***, 832 F.2d 290 (4th Cir. 1987) (debtor's failure to assert breach of contract counterclaim to proof of claim filed by creditor barred subsequent breach of contract action against creditor based on "principles of waiver closely related to those that, in the interests of repose and integrity, underlie res judicata"); ***United Virginia Bank/Seaboard Nat'l v. B.F. Saul Real Estate Investment Trust***, 641 F.2d 185 (4th Cir. 1981) (creditor judicially estopped from litigating issue based on earlier inconsistent position in bankruptcy proceedings).

[**25] 1.

Plaintiffs respond that the first judicial estoppel prong (inconsistent positions) is not satisfied, because Coastal fulfilled its duty to disclose its claims against Browning by initiating the adversary proceeding in April 1986, a week after filing its Chapter 11 petition. According to plaintiffs, the subsequent nondisclosure was inconsequential because, in the light of the adversary proceeding, everyone involved in the bankruptcy proceeding, including Browning, was aware of the claims.

a.

The record contradicts that assertion; Browning, Westinghouse, and Coastal's bankruptcy counsel all believed that, after Browning returned the inventory in May 1986, little remained of the adversary proceeding. Coastal's bankruptcy attorney testified at the July 1993 bankruptcy court hearing that the primary purpose of the adversary proceeding was to cause that inventory return. The attorney who represented Westinghouse in connection with lifting the stay testified similarly that Coastal's claims against Browning were not mentioned in the lift-stay stipulation, during the lift-stay hearing, in the notice of the auction, or at the auction because Westinghouse believed that the claims sought [**26] inventory turnover from Browning, which had already been accomplished; and that there was little left to be done in that adversary proceeding. Likewise, at a bankruptcy hearing in January 1994, Browning's attorney testified that inventory [*210] turnover was the essence of the adversary proceeding.

In the light of that consensus, it was particularly important for Duke (Coastal) to disclose his vastly different view: that the claims were worth millions. In sum, this silence led Browning, the other creditors, and the bankruptcy court to believe that Coastal's claims against Browning were resolved in May 1986, when it returned the inventory.

b.

Moreover, *Browning's knowledge of the claims*, or its non-reliance on the nondisclosure, even if supported by the record, are irrelevant. As discussed *supra*, unlike the well-known reliance element for other forms of estoppel, such as equitable estoppel, detrimental reliance by the party seeking *judicial estoppel* is *not* required. Again, the purpose of *judicial estoppel* is *not* to protect the litigants; it is to protect the integrity of the judicial system. [8]

8 Even if detrimental reliance were an element, there is evidence that Browning relied on the no-claims-existed representations in withdrawing its objection to lifting the stay and in not bidding at the auction on Coastal's intangible assets.

[**27] Accordingly, the inconsistent positions prong for judicial estoppel is satisfied. By omitting the claims from its schedules and stipulation, Coastal represented that none existed. Likewise, in scheduling its debt to Browning, Coastal did *not* specify that it was disputed, contingent, or subject to setoff. But in this proceeding, plaintiffs have asserted claims for $ 10 million against Browning for allegedly causing Coastal's bankruptcy and demise.

2.

Plaintiffs do not seriously dispute that the second prong for judicial estoppel (acceptance of Coastal's first position by the bankruptcy court) is satisfied. The stay was lifted based in part on the stipulation, which represented that Coastal's intangible assets were worth less than $ 20,000; and that its assets were inadequate to satisfy its debt to Westinghouse.

3.

Nevertheless, plaintiffs maintain that judicial estoppel is inapplicable because the nondisclosure was unintentional and inadvertent. On this record, plaintiffs' and the bankruptcy court's reliance on inadvertence to preclude judicial estoppel is misplaced. Therefore, the court abused its discretion.

Our review of the jurisprudence convinces us that, in considering [**28] judicial estoppel *for bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is "inadvertent" only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment. [9]

9 *See, e.g.*, ***Brassfield v. Jack McLendon Furniture, Inc.***, 953 F. Supp. 1424 (M.D. Ala. 1996) (in Chapter 7 case, where claims accrued after filing petition, and where debtor was *not* aware of claims during bankruptcy, debtor not judicially estopped from asserting unscheduled claims); ***Dawson v. J. G. Wentworth & Co., Inc.***, 946 F. Supp. 394 (E.D. Pa. 1996) (although debtor disclosed claim in amended bankruptcy schedules, fact issue regarding debtors' good or bad faith in not disclosing claims in original bankruptcy schedules precluded summary judgment based on judicial estoppel); ***Richardson v. United Parcel Serv.***, 195 B.R. 737 (E.D. Mo. 1996) (judicial estoppel inapplicable for undisclosed claim where debtor's bankruptcy case was still pending, assets had not been distributed, and no plan had been confirmed); ***In re Envirodyne Industries, Inc.***, 183 B.R. 812 (where retention of jurisdiction in plan of reorganization put creditors on notice as to possibility of such actions, and debtor's undisclosed counterclaim did *not* assert position contrary to listing of creditor's claim as undisputed, judicial estoppel did not bar debtor from pursuing counterclaim and setoff request); ***Elliott v. ITT Corp.***, 150 B.R. 36 (N.D. Ill. 1992) (where debtor was unaware that claim against creditor existed, and amended schedule after discovery of potential claims, judicial estoppel inapplicable); ***Neptune World Wide Moving, Inc. v. Schneider Moving & Storage Co. (In re Neptune World Wide Moving, Inc.)***, 111 B.R. 457 (Bankr. S.D.N.Y. 1990) (fact issue regarding debtor's contention that defendants concealed and altered documents which prevented debtor from discovering and disclosing preferential or fraudulent transfer claims in disclosure statement precludes dismissal based on judicial estoppel).

[**29] [*211] Two cases from the Third Circuit aptly illustrate the critical distinction between nondisclosures based on a lack of knowledge, and those where, as here, the debtor fails to satisfy its disclosure duty despite knowledge of the undisclosed facts. In ***Oneida***, 848 F.2d 414, judicial estoppel barred a former Chapter 11 debtor from prosecuting against a bank claims not disclosed during the bankruptcy proceedings. The excuse for nondisclosure was *not* lack of knowledge; instead, that the bankruptcy case was never in a procedural posture for the claims to be properly asserted. ***Id.*** at 418. Although the court stopped short of holding that the nondisclosure was equivalent to taking a position that the claims did not exist, it concluded that the debtor's acknowledgment of its debt to the bank, without any indication that the debt was disputed or subject to setoff (as is the situation here), constituted a position inconsistent with its later action against the bank. ***Id.*** at 419.

On the other hand, in ***Ryan***, 81 F.3d 355, the Third Circuit concluded that a Chapter 11 debtor's earlier nondisclosure would not judicially estop the debtor from pursuing the claims [**30] outside of bankruptcy, because there was no evidence that the debtor acted in bad faith. ***Id.*** at 362. The debtor, a builder, asserted claims against the manufacturers and suppliers of an allegedly defective product; but it had not listed any potential claims regarding the product in its bankruptcy schedules.

The court distinguished ***Oneida*** on the ground that the debtor there not only failed to disclose its potential claim as a contingent asset, but also scheduled its debt as a liability, without disclosing an offset possibility. *Id.* at 363. The court stated that the ***Oneida*** debtor had knowledge of its claim when it filed for bankruptcy because the "gravamen of [its] case against the bank was that the bank's actions were responsible for forcing [the debtor] into bankruptcy", *id.*; and noted that the ***Oneida*** debtor had a motive to conceal the claim because, had the bank known that the debtor would seek restitution of the amount paid to the bank under the plan, the bank "might well have voted against approval of the plan". *Id.* The ***Ryan*** court concluded that, in ***Oneida***, it was "this combination of [**31] knowledge of the claim and motive for concealment in the face of an affirmative duty to disclose [that] gave rise to an inference of intent sufficient to satisfy the [bad faith] requirements of judicial estoppel". *Id.* at 363.

In contrast, the court stated that there was no basis for inferring that the ***Ryan*** debtor "deliberately asserted inconsistent positions in order to gain advantage", *id.* at 363, because there was "no evidence that the nondisclosure played any role in the confirmation of the plan or that disclosure of the potential claims would have led to a different result", *id.*; and the debtor's failure to list claims against the manufacturers and suppliers as contingent assets was offset by its failure to list, as contingent liabilities, claims asserted against the debtor by homeowners for the defective product. *Id.* The court also noted that the debtor would derive no appreciable benefit from the nondisclosure, because creditors would receive 91 percent of any recovery on the claims, *id.*; and that the debtor's actions subsequent to filing its schedules, including obtaining authorization from the bankruptcy court [**32] to pursue the claims, were inconsistent with an intent to deliberately conceal them. *Id.* at 364. The court concluded that intent to mislead or deceive could not be inferred from the mere fact of nondisclosure. *Id.* at 364-65.

In ***Okan's Foods, Inc. v. Windsor Associates Ltd. Partnership (In re Okan's Foods, Inc.)***, 217 B.R. 739 (Bankr. E.D. Pa. 1998), the bankruptcy court held that the [*212] "bad faith" element mandated by ***Ryan*** was satisfied by "statements or conduct of the debtor evincing a reckless disregard for the truth". *Id.* at 755. There, a Chapter 11 debtor, following plan confirmation, filed an adversary complaint against its creditor-landlord, asserting claims under 42 U.S.C. § 1983, and alleging that the creditor's actions caused its bankruptcy. The court found that, because "the undisclosed claim involved allegations that a particular creditor's conduct precipitated the filing of the bankruptcy case and that substantial damage to its business occurred as a result ..., all of the facts underlying the claims were available and known to the debtor well before confirmation", *id.* at 756, and inferred that the debtor's motive [**33] for the pre-confirmation nondisclosure was "to preserve for its own uses, to the exclusion of its creditors, any recovery it might obtain upon a successful prosecution of such claim". *Id.*

Coastal's claimed "inadvertence" is not the type that precludes judicial estoppel against plaintiffs, as Coastal's successors, from asserting in the instant litigation the previously nondisclosed claims; Coastal both knew of the facts giving rise to its inconsistent positions, *and* had a motive to conceal the claims.

It is undisputed that Duke, who, as Coastal's CEO, signed Coastal's schedules, then believed that Coastal had claims for $ 10 million against Browning. And, as found by the bankruptcy court, he continued to maintain that belief when he authorized Coastal's attorney to execute the lift-stay stipulation. At the July 1993 bankruptcy hearing, when asked why he did not disclose those claims on Coastal's schedules, Duke responded that "we pretty much relied on our attorneys. We had no experience in filling those out, and we provided them the information, and maybe later on during the process, ... a couple of months down the road we may have filled them out ourselves.... We went [**34] to [a] library and tried to find books on how to fill these forms out...." He testified further: "We had never done these kind of statements before, and we depended upon our legal counsel ... about these types of things, and he had kind of a check list for us.... We depended upon [him] to give us the guidance on what to put...." Finally, Duke testified that he did not know what "contingent" and "unliquidated" claims meant under bankruptcy law; that Coastal's counsel told him "what to put" on the schedules; that it was counsel's conclusion that "there was no value" in the claims against Browning; and that, if there was an error, it was "just an oversight".

But, at that July 1993 hearing, Coastal's bankruptcy attorney testified that the adversary proceeding against Browning was a contingent or unliquidated claim that should have been included on Coastal's schedules; and conceded that Coastal's debt to Browning "probably" should have been listed as being disputed. Although the attorney testified that it was his firm's policy to discuss schedules with clients, he did not recall his specific involvement in preparing the schedules, could *not* recall any discussions with Young or [**35] Duke about the claims against Browning, and could *not* testify as to why the adversary proceeding was *not* listed as a contingent or unliquidated claim.

Duke's claimed lack of awareness of Coastal's statutory disclosure duty for its claims against Browning is not relevant. *See* ***Chandler v. Samford University***, 35 F. Supp. 2d 861, 865 (N.D. Ala. 1999) ("Research reveals no case in which a court accepted such an excuse for a party's failure to comply with the requirement of full disclosure"). In any event, no one testified that Coastal's bankruptcy attorney advised Coastal *not* to disclose the claims.

Moreover, Coastal had a motive for concealing them. Had those claims, believed to be worth $ 10 million (more than enough to satisfy Coastal's debt to Westinghouse) been disclosed, Coastal's unsecured creditors might have opposed lifting the stay, and the bankruptcy court might have [*213] reached a different decision in that regard. Or, even had the stay been lifted, creditors, including Browning, might have chosen to bid more at the foreclosure auction for Coastal's assets. Browning's representative at the auction testified that, had Browning been aware that Coastal's claims [**36] against it were then being sold, he "strongly suspected" that Browning would have authorized him to bid on them.

Coastal avoided paying its debts by filing bankruptcy. Yet IC, formed by Coastal's CEO, purchased Coastal's assets, including the undisclosed $ 10 million claim against Browning, for only $ 1.24 million, and continued to sell Browning's former inventory at discounted prices, then obtained a net judgment of $ 3.6 million against Browning on the undisclosed claims. For facts similar to those at hand, the bankruptcy court's interpretation of the "inadvertence" exception for judicial estoppel would encourage bankruptcy debtors to conceal claims, write off debts, purchase debtor assets at bargain prices, and then sue on undisclosed claims and possibly recover windfalls. This, of course, would be to the detriment of creditors who decided not to bid on the debtor's assets at a foreclosure sale because they lacked knowledge about the existence or value of the undisclosed claims.

Needless to say, judicial estoppel is intended to prevent just such a process. As the First Circuit aptly stated in ***Payless***:

> The basic principle of bankruptcy is to obtain a discharge [**37] from one's creditors in return for all one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh. Assuming there is validity in [debtor's] present suit, it has a better plan. Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively. [Debtor], having obtained judicial relief on the representation that no claims existed, can not now resurrect them and obtain relief on the opposite basis.

989 F.2d at 571.

4.

Finally, plaintiffs maintain that judicial estoppel would be inequitable because Browning also took inconsistent positions on issues related to its defense (regarding ownership of the claims and whether they were foreclosed on by Westinghouse). We disagree. Again, the purpose of judicial estoppel is to protect the integrity of courts, not to punish adversaries or to protect litigants.

B.

As noted, the only claim not barred by judicial estoppel is that for tortious interference. Plaintiffs claimed that, around the start of 1986, and but for Browning's interference, Walter Helms would have [**38] purchased Coastal for $ 10 million. Helms testified that Browning's president, Kooyman, told him (Helms) that he had heard Helms was interested in purchasing Coastal; Helms confirmed that he intended to do so; and Kooyman told Helms that "he couldn't divulge certain things that were going on, but it probably would be a good idea if [Helms] held up a little bit".

Browning presents, *inter alia*, a meritorious limitations bar.

1.

Although Coastal raised tortious interference claims against Browning in its original complaint (filed in 1986), and IC did likewise in several of its amended complaints, those claims were premised on Browning's failure to return inventory and its impact on Coastal's relationships with its customers and secured lender (Westinghouse). It was *not* until late December 1993, over seven years after the adversary proceeding was filed, that IC moved for leave to file a fifth amended complaint which, *for the first time*, claimed tortious interference based on the alleged Helms-purchase. [*214] That amended complaint was not filed until almost two years later, in 1995. And, plaintiffs subsequently restricted their tortious interference claim to the Helms-purchase.

[**39] Under Texas law, a two-year limitations period applies to tortious interference claims, TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a); ***First Nat'l Bank of Eagle Pass v. Levine***, 721 S.W.2d 287, 289 (Tex. 1986); and, "for the purposes of application of the statute of limitations, a cause of action generally accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy.... Put another way, a cause of action can generally be said to accrue when the wrongful act effects an injury". ***Murray v. San***

Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990) (internal quotation marks and citation omitted); *see also* ***Computer Associates Int'l, Inc. v. Altai, Inc.***, 918 S.W.2d 453, 458 (Tex. 1996) ("The traditional rule in Texas is that a cause of action accrues and the two-year limitations period begins to run as soon as the owner suffers some injury, regardless of when the injury becomes discoverable"). On the other hand, "the discovery rule exception defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action". ***Id.*** [**40] at 455.

But, the Texas Supreme Court has stated that "the discovery rule, in application, proves to be a very limited exception to statutes of limitations". ***Id.*** at 455 (internal quotation marks and citation omitted); *see also* ***S.V. v. R.V.***, 933 S.W.2d 1, 25 (Tex. 1996) ("exceptions to the legal injury rule should be few and narrowly drawn"). "Generally, application [of the discovery rule] has been permitted in those cases where the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable". ***Altai***, 918 S.W.2d at 456 (internal quotation marks and citation omitted).

In seeking judgment as a matter of law, Browning asserted that the interference claim was time-barred. Plaintiffs had to prove applicability of the discovery rule: first, that tortious interference claims are inherently undiscoverable; and second, that their claim is objectively verifiable. *See* ***Woods v. William M. Mercer, Inc.***, 769 S.W.2d 515, 518 (Tex. 1988).

a.

Browning contends that the claim is not inherently undiscoverable because the alleged injury is not, by its nature, unlikely to be discovered within the limitations [**41] period. Along this line, Browning maintains that Coastal became aware of its injury when the alleged sale did not materialize; and that, by simply asking Helms, the putative purchaser, Coastal could have discovered the alleged interference.

Plaintiffs counter that the claim was inherently undiscoverable because of the difficulty of learning about secret communications between third parties. They point out that Young, Coastal's former president and chairman, testified that he asked Helms why he wanted to delay purchasing Coastal, and that Helms refused to explain until his January 1993 deposition. Duke testified similarly that, until January 1993, Helms never mentioned why he did not complete the purchase.

"The requirement of inherent undiscoverability recognizes that the discovery rule exception should be permitted only in circumstances where it is difficult for the injured party to learn of the negligent act or omission". ***Altai***, 918 S.W.2d at 456 (internal quotation marks and citation omitted). "Inherently undiscoverable encompasses the requirement that the existence of the injury is not ordinarily discoverable, even though due diligence has been used". ***Id.*** [**42] The Texas Supreme Court has stated that "the common thread in [the 'inherently undiscoverable'] cases is that when the wrong and injury were unknown to the plaintiff because of their very nature and not because of any [*215] fault of the plaintiff, accrual of the cause of action was delayed". ***S.V.***, 933 S.W.2d at 7.

"To be 'inherently undiscoverable,' an injury need not be absolutely impossible to discover, else suit would never be filed and the question whether to apply the discovery rule would never arise." ***Id.*** "Nor does 'inherently undiscoverable' mean merely that a particular plaintiff did not discover his injury within the prescribed period of limitations; discovery of a particular injury is dependent not solely on the nature of the injury but on the circumstances in which it occurred and plaintiff's diligence as well". ***Id.*** "An injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence". ***Id.***

Helms was listed in October 1989 as an expert witness for plaintiffs, and so testified. There was also evidence that he was a director of IC's parent, Overline Corporation; [**43] that he had been paid $ 50,000 annually as a consultant for Overline; that he had owned ten percent of its stock; and that he was a creditor of IC. Under these circumstances, Helms' failure until his deposition in January 1993 to inform plaintiffs of Browning's alleged interference is inexplicable.

We doubt that tortious interference is the type of conduct that, *by its nature*, is unlikely, despite due diligence, to be discovered within the limitations period. In any event, it is not necessary for us to decide that question. The discovery rule is inapplicable because, as discussed below, the claim is not objectively verifiable.

b.

Browning asserts that the claim is not objectively verifiable because there is no objective or documentary evidence of either Helms' alleged offer or Browning's alleged interference. Plaintiffs respond, based on Helms' eyewitness account, that the claim is objectively verifiable.

The Texas Supreme Court has stated that "the bar of limitations cannot be lowered for no other reason than a swearing match between parties over facts and between experts over opinions". ***S.V.***, 933 S.W.2d at 15. The requirement of objective verifiability requires [**44] physical or other evidence, such as an objective eyewitness account, to corroborate the existence of the claim.

See ***S.V.***, 933 S.W.2d at 15. "Objectively verifiable evidence is the key factor for determining the discovery rule's applicability." ***Askanase v. Fatjo***, 130 F.3d 657, 668 (5th Cir. 1997).

There is no documentary evidence of Helms' proposed purchase or Kooyman's alleged comment regarding it. The only evidence concerning Helms' alleged agreement to purchase Coastal is his and Young's testimony; the only evidence concerning interference is Helms' testimony. Kooyman, Browning's president, did *not* testify at trial; his testimony was presented by deposition. And, he was *not* deposed about his alleged interference -- his alleged comments to Helms.

As stated, Helms testified as a paid expert witness for plaintiffs, was a creditor of IC, and was a consultant, part owner, and director of IC's parent. He also had other close ties to the Coastal and IC principals: at the time of Helms' testimony, Young was running a company for Helms; and both Young and Duke had served as expert witnesses for Helms in prior litigation involving one of Helms' companies.

2.

[**45] Because the discovery rule does not apply to the interference claim, it is time-barred unless it relates back to the complaints filed within the limitations period. Rule 15(c) of the Federal Rules of Civil Procedure provides, in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when
>
> [*216] (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading....

FED. R. CIV. P. 15(c).

"Under Rule 15(c), an amendment to a complaint will relate back to the date of the original complaint if the claim asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading". ***F.D.I.C. v. Conner***, 20 F.3d 1376, 1385 (5th Cir. 1994) (internal quotation marks and citation omitted).

> The theory that animates this rule is that once litigation involving particular conduct or a given transaction or occurrence has been [**46] instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading. Permitting such an augmentation or rectification of claims that have been asserted before the limitations period has run does not offend the purpose of a statute of limitations, which is simply to prevent the assertion of stale claims.

Id. (internal quotation marks and citation omitted).

Browning notes that the tortious interference claim is based on a different transaction than the earlier claims, which are based on Browning's failure to return inventory to Coastal. Plaintiffs counter that the relation-back doctrine applies because Browning had ample notice, after more than seven years of litigation, that plaintiffs were suing on all of Browning's acts that caused Coastal's demise; and that Browning's proposed-purchase interference was merely part of its broader plan to destroy Coastal.

We conclude that the claim does not arise out of the same conduct, transaction, or occurrences presented in the timely-filed complaints. [**47] As the district court stated in its post-verdict order:

> All of the claims asserted by plaintiffs revolve around two sets of occurrences. The tortious interference ... claim stems from an attempted sale of Coastal Plains to a third party.... The remaining claims involve the failure of Browning to return inventory to Coastal Plains.

And, in awarding attorney's fees, the district court stated that "the tortious interference claim is not factually interrelated to the other claims as it arose from a separate transaction".

Moreover, plaintiffs' contention that their tortious interference claim is based on the same transaction or occurrence as their other claims is not consistent with positions they have taken with respect to attorney's fees and Browning's right to setoff. In seeking attorney's fees, one of plaintiffs' attorneys stated by affidavit: *"with the exception of the claim involving tortious interference*, all of the causes of action pled in this case were dependent upon the same set of facts or circumstances". (Emphasis added.) In their appellate brief here, plaintiffs contend that Browning's tortious interference caused a separate injury to Coastal; and assert [**48] that, if we affirm the judgment solely on the basis of the interference claim, Browning will not be entitled to a setoff because "tortious interference is not sufficiently connected with Browning's claim to permit an offset".

III.

For the foregoing reasons, the judgment is **REVERSED**, and judgment is **RENDERED** in favor of Browning.

REVERSED and RENDERED

LEXSEE 453 F.3D 446

TRACI CANNON-STOKES, Plaintiff-Appellant, v. JOHN E. POTTER, Postmaster General of the United States Postal Service, Defendant-Appellee.

No. 05-4605

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

453 F.3d 446; 2006 U.S. App. LEXIS 16757; 18 Am. Disabilities Cas. (BNA) 201; Bankr. L. Rep. (CCH) P80,644; 12 Accom. Disabilities Dec. (CCH) P12-157

June 19, 2006, Submitted
July 5, 2006, Decided

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by Cannon-Stokes v. Potter, 2006 U.S. App. LEXIS 19410 (7th Cir. Ill., July 31, 2006)
US Supreme Court certiorari denied by Cannon-Stokes v. Potter, 2006 U.S. LEXIS 9525 (U.S., Dec. 11, 2006)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 03 C 1942. Joan Humphrey Lefkow, Judge.
Cannon-Stokes v. Potter, 2005 U.S. Dist. LEXIS 26751 (N.D. Ill., Nov. 3, 2005)

COUNSEL: TRACI CANNON-STOKES, Plaintiff - Appellant, Pro se, Chicago, IL.

For JOHN E. POTTER, Postmaster General, Defendant - Appellee: Samuel B. Cole, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL USA.

JUDGES: Before COFFEY, EASTERBROOK, and SYKES, Circuit Judges.

OPINION BY: EASTERBROOK

OPINION

[*447] EASTERBROOK, *Circuit Judge*. Traci Cannon-Stokes contends that the Postal Service, which hired her as a letter carrier, violated the Rehabilitation Act, 29 U.S.C. § 791, by not accommodating her mental aversion to making residential deliveries and by retaliating against her for asserting her statutory rights. At the same time as Cannon-Stokes was pursuing an administrative claim for $ 300,000 from the Postal Service, she filed a Chapter 7 bankruptcy petition asserting that she had no assets; her petition expressly denied that she had any valuable legal claims ("contingent and unliquidated claims of every nature", the schedule calls them, leaving no room for quibbles). The bankruptcy court believed that assertion and discharged all [**2] of her approximately $ 98,000 in unsecured debts.

After the bankruptcy was over, Cannon-Stokes filed this suit. Naturally enough, the Postal Service contended that judicial estoppel forecloses the action. Cannon-Stokes had represented that she had no claim against the Postal Service (or anyone else); that representation had prevailed; she had obtained a valuable benefit in the discharge of her debts. Now she wants to assert the opposite in order to win a second time. That satisfies the requirements of judicial estoppel. See, e.g., *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001); *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1547-48 [*448] (7th Cir. 1990). Cannon-Stokes blamed the false statement on her bankruptcy lawyer; accepting this explanation, the district court declined to dismiss the proceeding but later granted summary judgment to the Postal Service on the merits - which on appeal defends its judgment by relying, once again, on judicial estoppel.

All six appellate courts that have considered this question hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or [**3] other legal claim, cannot realize on that concealed asset after the bankruptcy ends. See *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570 (1st Cir. 1993); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314 (3d Cir. 2003); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598 (5th Cir. 2005); *United States ex rel. Gebert v. Transport Administrative Services*, 260 F.3d 909, 917-19 (8th Cir. 2001); *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778 (9th Cir. 2001); *Barger v. Cartersville*, 348 F.3d 1289, 1293-97 (11th Cir. 2003). We reserved that question in *Biesek v. Soo Line R.R.*, 440 F.3d 410 (7th Cir. 2006), while holding that judicial estoppel has aproviso: bankruptcy fraud designed to hide an asset from creditors does not prevent the creditors themselves from realizing on the claim after its discovery.

Judicial estoppel is an equitable doctrine, and it is not equitable to employ it to injure creditors who are themselves victims of the debtor's deceit. Moreover, as a technical matter the estate in bankruptcy, [**4] not the debtor, owns all pre-bankruptcy claims, and unless the estate itself engages in contradictory litigation tactics the elements of judicial estoppel are not satisfied. But if the estate (through the trustee) abandons the claim, then the creditors no longer have an interest, and with the claim in the debtor's hands the possibility of judicial estoppel comes to the fore. That is what has happened here: the trustee abandoned any interest in this litigation, so the creditors are out of the picture and we must decide whether Cannon-Stokes may pursue the claim for her personal benefit.

The answer is no, as the other circuits (cited above) have concluded. "By making [litigants] choose one position irrevocably, the doctrine of judicial estoppel raises the cost of lying." *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993). A doctrine that induces debtors to be truthful in their bankruptcy filings will assist creditors in the long run (though it will do them no good in the particular case) - and it will assist most debtors too, for the few debtors who scam their creditors drive up interest rates and injure the more numerous honest borrowers. Judicial [**5] estoppel is designed to "prevent the perversion of the judicial process," *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990), a fair description of the result if we were to let Cannon-Stokes conceal, for her personal benefit, an asset that by her reckoning is three times the value of the debts she had discharged. It is impossible to believe that such a sizeable claim - one central to her daily activities at work - could have been overlooked when Cannon-Stokes was filling in the bankruptcy schedules. And if Cannon-Stokes were really making an honest attempt to pay her debts, then as soon as she realized that it *had* been omitted, she would have filed amended schedules and moved to reopen the bankruptcy, so that the creditors could benefit from any recovery. Cannon-Stokes never did that; she wants every penny of the judgment for herself.

In the district court Cannon-Stokes filed an affidavit asserting that her false statement on the bankruptcy schedules was the result of good-faith reliance on legal advice. [*449] She maintained that in 2000 she told Erik Martin, her bankruptcy lawyer, about her administrative claim under the Rehabilitation Act and that he instructed her [**6] to omit the information. Martin certainly was not above shady dealings. In 2001 he was indicted on multiple counts of perjury committed in the course of his bankruptcy practice, and in 2003 he resolved that proceeding by pleading guilty to contempt of court. Martin is not currently authorized to practice law in either state or federal court, and a bankruptcy court recently found him complicit in tax fraud. See *Claxton v. United States*, 335 B.R. 680 (Bankr. N.D.Ill. 2006).

Yet bad legal advice does not relieve the client of the consequences of her own acts. A lawyer is the client's agent, and the client is bound by the consequences of advice that the client chooses to follow. Cannon-Stokes might as well say that she is free to ignore any contract that a lawyer advised her to sign with her fingers crossed behind her back. The lawyer's role as agent is why the Supreme Court held in *United States v. Boyle*, 469 U.S. 241, 105 S. Ct. 687, 83 L. Ed. 2d 622 (1985), that a taxpayer could not avoid paying interest and penalties occasioned by his lawyer's mishandling of the return. Just so here: a debtor in bankruptcy is bound by her own representations, no matter why they were [**7] made, at least until the debtor moves to amend the disclosures and pay the creditors their due (a step that, to repeat, Cannon-Stokes has not taken). The remedy for bad legal advice lies in malpractice litigation against the offending lawyer.

What is more, Cannon-Stokeshas repudiated the core of her affidavit. Asked at her deposition about her dealings with Martin, she replied that she could not remember meeting or talking with him. Maybe with other lawyers in his office, Cannon-Stokes said, but not Martin. Yet her affidavit maintained that Martin personally had told her not to list the Rehabilitation Act claim on her bankruptcy schedules.

Whether the bankruptcy fraud was Martin's suggestion, some other lawyer's, or Cannon-Stokes's own bright idea does not matter in the end. The signature on the bankruptcy schedule is hers. The representation she made is false; she obtained the benefit of a discharge; she has never tried to make the creditors whole; now she wants to contradict herself in order to win a second case. Judicial estoppel blocks any attempt to realize on this claim for her personal benefit.

AFFIRMED

LEXSEE 217 B.R. 739

In re: OKAN'S FOODS, INC., Debtor; OKAN'S FOODS, INC., Plaintiff v. WINDSOR ASSOCIATES LIMITED PARTNERSHIP, EDWARD S. BROWN, BREAN CORP., and OAKWOOD CORPORATE HOUSING, INC., Defendants; OKAN'S FOODS, INC., Plaintiff v. R & B DEVELOPMENT CO., d/b/a R & B APARTMENT MGT. CO., d/b/a R & B REALTY GROUP, d/b/a OAKWOOD CORPORATE HOUSING, INC., d/b/a OAKWOOD MGT. CO., Defendants

Chapter 11, Bankruptcy No. 95-10044SR, Adv. Proc. No. 97-029, Adv. Proc. No. 97-687

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

217 B.R. 739; 1998 Bankr. LEXIS 230

March 6, 1998, Decided

DISPOSITION: [**1] Defendants' cross motion granted, and summary judgment entered in favor of the Defendants and against the Debtor on Count I of the Complaint; Debtor's motion denied; Adv. Proc. No. 97-687 dismissed sua sponte.

COUNSEL: For Okan's Foods, Inc., Debtor: LEWIS H. GOLD, Philadelphia, PA.

JUDGES: By: Stephen Raslavich, United States Bankruptcy Judge.

OPINION BY: Stephen Raslavich

OPINION

[*742] **OPINION**

By: Stephen Raslavich, United States Bankruptcy Judge.

Introduction:

Before the Court is a motion for partial summary judgment filed by debtor/plaintiff Okan's Foods, Inc., d/b/a the Peacock on the Parkway (the "Debtor"). By means of the instant motion the Debtor seeks judgment in its favor on Count I of the Complaint which underlies adversary proceeding 97-029. Also before the Court is a cross motion for summary judgment filed by the defendants in the foregoing adversary proceeding -- Windsor Associates Limited Partnership ("Windsor, LP"), Edward S. Brown ("Brown"), Brean Corp. ("Brean"), and Oakwood Corporate Housing, Inc. ("Oakwood") (collectively the "Defendants") -- who request judgment in their favor on Count I. The Court held a hearing on the motions on December 8, 1997, after the conclusion [**2] of which, both matters were taken under advisement. The motions were submitted for final decision on January 5, 1998, after the Court received post hearing memoranda of law from the parties. For the reasons which are more fully stated below, the Debtor's motion is denied and the Defendants' cross motion is granted. Summary judgment, therefore, will be entered in favor of the Defendants and against the Debtor on Count I of the Complaint.

[*743] **JURISDICTIONAL STATEMENT**

The Court has jurisdiction over the parties and subject matter of the instant core proceeding pursuant to 28 U.S.C. § 1334; 28 U.S.C. § 157(a), § 157(b)(1) and § 157(b)(2)(A) and (O).

BACKGROUND

The Debtor is the owner of a restaurant known as the Peacock on the Parkway, located on the first floor and mezzanine level of the Oakwood Apartments at The Windsor (the "Windsor"), 1700 Benjamin Franklin Parkway, Philadelphia Pennsylvania. Windsor, LP is the record owner of the Windsor real estate. On or about November 22, 1993 the Debtor and Windsor, LP entered into a Retail Lease (the "Lease") for the commercial space at the Windsor which the Debtor's restaurant occupies (the "Premises"). [1] The Debtor was represented [**3] by legal counsel in the foregoing transaction.

1 The Lease was amended by an addendum dated November 22, 1993, and by a letter dated August 10, 1994. *See* Debtor's Motion for Partial Summary Judgment, Exhibit 1-A; Defendants' Response and Cross Motion for Summary Judgment ("Defendants' Response and Cross Motion"), Exhibit 5.

The Premises was formerly occupied by Continental Bank and was not outfitted for use as a restaurant at the time that the Lease was signed. While it is not disputed that the Debtor performed work on the Premises to convert it from its former use as a bank and to make it ready for use as a restaurant, the amount of the Debtor's expenditures for such work is contested by Windsor. The actual amount of the Debtor's expenditures, however, is not material to the matters presently before the Court.

The Debtor's restaurant opened for business in August, 1994. Although the restaurant's success prior to the filing date of the Debtor's bankruptcy petition constitutes a matter of dispute between [**4] the parties, *see* Amended Answer to Complaint, PP14 and 16; Defendants' Response and Cross Motion, PP6 and 7, it is not disputed that as of the petition date the Debtor was two months behind on its rent payments under the Lease, and four months behind on its obligation to pay both use and occupancy taxes and certain utilities bills. *See* Defendants' Response and Cross Motion, Exhibits 4 and 11, at P7. As will be discussed *infra*, the relative success or failure of the Debtor's business prepetition, as well as the actual amount of the Debtor's prepetition payment arrears under the Lease, are not material to the matters *sub judice*.

Of particular relevance to the instant matters are the uncontested material facts which follow. By letter dated December 20, 1994, Windsor notified the Debtor that it was in default under the Lease for failing to pay both rent for November and December 1994 ($ 8,075.84), and use and occupancy taxes from July 1994 through December 1994 ($ 701.40). The letter also informed the Debtor that Windsor, LP intended to pursue legal remedies against the Debtor, including confession of judgment and execution, if payment in full of the foregoing overdue [**5] amounts was not made within three days of the date of the letter. *See* Defendants' Response and Cross Motion, Exhibit 15. On December 27, 1994, Windsor, LP confessed judgment against the Debtor for: 1) the liquidated amount of $ 198,261.87; and 2) possession of the Premises. The money judgment Windsor, LP confessed against the Debtor consisted of: $ 8,075.84 for outstanding rent for November and December 1994, and unpaid use and occupancy taxes for the period July through December 1994; $ 403.79 for attorneys' commission; and $ 189,782.24 for accelerated rent due under the Lease for the period January, 1995 through November 30, 1998. *See* Debtor's Motion for Partial Summary Judgment, Exhibit 1-B. The Defendants admit that Brown signed the affidavits that supported entry of the foregoing judgments by confession. [2] *See* Amended Answer, P16.

2 Whether Brown is the general partner of Windsor, LP, as the Debtor averred in PP3 and 16 of the Complaint, or rather, that Brown is the managing partner of Windsor, LP's general partner, Brown Windsor Associates, as the Defendants asserted in their Amended Answer at P3, is not material to the resolution of the motions presently before the Court.

[**6] [*744] Also on December 27, 1994, Windsor, LP caused to be issued and delivered to the Philadelphia County Sheriff: 1) a writ of execution to levy on the Debtor's personal property at the leased premises and to attach, *inter alia*, all of the Debtor's bank accounts at CoreStates Bank; and 2) a writ of possession authorizing the Sheriff to seize possession of the leased Premises. On December 29, 1994, the Sheriff served the writ of execution on CoreStates Bank. Thereafter, on January 3, 1995, CoreStates Bank notified the Debtor that it had been served with a writ of execution and interrogatories in aid of attachment, and that the Bank had placed a total restraint on the Debtor's checking accounts -- account numbers 00200-07823, 00200-34646 and 00200-34654. The Bank also informed the Debtor that as a result of the execution it had withdrawn $ 1,064.06 from the Debtor's account and applied those funds against the Debtor's outstanding loan balance with the Bank. On December 30, 1994, the Sheriff served the writ of execution upon the Debtor and levied upon certain contents of the leased Premises. *See* Debtor's Motion for Partial Summary Judgment, Exhibit 1-G. The writ of possession was [**7] also served on the Debtor on December 30, 1994. *See id.*, at Exhibit 2, pp. 68-71 and attachments 4, 4A and 6A. Apart from the contents of its letter to the Debtor dated December 20, 1994 (notice of default under the Lease and of Windsor, LP's intent to pursue legal remedies, including confession of judgment and execution), Windsor, LP did not provide the Debtor with notice prior to the issuance of any of the foregoing execution. Windsor, LP posits, however, that the Debtor waived such notice pursuant to the terms of paragraph fourteen of the Lease. [3]

3 Paragraph fourteen of the Lease (captioned *Default*) states, in pertinent part:

> (h) In the event of any default occurrence by which Landlord shall have the rights and remedies specified in this Section 14:

(i) Tenant hereby authorized [sic] and empowers any prothonotary or attorney of any court of record to appear for Tenant and to confess judgment against Tenant (whether by Complaint to Confess Judgment or otherwise) in favor of Landlord and for any amount due to Landlord hereunder (including and without limitation the Accelerated Rent Component), together with interest and costs and an attorney's commission of five percent (5%) of the amount due;

(ii) For the purposes of obtaining possession of the Demised Premises, Tenant hereby authorizes and empowers and [sic] prothonotary or attorney of any court of record to appear for Tenant and to file in any court an agreement for entering an amicable action and judgment in ejectment for recovery of possession, and/or to confess judgment for possession against Tenant and those claiming by, through or under Tenant in favor of Landlord by Complaint to Confess judgment [sic] or otherwise, and Tenant agrees that upon such entry or judgment a writ of possession for the Demised Premises may forthwith issue; and

(iii) The authority herein granted to confess judgment for money or possession shall not be exhausted by one exercise thereof, but judgment may be confessed as aforesaid from time to time as often as there shall be default or breach by Tenant hereunder, and such power may be exercised after the expiration of the term hereof as well as during the original term and any extensions or renewals thereof.

(i) Tenant hereby waives all errors and defects of a procedural nature in any proceedings brought against it by Landlord under the Lease. Tenant further waives the right to any notices to quit as may be specified in the Landlord and Tenant Act of Pennsylvania as amended, and agrees that five (5) days notice shall be sufficient in any case where a longer period may be statutorily specified.

[**8] The Debtor filed a petition for relief under Chapter 11 of the United States Bankruptcy Code (the "Code"), 11 U.S.C. §§ 101-1330, on January 4, 1995. The automatic stay imposed by Code § 362(a) upon the filing of the petition prevented Windsor, LP from completing execution on its judgments. *See, e.g.*, 42 Pa.R.Civ.P. 2958 (rescinded April 1, 1996, effective July 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20

F.3d 1250, 1263 (3d Cir. 1994) (absent a discretionary stay of execution, a plaintiff executing on a judgment may seize property that has been attached twenty days after the date the prothonotary originally mailed notice of entry of the confessed judgment to the judgment debtor). Five days later (on January 9, 1995), the ink on the petition barely dry, Windsor, LP, filed a motion captioned "Motion to Compel Surrender of the Premises, Rejection of the Lease and for Relief from Stay." A hearing on the motion was held on February 9, 1995, whereupon it was reported to the Court on the record that the Debtor [*745] consented to the entry of an order granting relief from stay, but that issues with respect to rejection of the lease had not been discussed by the parties. [**9] *See* Transcript of hearing of February 9, 1995, at p.2. The form of order attached to Windsor, LP's motion was signed by the Court after striking out certain provisions therein pertaining to rejection of the Lease and vacation of the Premises by the Debtor. The Order, dated February 9, 1995, stated, *inter alia*, that: "it is hereby ORDERED and DECREED that the stay is modified and that [Windsor] may proceed with all available state court remedies to regain possession of the premises."

Later that day, Windsor, LP and the Debtor reached an agreement which provided, *inter alia*, that Windsor would forbear from exercising its state court remedy of eviction against the Debtor, conditioned on the Debtor timely making certain payments to Windsor. The agreement further provided that in the event the Debtor failed to make any of the prescribed payments on the dates specified, Windsor would be permitted to immediately, and without further notice, evict the Debtor from the Premises. The foregoing agreement was memorialized in a letter dated February 10, 1995, *see* Defendants' Response and Cross Motion, Exhibit 11, which was signed by counsel for Windsor, LP and countersigned by [**10] counsel for the Debtor.

On May 3, 1995, Windsor, LP caused the writ of possession for the Premises to be reissued by the Prothonotary. The next day, on May 4, 1995, Windsor, LP filed a Motion to Compel Surrender of Premises, Rejection of the Lease, and for Relief from Stay in which it alleged, *inter alia*, that the Debtor failed to move to assume the Lease within sixty days of the filing date of the bankruptcy petition, and that the Debtor defaulted, postpetition, under various terms of the Lease. In its response to the Motion, filed on May 22, 1995, the Debtor argued that the Lease was no longer subject to automatic rejection since it had been implicitly assumed by virtue of the February 10, 1995 agreement, and that Windsor, LP was precluded from moving for automatic rejection of the Lease by virtue of its acceptance of rent and other payments under such agreement. The Debtor also denied Windsor's allegations of material defaults under the Lease. The hearing date on Windsor's Motion was set for June 1, 1995. *See* Docket Report, Case No. 95-10044. However, on May 23, 1995, the Sheriff enforced the recently reissued writ of possession by evicting the Debtor from the Premises. [**11] By reason of the eviction the Debtor's business was closed on May 23, 1995.

The foregoing eviction and closing of the Debtor's business, however, proved to be only short lived. On May 25, 1995, the Debtor filed a Motion to Stay Windsor from Evicting the Debtor and to Abide by the Agreement between the parties dated February 10, 1995. The Debtor's request for expedited consideration was granted and a hearing on the motion was held the next day before Chief Bankruptcy Judge Scholl, sitting as emergency judge in my absence on that day. At the conclusion of that hearing, Judge Scholl Ordered that the Debtor be restored to possession of the Premises pending a final hearing on the motion to be held on my return on June 1, 1995 (the original return date of Windsor's motion), and conditioned on the Debtor making certain payments to Windsor, including an immediate payment of $ 2,000.

The June 1, 1995 hearings on both the Debtor's and Windsor, LP's motions were continued until June 8, 1995. By Order dated June, 8, 1995, I denied Windsor's motion, and granted, in part, the Debtor's motion. As pertains to the relief granted to the Debtor, the Court ruled that the Order of February 9, 1995 (granting [**12] Windsor's request for modification of the automatic stay) continued in full force and effect, and that the parties were to abide by the terms of their February 10, 1995 letter agreement. In addition, the Court directed the Debtor to file a motion to assume the Lease within seven days of the date of the Order, or, barring the filing of such motion, the Lease would be deemed rejected by operation of law.

The Debtor timely filed a motion to assume the Lease as directed in the June 8, 1995 Order. Although the motion was initially opposed by Windsor, LP, the parties stipulated and agreed on the record at a hearing [*746] held on September 7, 1995, that, conditioned on the Debtor timely making certain payments, Windsor's objection to the Debtor's assumption of the Lease would be withdrawn and the Lease would be assumed. The stipulation also provided that in the event the Debtor failed to make any of the specified payments on time: a) the Lease would be deemed rejected; b) the Debtor would immediately vacate the Premises; c) Windsor would be permitted to immediately proceed with all available state court remedies to gain possession of the Premises; and d) the Debtor's Chapter 11 case would be converted [**13] to a proceeding under Chapter 7. Thereafter, in January 1996, the Debtor requested Windsor, LP's agreement to the payment of certain prepetition arrears owed to Windsor on terms different than those previously agreed to in the February 10, 1995 forbearance agreement. *See* Defendants' Response and Cross Motion, Exhibit 4. Windsor, LP agreed to the Debtor's request.

On January 19, 1996 the Debtor filed a proposed Chapter 11 plan of reorganization and a disclosure statement pertaining to such plan. The disclosure statement was approved on March 7, 1996. No provision in either the plan or the disclosure statement makes reference to any specific claims or causes of action the Debtor might possess against Windsor, LP. By Order dated September 12, 1996, the Debtor's proposed Chapter 11 plan of reorganization was approved. [4]

4 Although the Order approving the Debtor's plan of reorganization is dated September 12, 1996, and was entered on September 13, 1996, the docket in the case does not reflect entry of this Order until December 30, 1996.

[**14] On January 15, 1997 the Debtor commenced adversary proceeding 97-029 by filing a Complaint against the Defendants -- Windsor, Brown, Brean and Oakwood. The cover sheet to the Complaint indicated a demand for judgment in the approximate amount of $ 1,00,000. The Debtor asserts four causes of action in the Complaint: I) Violation of 42 U.S.C. § 1983; II) Violation of U.S.C. § 362(a); III) Tortious Interference; and IV) Conversion of Security Deposit. By stipulation and agreement of the parties approved by the Court on April 17, 1997, Counts II and IV of the Complaint were voluntarily dismissed with prejudice. Thereafter, on May 27, 1997, the Court approved a stipulation and agreement submitted by the parties voluntarily dismissing Oakwood from the case with prejudice.

Subsequently, on May 30, 1997, the Debtor filed adversary proceeding 97-687 naming as the only defendant therein R & B, allegedly doing business under a number of fictitious names (one such d/b/a/ was Oakwood). The complaint commencing this adversary proceeding asserts two causes of action: I) Tortious Interference; and II) Permanent Injunction. By Order dated August 28, 1997, the Court granted a motion filed by the [**15] Debtor requesting consolidation of adversary proceedings 97-029 and 97-687 for purposes of trial. Thereafter, on September 30, 1997, the Court approved a stipulation agreed to by the parties voluntarily dismissing R & B from the case with prejudice. Since the only defendant in the case, R & B, was voluntarily dismissed from the proceeding with prejudice, no issues remain for the Court to decide. The proceeding, therefore, is effectively over, notwithstanding its continued presence on the Court's active case list. In light of the foregoing, and the Debtor's failure to formally withdraw this action, adversary proceeding 97-687 is hereby dismissed by the Court *sua sponte*.

Remaining before the Court, therefore, are only Counts I and III of adversary proceeding 97-029, asserted against defendants Windsor, Brown and Brean. The Defendants filed an Answer to the Complaint on February 18, 1997, and an Amended Answer on March 10. The Amended Answer asserts a counterclaim for judgment in favor of the Defendants on all counts of the Complaint, and requests the following additional relief: a declaration that the Lease has been terminated; an Order directing the Debtor to vacate the Premises; [**16] an award of immediate possession of the Premises to Windsor; and counsel fees and damages pursuant to the terms of the Lease.

On October 13, 1997 the Debtor filed the instant Motion for Partial Summary Judgment [*747] requesting judgment in its favor on Count I of the Complaint. In Count I, the Debtor contends that Windsor, LP deprived the Debtor of due process and violated its civil rights under 42 U.S.C. § 1983 by simultaneously confessing judgment against it and causing execution thereon to be issued without notice or opportunity for challenge prior to enforcement of such execution through the powers of the state. [5] The Debtor avers that Windsor, LP's actions proximately resulted in it having to file a Chapter 11 bankruptcy petition on January 4, 1995. The Debtor demands judgment against Windsor, LP on Count I for actual damages in the amount of $ 280,000, punitive damages in the amount of $ 500,000, and costs and attorney's fees.

5 The Debtor's accounts at CoreStates Bank were attached and the sheriff levied upon certain contents of the Debtor's restaurant in December 1994. Although a writ of possession was also issued and served on the Debtor at this time, enforcement of such writ did not take place prior to the filing of the Debtor's Chapter 11 petition. As noted, the writ of possession was subsequently reissued on May 3, 1995, and enforced twenty days later on May 23, 1995.

[**17] The Court observes that the Debtor did not raise the fact of the May 1995 eviction in the Complaint itself. However, in its motion for partial summary judgment, the Debtor stresses that Windsor, LP caused the writ of possession to be reissued and thereafter caused the sheriff to enforce such writ by evicting the Debtor from the Premises on May 23, 1995. Windsor, LP did not contest these facts in its response to the Debtor's motion. The Court also observes that the legal theory articulated by the Debtor in its motion for partial summary judgment differs from that asserted in Count I of the Complaint. For instance, in the Complaint the Debtor alleged that its

due process rights were violated by Windsor, LP's conduct of simultaneously confessing judgment and causing the issuance of execution thereon, *ex parte*, without notice or opportunity for challenge prior to its property being levied upon and seized by the sheriff in December 1994. Thus, the due process violation upon which the § 1983 claim asserted in the Complaint is based, is founded upon an alleged lack of notice prior to execution and seizure of its property. By contrast, in its motion the Debtor contends that Windsor, [**18] LP's entry of confessed judgments for both accelerated rent and possession of the Premises constituted an impermissible double recovery under Pennsylvania law, and that because of such infirmity, the confessed judgments are unlawful and should not be accorded any legal effect. The Debtor argues that Windsor, LP committed a *per se* civil rights violation when it invoked the state's power to execute on and enforce the purportedly unlawful judgments by evicting the Debtor from the Premises in May, 1995. Significantly, in both its motion and in its response to the Defendants' Cross Motion, the Debtor specifically argues that its § 1983 claim is not based on any alleged lack of notice prior to execution and enforcement of the writ of possession, but rather, solely on its contention that Windsor's execution on the purportedly unlawful judgments constitutes a *per se* civil rights violation.

The Defendants contend that they are entitled to summary judgment in their favor on Count I of the Complaint on grounds that:

> a) the Debtor's claims are barred by principles of both equitable and judicial estoppel because the Debtor failed to raise or even disclose the claims before confirmation; [**19]
>
> b) The Debtor's claims are barred by the applicable statute of limitations;
>
> c) The Debtor may not recover on its claim for violation of its right to due process because the Debtor waived its right to pre-deprivation notice and because the Defendants were not acting in bad faith;
>
> d) Improper use or abuse by a private party of an otherwise valid state procedure is not cognizable under 11 U.S.C. § 1983; and
>
> e) The May 1995 eviction did not violate the Debtor's constitutional right to due process because the Debtor had five months to contest the judgment and failed to do so.

DISCUSSION

The instant motion and cross motion for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure [*748] ("Fed.R.Civ.P."). [6] Pursuant to Rule 56, summary judgment should be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). For purposes of Rule 56, a fact is material if it might affect the outcome of the case. *See Anderson v. Liberty Lobby,* [**20] *Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party has the burden of demonstrating that no genuine issue of fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

> 6 Fed.R.Civ.P. 56 is applicable to the instant proceeding pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.")

The court's role in deciding a motion for summary judgment is not to weigh evidence, but rather to determine whether the evidence presented points to a disagreement that must be decided at trial, or whether the undisputed facts are so one sided that one party must prevail as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-252. In making this determination, the court must consider all of the evidence presented, drawing all reasonable inferences therefrom in the light most favorable to the nonmoving party, and against the movant. *See United States v. Premises Known as 717 South Woodward Street*, 2 [**21] F.3d 529, 533 (3rd Cir. 1993); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3d Cir. 1990), *cert. denied*, 499 U.S. 921, 113 L. Ed. 2d 246, 111 S. Ct. 1313 (1991); *Gould, Inc. v. A & M Battery and Tire Service*, 950 F. Supp. 653, 656 (M.D. Pa. 1997).

To successfully oppose entry of summary judgment, the nonmoving party may not simply rest on its pleadings, but must designate specific factual averments through the use of affidavits or other permissible evidentiary material that demonstrate a triable factual dispute. *Celotex Corp. v. Catrett*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-50. Such evidence must be sufficient to support a jury's factual determination in favor of the nonmoving party. *Id.* Evidence that merely raises some metaphysical doubt regarding the validity of a material fact is insufficient to satisfy the nonmoving party's burden. *Matsushita Electric Indus-*

trial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). If the nonmoving party fails to adduce sufficient evidence in connection with an essential element of the case for which it bears the burden of proof at [**22] trial, the moving party is entitled to entry of summary judgment in its favor as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. at 322-23.

As a threshold matter the Court shall address Windsor, LP's argument that the Debtor's claims under 42 U.S.C. § 1983 are untimely, and therefore barred, as being filed after the passage of the applicable statute of limitations. The parties are in agreement, and correctly assert, that the limitations period applicable to the Debtor's § 1983 claims is the Pennsylvania two-year statute of limitations for personal injury actions. *Kost v. Kozakiewicz*, 1 F.3d 176, 188 (3d Cir. 1993)(citing *Wilson v. Garcia*, 471 U.S. 261, 280, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985)); *Herbert v. Reinstein*, 976 F. Supp. 331, 336 (E.D. Pa. 1997); 42 Pa.R.Civ.P. 5524. Although federal law applies the state personal injury statute of limitations to § 1983 claims, federal law governs the question of when such claims accrue. *Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987); *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984). In § 1983 cases concerning deprivation of property, the violation of one's civil rights accrues when the property is seized. [**23] *See Gilbert v. City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991); *Johnson v. Cullen*, 925 F. Supp. 244, 249 (D. Del. 1996); *Shannon v. Recording Indus. Assn. of America*, 661 F. Supp. 205, 210-11 (S.D. Ohio 1987).

Although it initially appeared to the Court upon reading Count I of the Complaint that the Debtor was asserting § 1983 claims stemming from the December 1994 execution on the confessed judgments, e.g., attachment [*749] of the Debtor's bank accounts and a sheriff's levy being placed on certain of its restaurant equipment, the Debtor clarified in both its Motion for Partial Summary Judgment, and in its response to the Defendants' cross motion, that the § 1983 claims for which it seeks redress in Count I stem from the May 23, 1995 eviction. Since the Complaint commencing this adversary proceeding was filed on January 15, 1997, less than two years after the occurrence of the May 1995 eviction, the claim asserted in Count I is timely.

Count I of the Complaint alleges claims arising under 42 U.S.C. § 1983. In general, § 1983 provides a civil remedy against any person who, acting under color of state law, deprives another of rights protected by the Constitution or the laws [**24] of the United States. More specifically, § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The analysis of a § 1983 claims begins with the acknowledgment that the statute is not itself a source of substantive rights, but merely provide a method for vindicating federal rights that are elsewhere conferred. *Albright v. Oliver*, 510 U.S. 266, 271, [**25] 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994). Thus, in order to prevail on a claim under § 1983, a plaintiff must establish: 1) that a federally protected statutory or constitutional right has been violated; and 2) that such violation occurred by virtue of state action or under color of state law. *Jordan v. Fox, Rothschild, et al.*, 20 F.3d at 1264 (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978)). Where the defendant is a private individual who asserts a defense of good faith, the plaintiff must also establish that such party acted with a subjective intent to deprive the plaintiff of a federally protected right. 20 F.3d at 1276-1278. [7] The burden of persuasion with respect to the foregoing criteria rests with the plaintiff. 20 F.3d at 1278.

> 7 Thus, the Defendants' statement of the law -- to the effect that a § 1983 plaintiff must establish a private actors' subjective "bad faith" as a third element of its prima facie case -- is incorrect.

The first [**26] step in the above analysis is to identify the specific constitutional or federal right allegedly infringed. *Albright*, 510 U.S. at 271. In this case, the Debtor contends that Windsor, LP's execution and seizure of the Premises in May 1995, through the powers of the state, violated its constitutional right to due process. Although the Debtor did not specify in the Complaint whether the alleged violation was to its substantive or procedural due process rights, the Court observes that the parties have presented arguments solely on the issue of whether a procedural due process violation occurred. Any argument that the Debtor's substantive due process rights were also violated has therefore been waived, and the Court will proceed to address the procedural due process issues that have been joined by the parties in their cross motions for summary judgment.

The Debtor's § 1983 claim can be summarized as follows: the re-issuance of the writ of possession and actual seizure of its property by the sheriff in May 1995, on the basis of what the Debtor contends is an unlawful confessed judgment for possession, resulted in the deprivation of its property without due process of law. In the Debtor's [**27] Memorandum in support of its Motion for Partial Summary Judgment, and again in its Response to Windsor, LP's Cross Motion, the Debtor makes clear that its § 1983 claim is not based on any alleged lack of notice prior to the enforcement of the writ of possession. [*750] Rather, the Debtor contends that execution and seizure of its property based on the purportedly unlawful judgment constitutes a *per se* civil rights violation. Thus, the Debtor has abandoned the argument that its § 1983 claim is based, at least in part, on Windsor, LP's alleged failure to provide notice or opportunity for a hearing prior to the seizure of its property. [8]

8 Even assuming arguendo that the Debtor had not abandoned predeprivation notice as an issue in the case, the Court would nonetheless still have determined that, based on the record presented, the Debtor waived the right to receive such predeprivation notice. In *Swarb v. Lennox*, 405 U.S. 191, 31 L. Ed. 2d 138, 92 S. Ct. 767 (1972), and *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 31 L. Ed. 2d 124, 92 S. Ct. 775 (1972), the United States Supreme Court plainly decided that a debtor may waive its due process rights to predeprivation notice and a hearing when it voluntarily, knowingly and intelligently executes an agreement containing a cognovit clause or a warrant to confess judgment. Both *Swarb* and *Overmyer* also indicate that waiver is usually, though not always, a question of fact. *Jordan*, 20 F.3d at 1272 (citations omitted).

In *Jordan* the Third Circuit Court of Appeals stated that "a court faced with a due process challenge to a confessed judgment should always inquire whether the judgment debtor's execution of a document permitting judgment by confession is a valid waiver of his constitutional right to predeprivation notice and hearing." *Id.* 20 F.3d at 1272 (citations omitted). The Third Circuit also stated in *Jordan* that where a party was represented by counsel when it agreed to a confession of judgment clause, operated in corporate form, and had agreed to the confession of judgment as part of a commercial lease, "an inference of waiver would be strongly supported." *Id.* at 1274. The Defendants ask the Court to make a similar inference in the instant case in support of their cross motion for summary judgment.

Under the test set forth in *Jordan*, this Court must determine whether the undisputed material facts "establish that [the Debtor] did not knowingly waive its due process right to pre-judgment notice and hearing." *Id.* at 1272. The Court observes that the Complaint does not allege any disparity in bargaining power, a lack of advice from counsel, or any other misunderstandings. Morever, the Debtor does not allege that it failed to understand the confession of judgment clause in the Lease or that it entered into such agreement involuntarily. Indeed, the Debtor's counsel in the transaction testified in a deposition, that although it was his opinion that the provision in the Lease permitting Windsor, LP to confess judgment and issue execution for both accelerated rent and possession of the Premises was probably unenforceable, and that he so advised the principals of the Debtor, he also testified that he was satisfied that the principals had been given sufficient information to understand the significance of the provision. *See* Defendants' Response and Cross Motion, Exhibit 18, at pp.54, 64-65. Rather, the Debtor argues that Windsor, LP improperly confessed judgment against it for both accelerated rent and for possession of the Premises. Whether Windsor, LP improperly confessed judgment, however, is not relevant to the issue of whether the plaintiff waived its constitutional rights in the agreement. *See Jordan*, 20 F.3d at 1274. The latter issue is relevant solely to the determination of the validity of the plaintiffs state law claims which are not presently before the Court. The Court also notes that, as discussed more fully in text *infra*, the Debtor's argument that the cognovit clause is "*void ab initio*" as being against public policy, and that it cannot therefore be relied upon as the basis of a waiver is incorrect as a matter of law.

[**28] The Debtor's entire case, therefore, rises or falls on the theory that its due process rights were violated because Windsor, LP executed on judgments that the Debtor contends are unlawful. The Debtor cites no case law that directly supports this position. Although the Debtor correctly asserts that confessing judgment for both accelerated rent for the remaining unexpired term of

a lease and for possession of such demised property constitutes an impermissible double recovery under a long line of Pennsylvania authorities, *see e.g., Homart Development Co. v. Sgrenci*, 443 Pa. Super. 538, 662 A.2d 1092, 1100-02 (Pa. Super. 1995) (citations omitted), the remedy in such a situation would not be, as the Debtor contends, the nullification of the lease provisions which set forth the landlord's remedies for a breach or default by a tenant, but rather the opening or striking, in whole or in part, of the offending portions of the judgments entered pursuant to such provisions of the lease. 42 Pa.R.Civ.P. 2959. Thus, in the *Homart* case, the Pennsylvania Superior Court, after finding that the landlord had confessed judgments for both accelerated rent and for possession, stated that while the [**29] tenant failed to file a petition to strike the judgment and thus waived such relief, the money judgment should have been opened and the issue of the amount of such judgment submitted to a jury. 662 A.2d at 1101-02.

The Debtor also cites *American Assn. of Meat Processors v. Casualty Reciprocal Exchange*, [*751] 527 Pa. 59, 588 A.2d 491 (Pa. 1991) and *Finkle v. Gulf & Western Mfg., Co.*, 744 F.2d 1015 (3d Cir. 1984). In *American Assn. of Meat Processors*, the Pennsylvania Supreme Court reversed two lower court rulings enforcing an insurance contract that required payment of insurance premium rebates to certain of the insured parties through their business association. *American Assn. of Meat Processors* is inapposite to the instant case in that the contract which required payment of the insurance premium rebates was determined to be illegal as violating both certain provisions of the Pennsylvania insurance law and the public policy underlying the system of workers compensation insurance in Pennsylvania. 588 A.2d at 495-96. The most that can be said about the money judgment in the instant case is that it was grossly excessive in light of Windsor, LP having also obtained judgment [**30] for possession of the Premises. *See Homart*, 662 A.2d at 1101-02. As discussed *supra*, this infirmity may be corrected by a petition to open or strike the judgment under Pa.R.Civ.P. 2959. *Finkle* involved a long term lease of real estate that required the lessee to pay a sum certain to the landlord in the event the lessee failed to exercise an option to renew the lease. It was alleged that the amount of the termination payment corresponded to the balance remaining on amounts the lessor had spent to expand the building for the lessee. In upholding the district court's dismissal of the landlord's claim for termination damages on grounds that it violated Pennsylvania's rule against contractual provisions that establish penalties, the Third Circuit observed that the landlord had already regained possession of the property and had relet the premises at an increased rental sufficient in amount to permit it recoup its investment in the building expansion.

Both *American Assn. of Meat Processors* and *Finkle* are also inapposite in that they involved direct appeals of underlying judgments, and were not collateral attacks on such judgments. Such is not the case here. Under Pennsylvania [**31] law a judgement by confession is an act of court that, until set aside or reversed in an appropriate proceeding instituted for that purpose, e.g. petition to open or strike brought pursuant to Pa.R.Civ.P. 2959, has all the qualities and effect of a judgment entered upon a verdict. *See Zhang v. Southeastern Financial Group, Inc.*, 980 F. Supp. 787, 792 (E.D. Pa. 1997); 20 P.L.E. Judgment § 17 (West 1990). This Court does not sit as an appeals court of state court judgments, and in the absence of allegations of fraud, deception, accident or mistake in the procurement of a state court judgment -- no such allegations are present in the instant case -- it cannot entertain a collateral attack on an otherwise valid state court judgment. *See Jordahl v. Democratic Party of Virginia*, 122 F.3d 192, 202-03 (4th Cir. 1997), *cert. denied,* U.S. , 139 L. Ed. 2d 756, 118 S. Ct. 856 (1998); *In re DuFrayne*, 194 B.R. 354, 368-69 (Bankr. E.D. Pa. 1996).

Although a § 1983 plaintiff is not required to exhaust state court remedies prior to asserting its federal claims, the Debtor in the instant case has asserted a § 1983 claim based on the purported invalidity under Pennsylvania [**32] law of the judgments which gave rise to the execution and seizure of the Premises in May 1995. As discussed above, under Pennsylvania law a judgement by confession is an act of court, and until such time as it has been set aside or reversed, it has all the qualities and effect of a judgment entered upon a verdict. *See Zhang*, 980 F. Supp. at 792. It appears, therefore, that at the time that Windsor, LP enforced its writ of possession in May 1995, its confessed judgments had not been made the subject of a proceeding to strike or open, and for this reason the judgments remained enforceable by means of execution. *See Id.; see also* 49 C.J.S., Judgments, § 177 (West 1997) (judgment by confession supports an execution). This is not to say of course that the Defendants might not be liable to the Debtor under a state law cause of action. Such claims, if any, are not before the court at this juncture. Based on the foregoing, however, Windsor, LP's enforcement of its judgment did not give rise to a § 1983 claim. Accordingly, the Defendants are entitled to summary judgment in their favor on Count I of the Complaint.

[*752] Even if the Court were to have found that the proofs presented in connection [**33] with the instant cross motions supported the Debtor's claim that its due process rights were violated by the Defendants, the Court would nonetheless conclude that under the circumstances present in the case the Debtor is estopped from pursuing such claim by application of the doctrines of

equitable and judicial estoppel. The foregoing doctrines are judicially created rules that serve the common purpose of protecting the fairness and integrity of judicial proceedings. Equitable estoppel focuses on the relationship between the parties and prevents a party from assuming a position inconsistent with an earlier position upon which another party reasonably relied. *See Godwin v. Schramm*, 731 F.2d 153, 160 (3d Cir.), *cert. denied sub nom., Behrend v. Godwin*, 469 U.S. 882, 83 L. Ed. 2d 187, 105 S. Ct. 250 (1984); *see also, Novelty Knitting Mills, Inc. v. Siskind*, 500 Pa. 432, 457 A.2d 502, 503 (Pa. 1983) ("Equitable estoppel is a doctrine that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect. . . . [It] recognizes that an informal promise implied by one's words, deeds or representations which leads another to rely [**34] justifiably thereon to his own injury or detriment, may be enforced in equity."). Judicial estoppel, on the other hand, is concerned with the connection between a party and the judicial system itself. Judicial estoppel prevents a party from assuming a position in one proceeding that is inconsistent with a prior position asserted by that party either in the same or in an earlier proceeding. *McCarron v. F.D.I.C.*, 111 F.3d 1089, 1097 (3d Cir. 1997), *cert. denied*, U.S. , 139 L. Ed. 2d 635, 118 S. Ct. 689 (1998); *Government of the Virgin Islands v. Paniagua*, 922 F.2d 178, 183 (3d Cir. 1990); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988). The purpose of judicial estoppel is to prevent a party from playing "fast and loose" with the courts. *United States v. Vastola*, 989 F.2d 1318, 1324 (3d Cir. 1993). The determination of whether to apply either doctrine in a particular case lies within the sound discretion of the trial court.

In order to prevail on a claim of equitable estoppel, the party asserting such claim must establish that: (1) a representation of material fact was made to the party; (2) such party had a right [**35] to, and did, rely on the representation; and (3) that denial of the representation by the party making it would injure the relying party. *See Haymaker v. Green Tree Consumer Discount Co.*, 166 B.R. 601, 605-06 (Bankr. W.D. Pa. 1994) (citing *Wheeling-Pittsburgh Steel Corp. v. McCune*, 836 F.2d 153, 162-63 (3d Cir. 1987)); *In re Crain*, 158 B.R. 608, 612 (Bankr. W.D. Pa. 1993). The first of these criteria can be satisfied by conduct that amounts to a false representation or concealment of a material fact. *See generally In re Atlantic Marble, Inc.*, 126 B.R. 463, 467 n.1 (Bankr. E.D. Pa. 1991). The knowing failure of a party to disclose a material fact under circumstances wherein such party had both the duty and an opportunity to speak, may, where no plausible explanation or excuse for such silence exists, be construed as a false representation or concealment by such party. As discussed by the Third Circuit Court of Appeals in *Oneida*, a debtor in bankruptcy has an affirmative duty under Code § 521 to fully disclose all assets and interests in property. 848 F.2d at 416-17. Moreover, the foregoing disclose obligation continues throughout the case and requires the debtor [**36] to amend its schedules whenever it becomes necessary in order to insure the accuracy and reliability of the information disclosed therein. Additionally, debtors in Chapter 11 are obligated to file a disclosure statement containing "adequate information." The term "adequate information" is defined under Code § 1125(a) as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. . . ." 11 U.S.C. § 1125(a).

A review of the Debtor's bankruptcy schedules and statement of financial affairs, as well as its plan of reorganization and disclosure statement reveals that the Debtor did not satisfy the foregoing duties of providing full disclosure and adequate information. Reminded that in Count I of the Complaint [*753] the Debtor contends that its bankruptcy case was precipitated by the purportedly unlawful prepetition conduct of the Defendants, e.g., entry of confessed judgments for both possession and accelerated rent and issuance of execution thereon, it [**37] appears that Schedule B of the Debtor's petition is deficient in not listing, at the very least, a contingent or unliquidated claim, or right to setoff against Windsor, LP stemming from such conduct. Moreover, on Schedule D the Debtor listed Windsor, LP as a secured creditor holding an undisputed claim in the amount of $ 37,000, of which $ 13,000 was unsecured due to the value of the collateral. Omitted from Schedule F is the $ 198,261.78 confessed judgment entered against the Debtor just days before by Windsor, LP. The Debtor was admittedly aware of the foregoing judgment when the petition was filed.

More significant, however, was the Debtor's failure to include any specific reference to its purported § 1983 claim anywhere in either the plan or disclosure statement filed on January 19, 1996. Although Article IX of the plan refers to several potential causes of action, including bankruptcy actions under Code §§ 547, 548, 549 and 550, as possible funding sources for the plan, the language used in this section of the plan can at best be described as merely boilerplate. *See* Debtor's Response to Cross Motion, Exhibit C (reorganization plan). Indeed, placed in context, the oblique [**38] reference in the plan to causes of action other than the aforementioned statutory bankruptcy actions is downright misleading. In this regard, the Court observes that the plan provides for only a 15% distribution to unsecured creditors. In the liquidation analysis section of the disclosure statement, the Debtor opines that if the case were converted to Chapter 7 and its assets, including any causes of action, were liquidated by a trustee, unsecured creditors should expect to receive nothing on their claims after administrative, secured, and priority claims are paid. From the perspective of one reviewing the information provided in the schedules, the disclosure statement and the plan, one can only conclude that the Debtor did not place much stock in any of the potential causes of action as possible funding sources for the plan. Certainly, no one reviewing the information provided, the Court included, would have been able to discern that a cause of action of potentially sufficient value to pay everyone in the case in full was looming just over the horizon. As events in this case unfolded, however, approximately four months after the plan was confirmed, the Debtor asserted such a cause [**39] of action against the Defendants. Moreover, pursuant to the Article XI of the plan, upon confirmation title to such cause of action vested in the reorganized Debtor. *See Id.*, at P11.2. The Court also notes that the plan authorizes the reorganized Debtor to prosecute such claim. *Id.* Although the plan states that "all funds collected by the Debtor, with respect any and all Causes of Action as set forth in Article IX hereof, together with proceeds or collection of accounts receivable, shall be available for distribution under this Plan[,]", *id*, at Art. VI, it must be remembered, however, that under the plan unsecured creditors are entitled to receive only 15% of the allowed amount of their claims, and arguably will not, therefore, share in any recovery obtained by the Debtor in excess of such plan payment amount, no matter how large the Debtor's recovery might be on any of the causes of action purportedly preserved under Article XI. *See* Code § 1141(a). Based on the foregoing, the Court concludes that the plan and disclosure statement, lacking any specific reference to a potential § 1983 claim against the Defendants, were "informationally deficient" and materially misleading, [**40] since they failed to alert creditors, other parties in interest, and the Court, to the fact that a claim of sufficient magnitude to pay all creditors in full existed and soon would be prosecuted. *See Oneida*, 848 F.2d at 418; *In re H & L Developers, Inc.*, 178 B.R. 71, 74-75 (Bankr. E.D. Pa. 1994).

Windsor, LP, as a party in interest, was entitled to rely on the representations and information contained in the Debtor's schedules and disclosure statement. *See Oneida*, 848 F.2d at 417-18; *see also, In re Scott*, 77 B.R. 636, 637 (Bankr. N.D. Ohio 1987) ("The information provided by a debtor in the several petition documents should not only be complete but truthful so that the Court and other parties in interest can reasonably [*754] rely upon the data contained therein."). Moreover, such reliance was clearly to Windsor, LP's detriment in that Windsor, unaware that it was to become the target of a massive civil rights lawsuit filed by the Debtor, agreed to forbear from exercising the right it had been granted under the Order of February 9, 1995 to pursue its state court remedies against the Debtor. [9] Had the Debtor satisfied its statutory disclosure obligations under Code §§ 521 [**41] and 1125(a), and the true state of affairs been known, Windsor, LP would certainly not have agreed in September 1995 to withdraw its objection to the Debtor's assumption of the Lease, and thereafter refrain from exercising its state court remedies against the Debtor through the time the Debtor filed the instant adversary proceeding in January 1997. It is also inconceivable that Windsor, LP would have agreed to the Debtor's request, made on January 4, 1996, to extend the previously agreed upon January 1, 1996 payment deadline for the cure of the prepetition arrears, *see* Defendants' Response and Cross Motion, Exhibit 11, P7 (February 10, 1995 forbearance agreement), to April 1996. *Id.*, at Exhibit 4. Under the circumstances present in this case, it would be unjust to permit the Debtor to retreat from the position advanced prior to confirmation concerning the existence and value of the claims it possessed against others. Accordingly, the Debtor is equitably estopped from pursuing the previously undisclosed § 1983 claim asserted against the Defendants in Count I of the Complaint.

> 9 The Debtor argued that by virtue of a "tenant estoppel certificate" solicited by Windsor, LP in November 1996, Windsor knew at least two months prior to the confirmation order being signed that the Debtor intended to bring suit against it. *See* Debtor's Response to Cross Motion, p.7, at n.3. This argument, however, lacks merit for at least two reasons. First, as discussed in footnote four of this Opinion, the Order confirming the plan was signed on September 12, 1996, but not docketed until December 30, 1996. Since the estoppel certificate is dated November 11, 1996, it is clear that plan confirmation occurred prior to the certificate being issued. Thus, contrary to the Debtor's assertion above, Windsor, LP was not aware of the contents of the certificate prior to the plan being confirmed.
>
> Turning to the language of the certificate, the Court observes that it states, in pertinent part, as follows:
>
> > 7. All obligations of Landlord under the Lease have been performed, and no event has occurred and no condition exists that, with the giving of notice or lapse of time or both, would constitute a default by Landlord under the Lease. There are no offsets or de-

fenses that Tenant has against the full enforcement of the Lease by Landlord.

The foregoing language clearly refers to the obligations of the Landlord, and any perceived breaches thereof, arising under the Lease. Directly below the language quoted above, the Debtor added the following handwritten notation: "Tenant believes that it has claims against Landlord." Construed most favorably to the Debtor, the handwritten notation provides a modicum of notice that the Debtor believes it has a claim or right against Windsor, LP pertaining to some perceived default by Windsor of its obligations under the Lease. Notably absent from the Debtor's notation is a clear statement that identified any specific claim or cause of action pertaining to alleged breaches of Windsor, LP's obligations under the Lease. Thus, despite the Debtor's assertion to the contrary, nothing in the estoppel certificate, including the Debtor's handwritten notation, can be construed as notice of an impending law suit arising out of any alleged breach of the Lease by Windsor, LP. More importantly, even assuming *arguendo* that the handwritten notation could be construed as placing Windsor, LP on notice that a lawsuit were imminent, there is nothing in the certificate that would inform Windsor to expect a lawsuit based on matters extraneous to the Lease, such as an alleged violation of the Debtor's civil rights. Accordingly, the existence of the certificate does nothing to affect the Court's analysis, nor does it change the conclusions reached in this Opinion.

[**42] Also applicable in the instant case is the doctrine of judicial estoppel. Judicial estoppel was first articulated in the Third Circuit in the seminal case *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510 (3d Cir. 1953). The doctrine prevents a party from assuming a position that is inconsistent with a prior position taken either in the same or another proceeding. *See Government of the Virgin Islands v. Paniagua*, 922 F.2d at 183; *Oneida*, 848 F.2d at 419; *Scarano*, 203 F.2d at 512-13. Since judicial estoppel is intended to protect the courts rather than the parties, there is no requirement that the party urging estoppel demonstrate either that it relied on the other party's prior inconsistent statement, that it was a party or in privity with a party in the proceeding in [*755] which the prior statement was made, or even that the party making the statement benefitted in any way from its prior assertion. *See Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360-61 (3d Cir.1996). In *Ryan*, the Third Circuit Court of Appeals further refined the doctrine by holding that it may be applied when: (1) the party against whom the doctrine is asserted has taken [**43] a position that is inconsistent with an earlier position taken by such party in either the same or a previous proceeding; and (2) the party asserted either or both of the inconsistent positions in bad faith, i.e., with intent to play fast and loose with the courts. *Id.* at 361.

As discussed more fully in connection with the equitable estoppel argument, the Debtor represented in the disclosure statement and plan that, at best, the causes of action referenced in Article IX of the plan, when combined with amounts obtained from accounts receivable collections and post-confirmation operations, would enable the Debtor to pay unsecured creditors only 15% of the allowed amount of their claims. That the Debtor meant to convey the impression to creditors and the Court that the causes of action were not worth very much is confirmed by the liquidation analysis contained in the disclosure statement. There, the Debtor stated that if the plan were rejected and the Debtor's business operations were not considered as a funding source, insufficient funds would be generated from a straight liquidation of the Debtor's assets, including a liquidation of any causes of action, to pay anything to unsecured [**44] creditors. Based on the foregoing representations the plan was confirmed. Approximately four months later, however, the Debtor changed its position and asserted a civil rights claim against the Defendants containing a demand for judgment in excess of $ 750,000. Such claim, if successful would be more than sufficient to pay all of the Debtor's creditors in full. Thus, the filing of the civil rights claim four months after the plan was confirmed constituted a change of position that satisfied the first of the requirements for application of judicial estoppel.

The Court finds that the bad faith element mandated by the *Ryan* decision is satisfied here as well. While a person's motivation or intent is generally considered to be a question of fact which is not ordinarily subject to resolution on a motion for summary judgment, *see e.g., Richardson v. Kraft-Holleb Food Service, Inc., a Div. of Philip Morris, Inc.*, 774 F. Supp. 1108, 1111 (N.D. Ill. 1991), *aff'd*, 998 F.2d 1016 (7th Cir. 1993); *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903, 913 (2d Cir. 1981), intent may be inferred when the evidence is so one sided that reasonable minds could not differ [**45] as to the only rational outcome. *See e.g., Paragon Podiatry Lab., Inc. v. KLM Labs., Inc.*, 984 F.2d 1182, 1190 (Fed. Cir. 1993). Under circumstances such as these the factual issue of intent can be decided by the court as a matter of law. *Id.* Moreover, statements or conduct of the debtor evincing a reckless disregard for the truth satisfies the element of intent. *See*

In re Anastas, 94 F.3d 1280, 1286 (9th Cir.1996) (reckless disregard for the truth satisfies the intent element for purposes of a Code § 523(a)(2)(A) nondischargeability claim).

As discussed above, the plan in this case provides for a distribution to unsecured creditors worth only 15% of the allowed amount of their claims. The clear implication of the representations made in the Debtor's bankruptcy schedules and statement of financial affairs, as well as its reorganization plan and disclosure statement is that the causes of action the Debtor possessed and was going to prosecute in consummation of the plan were not valuable enough to pay even the barely nominal 15% distribution on their claims if the Debtor were not permitted to remain in business and fund the plan through post-confirmation operations. Only [**46] four months after confirmation, the Debtor filed the its § 1983 claim against the Debtor seeking damages in excess of $ 750,000. Under the plan title to this cause of action revested in the Debtor upon confirmation. Unsecured creditors having accepted the treatment provided for their claims in the plan, would have no legal right to share in any excess proceeds derived by the Debtor from the lawsuit. It is undeniable that at the time of confirmation all of the material facts upon which the § 1983 claim is based were known to the Debtor. The Debtor has not offered to explain [*756] either its failure to amend its bankruptcy schedules to reflect a potential § 1983 claim against the Defendants, or the omission from the plan of a specific reference to such a significant cause of action. Rather, the Debtor has argued only that Article IX of the plan contained a sufficient description of the causes of action that the Debtor was reserving the right to assert post-confirmation. The Court, however, has already determined that such disclosure was factually deficient.

The Court finds the circumstances present here to be strikingly similar to the situation faced by First Circuit Court of Appeals in [**47] *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570 (1st Cir.), *cert. denied*, 510 U.S. 931, 126 L. Ed. 2d 309, 114 S. Ct. 344 (1993). The following excerpt from that opinion is particularly germane to the matter *sub judice*:

> The basic principle of bankruptcy is to obtain a discharge from one's creditors in return for all one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh. Assuming there is validity in Payless's present suit, it has a better plan. Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively. *See, e.g., In re H.R.P. Auto Center, Inc.*, 130 B.R. 247, 253-54 (Bankr. N.D. Ohio 1991) (collecting cases). *Payless, having obtained judicial relief on the representation that no claims existed, can not now resurrect them and obtain relief on the opposite basis.*

989 F.2d at 571 (emphasis added).

Similar to the situation present in *Payless*, and the *Oneida* case from our own Circuit, the Debtor failed to disclose to its creditors, [**48] prior to confirmation, the existence of a rather significant claim that would have inured to their benefit. Had the existence of the claim been disclosed in accordance with the Debtor's obligations under § 521 and 1125(a), plan voting in the case would likely have been different. As in both *Payless* and *Oneida*, the undisclosed claim involved allegations that a particular creditor's conduct precipitated the filing of the bankruptcy case and that substantial damage to its business occurred as a result. Accordingly, all of the facts underlying the claims were available and known to the debtor well before confirmation. The only reasonable conclusion to be drawn from the forgoing is in failing to disclose its § 1983 claim prior to confirmation the Debtor sought to preserve for its own uses, to the exclusion of its creditors, any recovery it might obtain upon a successful prosecution of such claim. Such manipulation of the bankruptcy system constitutes bad faith, and cannot be countenanced. At the very least, the Debtor's conduct evinces a reckless disregard for the rights of creditors and its statutory duties to provide accurate and sufficiently detailed information at various [**49] stages in the Chapter 11 bankruptcy process. The failure to comply with these duties, under the circumstances present in this case, evinces the Debtor's intent to play fast and loose with the court. *Accord Welsh v. Quabbin Timber, Inc.*, 199 B.R. 224 (D. Mass. 1996) (precluding a debtor from asserting, after its discharge had been entered, a claim against a creditor that was not listed anywhere in the debtor's schedules).

In light of the Court's findings with respect to both the legal sufficiency of the Debtor's § 1983 claim, and the applicability of the doctrines of equitable and judicial estoppel to bar the assertion of such claim in this case, it is not necessary to give further consideration to the additional arguments made by the parties. Moreover, based on the foregoing conclusions, summary judgment is granted in favor of the Defendants and against the Debtor on Count I of the Complaint. An Order consistent with the foregoing findings and conclusions of the Court shall be entered concurrently herewith.

By the Court,

STEPHEN RASLAVICH

U.S. Bankruptcy Judge

Dated: March 6, 1998

ORDER

AND NOW, this 6th day of March 1998, upon consideration of the Motion for [**50] Partial Summary Judgment filed by debtor/plaintiff Okan's Foods, Inc., d/b/a the Peacock on the Parkway (the "Debtor"), and the Cross Motion for Summary Judgment filed by the defendants Windsor Associates Limited Partnership, Edward S. Brown, Brean Corp., and Oakwood Corporate Housing, Inc. (collectively the "Defendants"), after a hearing being held, and upon consideration of the memoranda submitted by the parties, it is, for the reasons that are more fully stated in the accompanying Opinion, hereby

ORDERED, that the Defendants motion is **granted**, and that summary judgment is entered in favor of the Defendants and against the Debtor on Count I of the Complaint; and it is further

ORDERED, that the Debtor's motion is **denied**; and it is further

ORDERED, that Adv. Proc. No. 97-687 is **dismissed** *sua sponte*.

By the Court,

STEPHEN RASLAVICH

U.S. Bankruptcy Judge

Dated: March 6, 1998

LEXSEE 81 F.3D 355, 360

RYAN OPERATIONS G.P., a Virginia General Partnership and NVR, L.P., a Virginia Limited Partnership, on behalf of its division, NVR BUILDING PRODUCTS CO. v. SANTIAM-MIDWEST LUMBER CO., an Oregon Corporation; FURMAN LUMBER, INC., a Massachusetts Corporation; BRIGHT WOOD CORP., an Oregon Corporation; BRIGHT WOOD CORP., Third Party Plaintiff v. FORREST PAINT CO., INC., an Oregon Corporation; GUARDSMAN PRODUCTS, INC., a Delaware Corporation, Third Party Defendants, Ryan Operations G.P. and NVR, L.P. and its division, NVR Building Products Co., Appellants

No. 95-3250

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

81 F.3d 355; 1996 U.S. App. LEXIS 9925; 28 Bankr. Ct. Dec. 1178

December 4, 1995, Argued
April 15, 1996, Filed

PRIOR HISTORY: [**1] On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Civ. No. 92-2480).

DISPOSITION: Reversed the order of the district court granting summary judgment in favor of defendants and remanded for further proceedings

COUNSEL: Robert B. Cave, Esq., David G. Leitch, Esq., (ARGUED), Hogan & Hartson, 555 13th Street, N.W. Washington, DC 20004-1109, Richard F. Rinaldo, Esq., Meyer, Unkovic & Scott, 1300 Oliver Building, Pittsburgh, PA 15222, Attorneys for Appellants, Ryan Operations G.P.;, NVR LP, and its division, NVR Building Products Co.

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JUDGES: BEFORE: SLOVITER, Chief Judge, STAPLETON and SAROKIN, Circuit Judges.

OPINION BY: SAROKIN

OPINION

[*356] OPINION OF THE COURT

SAROKIN, *Circuit Judge*:

This case raises issues concerning the application and scope of the doctrine of judicial estoppel. The district court, upon recommendation of a United States Magistrate Judge, granted summary judgment in favor of defendants on the theory that plaintiff, having failed to disclose its claims against defendants as a contingent asset in its Chapter 11 bankruptcy proceedings, was judicially estopped from seeking to recover on those [*357] claims. For the reasons that follow, we will reverse.

I.

Ryan Operations, plaintiff in this matter [1], is in the business of constructing homes. This action arises out of a commercial dispute between Ryan and the manufacturer and suppliers of primed [**3] Fingerjointed Ponderosa Pine wood trim that Ryan purchased between January 1988 and June 1991 and used in the construction of several thousand new homes. Ryan purchased the wood trim from Santiam-Midwest Lumber Co. ("Santiam") from January 1988 to March 1990, and from Furman Lumber, Inc. from March 1990 to June 1991. The trim was manufactured by Bright Wood Corporation.

1 Co-plaintiff in this matter is NVR, L.P., a limited partnership suing on behalf of its division NVR Building Products Company. Through a merger or series of mergers, a corporation entitled NVR, Inc. has become the successor in interest of NVR, L.P. and the parent corporation of NVR Homes, Inc. NVR Homes, Inc., also through a merger, has become the successor in interest of Ryan Operations. For simplicity's sake, we will refer to plaintiffs in this matter simply as "Ryan" or "plaintiff."

In July 1989, Ryan began receiving complaints from homeowners that the paint and underlying primer were peeling off the Ponderosa Pine trim on their new homes. [**4] Ryan informed Santiam of the problem, and Santiam suggested that Ryan switch to a different brand of primer. Ryan did so, but the problems continued and the complaints increased. As a result, Ryan instituted a consumer repair program in the fall of 1991, pursuant to which it has repainted and/or replaced the wood trim on hundreds of houses. Ryan is currently engaged in the costly process of replacing the trim on Ryan homes in several states.

In April 1992, Ryan filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. *In re NVR L.P.*, No. 92-11704-T (Bankr. E.D. Va. Apr. 6, 1992). The following month it filed its Schedule of Assets and Liabilities and Statement of Financial Affairs pursuant to Bankruptcy Code § 521. Although the Code requires the debtor to disclose all claims and causes of actions as contingent assets, Ryan did not mention any potential claims that it might have from the allegedly defective Ponderosa Pine trim.

In June 1992, the bankruptcy court entered an order authorizing Ryan to retain counsel to represent Ryan in lawsuits by and against it in the ordinary course of business. Among the "Routine Claims" that Ryan listed for the bankruptcy [**5] court were a class of "homeowners claims," nonspecifically defined as claims "by or against contractors or suppliers or relating to or arising out of the provision of services or material to the Debtors." App. 189-90. The court authorized Ryan to pursue and/or defend itself against such claims.

Subsequently, in December 1992, while the bankruptcy proceeding was still pending, Ryan filed suit in district court against Bright Wood, Santiam and Furman Lumber, alleging various breach of warranty claims arising out of the sale and manufacture of the Ponderosa Pine trim and seeking to recover the costs incurred in its consumer repair program.

In July 1993, without ever having been specifically informed of the pending lawsuit or the potential for recovery, the bankruptcy court confirmed Ryan's reorganization plan. Ryan emerged from bankruptcy the following month.

In September 1994, defendant Bright Wood moved for summary judgment on judicial estoppel grounds, arguing that Ryan's failure to inform the bankruptcy court of its warranty claims against Bright Wood precluded Ryan from pursuing those claims in the district court. Santiam, Furman, and the third-party defendants (who manufactured [**6] the primers used on the wood trim) joined in Bright Wood's motion. Upon recommendation of a United States Magistrate Judge, the district court granted summary judgment against Ryan on March 21, 1995, on the ground of judicial estoppel alone. From that ruling, Ryan appeals.

II.

The district court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[*358] **III.**

We exercise plenary review over the district court's order granting summary judgment. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir.), *cert. denied*, 133 L. Ed. 2d 107, 116 S. Ct. 165 (1995).

IV.

Judicial estoppel, sometimes called the "doctrine against the assertion of inconsistent positions," is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding. It is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from "playing 'fast and loose with the courts.'" *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953)(citation omitted). [**7] "The basic principle . . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477 (1981), p.782.

Ryan raises four issues regarding the scope and application of judicial estoppel for our review: (1) whether the district court erred in applying judicial estoppel at the request of one who was neither a party to the prior proceeding nor in privity with a party to that proceeding; (2) whether the district court erred in applying judicial estoppel because Ryan derived no benefit from its failure to disclose these potential claims in the bankruptcy proceedings; (3) whether the district court erred in concluding that Ryan's position in this lawsuit is inconsistent with a position it took in the bankruptcy proceedings; and (4) whether the application of judicial estoppel in this case is inconsistent with principles of equity and justice. We will examine each in turn.

V.

Both parties agree that federal law should govern our disposition of this case, [**8] and we accept their agreement. [2] Having [*359] determined that federal law controls, we turn to the first issue presented for our review: whether the doctrine of judicial estoppel is available only to those who were parties or in privity with a party to the prior proceeding. Ryan argues that the doctrine as expounded in this circuit has a privity requirement which prevents its being enforced by "strangers to the earlier litigation." Appellant's Br. at 29. As it is undisputed that none of the defendants in the instant action was a party to the bankruptcy proceeding, Ryan contends that the district court erred in applying judicial estoppel for their benefit.

2 Judge Sarokin, the author of this opinion, would not accept the agreement of the parties as to whether federal or state law governs in this case, because he believes that the question must be analyzed under the doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), and that the parties cannot stipulate as to the applicable law as they might in a choice-of-law situation. The following comments are the opinion of Judge Sarokin, not the court: It is well established that federal courts sitting in diversity must generally apply state substantive law and federal procedural law. *Erie*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817. This doctrine is rooted in the Constitution; the Supreme Court reasoned that "declaring substantive rules of common law" in diversity cases is "'an unconstitutional assumption of powers by courts of the United States.'" *Erie*, 304 U.S. at 78, 79; *see also* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, 19 *Federal Practice and Procedure* § 4505. Because the question of whether federal or state law should govern issues of judicial estoppel in diversity cases is a question of the constitutional powers of the federal courts, we cannot simply accept the parties' recommendation that federal law governs without first ensuring that applying federal law would be constitutional under the circumstances. We can ensure that the application of federal law is constitutional in one of two ways: (1) by determining, as I would, that the *Erie* doctrine does not apply; or (2) by determining under *Erie* that the law of judicial estoppel is procedural rather than substantive in nature.

Although I believe that judicial estoppel is substantive in nature, I am persuaded by the reasoning of the Sixth Circuit in *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 n.4 (6th Cir. 1982), and the Fourth Circuit in *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 n.4 (4th Cir. 1982), that *Erie* does not require us to apply state law. The *Erie* doctrine is not absolute; exceptions can be made where, as here, there are "affirmative countervailing considerations" that implicate "strong federal policy" considerations. *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 537-38, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958); *see also AFN, Inc. v. Schlott, Inc.*, 798 F. Supp. 219 (D.N.J. 1992). A federal court's ability to protect itself from manipulation by litigants should not vary according to the law of the state in which the underlying dispute arose. I would therefore conclude that a federal court sitting in diversity must apply federal law to questions regarding the doctrine of judicial estoppel.

There is an additional reason why I think it important to reach this matter. This court has never addressed this issue directly. While we have tended in the past to rely on federal law of judicial estoppel in diversity cases, we have occasionally applied state law or a combination of state and federal law. *Compare Scarano*, 203 F.2d 510 (applying federal law) *with Linan-Faye Construction Co. v. Housing Auth. of Camden*, 49 F.3d 915 (3d Cir. 1995)(applying New Jersey law) *and with Gleason v. United States*, 458 F.2d 171 (3d Cir. 1972)(applying both federal and state law). In some cases, there may be no relevant difference in terms of result between federal and state law of judicial estoppel. In other cases, however, the decision as to which law to apply may be dispositive of the outcome. As a result, I believe that we should take this opportunity to

> clarify the law of the circuit, especially since this issue has been properly briefed and presented to us.

[**9] We first articulated the doctrine of judicial estoppel in the seminal case of *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510 (3d Cir. 1953). The plaintiff in that case, following a work-related injury, sought damages from his employer on the ground that he was completely incapacitated. After winning a damages award, he proceeded to sue his employer for reinstatement under the terms of a collective bargaining agreement. We concluded that plaintiff was estopped from seeking reinstatement, explaining our reasoning as follows:

> The 'estoppel' of which, for want of a more precise word, we here speak is but a particular limited application of what is sometimes said to be a general rule that "a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits."

Id. at 512-13. We expressly declined to decide "whether the correct doctrine is that broad," however; instead, we stated that the

> rule we apply here need be and is no broader than this. A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one [**10] position may not be heard later in the same court to contradict himself in an effort to establish *against the same adversary* a second claim inconsistent with his earlier contention.

Id. at 513 (emphasis added).

Ryan argues that the language underlined above indicates our intention to instill a privity requirement into our newly articulated doctrine of judicial estoppel. The above excerpts make clear, however, that we did not hold that the doctrine was limited to circumstances in which a party asserted incompatible positions against the same adversary. On the contrary, we explicitly stated that we so articulated the rule because the facts of the case did not require us to determine whether a broader rule might apply in other circumstances.

Ryan correctly points out that we have never applied the doctrine of judicial estoppel for the benefit of parties who were not involved in the prior judicial proceeding. *See, e.g. Scarano*, 203 F.2d 510; *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3d Cir.)(holding that plaintiff is judicially estopped from asserting position in post-bankruptcy proceeding against a bankruptcy creditor that is inconsistent [**11] with position asserted in prior bankruptcy proceeding), *cert. denied*, 488 U.S. 967, 102 L. Ed. 2d 532, 109 S. Ct. 495 (1988); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107 (3d Cir. 1992)(holding that plaintiffs who promised bankruptcy court they would not seek recovery against debtor in excess of insurance coverage are judicially estopped from subsequently attempting to do so), *cert. denied sub nom Doughboy Recreational, Inc., Div. of Hoffinger Indus., Inc. v. Fleck*, 507 U.S. 1005, 123 L. Ed. 2d 267, 113 S. Ct. 1645 (1993); *Delgrosso v. Spang & Co.*, 903 F.2d 234 (3d Cir. 1990). However, we have never expressly limited the doctrine's applicability to situations in which a litigant asserts an inconsistent position against the same party or its privy.

[*360] The absence of an express rule notwithstanding, plaintiff argues that language in *Gleason v. United States*, 458 F.2d 171 (3d Cir. 1972), reveals that privity is required. The plaintiff in that case filed a Workers' Compensation petition following his exposure to radioactive material in a work-related accident, alleging prospectively that he had suffered injury. When injury from the radiation actually materialized four [**12] years later, plaintiff sued his employer for damages. Although plaintiff testified in deposition that he had not actually experienced an injury at the time of the Workers' Compensation petition, the trial court dismissed the case on statute of limitations grounds, reasoning that plaintiff's Workers' Compensation petition indicated that he knew about the injury well within the limitations period. On plaintiff's appeal, the employer argued that plaintiff should be judicially estopped from relying on deposition testimony which directly contradicted his Workers' Compensation petition.

In reaching our conclusion that judicial estoppel was inappropriate under the circumstances, we noted that the doctrine of judicial estoppel "has not always been applied, but has usually been applied where the same parties are involved and where one of the parties has changed his position or given something of value relying on the statement of his opponent." *Id.* at 175. Ryan now argues that this language evidences a rule that privity is required for the application of judicial estoppel. We disagree, for two reasons. First, we neither stated a rule in *Gleason* that these equitable characteristics [**13] were requirements for the application of judicial estoppel nor rested our decision on that basis. Rather, our decision rested on our conclusion that the plaintiff "did not play fast and loose with the courts or with the defendants." 458 F.2d 176. Second, although *Gleason* did not attempt to distinguish between equitable estoppel and judicial estoppel, we have since emphasized the importance of that distinction and more clearly articulated the border between the two doctrines. *See Oneida*, 848 F.2d at 419. Ryan cannot now extrapolate legal principles from any conflation of judicial and equitable estoppel that may have existed prior to our clarification of the distinction between the two.

In addition, we note that the purpose of the judicial-estoppel doctrine militates against the imposition of a privity requirement. Judicial estoppel "is intended to protect the courts rather than the litigants." *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 121-22 (3d Cir. 1992). As we explained in *Oneida*,

> judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties to the prior [**14] litigation.

Oneida, 848 F.2d 414, 419 (3d Cir. 1988). Unlike equitable estoppel, therefore, judicial estoppel does not require that the party urging estoppel demonstrate that she believed or relied upon the plaintiff's prior inconsistent statement. *Scarano*, 203 F.2d at 512. While privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required.

Our conclusion that privity is not required for the application of judicial estoppel accords with the majority view. *See Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 214 (1st Cir. 1987)("harm to an opponent is not an invariable prerequisite to judicial estoppel"); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)("judicial estoppel may be applied even if detrimental reliance or privity does not exist"); *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 937 (D.C. Cir. 1980)(same); *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 n.6 (8th Cir. 1987)(judicial estoppel does not require reliance or prejudice, because it seeks to protect the courts); *Muellner v. Mars, Inc.*, 714 F. Supp. 351, 356 (N.D. Ill. 1989).

There are many [**15] instances in which the assertion of inconsistent positions can work to the advantage of a party but where there is no identity or relationship between those against whom the claim (or defense) is asserted. Where the contentions are mutually exclusive, it is irrelevant that they are asserted against diverse parties for the purposes of determining judicial estoppel. The integrity of the court is affronted by the inconsistency notwithstanding the lack of identity of those against whom it is asserted.

[*361] The defendants in this case thus were not barred from seeking judicial estoppel by the fact that they were not parties to Ryan's bankruptcy proceeding.

VI.

We reach the same conclusion with respect to Ryan's related argument that "judicial estoppel should be applied only where the party resisting it benefited from the statement." Appellant's Br. at 44. Ryan contends that the district court erred in applying judicial estoppel in this case because, by Ryan's own estimation, Ryan did not benefit from its failure to disclose the instant claims in the bankruptcy court.

Putting aside for a moment the question of whether Ryan benefitted from its nondisclosure, we begin by determining [**16] whether as a general rule a party must have benefitted from her prior position in order to be judicially estopped from subsequently asserting an inconsistent one. We readily conclude that the doctrine of judicial estoppel in this circuit contains no such requirement. [3] We have noted on several occasions that "application of the doctrine of judicial estoppel is particularly appropriate in situations . . . where the party benefitted from its original position." *Delgrosso v. Spang & Co.*, 903 F.2d 234, 242 (3d Cir.), *cert. denied*, 498 U.S. 967, 112 L. Ed. 2d 412, 111 S. Ct. 428 (1990); *Murray v. Silberstein*, 882 F.2d 61 (3d Cir. 1989). In such cases, the tribunal has acted in reliance on the party's initial assertion, and thus the threat to the integrity of the judicial process from subsequent assertion of an incompatible position is more immediate.

> 3 We note that the Sixth and Seventh Circuits have reached the opposite conclusion. *See Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982); *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1548 (7th cir. 1990)("The offense is not taking inconsistent positions so much as it is winning, twice, on the basis of incompatible positions.").

[**17] Stating that benefit to the party from its prior position makes application of the doctrine "particularly appropriate," however, is not the equivalent of stating that such benefit is a necessary precondition to application of the doctrine. As we stated in *Lewandowski v. National Railroad Passenger Corp. (Amtrak)*, 882 F.2d 815 (3d Cir. 1989), "the critical issue is what the [party] contended in the underlying proceeding, rather than what the jury found." *Id.* at 819. Whether the party sought to be estopped benefitted from its earlier position or was motivated to seek such a benefit may be relevant insofar as it evidences an intent to play fast and loose with the courts. It is not, however, an independent requirement for application of the doctrine of judicial estoppel.

VII.

As judicial estoppel is intended to prevent parties from playing fast and loose with the courts by asserting inconsistent positions, any application of the doctrine must rest upon a finding that the party against whom estoppel is sought asserted a position inconsistent with one she previously asserted in a judicial proceeding. The third issue that Ryan raises on appeal is whether Ryan has in fact [**18] asserted inconsistent positions within the meaning of the judicial-estoppel doctrine. This entails a two-part inquiry: (1) is Ryan's present position inconsistent with a position it asserted in its Chapter 11 proceedings; and (2) if so, did Ryan assert either or both of the inconsistent positions in bad faith--i.e., with intent to play fast and loose with the court. Only if both prongs are satisfied is judicial estoppel an appropriate remedy.

The district court found that Ryan's failure to list its potential claims arising from the Ponderosa Pine trim on its schedule of assets in the Chapter 11 proceeding constituted a statement that Ryan had no such claim, which the current lawsuit contradicts. Ryan contends that its present claims are not inconsistent with any position it took in the bankruptcy proceeding because it neither affirmatively represented that it had no claim against defendants arising from the Ponderosa Pine Trim situation nor misled the court with regard to the existence and/or prosecution of those claims.

A.

As a preliminary matter, we will set forth the disclosure requirements of the United [*362] States Bankruptcy Code in order to place Ryan's alleged prior inconsistent [**19] statement in context. The Code imposes on debtors an affirmative duty of full disclosure. Section 521 requires the debtor to file with the court "a schedule of assets and liabilities . . . and a statement of the debtor's financial affairs." 11 U.S.C. § 521(1). The schedule must disclose, *inter alia*, "contingent and unliquidated claims of every nature" and provide an estimated value for each one. Official Forms, Schedule B, App. 41.

Once the bankruptcy proceeding is underway, the debtor may not solicit approval of a plan of reorganization from a claim-holder unless "at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). Adequate information is defined as

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed [**20] judgment about the plan . . . .

11 U.S.C. § 1125(a).

These disclosure requirements are crucial to the effective functioning of the federal bankruptcy system. Because creditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated. *See Oneida*, 848 F.2d at 417-18.

B.

It is undisputed that by failing to list its claims against defendants on its § 521 schedule of assets, Ryan violated these statutory duties of full disclosure. However, this court has expressly left open the question of whether such nondisclosure, standing alone, can support a finding that a plaintiff has asserted inconsistent positions within the meaning of the judicial-estoppel doctrine. *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988)("We stop short of finding that . . . [plaintiff's] prior silence is equivalent to an acknowledgment that it did not have a claim against the bank."). [4] We need not decide this issue here, and we decline to do so, because we conclude that judicial estoppel would be inappropriate [**21] in any event as there is no evidence that Ryan acted in bad faith.

4 In that case, as here, the plaintiff sought to pursue claims that it had failed to disclose on its § 521 schedule of assets in a prior bankruptcy proceeding. Unlike Ryan, however, the plaintiff in *Oneida* had not only failed to disclose its potential claim against a bank for $ 7.7 million as a contingent asset on its § 521 schedule of assets and liabilities, but simultaneously claimed the corresponding $ 7.7 million debt to the bank as a liability on the same schedule. Because the plaintiff had claimed the debt in the bankruptcy proceeding without disclosing the potential offset, we found that the plaintiff's "current suit speaks to a position clearly contrary to its Chapter 11 treatment of the bank's claim as undisputed." *Id.* As a result, we concluded that judicial estoppel was appropriate under the circumstances, because "Oneida's failure to list its claim against the bank worked in opposition to preservation of the integ-

rity of the system which the doctrine of judicial estoppel seeks to protect." *Id.*

In this case, Ryan did not treat the homeowners' claims arising from the Ponderosa Pine trim debacle as undisputed; in fact, it did not specifically mention those claims at all. As a result, Oneida does not compel a conclusion that Ryan's subsequent assertion of those claims was inconsistent with its Chapter 11 treatment of them.

[**22] Asserting inconsistent positions does not trigger the application of judicial estoppel unless "intentional self-contradiction is . . . used as a means of obtaining unfair advantage." *Scarano*, 203 F.2d at 513. Thus, the doctrine of judicial estoppel 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." *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 939 (D.C. Cir. 1980). An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing. *See Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993); *see also Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th [*363] Cir. 1987)(holding that the doctrine only applies to deliberate inconsistencies that are "tantamount to a knowing misrepresentation to or even fraud on the court.").

Defendants contend that in a bankruptcy proceeding, a debtor's failure to satisfy its statutory duty of full disclosure gives rise to an inference of bad faith sufficient to satisfy the requirements of the judicial-estoppel doctrine. They rely for support on our decision in *Oneida*, in which we [**23] applied judicial estoppel without an express finding of intentional misconduct. In reaching our conclusion that plaintiff's failure to list its claims as assets in the underlying Chapter 11 proceeding precluded it from asserting them in a post-bankruptcy proceeding, we stated that "Oneida's failure to list its claim against the bank worked in opposition to preservation of the integrity of the judicial system which the doctrine of judicial estoppel seeks to protect." 848 F.2d at 419.

While we did not expressly analyze plaintiff's intent in *Oneida*, we did not discard that analysis entirely in light of plaintiff's affirmative duty of full disclosure under the Bankruptcy Code. On the contrary, there was ample evidence in the record from which an inference of deliberate manipulation could be drawn. Oneida had listed its $ 7.7 million debt to the bank on its schedule of liabilities without mentioning the possibility of an offset. As a result, the creditors as a whole had a skewed sense of Oneida's financial condition and no knowledge of a claim that could inure to their benefit. Whereas the creditors may have been entitled to the full amount of any recovery had they known about the [**24] claim in advance, the reorganization plan that they approved without knowledge of the claim limited their potential recovery to one-third of the debtor's gross recovery. 848 F.2d at 416 n.1. In addition, had the bank known that Oneida would subsequently seek restitution of the amount paid under the plan, it might well have voted against approval of the plan. 848 F.2d at 418. It is therefore clear that Oneida had ample motive to conceal its claim. Moreover, as the gravamen of Oneida's case against the bank was that the bank's actions were responsible for forcing Oneida into bankruptcy, it is clear that Oneida had knowledge of this potential claim at the time it filed for bankruptcy. This combination of knowledge of the claim and motive for concealment in the face of an affirmative duty to disclose gave rise to an inference of intent sufficient to satisfy the requirements of judicial estoppel.

In contrast to *Oneida*, there is no basis in this case for inferring that Ryan deliberately asserted inconsistent positions in order to gain advantage--i.e., that it played fast and loose with the courts. There is no evidence that the nondisclosure played any role in the confirmation of the [**25] plan or that disclosure of the potential claims would have led to a different result. Although it may generally be reasonable to assume that a debtor who fails to disclose a substantial asset in bankruptcy proceedings gains an advantage, the undisputed facts weigh against such an inference in this case. First, Ryan's failure to list the instant claims as contingent assets was offset by its failure to list the corresponding claims of homeowners against Ryan resulting from the allegedly defective wood trim as liabilities. As a result, the balance of assets and liabilities before the court and creditors when the reorganization plan was approved may have been unaffected by the failure to list the claims as assets. *Compare Oneida*, 848 F.2d at 418 (finding debtor who listed amount owed to creditor as a liability in bankruptcy proceeding without any mention of possible offset judicially estopped from pursuing post-bankruptcy claim against that creditor). Second, pursuant to the reorganization plan, creditors will receive 91 percent of any future recovery on the Ponderosa Pine Trim claims, and will suffer 91 percent of the loss if Ryan is unable to recover the expenses incurred in the [**26] repair and replacement program from defendants. Affidavit of Bruce W. Gilchrist, App. 191-92. Thus, it appears that Ryan derived and intended no appreciable benefit from its nondisclosure. *Compare Payless Wholesale Distributors, Inc. v. Culver*, 989 F.2d 570, 571 (1st Cir.)(applying judicial estoppel upon finding that plaintiff intended to "conceal [its] claims [in bankruptcy proceeding]; get rid of [its] creditors on the cheap; and start over with a bundle of rights"), *cert. denied*, [*364] 126 L. Ed. 2d 309, 114 S. Ct. 344 (1993).

Nor do Ryan's actions subsequent to the filing of its § 521 schedule support a finding that it sought to conceal the claims deliberately. In an order modifying the automatic stay to allow for litigation of "routine claims," the bankruptcy court specifically authorized Ryan to pursue "(i) homeowner claims, including, but not limited to, warranty claims, . . . [and] (ii) claims by or against contractors or suppliers or relating to or arising out of the provision of services or materials to the Debtors . . . ." Order (i) Modifying the Automatic Stay to Allow Litigation of Routine Claims to Proceed, (ii) Authorizing Debtors to Settle Routine Claims, [**27] and (iii) Authorizing Debtors to Pay Settlement Amounts or Judgments of $ 15,000 or Less Relating to Routine Claims, July 1, 1992, App. 218-19. Upon receipt of this authorization, Ryan filed the instant action during the pendency of the bankruptcy proceedings, albeit in a different jurisdiction. Ryan then submitted fee requests to the bankruptcy court detailing, among other things, counsel's work in the Ponderosa Pine Trim litigation, which the bankruptcy court reviewed and approved for payment. App. 231-40. Finally, the reorganization plan that the court and creditors approved authorized Ryan to retain and enforce claims against any entity and to adjudicate homeowner claims. Second Amended Joint Plan of Reorganization, §§ 4.09 & 7.02, App. 86 & 92. While none of these facts standing alone is sufficient to substitute for disclosure under § 521, in combination they preclude a finding that Ryan deliberately concealed its claims against defendants from the bankruptcy court or otherwise sought to "obtain . . . unfair advantage." *Scarano*, 203 F.2d at 513. [5]

5 Defendants cite several district court cases from other jurisdictions in support of their position that a debtor's failure to disclose a claim as an asset in bankruptcy precludes later assertion of that claim under the doctrine of judicial estoppel. *See Pako Corp. v. Citytrust*, 109 Bankr. 368 (D. Minn. 1989); *In re Hoffman*, 99 Bankr. 929 (N.D. Iowa 1989); *In re Louden*, 106 Bankr. 109 (E.D. Ky. 1989); *In re Galerie des Monnaies*, 62 Bankr. 224 (S.D.N.Y. 1986), *aff'd*, 1986 WL 6230 (S.D.N.Y. 1986); *In re Caro Area Services for the Handicapped*, 53 Bankr. 438 (E.D. Mi. 1985). Several of these cases are clearly distinguishable from the instant case. *See, e.g., Pako*, 109 Bankr. at 377 (finding that debtor knowingly concealed claim in light of pre-bankruptcy testimony of General Counsel/Chief Administrative Officer that he thought debtor had been wronged by defendant). To the extent that some are not, we note simply that these cases are not binding on this court, and we are not persuaded by their analysis.

[**28] We note in addition that while plaintiff cites district court decisions from various jurisdictions that support its position, [6] defendant cites no case in which a court held that intent to mislead or deceive could be inferred from the mere fact of nondisclosure, and we are aware of none. We are persuaded, however, that policy considerations militate against adopting a rule that the requisite intent for judicial estoppel can be inferred from the mere fact of nondisclosure in a bankruptcy proceeding. Such a rule would unduly expand the reach of judicial estoppel in post-bankruptcy proceedings and would inevitably result in the preclusion of viable claims on the basis of inadvertent or good-faith inconsistencies. While we by no means denigrate the importance of full disclosure or condone nondisclosure in bankruptcy proceedings, we are unwilling to treat careless or inadvertent nondisclosures as equivalent to deliberate manipulation when administering the "strong medicine" of judicial estoppel. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993).

6 *See Guenther v. Snap-On Tools Corp.*, 1995 WL 137061, *11 (N.D. Ill. 1995)(unreported decision)(holding that judicial estoppel on the basis of bankruptcy nondisclosure is inappropriate because "there is no basis for finding any misconduct or injustice"); *In re TGX Corp.*, 168 Bankr. 122, 132 (W.D. La. 1994)(finding nondisclosures "not sufficiently egregious" to justify judicial estoppel); *Reciprocal Merchandising Services, Inc. v. All Advertising Associates, Inc.*, 163 Bankr. 689, 697 n.11 (S.D.N.Y. 1994)(finding that "intentional misconduct is a necessary element in a claim for judicial estoppel" even in bankruptcy context); *In re Neptune World Wide Moving, Inc.*, 111 Bankr. 457 (S.D.N.Y. 1990)(stating that judicial estoppel does not apply where inconsistency was based on inadvertence or mistake).

[**29] Defendants argue that rejecting their proposed "inferred intent" rule "would invite prolonged discovery into the motives of the debtor." Bright Wood's Br. at 25. We disagree. [*365] For purposes of judicial estoppel, we require a showing of intent in other contexts; we see no reason why the process of discerning that intent should be unworkable in the bankruptcy context when it is workable elsewhere. We therefore reject defendant's argument that intent may be inferred for purposes of judicial estoppel solely from nondisclosure notwithstanding the affirmative disclosure requirement of the Bankruptcy Code.

Because Ryan did not act with the intent to play fast and loose with the courts that is required for application of the judicial-estoppel doctrine, we conclude that the district court erred in granting summary judgment against Ryan on judicial estoppel grounds.

VIII.

As we have already concluded that the district court erred in granting summary judgment against Ryan on judicial estoppel grounds, we need not reach Ryan's argument that application of judicial estoppel under the circumstances of this case would violate principles of equity and justice. We nonetheless state briefly [**30] our belief that judicial estoppel is an "extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." *Oneida*, 848 F.2d at 424 (Stapleton, J., dissenting). It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to "secure substantial equity." *Gleason*, 458 F.2d at 175. In this case, application of judicial estoppel would be unduly harsh and inequitable. While we need not and do not decide whether we would reverse the district court's order on this ground alone, our equitable concerns lend support to our overall conclusion.

IX.

For the foregoing reasons, we will reverse the order of the district court granting summary judgment in favor of defendants and remand for further proceedings.

LEXSEE 848 F.2D 414, 419

Oneida Motor Freight, Inc., a Corporation of the State of New York, Appellant v. United Jersey Bank, a Corporation organized under the Banking Laws of the United States of America and United Jersey Bank, a New Jersey Corporation, Defendant-Third Party Plaintiff v. Donald T. Singleton, Third Party Defendant Action for Referral to Bankruptcy Court; In re: Oneida Motor Freight, Inc., Debtor, B.C. # 85-03606(DV)

No. 87-5525

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

848 F.2d 414; 1988 U.S. App. LEXIS 7162; Bankr. L. Rep. (CCH) P72,329; 17 Bankr. Ct. Dec. 1272

February 1, 1988, Argued
May 31, 1988, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of New Jersey - Newark, D.C. Civil No. 87-1440.

COUNSEL: Allan H. Klinger, Esq., (argued), John A. Rizzo, Esq., Jane S. Shapiro, Esq., Klinger, Nicolette, Mavroudis & Honig, Oradell, New Jersey, Counsel for Appellant.

William S. Katchen Esq., (argued), John L. Laskey, Esq., Vincent F. Papalia, Esq., Clapp & Eisenberg, Newark, New Jersey, Counsel for Appellee.

JUDGES: Sloviter, Stapleton, and Mansmann, Circuit Judges. Stapleton, Circuit Judge, dissenting.

OPINION BY: MANSMANN

OPINION

[*415] OPINION OF THE COURT

MANSMANN, Circuit Judge.

Oneida Motor Freight, a Chapter XI debtor, appeals the dismissal of its contract and tort action against United Jersey Bank, a secured creditor. We must determine whether Oneida, seeking damages for the bank's alleged breach of certain loan agreements, is estopped from litigating this action by the preclusive effect of prior bankruptcy proceedings.

We conclude that Oneida violated both its statutory and fiduciary duty to disclose this current claim against the bank during the pendency of the bankruptcy case. By virtue of this failure to disclose, equitable and judicial estoppel [**2] operate against further litigation by Oneida. Accordingly, we shall affirm the order of the district court.

I.

Oneida Motor Freight, engaged in the interstate and intrastate trucking industry, and United Jersey Bank have maintained a banking relationship since 1983. In the course of their business dealings, the parties entered into two lending agreements. Under the terms of a "Revolving Credit Agreement", the bank would extend up to five million dollars in credit through loans and letters of credit. The parties also negotiated an "Accounts Receivable Security Agreement", whereby the bank would lend Oneida a percentage of Oneida's accounts receivable while maintaining a security interest in Oneida's accounts, equipment and inventory. The lending limits of these agreements have never been reached or exceeded.

In February 1985, Oneida settled a dispute which arose in connection with its acquisition of another trucking company, Dorn Transportation Company. In order to satisfy its obligations under the terms of the settlement, Oneida called upon the bank to pay certain outstanding letters of credit. Rather than charging against the letters of credit, however, the bank withdrew the [**3] necessary funds from Oneida's operating account. As a result, Oneida's account became habitually overdrawn. Nonetheless, at least for a period time, the bank honored Oneida's overdrafts.

In July 1985, the bank requested that the owner of Oneida, Donald Singleton, personally guarantee Oneida's debt. According to Oneida, when Mr. Singleton refused, the bank ceased honoring Oneida's checks. The dishonor of these checks allegedly compelled Oneida, on July 10, 1985, to file a petition under Chapter XI of the Bankruptcy Code. Oneida then ceased its operations and proceeded with liquidation.

On July 11, 1985, the bank filed a motion for relief from the automatic stay entered in the bankruptcy proceeding. The application for relief further sought an order establishing the validity and extent of the bank's lien. On that same date, Oneida requested permission of the bankruptcy court for Oneida to use cash collateral of the bank, which was granted.

A series of subsequent orders was entered by the bankruptcy court in regard to matters pertaining to Oneida's and the creditors' rights, including, on September 30, 1985, a stipulation and order confirming a settlement among the bank, Oneida [**4] and the official unsecured creditors' committee. This order provided for an unconditional payment by Oneida to the bank in the amount of $ 6,650,000. Thereafter, on January 14, 1986, an order and a judgment were entered by the bankruptcy court, further detailing the extent and validity of the bank's lien. In this order, the amount due the bank by Oneida was established at $ 7,631,322.73 an amount already paid in full.

On August 14, 1986 the bankruptcy court entered an order confirming Oneida's Joint [*416] Plan of Reorganization. Nowhere in the plan or in the confirmation order is reference made to Oneida's current claim against the bank. [1]

1 After the present action was filed in state court, the plan was modified to order that one-third of the net recovery that Oneida might obtain against the bank in this lawsuit be paid to the creditors.

Approximately seven months later, on March 11, 1987, Oneida commenced this action against the bank in the Superior Court of New Jersey. In its complaint, Oneida [**5] alleged breaches of the credit agreements, of the parties' course of dealing and of the bank's duty of good faith. Oneida also set forth a cause of action in tort for fraudulent misrepresentation on the part of the bank and its agents. Oneida alleged that the bank's prior assurances, coupled with its dishonor of certain checks "without notice" denied Oneida an adequate opportunity to seek alternate financing to satisfy the payees of the dishonored checks. Oneida additionally asserted that the actions of the bank seriously damaged its business reputation with its customers and creditors. Oneida cited these improper activities by the bank as the catalyst for its Chapter XI filing.

The bank filed an answer and a third party complaint against Donald Singleton, Oneida's sole shareholder. [2] The bank then removed the action to the U.S. District Court for the District of New Jersey.

2 By order of June 24, 1987, the district court granted Singleton's motion to dismiss the third party complaint.

On May 14, 1987 the [**6] bank moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), failure to state a claim upon which relief can be granted, and/or Rule 12(c), motion for judgment on the pleadings. The district court, after argument, dismissed the complaint. 75 Bankr. 235. The court held that since Oneida's claims against the bank arose from the same series of transactions which were the subject of the extensive prior bankruptcy proceedings, its failure to bring this particular claim to the bankruptcy court's attention violated fundamental principles of preclusion and barred Oneida from proceeding with the action.

Oneida filed a notice of appeal from this final decision of the district court. We have jurisdiction under the authority of 28 U.S.C. § 1291.

The historical facts are undisputed. It is the preclusive effect of the bankruptcy proceeding upon this current action, if any, which is contested; resolution involves interpretation of legal precepts over which we invoke our power of plenary review. [3]

3 The bank captioned its motion as, alternatively, a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and/or Rule 12(c). The district court granted the bank's motion without comment as to which procedural rule it applied.

Oneida argues that the motion should have been handled as a motion requesting summary judgment and asserts that the presence of unresolved factual matters mandate that the order entered in the bank's favor be reversed.

The district court characterized this argument as "irrelevant" since its decision was based on the legal question of the preclusive effect of the bankruptcy proceeding. The court then determined that no discovery was necessary for Oneida to defend against the bank's res judicata argument.

In deciding the merits of Oneida's argument, we are unable to discern which precise facts the district court relied upon, *i.e.*, what comprised "the current record." Under either motion, however, the district court had to examine the record of the prior bankruptcy proceeding. Indeed, the district court was entitled to take judicial notice of these matters in rendering its decision, regardless of the motion employed. *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364 (7th Cir. 1983); 2A J. Moore, J. Desha Lucas and G. Grotheer, Moore's Federal Practice para. 12.15 (2d ed. 1987).

Review of the legal component for either of the motions is identical -- since the material facts here are the undisputed historical facts -- we determine, as did the district court, whether the moving party, the bank, is entitled to judgment as a matter of law.

[**7] II.

A long-standing tenet of bankruptcy law requires one seeking benefits under its terms to satisfy a companion duty to schedule, for the benefit of creditors, all his interests and property rights. *In Re Hannan*, 127 F.2d 894 (7th Cir. 1942).

[*417] Section 521 of the current Bankruptcy Code outlines a non-exhaustive list of the debtor's duties in a bankruptcy case. Foremost for our purposes, the debtor is required to "file a . . . schedule of assets and liabilities . . . and a statement of the debtor's financial affairs. . . ." 11 U.S.C. § 521(1) (1978).

An additional obligation is imposed by 11 U.S.C. § 1125(b) mandating the filing of a disclosure statement containing "adequate information." Section 1125(a) defines adequate information [**8] as follows:

> § 1125. Postpetition disclosure and solicitation
>
> (a) In this section--
>
> (1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan
>
> . . . .

Concomitant with these prescribed duties is the debtor's "absolute and unlimited right to be heard in reorganization proceedings." *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 871 (5th Cir. 1984).

We regard the right-conferring language of *Southmark* as confirmation of the debtor's express obligation of candid disclosure. The preparing and filing of a disclosure statement is a critical step in the reorganization of a Chapter XI debtor. One commentator, citing the relevant legislative history, labeled this duty as the pivotal concept in reorganization procedure under the Code. 5 Collier on Bankruptcy para. 1125.03 [**9] (15th ed. 1988).

The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of "adequate information."

From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case. H.R. Rep. No. 595, 97th Cong., 1st Sess. 266 (1977). It has been specifically held that a debtor must disclose any litigation likely to arise in a non-bankruptcy contest. *Monroe County Oil Company v. Amoco Oil Co.*, 75 B.R. 158 (Bankr. S.D. Ind. 1987). The result of a failure to disclose such claims triggers application of the doctrine of equitable estoppel, operating against a subsequent attempt to prosecute the actions. *In Re Galerie Des Monnaies of Geneva Ltd.*, 55 B.R. 253 (Bankr. S.D. N.Y. 1985), *aff'd*, 62 B.R. 224 (Bankr. S.D. N.Y. 1986).

A strong interest to achieve finality pervades Chapter [**10] XI arrangements. *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703 (2d Cir. 1983). This goal of finality was supported by the Supreme Court in *Stoll v. Gottlieb*, 305 U.S. 165, 83 L. Ed. 104, 59 S. Ct. 134 (1938), holding that confirmation of a plan acts to bar attempts by the parties to relitigate any of the matters that could have been raised during the bankruptcy proceedings. 5 Collier on Bankruptcy para. 1141.01[1] (15th ed. 1988). *See also, In Re Penn Central Transportation Co.*, 771 F.2d 762 (3d Cir. 1985), *cert. denied*, 474 U.S. 1033, 106 S. Ct. 596, 88 L. Ed. 2d 576 (1985).

Disclosure is important, in this case, not only to the bank as an adversary and as a creditor, but to the other creditors and to the bankruptcy court. Here, "the silence" in the Oneida bankruptcy record concerning this present claim, as they say in the vernacular, "is deafening." In Schedule A-2 of its Statement of Financial Affairs required by § 521, Oneida acknowledged its debt to the bank in the amount of approximately 7.7 million dollars, without any mention of a setoff. The debt to the bank in part represented principal [**11] and interest due on the lending agreements, the alleged breach of which Oneida now seeks to place at issue. In the portion of the statement requiring enumeration of "contingent and unliquidated claims of every nature, *including counterclaims . . .*", Oneida listed only an unrelated accounts receivable claim [*418] of $ 6,827.030. (Emphasis added.) We conclude that the reorganization plan presented by Oneida to the creditors for confirmation, lacking disclosure of the potential for recovery against the bank, was informationally deficient, and not cured by the later modification. [4] The original plan failed to alert the creditors to the possible financial benefits enuring to them upon the successful prosecution of the claim.

4 *See supra* note 1.

We can assume that revealing the potential action may also have impacted upon the bank's decision to enter into the stipulation establishing the extent and validity of its lien against Oneida and to vote for confirmation. The practical effect of a successful [**12] prosecution of Oneida's claim would be to require the bank to make restitution of the amount realized on its bankruptcy claim, since Oneida's present action calls into question the bank's right to collect its secured debt. This would also constitute a successful collateral attack on the bankruptcy court's order confirming the reorganization plan. In such circumstances, employment of equitable estoppel is required to preserve the integrity of the earlier proceedings, particularly where, as here, the creditors have reasonably acted in reliance upon the assumed finality and integrity of those adjudications. *County Fuel Company v. Equitable Bank Corporation*, 832 F.2d 290 (4th Cir. 1987).

In order to preserve the requisite reliability of disclosure statements and to provide assurances to creditors regarding the finality of plans which they have voted to approve, we hold that under the facts here present Oneida's failure to announce this claim against a creditor precludes it from litigating the cause of action at this time.

III.

Oneida asserts that it did not make known the presence of this cause of action during the course of the bankruptcy proceeding primarily [**13] because the bankruptcy matter was never in a procedural posture for a proper assertion of this claim.

Oneida argues that the bank's decision to commence a "contested matter" when requesting relief from the automatic stay rather than instituting an "adversary proceeding" foreclosed Oneida's obligation to raise this current claim. Oneida notes that Bankr. Rule 9014, governing contested matters, delineates other bankruptcy rules which can apply to contested matters. Rule 9014 does not, however, cross-reference Rule 7008, allowing for a debtor to raise affirmative defenses to a creditor's claim, or Rule 7013, allowing a debtor to assert counterclaims against a creditor.

Recognizing that Rule 9014 allows the bankruptcy court, at any stage in a particular matter, to direct that the unenumerated rules of Chapter VII shall apply, Oneida states that it could not raise its claim because the bankruptcy court did not utilize this permissive authority. We are somewhat surprised by this argument because the bankruptcy court was totally unaware that Oneida thought it had such a claim and the bankruptcy court was, therefore, never in a position to direct application of rules which might otherwise [**14] have been applicable.

Oneida further argues that it had no obligation to raise the claim when the bank sought relief from the automatic stay. Oneida cites several cases for the proposition that a motion for relief from stay, as brought by the bank under 11 U.S.C. § 362(d), is not the proper setting for adjudication of a counterclaim. *See, e.g., In Re Lexington Racquetball Club, Inc.*, 58 B.R. 103 (Bankr. E.D.Pa. 1986); *In Re Transleisure Corp.*, 41 B.R. 201 (Bankr. E.D.N.Y. 1984). Despite these cases, it is clear that while stay proceedings may not be proper for adjudication of a counterclaim, a party may, nevertheless, raise its counterclaim at that time. One court noted:

> The Court fully agrees that a preliminary hearing under § 362 is not the proper time or place for a full *adjudication* of the trustee's claims against the creditor. . . . However, there is a tremendous difference between *adjudication* of the [*419] merits [**15] and mere *consideration* of counterclaims and defenses.

In Re Tallywell Services, Inc., 45 B.R. 149, 151 (Bankr. E.D.Mich. 1984). S. Rep. No. 95-989, 95th Cong., 2d Sess. 66 (1978).

The next procedural event providing an opportunity to bring this present claim to the forefront in the bankruptcy proceeding occurred when a hearing was held regarding Oneida's request, opposed by the bank, for use of cash collateral. After testimony, the parties consented to a cash collateral arrangement and partial vacation of the automatic stay which were memorialized in the bankruptcy court's order of July 25, 1985. It is not unreasonable to conclude that neither the bankruptcy court, nor particularly the bank, would have agreed to allow Oneida to utilize the collateral in the hands of the bank if a question as to the bank's threshold right to the funds was put at issue.

Oneida also asserts that it had no obligation to raise the claim when the bankruptcy court entered orders confirming validity of the bank's loan. Four separate orders were entered regarding the validity, priority and extent of the bank's claim against Oneida. The end result of these orders was the [**16] establishment and confirmation of the amount of the bank's claim for 7.7 million dollars. No affirmative defenses, counterclaims or objection to the claim were pleaded or raised in connection with entry of these orders. Oneida contends that these orders involve different causes of actions than those presented by the district court complaint, and thus did not provide an opportunity to raise its defense to the claim. As we discuss later, we reject this argument of Oneida's, finding instead that the two claims stem from the same transaction, *i.e.*, alleged breaches of the loan agreement present an issue of fact common to the matters before the bankruptcy court in determining the extent and validity of the bank's lien based on the loan agreement.

Although Oneida may be technically correct in its argument that it was never *procedurally* compelled to raise its claim, we are satisfied that its failure to mention this potential claim either within the confines of its disclosure statement or at any stage of the bankruptcy court's resolution precludes this later independent action. Even absent [**17] a specific mandate to file a counterclaim, complete disclosure is imperative to assist interested parties in making decisions relevant to the bankrupt estate.

IV.

We are also mindful of the equitable concept of judicial estoppel. This doctrine, distinct from that of equitable estoppel, applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted. Judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties to the prior litigation. *Scarano v. Central Railroad Co.*, 203 F.2d 510 (3d Cir. 1953); *USLIFE Corp. v. U.S. Life Insurance Co.*, 560 F. Supp. 1302 (N.D. Tex. 1983).

We conclude that Oneida's failure to list its claim against the bank worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect. Although we stop short of finding that, as the bank urges, Oneida's prior silence is equivalent to an acknowledgement that it did not have [**18] a claim against the bank, we agree that its current suit speaks to a position clearly contrary to its Chapter XI treatment of the bank's claim as undisputed.

Oneida argues that judicial estoppel is not applicable because the claims raised in this lawsuit are entirely different, factually and legally, from those matters addressed in the bankruptcy proceeding. [5] In light of [*420] Oneida's threshold assertion in its district court complaint that the bank's breach of the lending agreements was the catalyst to its Chapter XI filing, we are unpersuaded by this argument. The relative rights and obligations of these parties are embodied in the lending agreements and the parties' course of dealing. To be successful in this action, Oneida must demonstrate a deviation from the contracted-for and established business relationship -- a deviation which would certainly call into question any rights which the bank could assert as a creditor of Oneida for obligations accruing under the lending agreements. *Cf. Paradise Hotel Corporation v. Bank of Nova Scotia*, 842 F.2d 47 (3d Cir. 1988) (debtor, after filing a voluntary bankruptcy petition, requested the bankruptcy court [**19] to stay a previously-filed involuntary petition; debtor's stated motivation was to preserve potential claims arising from filing of the involuntary petition to pursue these claims later).

5 This is the identical argument raised in both Oneida's contest of the district court's application of the preclusion principle of res judicata to this matter and Oneida's rationale for not raising its claim in the bankruptcy forum.

In reaching its decision to apply res judicata here, the district court indicated what we described in *United States v. Athlone Industries, Inc.*, 746 F.2d 977 (3d Cir. 1984), as, "a predisposition towards taking a broad view of what constitutes identity of causes of action -- 'an essential similarity of the underlying events giving rise to the various legal claims.'" *Id.* at 984, citing *Davis v. United States Steel Supply*, 688 F.2d 166, 1971 (3d Cir. 1982) (in banc), *cert. denied*, 460 U.S. 1014, 75 L. Ed. 2d 484, 103 S. Ct. 1256 (1983). Without further elaboration, the district court then found that the current claims for breach of contract and misrepresentation were part of the same cause of action before the bankruptcy court, thereby barring further litigation of the present suit.

Because the matter here originated as a bankruptcy petition and was adjudicated in a format peculiar to bankruptcy matters, comparison of the two actions is not susceptible to the four-step analysis outlined in *Athlone*. Rather, we scrutinize the totality of the circumstances in each action and then determine whether the primary test of *Athlone, i.e.*, essential similarity in the underlying events, has been satisfied. Since it is Oneida's threshold allegation that the bank's activity in connection with the lending agreements was the catalyst to Oneida's filing a Chapter XI petition, we are unpersuaded by Oneida's current position that the two actions represent unrelated events. In any event, because the concept of equitable estoppel in relation to the debtor's duty of disclosure is dispositive in this matter, we need not further address this issue.

[**20] V.

The district court, although focusing primarily upon basic principles of res judicata, properly stressed the debtor's special duty of candid disclosure when it granted the bank's motion to dismiss.

While the result of terminating this lawsuit may produce a harsh result to other creditors of Oneida whose claims have not been paid in full, we are mindful of our review authority here -- we have been asked to rule only on the propriety of the district court's conclusion with respect to the bank. Although we focus our decision on estoppel by reason of failure to disclose, we cannot say that the district court erred in its result. We shall affirm the order of the district court.

DISSENT BY: STAPLETON

DISSENT

STAPLETON, Circuit Judge, dissenting:

Concern for Oneida's numerous unsecured creditors compels me to dissent from the court's disposition. Those creditors, as well as Oneida, stand to lose by virtue of that disposition. If Oneida had been able to foresee this court's novel application of equitable and judicial estoppel, it would have been able to protect itself against the loss the court today imposes upon it. Oneida's unsecured creditors, however, had no way of protecting themselves [**21] and should not be required to contribute towards a windfall for an alleged wrongdoer.

I.

The court professes to steer clear of the claim preclusion analysis that underlies the district court's decision. It does so, however, only in the wake of an analysis sounding as much in claim preclusion as in the estoppel theories it embraces, and in a fashion which reflects, at most, only minor quibbles with the district court's view. I therefore begin with a discussion of the claim preclusion issue.

In effectuating the indisputable public interest in finality in bankruptcy proceedings, courts apply ordinary rules of claim and issue preclusion in the bankruptcy context. *See e.g. Miller v. Meinhard-Commercial* [*421] *Corp.*, 462 F.2d 358, 360 (5th Cir. 1972); *Virgin Islands Bureau of Internal Revenue v. St. Croix Hotel Corp.*, 60 B.R. 412, 414 (D. V.I. 1986). Restatement (Second) of Judgments § 24(1) sets forth the general rule with respect to claim preclusion, stating that:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all [**22] rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

The court is simply mistaken, as was the district court, to the extent it suggests that this principle directs the outcome reached in this case. Section 24(1) prohibits claim-splitting, which by definition occurs when a party who has once asserted a claim attempts to reintroduce the claim in another guise thereafter. Here, Oneida asserted no claim against the bank in the bankruptcy proceedings. Having made no previous attempt to pursue a claim against the bank, Oneida cannot now be said to be prosecuting, and forcing the bank to defend, a suit for the second time.

One might argue to greater effect that Oneida's claims are precluded because Oneida did not file a counterclaim in response either to the bank's proof of claim or to its motion to lift the automatic stay and determine the extent and validity of its lien. Section 22(2) of the Restatement (Second) of Judgments states:

> A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the [**23] rendition of judgment in that action, from maintaining an action on the claim if:
>
> (a) the counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or
>
> (b) the relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

For me, analysis of this case under this applicable legal principle dispels any doubt about whether it is barred by claim preclusion. As the majority acknowledges, no compulsory counterclaim statute or rule required Oneida to assert its claim in the bankruptcy proceedings. Because the bank's motion to establish the validity and extent of its lien and to lift the automatic stay gave rise to contested, rather than adversary proceedings, Bankruptcy Rule 9014 governed and Fed. R. Civ. P. 13(a) [1] was inapplicable absent explicit court direction to the contrary. The court issued no such direction. Similarly, while the Code calls for the disclosure of claims, as we discuss hereafter, no Code provision requires that the debtor actually litigate in the bankruptcy proceedings [**24] any claim the debtor happens to have against one of its creditors. [2] Indeed, as noted in our subsequent discussion, Oneida's reorganization plan provides by its very terms, *See* Article XII, App. at 146, [3] that all claims and causes of action of Oneida's not expressly released or terminated in accordance with the plan may be prosecuted by Oneida or the Creditor's Committee after entry of the confirmation order.

1 Rule 13(a) states that: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ."

2 The absence of such a rule is consistent with § 553, the Code's setoff provision. Section 553 permits a creditor to exercise a right of setoff, but does not require the creditor to do so. The absence of such a rule also is consistent with our recent decision in *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47 (3d Cir. 1988), where we held that a debtor who believes that an involuntary bankruptcy proceeding was filed against it in bad faith may pursue its remedies after bankruptcy, rather than relying exclusively on the relief provided by the Code in § 303(i)(2).

[**25]

3 Article XII is quoted, *infra*, slip op. at 8.

Nor can it be said that Oneida's decision to prosecute its claims now, after the close of the bankruptcy proceedings, threatens to undermine a judgment of the bankruptcy [*422] court and thus that Oneida's claims should be barred on that basis. *See* Restatement (Second) of Judgments § 22(2)(b). [4] While the court suggests that such a danger is presented by the facts of this case, I fail to see the logic of its argument. The bankruptcy court entered orders reflecting the undisputed facts that the bank had loaned Oneida more than $ 7.6 million, that Oneida was indebted to the bank to that extent, and that the bank's lien on Oneida's property securing that amount was valid. Oneida had no basis for contesting its debt to the bank or the validity of the bank's lien and, accordingly, it did not contest the bank's applications to the bankruptcy court. Oneida now seeks to prosecute behavior by the bank, occurring after the loaning of the $ 7.6 million, which Oneida believes was both impermissible and directly responsible for the circumstances [**26] that led to its bankruptcy. Resolution of the question of the propriety of the bank's behavior in Oneida's favor and entry of a judgment against the bank on Oneida's claims would be entirely consistent with the determinations of the bankruptcy court that Oneida had a duty to repay the $ 7.6 million loaned to it and that the bank's security interest had been perfected. [5] Accordingly, I would conclude that Oneida's failure to raise its present claim as a counterclaim in the bankruptcy proceeding did not undermine the bankruptcy court's orders.

4 In two cases cited by the court, *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 871 (5th Cir. 1984) and *County Fuel Co. v. Equitable Bank Corp.*, 832 F.2d 290 (4th Cir. 1987), courts of appeal held that claims were barred by claim preclusion in contexts where granting relief would have been inconsistent with findings of fact or conclusions of law supporting the judgment in a prior case or would have effectively rescinded relief granted in a prior case. Both holdings are supported by the principle set forth in § 22(2)(b). In *Southmark*, the debtor sought to collaterally attack an order authorizing and confirming a sale of property to the debtor's mortgagee. In *County Fuel Co.*, the debtor attempted to raise claims that, had they been successfully raised when the creditor moved for removal of the automatic stay, would have caused the court to reject the motion.

[**27]

5 There is not even a significant overlap of the evidence crucial to the motions decided in the bankruptcy court and the evidence necessary to an analysis of Oneida's current claims. The bankruptcy court's determinations required consideration of the credit agreement, the value of the lien on Oneida's property and accounts receivable, and the question whether the bank properly perfected its liens. Oneida's current claims on the other hand, would necessitate investigation of the bank's behavior immediately prior to Oneida's filing in Chapter 11. With the exception of the credit agreement itself, the evidence adduced in the bankruptcy court would likely be irrelevant to this investigation.

Thus, I conclude that Section 22(2) of the Restatement sets forth the applicable rule of claim preclusion and that application of that rule to the facts of this case requires a conclusion that Oneida's claim is not precluded.

II.

I would also reject the equitable and judicial estoppel theories on which the court places express reliance in foreclosing Oneida's claims. The court's reasoning, in short, is [**28] that Oneida forfeited its claims when it did not list them in its disclosures pursuant to § 521, which requires every debtor to file a schedule of assets, and § 1125, which imposes a similar obligation on a debtor soliciting acceptance of a reorganization plan. In my view, the court's analysis and the remedy it endorses ignore the purposes of the Code's disclosure requirements.

The Code's disclosure requirements are intended to protect those creditors whom a debtor's failure to disclose hidden assets would prejudice. *A fortiori*, a court's response to nondisclosure should do likewise. Not only does the court fail to safeguard the interests of Oneida's unsecured creditors, but it effectively penalizes them by foreclosing the prosecution of claims against the bank that would, if successful, result in a substantial enhancement of the estate and in their receiving more than the approximately thirty cents on the dollar for which they have been forced to settle. The only real winner in the case as decided is the bank, whom the court has relieved of [*423] the responsibility of justifying its allegedly improper behavior.

The court does not explain why it finds more even-handed [**29] alternatives inadequate. I see no reason, for example, why we could not allow this suit to proceed and simply make reference to the fact that the bankruptcy court has jurisdiction to entertain motions to amend or rescind the debtor's reorganization plan if such motions are brought by unsecured creditors who feel that Oneida's nondisclosure has prejudiced them. [6] *See* § 350(b) ("A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."). The availability of such a course of action would in most cases adequately deter nondisclosure. Section 1141(d)(3), which authorizes denial of discharge under certain conditions, provides additional deterrence, as does 18 U.S.C. § 152 which makes it a crime, among other things, to "knowingly and fraudulently [conceal] . . . any property belonging to the estate of a debtor." *See e.g. 3 Collier on Bankruptcy* para. 521.02 (15th ed. 1986) (suggesting that concealment of an asset is subject to denial of discharge or criminal sanctions pursuant to 18 U.S.C. § 152).

6 At oral argument, we were advised that the Creditor's Committee had concurred in Oneida's decision to pursue its claims against the bank and that an application had been made to the bankruptcy court for a plan amendment that would provide for creditor participation in any recovery.

[**30] Moreover, this case stands in marked contrast to the circumstances under which estoppel has traditionally been invoked. Here, Oneida never represented that it would not press a claim against the bank. On the contrary, starting with its initial disclosure statement and continuing throughout the Chapter 11 proceedings, Oneida made clear that it thought it had been mistreated by the bank. [7] Having announced its displeasure at the outset, Oneida actively preserved its right to file claims. When the bank sought a general release in connection with the order establishing the extent and validity of its lien, for instance, Oneida's counsel wrote:

> While we would have no objection to an amendment of the Order to, in effect, delete the handwritten portion of the Order which was included per Judge DeVito's direction, the Order proposed by you constitutes an omnibus release pertaining to the matters far beyond the issue of service charges. Unless the Order is modified to pertain only to the issue of service charges, the matter cannot be resolved . . .

App. at 422. Oneida successfully secured exclusion of the release. Thereafter, Oneida's insistence on preserving any claims [**31] it might have never wavered, and culminated in Article XII of the reorganization plan itself:

> All claims and causes of action in favor of [Oneida] not expressly released or terminated in accordance with the Plan are hereby preserved and may be prosecuted by [Oneida] or the Creditors' Committee after entry of the Confirmation Order.

App. at 146.

7 Oneida's disclosure statement charged the bank with:

> unilaterally with [drawing] Four Hundred Fifty Thousand Dollars ($ 450,000) from the Debtor's operating account to be applied towards satisfaction of the Dorn's settlement

and claimed that

> Said overdraft caused an immediate overdraft in the Debtor's account, which became a chronic situation until the filing of the bankruptcy proceedings.

App. at 109.

Thus, Oneida never assumed a position which its current actions repudiate. *Compare Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953); *In re Galerie Des Monnaies of Geneva Ltd.*, 55 B.R. 253 (Bankr. S.D. N.Y. 1985), [**32] *aff'd* 62 B.R. 224 (S.D. N.Y. 1986) (debtor had affirmatively stated a belief it did not have preference actions, and would have been the only beneficiary of actions ultimately brought after bankruptcy). Nor has the bank pointed to any persuasive evidence that it was prejudiced by anything Oneida did or did not do during the bankruptcy [*424] proceeding. [8]

8 The court maintains that, had the bank known about Oneida's claims, it might not have entered into a stipulation as to the extent and validity of its lien, or voted for confirmation. I find it difficult to believe the bank was prejudiced in these respects, when undisputed evidence indicates that the bank was essentially paid in full by Oneida's plan. The bank's consent to the use of some of its cash collateral came prior to the filing of Oneida's statements of assets and liabilities and its disclosure statement and could not have been influenced thereby.

In sum, equitable and judicial estoppel are extraordinary remedies to be [**33] invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. Oneida's behavior was neither inconsistent nor inequitable. Accordingly, I believe that the court should not have applied estoppel doctrines to this case.

III.

For the foregoing reasons, I would reverse the judgment of the district court.

LEXSEE 11 F.3D 1420, 1428

HARRY F. CHAVERIAT, JR., et al., Plaintiffs-Appellants, v. WILLIAMS PIPE LINE COMPANY, Defendant-Appellee.

No. 93-1652

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

11 F.3d 1420; 1993 U.S. App. LEXIS 33373; 24 ELR 20217

October 25, 1993, Argued
December 21, 1993, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 89 C 5841. James B. Zagel, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For HARRY F. CHAVERIAT, JR., Successor Trustee of Trust Agreement dated January 19, 1972, HILDEGARD F. HOCHSTETLER, HELENE L. NICKLES, Plaintiffs - Appellants: James T. J. Keating, Richard M. Kuntz, Dennis A. Berg, Chicago, IL.

For WILLIAMS PIPELINE COMPANY, Defendant - Appellee: Kathleen M. Hennessey, MAYER, BROWN & PLATT, Washington, DC. Percy Angelo, Mark R. Ter Molen, Sheila D'Cruz, MAYER, BROWN & PLATT, Chicago, IL.

JUDGES: Before POSNER, Chief Judge, MANION, Circuit Judge, and GRANT, District Judge. *

* Hon. Robert A. Grant of the Northern District of Indiana, sitting by designation.

OPINION BY: POSNER

OPINION

[*1423] POSNER, *Chief Judge.*

The plaintiffs in this diversity suit seek damages for a nuisance caused by petroleum contamination. Illinois law controls. In 1931 Great Lakes Pipe Line Company, the defendant's predecessor, constructed a six-inch pipeline under a 208-acre tract of farmland in DuPage County. In 1944 the pipeline broke and spilled 30,000 gallons of unleaded gasoline which soaked into the ground and could not be recovered. The land was owned [**2] by Thaddeus Milfeld and farmed by his daughter and son-in-law. Great Lakes paid the daughter and son-in-law for the damage caused by the spill, obtaining a release from the son-in-law. The daughter and her siblings later inherited the land and sold it to the plaintiffs' predecessor in title. In 1956 Great Lakes built a second, larger (twelve-inch) petroleum pipeline under the land. Ten years later Great Lakes sold all its pipeline assets to the defendant, expressly retaining all liabilities not listed on its balance sheet. Actual or contingent liabilities arising from damage to land through which the pipelines ran were therefore retained. In 1985 the defendant sold the six-inch pipeline to a fiber optics company and it ceased being used to carry petroleum products.

We come now to the immediate antecedents of the suit. In 1986, the plaintiffs sold an option to a real estate developer to buy the land for the creation of an industrial park. The developer, who eventually exercised the option for some $ 7 million, made soil borings which revealed petroleum contamination. The plaintiffs retained a contractor named Eiler to clean up the contamination. Eiler in turn retained Testing Service [**3] Corporation to take soil samples, and TSC hired NET Midwest to test the samples. After subjecting the samples to chromatographic analysis, NET reported to TSC, which reported to Eiler, that the only petroleum product in the samples was unleaded gasoline. But NET did not give TSC, Eiler, or the plaintiffs the actual chromatograms on which NET's conclusion concerning the nature of the contamination was based.

Satisfied that the contamination had been caused by the unleaded gasoline spilled in 1944, Eiler so represented to the Illinois Environmental Protection Agency, which approved a cleanup plan designed and executed by Eiler at a cost to the plaintiffs of more than $ 1 million. This suit, filed in July 1989, seeks to recover that cost. Although the complaint alleges petroleum contamination without specifying the type of petroleum product or the date of the break or leak that [*1424] caused the contamination, pretrial discovery brought to light no indication of any break or leak other than the break that had occurred in 1944. In response to the defendant's discovery request for "all documents referring to, reflecting or relating to any contamination of the Property," the plaintiffs did not [**4] hand over the chromatograms, as they had never been in their possession, or Eiler's, or even TSC's.

Discovery, other than of prospective expert witnesses, closed in April 1991. The following month the plaintiffs moved to amend their complaint to add a new claim of contamination, based on the discovery of diesel fuel in two stormwater retention ponds. The judge denied the motion, ruling that it could be made the basis of a new suit if the plaintiffs wanted. The discovery of the diesel fuel had prompted the plaintiffs in March 1991 to arrange for the taking of additional soil samples, which were subjected to chromatographic tests that revealed the presence of diesel fuel. In July, the plaintiffs' expert, Ball, obtained from NET the chromatograms that the laboratory had prepared at TSC's request back in 1989, and according to Ball these chromatograms, too, reveal the presence of diesel fuel in the soil. If Ball is correct, NET had either failed to analyze the chromatograms fully back in 1989 or failed to communicate its analysis fully to TSC.

The plaintiffs submitted copies of the 1989 chromatograms to the defendant forthwith (it had already submitted copies of the 1991 ones to them), [**5] only to be met by a motion to exclude the chromatograms from evidence as a sanction for the plaintiffs' having failed to produce them in response to the original document request; for they had been in existence then. The district judge granted the motion--and excluded the 1991 chromatograms to boot. He thought the plaintiffs' failure to have produced the 1989 chromatograms in 1989 was inexcusable; that the plaintiffs were estopped by their representations to the defendant and to the Illinois Environmental Protection Agency to change the theory of their case from a 1944 gasoline spill to a fairly recent (date unknown) spill of diesel fuel; that the new evidence was weak; and that it was too late for the plaintiffs to change the theory of their case. The last must have been the reason the judge excluded the 1991 chromatograms as well--they were pertinent only to a claim of contamination by diesel fuel. With the case now confined to the 1944 spill, the judge granted summary judgment for the defendant on the ground that the defendant bore no liability as the successor to Great Lakes, the owner of the pipeline in 1944.

The easy issue is the correctness of the judgment with respect to the [**6] 1944 spill. That was long before the defendant became the owner of the pipeline. The general rule in Illinois as elsewhere is that the purchaser of assets does not acquire the seller's liabilities unless he agrees to do so. *Nilsson v. Continental Machine Mfg. Co.,* 251 Ill. App. 3d 415, 190 Ill. Dec. 579, 621 N.E.2d 1032, 1034 (Ill. App. 1993); *Myers v. Putzmeister, Inc.,* 232 Ill. App. 3d 419, 596 N.E.2d 754, 173 Ill. Dec. 130 (Ill. App. 1992). If the liabilities always went with the assets, it would be difficult to sell assets because the purchaser would not know what he was getting. He might be "buying" a lawsuit the expected cost of which exceeded the value of the asset purchased, yet it would be too late for him to back out of the sale or renegotiate the price. *Manh Hung Nguyen v. Johnson Machine & Press Corp.,* 104 Ill. App. 3d 1141, 433 N.E.2d 1104, 1110, 60 Ill. Dec. 866 (Ill. App. 1982).

The rule permitting assets to be sold separately from liabilities is part of a large family of rules aimed at facilitating transactions by clearing clouds on titles. Another member of the family is the rule that a bona fide purchaser for value takes free of certain claims against the seller in respect to the good sold. See, [**7] e.g., UCC § 2-403. If, however, the "sale" is simply a corporate reorganization that leaves real ownership unchanged, the liabilities go with the assets. *Nilsson v. Continental Machine Mfg. Co., supra; State ex rel. Donahue v. Perkins & Will Architects, Inc.,* 90 Ill. App. 3d 349, 413 N.E.2d 29, 32, 45 Ill. Dec. 696 (Ill. App. 1980); *Plaza Express Co. v. Middle States Motor Freight, Inc.,* 40 Ill. App. 2d 117, 189 N.E.2d 382, 385 (Ill. App. 1963). And when one corporation is merged into another, the acquiring corporation gets the liabilities of the acquired one along with the [*1425] assets. *Robinson v. KFC National Management Co.,* 171 Ill. App. 3d 867, 525 N.E.2d 1028, 1032, 121 Ill. Dec. 721 (Ill. App. 1988); 805 ILCS 5/11.50(a)(5). If it did not, the transaction would be a sale of assets rather than a merger.

We confess to some puzzlement as to why liabilities are retained when the assets sold constitute an entire business, a "going concern." A seller who is exiting from a business doesn't want to be plagued by lawsuits afterward and may not even retain the organizational capacity to defend against them. It is true that a disclaimer of liability is good only against the [**8] purchaser, not against a nonconsenting third party. Assignment makes the assignee another obligor; it does not let the assignor off the hook. But it reduces the probability that he will be sued. A further consideration in the case in which the entire business is sold is that the buyer is likely as a matter of ordinary prudence to have investigated the business's history before buying it and through that investigation to have discovered the seller's contingent liabilities, and he is therefore less likely to be surprised by a subsequent lawsuit than the purchaser of a particular asset would be. Of course not all contingent liabilities are foreseeable. The requirements for cleaning up polluted land have become much more stringent since 1966, when Great Lakes sold its pipeline business to the defendant; and it is unlikely that the parties anticipated the political and legal changes that are responsible for that greater stringency.

Still another consideration is that when an entire business is sold the seller may no longer be able to pay a judgment. This is clearest in the case where after the sale of all its assets a corporate seller distributes the proceeds of the sale to the shareholders [**9] and dissolves. If the purchaser is not liable, the transaction will have externalized the costs of the seller's acts that gave rise to liability. This consideration may help explain why liabilities are retained rather than transferred when a business operated as a proprietorship rather than in the corporate form is sold, even though all the assets used in the proprietorship are sold. James J. White & Robert S. Summers, *Uniform Commercial Code* § 19.1, p. 755 (2d ed. 1980). Unlike a corporation that sells its entire business and dissolves, rendering suit against it difficult (to say the least), a proprietor does not dissolve when he sells his business.

The common law rule that the sale of assets does not carry the liabilities with them is qualified by bulk-sale statutes. And it is merely a default rule--a rule that courts use to complete contracts when the parties have failed to specify the allocation of some risk. If, not trusting the default rule or wanting to vary it, the parties have specified whether liabilities are to be retained by the seller or assumed by the buyer, the court will enforce the specified allocation and the default rule drops out. *American Xyrofin, Inc. v. Allis-Chalmers Corp.*, 230 Ill. App. 3d 662, 595 N.E.2d 650, 658-59, 172 Ill. Dec. 289 (Ill. App. 1992). [**10] Neither the default rule nor an express retention of liabilities will be enforced, however, if there is some element of fraud against present or prospective tort or contract or other creditors of the seller. To avoid a judgment in an impending lawsuit or avalanche of suits the seller might have sold all its assets to a new corporation owned by its predecessor's owners and retained all its liabilities in an assetless shell; if so, then as in *Wolff v. Shreveport Gas, Electric Light & Power Co.*, 138 La. 743, 70 So. 789, 794-95 (La. 1916); *cf. Plaza Express Co. v. Middle States Motor Freight, Inc., supra,* 189 N.E.2d at 385, the successor corporation would be liable. Or, again to avert impending financial destruction through litigation, the original enterprise might have sold its assets to a third party, retained the liabilities in the shell, and distributed the proceeds of the sale to its shareholders. The purchaser would be liable, though only up to the value of the assets (since any debt above that value would have been dischargeable in bankruptcy), provided that he knew about the suit. Cf. *In re International Paper Co.*, 961 F.2d 558, 559 (5th Cir. 1992). [**11]

There are few cases under the fraud exception, partly because the corporate-reorganization rule noted earlier takes care of a *Wolff-type* corporate shell game and partly because creditors prefer to cast these cases as suits to set aside a fraudulent conveyance. [*1426] It has been suggested, indeed, that the fraud exception to the nonliability of successors is merely an application of the law of fraudulent conveyances. 15 *Fletcher Cyclopedia of the Law of Private Corporations* §§ 7125, 7129 (1990 rev. ed.). We need not pursue the issue. There is no suggestion of fraud here; so the express retention of liability by Great Lakes ends the case so far as the 1944 break is concerned. Even without that express retention the defendant would be off the hook. For while Great Lakes sold its entire pipeline business to the defendant rather than merely selected assets, the default rule as we have said is that liabilities are retained, not transferred, unless the sale is pursuant to a corporate reorganization or merger.

Even less need we consider the argument that as an original matter a seller, whatever the intention behind the transaction (and so regardless of whether there is fraud), ought not [**12] be allowed to render itself judgment-proof by selling all its assets and distributing the proceeds of the sale, while retaining all liabilities, thus shielding the buyer; that in such a case the liabilities should follow the assets into the hands of the purchaser, or of the seller's owners, so that the holder of a judgment against the seller will be able to collect on it. This is not the law, with irrelevant exceptions that include special rules for collective bargaining agreements and in some states for products liability suits, and the "trust fund" doctrine, recognized in most states, which imposes continued liability for a brief time on former shareholders of a dissolved corporation for the corporation's debts. *Blankenship v. Demmler Mfg. Co.*, 89 Ill. App. 3d 569, 411 N.E.2d 1153, 1155-56, 44 Ill. Dec. 787 (Ill. App. 1980); *In re RegO Co.*, 623 A.2d 92, 95 (Del. Ch. 1992); Mark J. Roe, "Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability," 70 *Va. L. Rev.* 1559, 1564 n. 15 (1984). The issue is doubly academic because Great Lakes did not dissolve or otherwise render itself judgment-proof [**13] after the sale of its pipeline business.

It is triply academic. The statute of limitations for bringing suit against either Great Lakes or a successor in respect of the 1944 spill expired many years ago. It is true that a statute of limitations does not begin to run in Illinois until the plaintiff (or his predecessor in title) discovers or should have discovered the injury on which he wants to base his suit. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 430 N.E.2d 976, 979-80, 58 Ill. Dec. 725 (Ill. 1981); *Singletary v. Continental Illinois National Bank & Trust Co.*, 9 F.3d 1236, 1993 U.S. App. LEXIS 29705, No. 93-1849, slip op. at 7 (7th Cir. Nov. 16, 1993). But it is so highly improbable that Milfeld's daughter and son-in-law failed to inform Milfeld--who lived just half a mile from the farm--of the large oil spill for which Great Lakes was offering compensation that, all witnesses being dead so that only the probabilities of the situation are available to guide decision, no reasonable factfinder could conclude that the statute of limitations had not begun to run when the spill occurred.

The difficult question is whether the plaintiffs should have been allowed in 1991 to expand this lawsuit to take in the possibility [**14] that some part of the contamination of their land was due to a spill of diesel fuel. They cannot be criticized for having failed to produce the 1989 chromatograms when the defendant first requested all test results. The request was broad enough to have encompassed any chromatograms that the plaintiffs had; and the plaintiffs do not deny that the request required them to produce every pertinent document in their "possession, custody or control" within the meaning of Fed. R. Civ. P. 34(a)(1), even if it was not in their physical possession. But they did not have custody or control: they could not order NET to surrender the chromatograms to them. *Searock v. Stripling,* 736 F.2d 650, 653-54 (11th Cir. 1984); *Gerling Int'l Ins. Co. v. Commissioner,* 839 F.2d 131, 139-40 (3d Cir. 1988). The plaintiffs disclosed to the defendant the identities of Eiler, TSC, and NET as sources of the information on which the suit was based, and if the defendant had wanted pertinent documents in the custody or control of any of those entities it had only to issue a subpoena duces tecum. Fed. R. Civ. P. 34(c), 45. It did not do so. The plaintiffs could [**15] no doubt have asked NET to give it the chromatograms; judging from what happened later, NET would have complied; [*1427] and maybe if it had balked, the plaintiffs could have bought the chromatograms from it. But the fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control; in fact it means the opposite.

The district judge gave additional grounds, however, for refusing to allow the plaintiffs to press their alternative theory. One was that the evidence for it was very weak. The stormwater retention ponds in which the diesel fuel was first spotted drain a larger area than the plaintiffs' property and anyway would be more likely to collect surface spills than underground ones. A recent spill from the defendant's pipeline (or pipelines, for it had two under the plaintiffs' land until 1985) would, moreover, almost certainly have included some leaded petroleum products; but no lead has ever been found in the plaintiffs' land. And pretrial discovery turned up no record of any post-1944 break, leak, or spill even though the owner of a pipeline has a powerful self-interest, unrelated [**16] to liability concerns, in identifying and correcting a leak, since a leak causes a loss of product and resulting loss of revenue to the pipeline company. A leak could go undiscovered for a time, but modern pipelines contain electrical detection systems which make this unlikely. Finally, Eiler's original conclusion that the contamination had been caused by the 1944 spill was based on some 400 soil borings and was concurred in by the public agency responsible for the elimination of such contamination. The inference seems inescapable that the "discovery" of diesel fuel contamination was spurred by a well-founded concern that the plaintiffs' claim based on the 1944 gasoline spill was doomed by Great Lakes' retention of liability and by the expiration of the statute of limitations.

Another ground that the district judge offered for his ruling was judicial estoppel. A litigant is forbidden to obtain a victory on one ground and then repudiate that ground in a different case in order to win a second victory. *Davis v. Wakelee,* 156 U.S. 680, 689-91, 39 L. Ed. 578, 15 S. Ct. 555 (1895); *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America,* 2 F.3d 760, 764 (7th Cir. 1993); [**17] *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.,* 910 F.2d 1540, 1547-49 (7th Cir. 1990); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (1981). Though called judicial estoppel, the doctrine has been applied, rightly in our view, to proceedings in which a party to an administrative proceeding obtains a favorable order that he seeks to repudiate in a subsequent judicial proceeding. *Smith v. Pinner,* 891 F.2d 784, 787 n. 4 (10th Cir. 1989) (per curiam); *Parisi v. Jenkins,* 236 Ill. App. 3d 42, 603 N.E.2d 566, 573-74, 177 Ill. Dec. 496 (Ill. App. 1992); *Department of Transportation v. Coe,* 112 Ill. App. 3d 506, 445 N.E.2d 506, 508, 68 Ill. Dec. 58 (Ill. App. 1983); *Czajkowski v. City of Chicago,* 810 F. Supp. 1428, 1435-36 (N.D. Ill. 1992). It was very much in the plaintiffs' interest to persuade the Illinois EPA that the contamination of their land was due to a spill of unleaded gasoline in 1944, because the agency has more stringent requirements for cleaning up land that is contaminated by lead. Having fended off the agency, the plaintiffs want [**18] now to reverse course and recover their clean-up costs by persuading a court that what was really cleaned up was a much later diesel-fuel spill.

True, this about-face might not make the defendant on balance worse off than it would have been had the plaintiffs put their money on the diesel-fuel hypothesis from the start. It is not a case of a plaintiff seeking double recovery by taking inconsistent positions in subsequent suits. All that the plaintiffs are seeking by way of damages is the expense they incurred to clean up the land. If the Illinois EPA had imposed more stringent requirements on the clean up, the plaintiffs would have incurred higher costs and would be seeking higher damages. But the objective of the doctrine of judicial estoppel is not just to protect the party in the suit in which his opponent seeks to repudiate an earlier position successfully asserted. It is also to prevent situations from arising in which one of two related decisions has to be wrong because a party took opposite positions [*1428] and won both times. If the plaintiffs are right this time, and the contamination that they cleaned up was due to a spill of diesel fuel, then they failed to comply with the state's [**19] environmental protection regulations. If they did comply fully with those regulations, it means they are wrong this time and there was no spill of diesel fuel. By making them choose one position irrevocably, the doctrine of judicial estoppel raises the cost of lying. Alternative pleading is permitted, so a party does not have to make a binding election of positions until the first suit goes to judgment. *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 364 (7th Cir. 1990). But he is forbidden to equivocate beyond that point.

This case is further complicated, however, by the possibility that the opposite positions are not really opposite. It may simply be that in 1989, when the plaintiffs persuaded the Illinois EPA that the contamination was due to the old spill, this was the best information available to them and it was not until the diesel fuel showed up in the retention ponds two years later that there was any reason to suspect a spill more recent than 1944. There would be no purchase at all for invoking judicial estoppel if the diesel fuel had been spilled *after* the Illinois EPA's ruling. But we do not understand the plaintiffs to be arguing [**20] that the spill is that recent; the fuel in the ponds may be symptomatic of a spill that occurred earlier, though more recently than 1944.

The plaintiffs should of course have alerted the state agency to the possibility of additional contamination. Their stated reason for not doing so--that none of the additional tests revealed lead--weakens their new theory, because pipelines don't run just diesel fuel and a recent spill would almost certainly have included some leaded products. However that may be, the doctrine of judicial estoppel is not an absolute bar to obtaining legal relief on the basis of new information, even if inconsistent old information had gotten the party an advantage in some other proceeding. It would be odd to apply this rather esoteric though we think salutary doctrine more strictly than collateral estoppel or law of the case, related bars to changing one's position after it has been adopted by a court. At least where there is no issue of double recovery (an important qualification to which we shall return shortly), if the court in the second suit is satisfied that the position adopted in the first suit was clearly wrong yet had been advanced in good faith by the [**21] party now sought to be estopped to repudiate it, the court is not required to apply the doctrine of judicial estoppel. *In re Cassidy,* 892 F.2d 637, 642 (7th Cir. 1990).

Whether the court would be *permitted* to apply the doctrine in such a case if the party sought to be estopped had been fully compensated in the earlier proceeding in which it had taken the opposite position is an interesting question, although one unnecessary to resolve in this case. Judicial estoppel is strong medicine, and this has led courts and commentators to characterize the grounds for its invocation in terms redolent of intentional wrongdoing. Comment, "Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel," 80 *Nw. U. L. Rev.* 1244, 1264-65 (1986). But barring *double* recovery hardly seems an excessive sanction for careless as distinct from deliberate reliance in an earlier proceeding on a ground now argued to be mistaken. To base double recovery on the plaintiff's own carelessness would be a strange inversion of the principles of unjust enrichment. But that is not an issue here, and the judge's invocation of the doctrine of [**22] judicial estoppel, like his sanctioning the plaintiffs for failing to produce the chromatograms in response to the defendant's discovery request, was unwarranted.

All this said, we think the district judge acted within the bounds of reason in refusing to allow the suit to be expanded to take in the claim of diesel-fuel contamination. It was a weak claim, seemingly a desperate response to the increasing remoteness, legal as well as chronological, of the 1944 spill. And the plaintiffs were seeking to make a fundamental change in the theory of their case after two years of litigation, including extensive pretrial discovery.

Most important, it was not a matter of introducing new evidence, or changing merely the legal conceptualization of their claim, but of injecting an entirely new and separate [*1429] claim. The original suit--everyone had understood despite the vagueness of the complaint--had been based on damage caused in 1944 by a large spill of unleaded gasoline. The new evidence had nothing to do with the 1944 spill and resulting damage, except that the defendant could be expected to cite that spill as the real cause of any contamination of the plaintiffs' land. Although the date of the [**23] hypothetical diesel-fuel spill has never been pinpointed, the plaintiffs describe it as fairly recent and let us suppose, simply to make analysis concrete, that it occurred in 1980. A petroleum spill in 1980 is a different tort from a petroleum spill in 1944. That it came from the same pipeline and polluted the same land no more makes it part of the earlier tort than the fact that A had assaulted B in 1944 and again in 1980 would make the two assaults one tort rather than two. Suppose B had sued A, claiming that an assault (not otherwise specified) by A had caused brain damage to B first discovered in 1985; and suppose the parties had assumed (and B had made representations to the district attorney) that the assault that did the damage was the one that occurred in 1944. Two years into the case B decides that the 1944 assault probably had not caused the damage to his brain--it was the 1980 assault that had done so--and he asks the judge for permission to introduce evidence concerning that assault. It would be entirely within the judge's power to say to B: If you want to bring a case based on the 1980 assault you're free to do so; but the case you have brought is based on the 1944 assault [**24] and I will decide that case without allowing it to become encumbered with a separate claim. *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 437-38 (7th Cir. 1989); *Kier v. Commercial Union Ins. Cos.*, 808 F.2d 1254, 1258 (7th Cir. 1987).

Since the decision whether to permit a complaint to be amended is confided to the district judge's discretion, *id.*, rather than to our own, we cannot be entirely comfortable in affirming, because we cannot be entirely confident that the judge's decision was not affected by misconceptions concerning both the doctrine of judicial estoppel and the culpability of the plaintiffs in failing until 1991 to produce the 1989 chromatograms in response to the defendant's document request. But our confidence is restored by the remarks that the judge made in open court when he denied the motion to amend the complaint. He said that when "you [the plaintiffs] offer something which essentially changes the scope of liability and increases the costs, you are in a very real sense being unfair to your opponent, who had they known about this earlier on may very well have decided that [**25] all of this was not worth the candle and this may very well have settled, at less cost to them, at less cost to you and at less time consumed in court, although in all honesty the time consumed by the court in this case has not been particularly great." There is no reference to nonproduction of the 1989 chromatograms or to judicial estoppel. And it undoubtedly is true that a more diligent investigation into the nature and possible causes of the contamination before the plaintiffs filed their complaint would have shortened the litigation, economized on the parties' expenses and the judge's time, and possibly facilitated settlement. For failure to exercise such diligence the sanction imposed by the judge, refusing to allow the complaint to be amended, was mild, since the plaintiffs can bring a new suit in an effort to vindicate their new theory. They can do so because, for the reasons that we have indicated, the doctrine of judicial estoppel would not bar such a suit. The suit would not be barred by res judicata either, since it would arise from a different act, at a different time, causing a different harm, from the first suit--as the defendant itself emphasizes, so that for it to [**26] plead res judicata in the next suit would invite application of the doctrine of judicial estoppel against it! And the statute of limitations is not an obstacle. The plaintiffs did not discover the new injury until 1991. They cannot be faulted for NET's failure to discover it or if it did discover it to communicate its discovery to them. So they can obtain all the relief to which they are legally entitled by filing a new suit without the clutter and confusion that turning the old suit 180 degrees in mid-course would invite.

We have thus far been treating the issue as whether the district judge abused [*1430] his discretion in refusing to permit the complaint to be amended. But that is only part of the issue. He did refuse to permit the complaint to be amended but he also and separately precluded the plaintiffs from using as evidence either set of chromatograms. By doing this he prevented them from developing their new claim, that of a recent spill of diesel fuel. The plaintiffs didn't have to amend their complaint (though they tried to anyway) to add the claim; the complaint was sufficiently vague to encompass it.

We have to compare two situations in order to evaluate the judge's preclusion [**27] order. In the first, as is increasingly common despite the "notice pleading" philosophy of the Federal Rules of Civil Procedure and the specific admonition of Rule 8(a) that the statement of the claim in the complaint shall be "short and plain," the complaint is highly specific. So, if the plaintiff in the course of pretrial discovery comes up with a new claim, he will have to get his complaint amended if the pleadings and the proof are to be conforming. In the second situation the statement of "the claim" in the complaint is sufficiently general to encompass a variety of claims, and then no amendment is needed to add a new claim provided it falls within the broad range staked out by the complaint. But the defendant may object to the injection of a new claim after there has been extensive discovery during which that claim was never so much as hinted at. Whatever power a judge has to refuse to amend the complaint in the first situation he should also have in ruling on a request by the defendant in the second situation to exclude the new claim by keeping out the evidence on which it is based. And since the guidelines to the exercise of judicial discretion are more developed in the first [**28] situation than in the second, we can follow them here even though this is a case of the second as well as of the first type. Undue delay, undue prejudice to the opposing party, and futility of amendment (because the claim sought to be added has no merit) are all reasons for a district judge's deciding that allowing the complaint to be amended would not serve the interests of justice. Fed. R. Civ. P. 15(a); *Foman v. Davis,* 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). All are present here, justified the denial of the motion to amend the complaint, *Johnson v. Methodist Medical Center,* 10 F.3d 1300, 1993 U.S. App. LEXIS 31334, No. 92-2937, slip op. at 8-9 (7th Cir. Dec. 1, 1993); *Jones v. Psimos,* 882 F.2d 1277, 1285 (7th Cir. 1989); *Smith v. Duff & Phelps, Inc.,* 5 F.3d 488, 494 (11th Cir. 1993); *Berger v. Edgewater Steel Co.,* 911 F.2d 911, 924 (3d Cir. 1990); *Anderson v. USAir, Inc.,* 260 U.S. App. D.C. 183, 818 F.2d 49, 57 (D.C. Cir. 1987), and therefore equally justified the preclusion order.

It is true that the original theory of the Federal Rules of Civil Procedure was that the plaintiff ought to be permitted [**29] to fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint until the final pretrial conference. No judge or lawyer in this age of crowded dockets takes that completely seriously and in any event it is not a reversible error for the judge to insist that a separate claim be made the subject of a separate suit, especially when the original claim was ripe for judgment.

AFFIRMED.

LEXSEE 337 F.3D 314

KRYSTAL CADILLAC-OLDSMOBILE GMC TRUCK, INC., Appellants v. GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION

No. 01-2952

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

337 F.3d 314; 2003 U.S. App. LEXIS 14965; Bankr. L. Rep. (CCH) P78,900; 50 Collier Bankr. Cas. 2d (MB) 1211; 41 Bankr. Ct. Dec. 183

September 19, 2002, Argued
July 28, 2003, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Krystal Cadillac-Oldsmobile-Gmc v. GMC, 2004 U.S. LEXIS 3429 (U.S., May 17, 2004)

PRIOR HISTORY: [**1] On Appeal from the United States District Court for the Middle District of Pennsylvania. District Judge: Hon. Sylvia H. Rambo.
Krystal Cadillac-Oldsmobile-Gmc Truck, Inc. v. GM Corp., 232 B.R. 622, 1999 U.S. Dist. LEXIS 4291 (E.D. Pa., 1999)

COUNSEL: GERARD J. JACKSON, ESQ. (Argued), Cherry Hill, NJ, Attorney for Appellant.

JAMES A. MOLLICA, ESQ. (Argued), TIMOTHY MURRAY, ESQ., Pittsburgh, PA, Attorneys for Appellees.

JUDGES: Before: SCIRICA, * Chief Judge, ALITO, and MCKEE, Circuit Judges.

> * Judge Scirica began his term as Chief Judge on May 4, 2003.

OPINION BY: McKEE

OPINION

[*316] **OPINION OF THE COURT**

McKEE, *Circuit Judge.*

Krystal Cadillac-Oldsmobile-GMC Truck, Inc., a Chapter 11 debtor, appeals an order of the District Court affirming the Bankruptcy Court's dismissal of the suit Krystal filed against GMC for breach of contract and related causes of action. The District Court concluded that the Bankruptcy Court correctly relied upon the doctrine of judicial estoppel in dismissing all of the counts in Krystal's complaint. We agree that judicial estoppel was properly invoked by the Bankruptcy Court, and we will affirm the order of the District Court. [1]

> 1 The District Court had jurisdiction pursuant to 28 U.S.C. § 548(a). We have appellate jurisdiction pursuant to 28 U.S.C. §§ 158(d) and 1291.
>
> In reviewing the decision of the District Court, we apply the same standard of review the District Court employed in reviewing the Bankruptcy Court's decision. We review factual findings for clear error, and we exercise plenary review over any legal conclusions. *See In Re Woskob*, 305 F.3d 177 (3d Cir. 2002).

[**2] [*317] **I. FACTUAL AND PROCEDURAL BACKGROUND**

A. Termination of the Franchise Agreement

Since 1987, Krystal Cadillac has operated a General Motors automobile dealership in Gettysburg, Pennsylvania pursuant to a franchise agreement with GM. Under the terms of that agreement, Krystal maintained a line of credit from a financial institution in order to finance Krystal's purchase of new GM vehicles. [2] In October 1991, Krystal lost its "floor plan" financing with General Motors Acceptance Corporation, GM's financial arm, and Krystal was not able to secure any other financing. This constituted a default under the franchise agreement. Consequently, on July 13, 1993, GM notified Krystal that GM intended to terminate the dealer agreements. Following an extension, that termination was to become effective on August 12, 1993. However, on August 11, 1993, the day before the termination became effective, Krystal initiated a proceeding before the Pennsylvania

Board of Vehicle Manufacturers, Dealers, and Salespersons ("Vehicle Board") challenging the legality of the franchise termination. [3]

2 Article 6.4.1 of the Dealer Agreement between Krystal and GM requires Krystal "to have a reasonable quantity and variety of . . . Motor Vehicles in inventory." Article 10 requires Krystal "to maintain a separate line of credit . . . to finance its purchase of new vehicles."

[**3]

3 The Board of Vehicles Act of December 22, 1983, P.L. 306, *as amended*, 63 P.S. § 818.9(c) provides, in pertinent part, the following:

> Canceling of franchises.--It shall be a violation of this act for any manufacturer, distributor, officer, agent or any representative whatsoever of a vehicle manufacturer to unfairly, without due regard to the equities of said dealer and without just provocation, cancel the franchise of any vehicle dealer . . . . At any time before the effective date of such termination . . . the dealer or distributor may appeal to the board for a hearing on the merits, and following due notice to all parties concerned, such a hearing shall be promptly held. No such termination . . . shall become effective until final determination of the issue by the board. In the event of a dealer . . . appeal of the termination . . . of its franchise, the burden of proof shall be on the manufacturer or importer to show that such termination . . . was based on the dealer's failure to comply substantially with the reasonable and material requirements of the franchise. The manufacturer shall not meet its burden of proof to terminate . . . the franchise if the acts of the manufacturer, in whole or in significant part, caused the dealer to be unable to comply substantially with the reasonable and material requirements of the franchise.

[**4] The Vehicle Board held a hearing on Krystal's petition on August 8, 1994, and entered an Order and Adjudication upholding GM's termination of the dealership agreements on September 27, 1994. [4] Krystal thereafter appealed that Order to the Commonwealth Court of Pennsylvania, but that court affirmed the ruling of the Vehicle Board on November 6, 1995.

4 The Board found that GM's termination of Krystal's franchise was proper because Krystal had failed to comply with the reasonable and material franchise requirements for obtaining a line of credit, and had failed to maintain an adequate inventory of new vehicles.

B. The Proceedings in the Bankruptcy Court *(Krystal I)*.

On September 8, 1994, (approximately three weeks before the Vehicle Board rendered its decision), Krystal filed for Chapter 11 protection. Thereafter, on June 15, 1995, Krystal filed a Plan of Reorganization in which it provided for the sale of its GM franchise in order to raise funds to pay creditors. GM objected to the plan arguing [**5] that it had properly terminated [*318] the franchise agreement with Krystal pursuant to the terms of that agreement. The appropriate state agency had upheld the termination, and the Commonwealth Court had affirmed the agency's determination that the termination was proper. Thus, according to GM, the franchise was not an asset of the estate available for sale in the bankruptcy proceedings. On October 24, 1995, Krystal filed an Amended Reorganization Plan and an Amended Disclosure Statement. Article V of the Disclosure Statement stated:

> Debtor also holds an Automobile Franchise Agreement with General Motors Corporation. However, the status of this franchise is now in litigation. General Motors terminated the franchise prior to the commencement of the case and the matter was in litigation at the time the Chapter 11 petition was filed. General Motors nevertheless proceeded with termination and the matter is now on appeal in the Commonwealth Court. Debtor takes the position, which is vigorously contested by General Motors, that this franchise agreement remains an asset of the case.

GM responded by filing a separate objection to the plan and disclosure statement based upon its continuing [**6] contention that Krystal's franchise was not an asset of the estate and could not be sold by Krystal or the Trustee to satisfy Krystal's creditors.

The Bankruptcy Court affirmed GM's objections and ruled that the franchise had been validly terminated by GM. Accordingly, the court held that the franchise could not be sold as part of the bankrupt's estate. The District Court subsequently affirmed that ruling, and Krystal then appealed to us. We reversed. We held that inasmuch as Krystal had filed for bankruptcy before GM terminated the franchise agreement, GM's termination of that agreement was a violation of the automatic stay imposed under § 362 of the Code. *See, In Re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F.3d 631 (3d Cir. 1998) *("Krystal I")*. [5]

5 We concluded that, under Pennsylvania law, termination of a franchise does not become effective "until final determination of the issue by the board." *Krystal Cadillac*, 142 F.3d at 636 (3rd Cir. 1998). Since the Vehicle Board did not issue its final determination on Krystal's appeal of GM's purported termination until after Krystal filed for bankruptcy, the subsequent termination of the franchise was a violation of the automatic stay and therefore invalid. *Id.*

[**7] C. Krystal II: The Instant Dispute

On September 25, 1998, Krystal filed the instant action in the District Court for the Eastern District of Pennsylvania against GM. Krystal's claims for relief arise from GM's violation of the automatic stay by terminating Krystal's franchise agreement after Krystal filed for Chapter 11 protection. More specifically, Krystal seeks damages on each of the following seven grounds: (1) violation of the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362(h); (2) breach of contract; (3) violations of Federal Dealer's Day in Court Act, 15 U.S.C. § 1221 and of the Pennsylvania Board of Vehicles Act, 63 P.S. § 818 et seq.; (4) conspiracy; (5) conversion; (6) tortious interference with contractual relations; and (7) violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

The Eastern District Court referred Krystal's suit to the District Court for the Middle District of Pennsylvania because the claims were interwoven with the bankruptcy action then pending in the Bankruptcy Court for the Middle District. Although GM filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), [**8] the court never [*319] ruled on that motion. Rather, the court *sua sponte* dismissed Krystal's complaint in its entirety under the doctrine of judicial estoppel. In doing so, the court noted that Krystal's complaint could also be dismissed for (1) failure to state a claim upon which relief could be granted, and (2) expiration of the applicable statutes of limitations. As noted above, the District Court affirmed the Bankruptcy Court's application of the doctrine of judicial estoppel, and this appeal followed. [6]

6 Krystal's bankruptcy case was still pending in Bankruptcy Court when this case was argued.

II. DISCUSSION

Krystal makes several arguments as to why judicial estoppel was improperly applied here. However, before we address any of those specific arguments, it will be helpful to first provide a brief overview of that doctrine as a framework for our analysis.

A. Judicial Estoppel In General

We first articulated the doctrine of judicial estoppel in *Scarano v. Central R. Co. of N.J.*, 203 F.2d 510 (3rd Cir. 1953). [**9] There, we stated that "a plaintiff, who has obtained relief from an adversary by asserting and offering proof to support one position, may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention." *Id.* at 513. In doing so, we recognized the intrinsic ability of courts to dismiss an offending litigant's complaint without considering the merits of the underlying claims when such dismissal is necessary to prevent a litigant from "playing fast and loose with the courts." *Id.* [7] (internal quotation marks omitted).

7 *See also*, *Delgrosso v. Spang and Co.*, 903 F.2d 234 (3rd Cir. 1990) (stating that unlike the concept of equitable estoppel, which focuses on relationship between parties, judicial estoppel focuses on relationship between litigant and judicial system, and seeks to preserve integrity of system).

Since *Scarano*, we have consistently stated that the doctrine [**10] should only be applied to avoid a miscarriage of justice. *See Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773 (3rd Cir. 2001). Thus, in *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996), we stated: "[t]he basic principle of judicial estoppel . . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *Id.*

Judicial estoppel is therefore not intended to eliminate all inconsistencies no matter how slight or inadvertent they may be. *See, In re Chambers Development Co., Inc.*, 148 F.3d 214 (3rd Cir. 1998). In *Montrose Medical Group,* we identified certain criteria for determining when seemingly inconsistent litigation stances justify application of the doctrine. We concluded:

> First, the party to be estopped must have taken two positions that are *irreconcilably inconsistent*. Second, judicial estoppel is unwarranted unless the party *changed his or her position "in bad faith* --i.e., with intent to play fast and loose with [**11] the court." Finally, a district court may not employ judicial estoppel unless it is "tailored to address the harm identified" and *no lesser sanction would adequately remedy the damage* done by the litigant's misconduct.

[*320] 243 F.3d at 779-80 (emphasis added) (citations omitted). We also noted that equity requires that the presiding court give the party to be estopped a meaningful opportunity to provide an explanation for its changed position. *Id.* at 780.

With these principles in mind, we turn to Krystal's alleged inconsistent representations here.

B. Krystal's Inconsistent Representations

As noted above, each of the claims in Krystal's seven count complaint is related to, and arises from, GM's termination of Krystal's Franchise Agreement. The primary claim is the violation of the automatic stay contained in count I. All of Krystal's other claims against GM rest upon that violation. [8]

> 8 For reasons best known to GM and/or its attorneys, GM spends considerable time and energy in this appeal arguing that its violation of the automatic stay was not willful. *See* Appellee's Br. at 17-21. For example, GM argues "In [*Krystal I*], this Court held that GM had violated the automatic stay, but did *not* reach the issue of whether GM's conduct also constituted a *willful* violation under § 362(h)." Br. at 17-8. (emphasis in original). GM obviously knows that we have already ruled that its attempt to terminate the franchise agreement was a violation of the automatic stay. We can not, and will not, revisit that issue here.
>
> Moreover, although § 362(h) requires a "willful" violation as a condition precedent to recovering damages, we have noted that this does not mean that the creditor must intend to violate the stay. "It is a willful violation of the automatic stay when a creditor violates the stay with knowledge that the bankruptcy petition has been filed. Willfulness does not require that the creditor intend to violate the automatic stay provision, rather it requires that the acts which violate the stay be intentional." *Lansdale Family Restaurants Inc. v. Weis Food Service*, 977 F.2d 826, 829 (3rd Cir. 1992) (internal citations and quotation marks omitted).

[**12] When Krystal filed its Amended Disclosure Statement, it knew about each of the claims it has now included in this action. However, as quoted above, the Amended Reorganization Plan and Amended Disclosure Statement merely referenced Krystal's position that the dealer agreements were part of the bankruptcy estate and the ongoing state proceedings wherein Krystal was attempting to undo GM's termination of them.

The Bankruptcy Court found that Krystal limited the reference to the instant claim in order to conceal the claims from creditors in the hope of retaining any recovery for itself. While Krystal concedes that the schedules and statements it initially filed with the Bankruptcy Court on October 24, 1995 "failed to specifically list as a potential asset of Debtor's estate any claims against General Motors or GMAC," Appellant's Br. at 14, and 21, it vigorously denies taking two irreconcilably inconsistent positions in this case.

Krystal argues that although it did not list the instant claim as an asset in the October 24, 1995, Amended Disclosure Statement, the language of that disclosure was nevertheless adequate to inform creditors of claims Krystal had against GM and therefore they [**13] knew of the contingent asset of a potential damage award.

Alternatively, Krystal argues that even if the disclosure was insufficient, it could amend the disclosure statement under Bankruptcy Rule 1009 and thereby cure any inadequacy because the bankruptcy case is still open. Krystal insists that it did effectively amend the disclosure as soon as the Bankruptcy Court notified Krystal of the possible application of judicial estoppel. [9] Therefore, argues Krystal, [*321] it legitimately cured "any conceivable defect in a previously filed schedule or non-disclosure." The Bankruptcy Court was not impressed by Krystal's eleventh hour candor and neither are we.

> 9 Krystal thereafter added the following amendment to Schedule B which asks disclosure of contingent and unliquidated claims:
>
> > "Tort, contract and violation of automatic stay claims against General Motors Acceptance Corporation."

> It also noted that it did not know the value of the claims.

As the Bankruptcy Court properly noted, the language in the [**14] Amended Disclosure Statement was "little more than boilerplate." It did not specify any of the claims contained in the instant complaint against GM, much less attempt to place any monetary value on them. We agree that such boilerplate language is simply not adequate to provide the level of notice required. The bankruptcy rules were clearly not intended to encourage this kind of inadequate and misleading disclosure by creating an escape hatch debtors can duck into to avoid sanctions for omitting claims once their lack of candor is discovered.

> Allowing [Krystal] to back-up, . . . and amend [its] bankruptcy filings, only after [its] omission has been [detected], suggests that a debtor should consider disclosing potential assets only if . . . caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the Bankruptcy Court with a truthful disclosure of the debtors' assets.

Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1288 (11th Cir. 2002).

As noted above, judicial estoppel is properly applied only when appropriate to redress the problem the doctrine was designed to remedy. Krystal argues that the doctrine [**15] of judicial estoppel is too drastic a remedy to apply here because the "[p]lan calls for a one hundred (100%) percent payment to all creditors." Appellant's Br. at 22. However, as GM is quick to point out, full payment is contingent upon Krystal's ability to sell its GM franchises for some undetermined profit. *See* App. 95, and 104, Appellee's Br. at 13. Moreover, GM represents without contradiction that Krystal still has not paid its creditors in full, and that the Amended Plan noted the necessity of Krystal's owner ("Pappas") getting creditors to compromise their claims. According to GM, creditors may not have been willing to compromise their claims as much, if at all, had they known of the possible addition of damages from the instant law suit.

C. Bad Faith

In *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416-18 (3d Cir. 1988), we concluded that a rebutable inference of bad faith arises when averments in the pleadings demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose. That is precisely Krystal's situation here. Accordingly, the record is sufficient to support the [**16] Bankruptcy Court's finding of bad faith.

1. Krystal's Knowledge of the Assets

Under 11 U.S.C. § 1125(b), a party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing "adequate information" to "enable a creditor to make 'an informed judgment' about the Plan." 11 U.S.C. § 1125(a)(1). Debtors must therefore identify and disclose all "property of the estate" including all of the debtor's "legal and equitable" property interests. This includes such contingent assets as any cause of action Krystal may have against GM, and Krystal does not argue to the contrary. The nature of Krystal's purported misrepresentations [*322] here can fully be appreciated if we place them within the proper context.

"A long-standing tenet of bankruptcy law requires one seeking benefits under its terms to satisfy a companion duty to schedule, for the benefit of creditors, all his interests and property rights." *Oneida*, 848 F.2d at 416. Therefore, "preparing and filing a disclosure statement is a critical step in the reorganization of a Chapter 11 debtor." *Id.* at 417. [**17] It has been called by one commentator, "the pivotal concept in reorganization of a Chapter 11 debtor." *Id.*

> The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of adequate information.

Oneida, 848 F.2d at 417 (internal quotation marks omitted).

Krystal relies upon the history of this dispute in arguing that it did not have any claim to disclose until we ruled in *Krystal I*, that GM's termination of the franchise agreement violated the automatic stay. Until then, argues Krystal, the appropriate state agencies had ruled that GM properly terminated the franchise agreement and there was therefore no cause of action against GM to include in the disclosure statement of October 24, 1995. Therefore, according to Krystal, when the Bankruptcy Court confirmed the Plan in October of 1997, the "law of the case" was that (1) Krystal had no ownership interest in the dealership franchise and (2) GM had not violated the automatic stay provisions of the Bankruptcy [**18] Code. Therefore, there was no cause of action to disclose. Appellant's Br. at 21.

However, Krystal was aware of every allegation currently asserted in Counts II through VII of its complaint when it filed its Statement and Plan. Each of the events alleged in those counts had already occurred when Krystal made the applicable filings under the Bankruptcy Code. Moreover, Krystal's argument that it could not know that GM violated the automatic stay as it alleges in Count I, is also unpersuasive. Krystal clearly knew of this potential claim because it vigorously argued that GM violated the automatic stay when it appeared before us in *Krystal I.*

Although it is true that the relevant state agencies had upheld GM's right to terminate the lease, the agencies were never asked to consider the issue of Krystal's alleged violation of the automatic stay, and Krystal knew this when it filed its disclosure statement in the Bankruptcy Court on October 24, 1995. The Vehicle Board's Adjudication and Order did not reach this issue, and the Commonwealth Court's November 6, 1995 decision had not yet been filed. Therefore the "law of the case" did not negate Krystal's duty to disclose its claims against [**19] GM.

Krystal's attempt to seek refuge in the law of the case doctrine ignores the scope of the disclosure requirement as well as the precise issues before the Vehicle Board and Commonwealth Court. The Code requires that a debtor list *potential* causes of action, not claims it actually intends to sue on at the time of the required disclosure. "It has been held that a debtor must disclose any litigation likely to arise in a non-bankruptcy context." *Oneida*, 848 F.2d at 416. Thus, Krystal's own actions belie its contention that it did not know it had a potential claim against GM. Krystal has consistently and vigorously maintained that GM's termination of the franchise agreement violated the automatic stay. That claim was not within the purview of the proceeding Krystal brought [*323] before the Vehicle Board or Commonwealth Court, and the record belies any argument that it was not then within Krystal's contemplation. To the contrary, it appears that Krystal continuously believed that GM had violated the automatic stay. Nothing here supports Krystal's current position that it had to await a court decision to disclose this potential claim. Moreover, Krystal ignores the rather [**20] damning fact that it included the franchise as an asset of the estate in its disclosure statement even though the Vehicle Board had already upheld GM's termination of it. App. at 142.

Although we do not require debtors to list hypothetical claims that are so tenuous as to be fanciful, we do require them to advise creditors of the kind of potential claims that Krystal is asserting here. "[C]reditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan, [therefore] the importance of full and honest disclosure cannot be overstated." *Ryan*, 81 F.3d at 362.

The Bankruptcy Court properly concluded that Krystal had enough information prior to confirmation to know it might have a claim against GM. "'[I]f the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed.'" *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999) *(citations omitted)*. It is difficult to understand why Krystal would list the franchise as an asset after the administrative [**21] rulings upholding GM's termination of it and yet fail to disclose a potential suit against GM for what Krystal has always argued was an improper and ineffective cancellation other than an intent to hide the claim from creditors.

2. Krystal's Motive to Conceal the Claims

The Bankruptcy Court found that (1) Krystal's owner ("Pappas") agreed to contribute substantial funds toward the [*324] payment of claims and expenses associated with Krystal's reorganization and (2) the owner was also engaged in negotiating unsecured claims downward to minimize the amount Pappas would have to pay. [10] Krystal therefore had every reason to minimize its assets so that creditors would conclude they had no choice but to significantly compromise their claims and approve Krystal's reorganization. Indeed, the argument that Krystal made in support of its planned reorganization confirms this. The liquidation analysis Krystal set forth in its Disclosure Statement provides as follows:

> [S]ecured and priority claims far exceed the value of the Debtor's assets. This means that in the event of a liquidation no unsecured creditor will receive any dividend. In fact, it is most likely that in the event of [**22] a Chapter 7 liquidation secured and priority claims will not be paid in full.
>
> Although Debtor's proposed Plan actually amounts to a liquidation of all Debtor's assets, it is nevertheless asserted that all creditors will still be treated much better under the Plan than under a Chapter 7 liquidation. This is because the Plan provides for substantial cash payments to almost all creditors.
>
> The reason Debtor can propose cash payments under the Plan, and none can be expected under a Chapter 7 liquidation, is because Mr. Pappas is willing to contribute substantial cash toward the payment

> of claims and expenses associated with this reorganization.

App. 27. Against this background, it is undeniable that creditors should have been informed of this contingent asset.

> 10 GMAC's $ 114,486 claim was negotiated down to $ 23,000. App. 12.

3. Harm To Creditors

Judicial estoppel is only appropriate when the inconsistent positions are "tantamount to a knowing misrepresentation to or even fraud on the court." *Total Petroleum, Inc. v. Davis,* 822 F.2d 734-38 (8th Cir. 1987). [**23] Not surprisingly, Krystal reminds us of this, as well as the fact that the doctrine is to be used sparingly and reserved for the most egregious case. According to Krystal, employing that doctrine and the sanction of dismissal here was "overkill," even if the doctrine is otherwise appropriate.

This position is based upon Krystal's assertion that under the Plan, (1) the secured creditors receive 100% payment; (2) unsecured creditors received 75% and stand to receive full payment upon the sale of the franchise; and (3) the legal claims are contingent assets of a highly speculative nature and therefore would have been valued at zero dollars even if disclosed. Krystal concludes that since the creditors experienced no financial harm, the court erred by finding that there was bad faith.

In making this argument, Krystal compares itself to the debtor in *Ryan.* There, we held that a Chapter 11 debtor-builder's failure to disclose causes of action against suppliers of allegedly defective wood trim in bankruptcy proceedings did not bar debtor from pursuing those claims outside of bankruptcy. Although the contingent assets represented by those claims were not disclosed in the bankruptcy proceedings, [**24] we rejected the Bankruptcy Court's application of judicial estoppel because the debtor did not attempt to "play fast and loose" with the court.

We also held that the application of judicial estoppel does not turn on whether the estopped party actually benefitted from its attempt to play fast and loose with the court. We concluded that the presence or absence of any such benefit is merely a factor in determining whether the evidence would support a conclusion of bad faith. After raising the issue of whether Ryan actually received a benefit from the omissions there, we stated: "We readily conclude that the doctrine of judicial estoppel in this circuit contains no such requirement." 81 F.3d at 361. We then explained:

> the critical issue is what the [party] contended in the underlying proceeding, rather than what the jury found. Whether the party sought to be estopped benefitted from its earlier position or was motivated to seek such a benefit may be relevant insofar as it evidences an intent to play fast and loose with the courts. It is not, however, an independent requirement for application of the doctrine of judicial estoppel.

Id. (Internal citations [**25] and quotation marks omitted).

The totality of the circumstances in *Ryan* lead us to conclude that the debtor did not omit any information in bad faith. Ryan omitted certain assets from its disclosures, but it also omitted counterbalancing liabilities. Therefore, largely the "balance of assets and liabilities . . . may have been unaffected by the failure to list [certain] claims as assets." 81 F.3d at 363. Ryan did not benefit from the omission. [11] [*325] Despite Krystal's argument to the contrary, that is not the situation here.

> 11 Because, as we have noted, the estopped party need not have benefitted from the misrepresentation, we note the absence of a benefit in *Ryan* only because it was relevant to an inquiry into that debtor's bad faith. For the same reason, we note that Krystal benefitted from the omission here. At the very least, the record certainly supports the Bankruptcy Court's finding that it tried to derive such a benefit.

The Bankruptcy Court could not accept Krystal's argument [**26] that its creditors were not harmed, and neither can we. The Bankruptcy Court also reasoned that the impact of this nondisclosure must be measured in more than monetary terms. Such nondisclosures affect creditors' willingness to negotiate their claims and enhance the debtor's bargaining position by making the pot that creditors look to for recovery appear smaller than it really is. That is particularly important here because, as noted above, Krystal's owner negotiated very substantial compromises of claims against Krystal.

4. Lesser Sanctions

The fact that a sanction is to be used sparingly does not mean that it is not to be used when appropriate. Applying a lesser sanction here (such as requiring Krystal to pay unsecured creditors the balance of their claims out of any damages Krystal might recover from the instant action) would reward Krystal for what appears to be duplicitous conduct in the course of its bankruptcy proceeding. Krystal would still reap the benefit of any recovery beyond the amount paid to satisfy outstanding debts. In addition, the integrity of both the bankruptcy process and the judicial process would suffer. In short, allowing Krystal the lesser sanction [**27] it advocates would send a message that "a debtor should consider disclosing potential assets only if he is caught concealing them." *Pemco*, 291 F.3d at 1288. The Bankruptcy Court was understandably reluctant to allow Krystal to use sleight of hand to show its cards to its creditors and so are we. Dismissal is necessary to prevent Krystal from profiting from its omission. It is also "required to preserve the integrity of the earlier proceedings." *Oneida*, 848 F.2d at 418.

5. Opportunity to Explain

Lastly, Krystal argues that the Bankruptcy Court's finding of bad faith is undermined by the absence of any testimony on this issue. It maintains that it never had an adequate opportunity to explain. However, "[w]e have held that a District Court need not always conduct an evidentiary hearing before finding the existence of bad faith for judicial estoppel purposes." *Montrose Medical Group*, 243. F.3d at 780 n.5.

In *Oneida*, we held that if the pleadings show (1) the fact of non-disclosure of the asset combined with (2) a debtor's obvious knowledge of the existence of the asset, a court need not take testimony in order to make a finding of bad [**28] faith. Although the Bankruptcy Court here raised the issue of judicial estoppel *sua sponte*, the court gave Krystal the opportunity to fully brief this issue and gave both parties the opportunity for oral argument. We conclude that Krystal had a fair opportunity to argue that the doctrine did not apply and to ask the Bankruptcy Court not to dismiss its complaint. We find no error in the Bankruptcy Court's ruling, and we conclude that the District Court properly affirmed it.

III. CONCLUSION

For all of the above reasons, the judgment of the District Court will be affirmed.

LEXSEE 63 B.R. 986, 993

In re: A.H. ROBINS COMPANY, INCORPORATED, Debtor

No. 85-01307-R

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

63 B.R. 986; 1986 Bankr. LEXIS 5453

August 25, 1986, Decided

PRIOR HISTORY: [**1] Retained Proceeding (Judge Merhige).

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Counsel for Rebecca Grady: Stephen H. Fredkin, Stan L. Linker, Samuel M. Walker, Jr., Coates & Comess.

OPINION

[*987] [**3] MEMORANDUM

This matter comes before the Court on motion of Rebecca Grady ("Grady") for a declaration by the Court that her claim against A. H. Robins Company, Incorporated (the "Debtor," the "Company," "Robins"), is a post-petition claim which is to be paid as an administrative expense of this proceeding. Grady filed suit against Robins in the United States District Court for the Northern District of California [1] for injuries she allegedly suffered from as a result of her wearing the Dalkon Shield intrauterine device ("Dalkon Shield," "IUD"). She contends that to proceed with the prosecution of her complaint would not offend the automatic stay provisions of 11 U.S.C. § 362(a)(1).

1 Grady's lawsuit in United States District Court for the Northern District of California is styled *Rebecca Grady v. A. H. Robins Company, Inc.*, Action No. 85-20635 SW.

The issue has been thoroughly briefed and argued by all interested parties [2] and is ripe for disposition.

2 A brief in support of the motion was filed by Grady and the Legal Representative for Future Tort Claimants (Futures Representative). Briefs in Opposition to the motion were filed by the Official Unsecured Creditors' Committee, A. H. Robins Company, Incorporated, Committee of Dalkon Shield Claimants, and the Official Committee of Equity Security Holders. Supplemental briefs were filed by Grady and the Legal Representative for Future Tort Claimants.

[**4] 1. *Factual Background*

a. *Robins*

Robins, a sizeable world-wide "pharmaceutical" company, was the manufacturer, distributor, and seller of the Dalkon Shield from approximately 1970 to 1976. The Dalkon Shield has been the source of an incredible amount of litigation over the years; women have filed numerous lawsuits against the Company alleging that the Dalkon Shield caused them to suffer from injuries as serious as ectopic pregnancy, uterine embedment or perforation, and pelvic inflammatory disease. The spiraling debt which Robins faced, from the settlement of cases as well as legal fees and costs arising out of the lawsuits, became, so Robins contends, insurmountable. By August 21, 1985, the Company decided that its only option, if it were to remain a viable entity, was to file a voluntary petition for relief pursuant to Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

b. *Grady*

For purposes of addressing the instant issue, the Court accepts as accurate Grady's recitation of the facts supporting her claim against the Company. Those facts reveal the following:

Grady had been inserted with a Dalkon Shield, but thought it had fallen out some [**5] years before her admission to a hospital in California. [3] Approximately four days prior to the Company's filing Chapter 11, Grady began experiencing abdominal pain, fever and chills, but she did not go to a hospital for treatment until August 21, 1985, the date Robins filed its petition for relief. [4] Her doctors did not discover the presence of the Dalkon Shield until August 28, 1985, seven (7) days after the Company filed its [*988] petition for relief. [5] Once the Dalkon Shield was discovered, the doctors operated, and it was removed. [6]

3 Grady Affidavit, para. 4.
4 Grady Affidavit, para. 3.
5 Grady Affidavit, paras. 3, 5.
6 Grady Affidavit, para. 6.

2. *Merits*

Grady argues that her claim arose post-petition; hence, it is her contention that the automatic stay does not prohibit her from proceeding with her lawsuit against the Company. [7] Grady's position is that her claim, for federal bankruptcy purposes, arose at the same time her cause of action accrued for state law purposes. [**6] Since it is Grady's position that California law applies to her suit, she argues that because her cause of action did not arise until the time she knew or should have known the cause of her injury, she has a post-petition claim. The Court disagrees.

7 The United States District Court for the Northern District of California transferred Grady's suit to this Court's; *see Grady v. Robins*, CA 86-303.

a. *The Applicability of the Automatic Stay, 11 U.S.C. § 362(a)(1).*

The issues arising from the pending motion involve the interplay of two separate, yet crucially interwoven provisions of the Bankruptcy Code, 11 U.S.C. § 362(a)(1), and 11 U.S.C. § 101(4)(A). Section 362 covers the automatic stay and section 101(4)(A) defines the scope of a "claim"

Section 362(a)(1) provides in pertinent part:

> Except as otherwise provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection [**7] Act of 1970 (15 U.S.C. 78 eee(a)(3)), operates as a stay, applicable to all entities of -
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administra-

> tive, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover *a claim against the debtor that arose before the commencement of the case under this title.*

11 U.S.C. § 362(a)(1)(emphasis added).

The automatic stay is a self-executing provision of the Bankruptcy Code and begins to operate nationwide, without notice, once the debtor files its petition for relief. *See In re Johns-Manville Corp.*, 57 B.R. 680, 686 (Bankr. S.D.N.Y. 1986). It is "one of the fundamental debtor protections provided by the bankruptcy laws," *In re Johns-Manville Corp., supra,* 57 B.R. at 685, *citing* H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* U.S. Code Cong. & Ad. News 5963, 6296; S.Rep. No. 989, 95th Cong., 2d Sess. 54, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5840, "particularly for debtors in reorganization proceedings under Chapter 11." *Matter* [**8] *of Baldwin-United Corp.*, 48 B.R. 901, 902 (Bankr. S.D. Ohio 1985). It is, as the United States Court of Appeals for the Second Circuit explained, "designed to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir. 1976). *See also In re Frigitemp Corp.*, 8 B.R. 284, 289 (Bankr. S.D.N.Y. 1981) (holding that "the federal policy underlying the stay is the protection of the debtor's estate from the chaos and the wasteful depletion resulting from multifold, uncoordinated and possibly conflicting litigation.") What the automatic stay provides is "the essential breathing room for a Chapter 11 debtor to restructure its affairs with its creditors and reorganize into a viable entity. Its importance increases exponentially in cases the magnitude of these Chapter 11s." *Matter of Baldwin, supra,* 48 B.R. at 902.

[*989] The parties do not contest the operation of the automatic stay in this proceeding, though all agree that its power is not omnipotent. [8] Section 362(a)(1) authorizes the stay to extend to either a *cause of* [**9] *action* which could have been commenced pre-petition or to a *claim* which arose pre-petition. Thus, the court's determination of whether Grady could have proceeded with her lawsuit before the petition was filed or whether she had a claim against the Debtor which arose pre-petition will be the finding which renders the automatic stay either applicable or inapplicable to Grady's lawsuit.

> 8 There are exceptions to the automatic stay provided in 11 U.S.C. § 362(b). The Court can also grant a party in interest relief from the stay pursuant to 11 U.S.C. § 362(d). These exceptions, however, are inapplicable to the instant case. Likewise, Grady has not asked relief from the stay under § 362(d). Instead, Grady argues that the stay does not apply to her claim since her cause of action arose post-petition.

Assuming California law were applicable to Grady's claim, she could not have filed her case pre-petition. California law provides that "actions based on progressively developing or continuing wrongs where the [**10] nature, extent, or permanence of the harm are difficult to discover, do not accrue until the injured party knows or should have known of the cause of injury." *Warrington v. Charles Pfizer & Co.*, 274 Cal. App. 2d 564, 567, 80 Cal. Rptr. 130 (1979). Assuming that Grady did not become aware of the cause of her injury until her operation on August 28, 1985, the Court could not find, at this stage of the proceeding, [9] that Grady's suit could have been filed pre-petition. Thus, the critical issue in this motion becomes whether Grady has a claim which arose pre-petition; if she did, the automatic stay would apply.

> 9 The statute of limitations which will be applicable to all Dalkon Shield claimants is still an outstanding and unresolved issue for the Court.

b. *Does Grady Have a Claim Which is Applicable to the Automatic Stay?*

"Claim" is broadly defined in the Bankruptcy Code, and provides for a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, [**11] matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(4)(A).

This broad definition of claim is an intentional departure from the "provability" and "allowability" concepts promulgated under the old Bankruptcy Act. [10] The old Act required that a debt be "provable" in order for it to be dischargeable, and thus, if a debt were remote, i.e. it could not be estimated or liquidated, it could not be discharged by the debtor's estate. What all too frequently resulted was a debtor, fresh out of a reorganization proceeding, who was precluded from successfully reorganizing because there were too many non-"provable" debts outstanding after its plan of reorganization had been confirmed.

> 10 The Bankruptcy Act of 1898 ("Act") did not specifically define a "claim," although § 63 of the Act provided that certain debts could be 'proved and allowed against [the] estate.' A debt was specifically defined in § 1(14) of the Act to 'include any debt, demand, or claim provable in bank-

ruptcy.' The act thus required an initial determination of the claim's provability. Section 63(a) interlocked with § 57(d) of the Act which provided:

> claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: Provided, however, that an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this title.

[**12] The legislative history of the Code supports a broad definition of the term "claim." It states:

> The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . . By this broadest possible definition [*990] and by the use of the term throughout the Title 11, especially in subchapter I of Chapter 5, the Bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the Bankruptcy Court.

H.R. Rep. No. 595, 95th Cong., 2d Sess. 309, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6266; *see also* S.Rep. No. 989, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5785, 5807-08.

The courts, following the legislators' intent, have interpreted the term "claim" liberally. For example, courts have found that a "claim" under the Bankruptcy Code is:

> inter alia, "broad," *Ohio v. Kovacs,* [469 U.S. 274], 53 U.S.L.W. 4068, 105 S. Ct. 705, 709 [83 L. Ed. 2d 649] [**13] (1985); "very broad." *In re M. Frenville Co., Inc.,* 744 F.2d 332, 336 (3d Cir. 1984). cert. denied 469 U.S. 1160, 105 S. Ct. 911 [83 L. Ed. 2d 925] (1985); "extremely broad." *In re Kennise Diversified Corp.* 34 B.R. 237, 244 n.6 (Bankr.S.D.N.Y. 1983); "could not be broader," *In re Thomas,* 12 B.R. 432, 433 (Bankr.S.D.Iowa 1981); "broadest possible," *Kallen v. Litas,* 47 B.R. 977, 982 (N.D. Ill. 1985); *In re Vasu Fabrics, Inc.,* 39 B.R. 513, 517 (Bankr. S.D.N.Y. 1984); *In re Johns-Manville Corp.,* 36 B.R. 743, 754 n. 6 (Bankr. S.D.N.Y. 1984); "all-encompassing," *In re Baldwin-United Corp.,* 48 B.R. 901, 903 (Bankr.S.D. Ohio 1985); *In re Barnett,* 42 B.R. 254, 257 (Bankr.S.D.N.Y. 1984); and "sufficiently broad to cover any possible obligation," *In re Smith Jones, Inc.,* 26 B.R. 289, 293 (Bankr.D.Minn. 1982).

In re Robinson, 776 F.2d 30, 35 (2d. Cir. 1985).

Despite the inherently broad definition of the term "claim," the parties disagree over whether its definition would include Grady's lawsuit in the instant motion.

The Futures Representative argues that when determining whether a claim exists, the crucial inquiry is first, whether a right [**14] to payment exists, and second, whether the right thus identified is one of those described by the adjectives enumerated in the definition of claim. [11] The Futures Representative contends that since Grady did not, at the time the petition was filed, have a right of payment from Robins, then it was not legally obliged to her at the time it filed Chapter 11, and she does not, therefore, have a claim subject to the automatic stay.

11 Futures Representative's Brief, p. 4.

The Unsecured Creditors Committee argues that the determination of "whether a claim against a debtor is pre- or post-petition can be made by analyzing when the conduct of the debtor upon which the claim is based occurred or, in other words, whether it was conduct of the pre-petition debtor or conduct of the post-petition debtor in possession or trustee." [12] The Unsecured Committee argues that since Grady was inserted with the allegedly defective product prior to the Debtor's filing its petition, the claim is pre-petition and must be stayed pursuant [**15] to § 362(a)(1).

12 Unsecured Creditor's Committee Brief, p.5.

The Court concurs with this conclusion.

The Futures Representative argues that the leading authority on the definition of a claim is *Matter of M. Frenville Co., Inc.,* 744 F.2d 332 (3d Cir. 1984). However, the court disagrees with the Futures Representative and the degree of authority he attributes to the *Frenville* opinion. This Court respectfully finds the holding in *Frenville* questionable, and one which has been highly criticized. [13] The invitation to embrace the *Frenville* error is respectfully declined.

> 13 *See Johns-Manville, supra,* 57 B.R. at 688 (holding that "not only are the facts of this *[Johns-Manville]* case distinguishable from those in *Frenville,* but *Frenville* with a strained, narrow analysis limits by judicial fiat a broad, legislatively-mandated definition of the term "claim ""); *In re Baldwin-United Corp.,* 48 B.R. 901, 903 (Bankr. S.D. Ohio 1985) (holding that the *Frenville* decision is
>
> > .... fundamentally at odds with applicable precedents from the Sixth Circuit, and respectfully decline to follow it. Our disagreement with that decision flows from the Court's failure to distinguish between "claim" as defined in 11 U.S.C. § 101(4) and a cause of action for indemnity or contribution under state law. While the Third Circuit acknowledges the all-encompassing definition of "claim" under § 101(4), it nonetheless holds that the claim for indemnity or contribution arose at the same time that a cause of action arose.
>
> *See also In re Yanks,* 49 B.R. 56, 58 (Bankr. 1985) (holding that "this Court, after careful consideration, respectfully elects not to follow the *Frenville* decision.")

[**16] [*991] Prior to its assuming the position of a Chapter 7 debtor, Frenville, an independent auditor, employed an accounting firm to prepare its financial statements. After Frenville filed its petition for relief, a number of banks who had received these financial statements filed suit against the accounting firm alleging that the statements were negligently and recklessly prepared. The accounting firm, seeking indemnification from Frenville moved for relief from the automatic stay so that they could implead Frenville in the lawsuit pending against them. *Frenville, supra,* 744 F.2d at 333.

The *Frenville* case is similar to the instant case to the extent that in both, the acts of the debtor giving rise to the action against it occurred pre-petition, yet the actual filing of the cause of action did not arise until post-petition. The *Frenville* court, faced with these facts, framed its task accordingly:

> Is the automatic stay of 362(a) of the Code applicable when the debtor's acts which form the basis of a suit occurred pre-petition but the actual cause of action which is being instituted did not arise until after the filing of the bankruptcy petition?

Frenville, [**17] *supra* 744 F.2d at 334.

Although the *Frenville* court was aware that the term "claim" was defined broadly, the court held, in any event, that the threshold determination of whether a claim existed depended on if there was a "right to payment." *Frenville, supra* 744 F.2d at 336. Recognizing that the Code did not define "right to payment," *Frenville* held that "while federal law controls which claims are cognizable under the Code, the threshold question of when a right to payment arises, absent overriding federal law, is to be determined by reference to state law."' *Frenville,* 744 F.2d at 337 *citing Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156, 161, 67 S. Ct. 237, 91 L. Ed. 162 (1946). [14]

> 14 In *In re Yanks, supra,* 49 B.R. at 58, the court found *Frenville's* reliance on *Vanston, supra,* 329 U.S. at 161, misplaced. *Yanks* found that "the holding of that case is that federal case law under the Bankruptcy Act and developed in federal equity receiverships prohibited the allowance of a claim which was valid and enforceable under state law. That holding does not support *Frenville's* reliance upon state law to determine if a claim existed against the debtors at the time the bankruptcy cases were commenced." Furthermore, the *Yanks* court found the *Frenville* decision inconsistent with the recent Supreme Court opinion, *Ohio v. Kovacs,* 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985). The *Yanks* court, interpreting *Kovacs,* held that
>
> > .... the Supreme Court followed Congressional intent by applying a broad definition of

> "claim" and held that a state's injunction against an individual debtor had become an obligation to pay money, a claim dischargeable in bankruptcy. The Court's inquiry focused on the definition of "claim" in the Bankruptcy Code and its legislative history. Not once did the Supreme Court find it necessary to consider state law to determine whether there was a "claim" or right of payment.

Yanks, supra 49 B.R. at 58.

[**18] The *Frenville* court did not find any overriding federal law in its case, and therefore applied New York law to determine when the right to payment arose. In its application of New York law, the court held that a claim for contribution or indemnification did not accrue until the time of the payment of the judgment flowing from the act. *Frenville, supra* 744 F.2d at 337. Because the accounting firm did not have a claim until after the banks instituted suit, the Court found the claim to be post-petition.

Although *Frenville* applied state law to determine whether a claim existed, it did note that:

> "if there were some overriding federal policy, we might have the power to develop [*992] federal law. *See In re Beck Industries, Inc.,* 725 F.2d 880, 891 (2d Cir. 1984); *In re Johns-Manville Corp.,* 36 B.R. 743, 751 n.4 (Bankr.S.D.N.Y.), *appeal denied,* 39 B.R. 234 (S.D.N.Y. 1984). A bankruptcy proceeding stemming from a mass tort -- such as exposure to asbestos -- may be a case in which the application of federal law is indicated."

Frenville, supra 744 F.2d at 337 n.8.

Along these same lines, Judge Lifland in *Johns-Manville,* noted that:

> Reference [**19] to state law, even if possible and accurate, may produce a conflict with overriding policies of federal law. Under the Bankruptcy Code, if state law notions so narrow the definition of a 'claim' as to frustrate the stated objective of providing the debtor the broadest possible relief, state law must yield to an overriding federal construction.

Johns-Manville, 36 B.R. at 755 n.6.

Robins represents the type of case both Judge Lifland and Judge Adams envisioned when they constructed these two oft-cited footnotes. Robins filed its petition for relief in an effort to survive the massive liabilities arising out of the Dalkon Shield. If federal law were not created in this case, Robins could be subject to an ongoing battle with Dalkon Shield cases and would have to defend piece-meal litigation, which technically, if allowed, could be interpreted to fall outside the reorganization umbrella. This is just the type of chaos the drafters of the Code sought to avoid when they abandoned the concept of "provability" and "allowability" which was rooted in the old Act, and adopted, in its place, the more broad, and liberal definition of the term "claim" as presently found in the Code.

[**20] To follow *Frenville* and apply state law would be to confuse a "right to payment" for federal bankruptcy purposes with the accrual of a cause of action for state law purposes. As the *Edge* court noted, "the statute of limitations cases do not concern the same issues or the same principles [as those which arise under the Code and a determination of when a claim arises]." *In re Edge,* 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986). *Edge* further explained that just because "the Tennessee Legislature would limit access to the courts for redress of a wrong does not illuminate when the underlying right of redress became cognizable for bankruptcy purposes." *Edge, supra* 60 B.R. at 699.

This Court will not sanction a state's statute of limitations as controlling either the existence or nonexistence of a "claim" under the Bankruptcy Code. As the *Johns-Manville* court commented, "it creates an artificial and arbitrary classification system by which the timing of the lawsuit against the claimant determines not only the priority of the distribution on a claim, but also the dischargeability of the claim." *Johns-Manville, supra* 57 B.R. at 689. *Johns-Manville* further recognized [**21] that if a statute of limitations analysis were followed "parties could artificially juggle their existing substantive rights by deciding for themselves the best time to serve process." *Johns-Manville, supra* 57 B.R. at 689.

Furthermore, the statutory construction of § 362(a)(1) would be frustrated if the statute of limitations analysis were left to control the issue. The automatic stay of § 362(a)(1) was promulgated as a safeguard for the debtor's estate so that a plan of reorganization could be submitted and eventually confirmed. *See* text *infra* at 3-4. In its carefully constructed language, the statute precludes a creditor from pursuing his or her claim if his or her suit could have been filed pre-petition *or* if his or her claim arose pre-petition. Obviously, whether a creditor's suit could have been commenced pre-petition implicates an analysis of the statute of limitations; the drafters of the Code, with their use of the disjunctive *or,* could not have envisioned a similar analysis in their determination of when a claim would arise. The two concepts invoke separate analyses.

[*993] The Court finds the opinion of Bankruptcy Judge Lundin in *In re Edge,* [**22] *supra* 60 B.R. at 699 more persuasive in its disposition of this aspect of the case than it does that of the Third Circuit's, as expressed in *Frenville.*

In *Edge,* the court was faced with a plaintiff who wanted to sue two Chapter 7 debtors for negligent dental treatment which had occurred as a result of the debtors' pre-petition conduct, but whose injuries did not surface until post-petition. The court, rejecting *Frenville* and its application of state law to determine when a right to payment arose, held that:

> I believe that the 1978 Bankruptcy Code recognizes a 'right of payment' for the victim of a debtor's pre-petition conduct at the earliest point in the relationship between victim and wrongdoer. Though this right to payment may not be manifested as a right of access to other courts and though it be unmatured and contingent, it is a charge upon the wrongdoer and a demand inherent in the victim from the moment of the wrongful act.

Edge, supra 60 B.R. at 699.

The *Edge* court, understandably concerned that an application of state law would frustrate the goals of the Bankruptcy Code, found that "overriding federal policies" substantiated its conclusion [**23] favoring: (1) compensation for hurt people, (2) providing a fresh start for the debtor, and (3) equitably distributing the debtor's assets. Accordingly, *Edge* found that a "right to payment for a victim of a debtor's pre-petition misconduct arises at the earliest point in the relationship between victim and wrongdoer." *Edge, supra* 60 B.R. at 699.

Although the *Edge* court found it necessary to hold that a "right to payment" arises at the earliest point in the relationship between the victim and wrongdoer, this Court finds that such a sweeping definition is not necessary to further the policies underlying the Code. In determining the appropriate definition of a "right to payment" the Court, in its desire to further the policies of the Code, finds the definition as expressed in *Johns-Manville,* more appropriate and well-tailored to its needs.

In *Johns-Manville,* the court was faced with two third-party actions which were filed against Manville post-petition. The court, rejecting the holding in *Frenville,* concluded that a "right to payment" arises at the "time when the acts giving rise to the alleged liability were performed." *Johns-Manville, supra* 57 B.R. at [**24] 690. This definition if adopted in the instant case, would support most equitably the Code, and its policies of compensating creditors, allowing a debtor an opportunity to reorganize, and providing an equitable distribution of the debtor's estate. Accordingly, it is this Court's position that a "right to payment" arises at the "time when the acts giving rise to the alleged liability were performed." *Johns-Manville, supra* 57 B.R. at 690. Applying this definition to the Robins case, the Court finds that the "right to payment" arises at the time the Dalkon Shield claimant, and more specifically for this motion, Grady, was inserted with the Dalkon Shield. [15]

> 15 The Court's finding that the time at which plaintiff was inserted with the Dalkon Shield is the point at which a "right to payment" arises should not be confused with any issues which might later arise as a result of a statute of limitations analysis, presently under advisement by the court. This Court's holding is narrowly tailored to resolve the issue of what constitutes a "claim" under the Code, and should not be construed as anything more.

[**25] The Bankruptcy Code seeks to provide a system whereby creditors will be compensated, a debtor will be allowed a fresh start and an opportunity to reorganize, and creditors will be subject to an equitable distribution of the debtor's assets. These policy concerns, as highlighted in *Edge* and *Johns-Manville,* are equally important to the instant case.

If the contentions urged by Grady and the Futures Representative were accepted, [*994] it is reasonable to assume that Robins would continue to be subjected to a continuous flow of piece-meal litigation arising out of the Dalkon Shield. Such a situation could, if permitted, render the efforts now being, and which will continue to be expended to fulfill the promise and intent of Congress in enacting Chapter 11, meaningless. This Court, in the absence of authority mandating such a scenario, will not participate in an obviously futile "Catch 22" exercise. This result would clearly "upset Congress' intent to channel claims concerns toward one forum and allow for a comprehensive plan of reorganization." *Johns-Manville, supra* 57 B.R. at 690. Furthermore, it would "reinstate the 'provability' concept of claims which the drafters [**26] of the Code specifically intended to abolish." *Johns-Manville, supra* 57 B.R. at 690.

Additionally, the position forwarded by Grady and the Futures Representative is patently unfair to the Dalkon Shield claimants. Simply because a woman who has been injured by the Dalkon Shield has a claim, according to state law analysis, which might arise pre-petition, her means of recovery should not be any different from that of a woman whose claim, according to state law analysis, arises post-petition. It would be unfair to allow the timing of a woman's claim to be the factor which determines whether her remedy is based on the distribution of the debtor's assets arising out of a plan of reorganization or the more broad based remedies arising out of federal civil procedure and its practices.

Finally, though it might seem more advantageous for a woman to seek a post-petition status and pursue her federal civil remedies, her status unquestionably puts her claim at risk. More specifically, if the debtor were to file Chapter 7 and be in a position of having to liquidate its assets, post-petition claimants would fall outside the bankruptcy umbrella and thus be precluded from sharing in the debtor's [**27] estate. [16] A liquidated corporation would be of no assistance to one whose claim arose subsequent to any such liquidation.

> 16 It is unnecessary for the court to determine at this time whether a post-petition claim arising from the Dalkon Shield would constitute an administrative expense under 11 U.S.C. § 503(b)(1)(A).

This case mandates the application of federal law if the federal policies underlying the Bankruptcy Code are to be furthered. The technical reading of the phrase "right to payment," which has been supported by Grady and the Futures Representative would frustrate the purposes of Chapter 11. This Court must, and will, promote the true intent of the drafters of the Code when it promulgated the term "claim." Accordingly, this Court concludes that women, who were allegedly injured by the Dalkon Shield, have a "right to payment" which arises when the acts giving rise to the alleged liability were performed. [17]

> 17 The Court's holding does not address whether the future claimants will have a dischargeable claim in this reorganization. Whether or not a future's claimant will be afforded relief in this bankruptcy will be determined when the issue is ripe for disposition.

[**28] *Conclusion*

For the reasons stated in this memorandum, the Court concludes that Grady's lawsuit represents a pre-petition claim and is therefore stayed pursuant to the mandates of § 362(a)(1).

An appropriate order shall issue.

ORDER

For the reasons stated in the memorandum this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED. that the motion of Rebecca Grady for a declaration by this Court that the injuries of which she complains in the matter of Rebecca Grady v. A. H. Robins Company, Inc., transferred to this Court from the Northern District of California, constitutes a post-petition claim, and the same is hereby DENIED.

Let the Clerk send a copy of this order and the accompanying memorandum to all counsel of record.

4 *In re Swift,* 124 B.R. 475, 483-86 (Bankr.W.D.Tex.1991).
5 *In re Swift,* 126 B.R. 725 (Bankr.W.D.Tex.1991).
6 *In re Swift,* 3 F.3d 929 (5th Cir.1993).

Swift filed the present suit against State Farm in state court [**3] alleging that State Farm is liable for the lost exemption for his IRA under theories of negligence and breach of fiduciary duty. [7] State Farm removed this action to the bankruptcy court. Swift filed a motion to remand the case. State Farm filed a motion for summary judgment, arguing that the causes of action were property of the bankruptcy estate, not of Swift individually. The bankruptcy court denied State Farm's motion. [8] It granted Swift's motion for a partial summary judgment and remanded the case to the state courts. The bankruptcy court stayed its remand order pending the outcome of this appeal. On October 28, 1996, the district court affirmed the bankruptcy court's ruling. State Farm appeals.

7 For purposes of this appeal only, we assume that Swift's causes of action are viable.
8 *In re Swift,* 198 B.R. 927 (Bankr.W.D.Tex.1996).

II.

The legal issue that we must decide is whether the causes of action against State Farm are property of Swift as an individual or whether those causes of action [**4] belong to the bankruptcy estate. Our answer depends upon an interpretation and application of Sec. 541 of the Bankruptcy Code. This is purely a question of law which we review *de novo.* [9]

9 *See Peaches Entertainment Corp. v. Entertainment Repertoire Assoc., Inc.,* 62 F.3d 690, 693 (5th Cir.1995).

A.

Upon the filing of bankruptcy, Sec. 541 of the Bankruptcy Code creates an estate that consists of "all legal or equitable interests of the debtor in property as of the commencement of the case". [10] This definition is very broad, and includes causes of action belonging to the debtor at the commencement of the case. [11] Our first task, then, is to determine whether Swift had a property interest in the causes of action against State Farm at the time he filed bankruptcy. Stated differently, we must determine whether Swift's causes of action had accrued. To determine this, we look to Texas law. [12]

10 11 U.S.C. § 541(a)(1).

[**5]

11 *Louisiana World Exposition v. Federal Ins. Co.,* 858 F.2d 233, 245 (5th Cir.1988).
12 "Property interests are created and defined by state law." *Butner v. United States,* 440 U.S. 48, 55, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136, 141-42 (1979); *In the Matter of Educators Group Health Trust,* 25 F.3d 1281, 1284 (5th Cir.1994).

"The accrual of a cause of action means the right to institute and maintain a suit, and whenever one person may sue another a cause of action has accrued." [13] Swift's causes of action are for negligence and breach of fiduciary duty based upon negligence. Damages are an essential element of each of these theories. [14] Therefore, some form of legal injury must occur before these causes of action accrue. [15] But, it is not necessary to know immediately the type and extent of that injury. [16] All that is needed is a specific and concrete risk of harm to the [*796] party's interest. [17] These rules are well-established. Recent cases applying these rules have muddied the waters, however. The basic problem is that the issue of accrual of a cause of action rarely occurs [**6] apart from the issue of when the statute of limitations begins to run for a particular cause of action. These are two separate and distinct issues aimed at very different problems. [18]

13 *Luling Oil & Gas Co. v. Humble Oil & Refining Co.,* 144 Tex. 475, 191 S.W.2d 716, 721 (1946). *See also Educators Group Health Trust,* 25 F.3d at 1284; *General Motors Acceptance Corp. v. Howard,* 487 S.W.2d 708, 710 (Tex.1972).
14 *See Greater Houston Transp. Co. v. Phillips,* 801 S.W.2d 523, 525 (Tex.1991).
15 *See Lumbermens Mutual Casualty Co. v. Shaw,* 684 S.W.2d 195, 196 (Tex.Ct.App.1984), holding that an insurance company could not appeal the decision of the Industrial Accident Board when the insurance company prevailed before the Board; *see also Philips v. Giles,* 620 S.W.2d 750, 751 (Tex.Ct.App.1981) dismissing a suit as premature after the court found that no damages had occurred.
16 *Atkins v. Crosland,* 417 S.W.2d 150, 153 (Tex.1967).
17 *Zidell v. Bird,* 692 S.W.2d 550, 557 (Tex.Ct.App.1985).
18 *See In re Ellwanger,* 140 B.R. 891, 897 (Bankr.W.D.Wash.1992). Although these inquiries are different, it is often necessary to look to state law on the statute of limitations to determine when a cause of action accrues because accrual rarely is discussed apart from the issue of the running of the statute of limitations. When this is the case, the court must be careful to extract ac-

crual principles only, and not principles of discovery and tolling.

> Swift suggests that this case is governed by *Lawrence v. Jackson Mack Sales, Inc.*, a case in which the district court applied statute of limitations cases to determine whether a cause of action accrued for bankruptcy purposes. 837 F. Supp. 771 (S.D.Miss.1992), *aff'd* 42 F.3d 642 (5th Cir.1994). Principles of *stare decisis* of course bind this panel to follow previous decisions of other panels of this Court. In *Lawrence*, however, this Court did not consider the issue of when the cause of action accrued because that issue was not raised on appeal. *See* Briefs filed in *Lawrence v. Jackson Mack Sales, Inc.*, 42 F.3d 642.

[**7] The accrual of a cause of action is a concept closely tied to the fundamental purpose of a cause of action--to make an injured party whole. [19] Damages, then, are a prerequisite to a cause of action. [20] Without damages, there is no injury to remedy.

19 "The purpose of actual damages in civil actions is to compensate the injured plaintiff, rather than to punish the defendant. Consequently, a prevailing plaintiff is entitled to actual damages that will most nearly put him in the position that he would have been, but for the defendant's negligence." *Deloitte & Touche v. Weller*, 1997 Tex. App. LEXIS 5029, 1997 WL 572530 (Tex.Ct.App.1997) (internal citations omitted).

20 *Lumbermens Mutual Casualty Co.*, 684 S.W.2d at 196.

The purpose of statutes of limitation is different: they bar the litigation of stale claims at a time removed from when the pertinent events occurred. [21] The concept of accrual is important to the statute of limitations because accrual sets the clock in motion. But the running of the statute of limitations [**8] is influenced by more than just the concept of accrual. In this connection, to avoid harsh and unfair consequences that may result from the premature running of the statute of limitations, Texas adopted the "discovery" rule. Under this rule, the statute of limitations does not begin to run until the injured party "discovers" or with the exercise of reasonable care and diligence should have discovered that a particular injury has occurred. [22] The result is that the statute of limitations may begin to run on a date other than that on which the suit could first be maintained. A classic example illustrates this. Consider a case of medical malpractice in which the treating physician has left a dangerous metal instrument inside the body of his patient. At the time the doctor finishes the surgery, the doctor has completed a tort. He has violated a legal duty owed to the patient, and the patient was injured by that violation. If the patient instituted suit at this moment, his suit would be viable. The statute of limitations has not begun to run, however. Under the discovery rule, the statute of limitations is tolled until the patient either discovers or should have discovered that an injury [**9] has occurred. This example shows that the dates of accrual and the start of the running of the statute of limitations may vary greatly. Unfortunately, many cases applying the principles of the discovery rule are written in terms of accrual.

21 *Deloitte & Touche v. Weller*, 1997 Tex. App. LEXIS 5029, 1997 WL 572530, *4 (Tex.Ct.App.1997).

22 *Ponder v. Brice & Mankoff*, 889 S.W.2d 637, 641 (Tex.Ct.App.1994); *Hoover v. Gregory*, 835 S.W.2d 668, 671 (Tex.Ct.App.1992).

The blurring of these two issues begins with *Atkins v. Crosland*, [23] a case whose logic and reasoning is sound. In *Atkins*, the Texas Supreme Court addressed the concept of accrual for purposes of the statute of limitations in the context of an accountant malpractice suit. The court began:

> [*797] The test to determine when the statute of limitations begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute a legal injury, that is, an injury giving rise to a cause of action because it is an [**10] invasion of some right of plaintiff. If the act is of itself not unlawful in this sense, and plaintiff sues to recover damages subsequently accruing from, and consequent on, the act, the cause of action accrues, and the statute begins to run, when, and only when, the damages are sustained; and this is true although at the time the act is done it is apparent that injury will inevitably result.
>
> If, however, the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the cause of action accrues and the statute begins to run from the time the act is com-

> mitted, even where little, if any, actual damage occurs immediately on commission of the tort. [24]
>
> The court reasoned that the causes of action for accountant malpractice were not unlawful in themselves. The decision to use the cash receipts and disbursements method of accounting rather than the accrual method of accounting when preparing tax returns was not one that would result in injury unless something more happened. That additional event was the assessment of a tax deficiency. The causes of action accrued and the statute of limitations began to run when the taxpayer [**11] received notification of the tax deficiency.

23 417 S.W.2d 150 (Tex.1967).
24 *Id.* at 153.

B.

The "legal injury" principles discussed in *Atkins* are largely an elaboration on the need for damages for a cause of action to accrue. In subsequent cases, however, Texas courts have blended the legal injury analysis into the holding of *Atkins* that the cause of action did not accrue until the assessment of the tax deficiency. A few examples illustrate this point.

In *Hoover v. Gregory,* [25] for instance, the Dallas Court of Appeals addressed the accrual of causes of action for tort and breach of contract resulting from tax shelters that were declared to be shams by the IRS. This inquiry was to determine whether the statute of limitations had run. The court found that it had. It wrote: "Because we determine that the Notices of Deficiency announced facts from which appellants discovered or with reasonable diligence could have discovered their injuries, we conclude that the trial court properly [**12] granted summary judgment because each of appellant's claims was barred by the applicable statutes of limitations." [26] That court read *Atkins* "as establishing a general rule that a taxpayer's cause of action accrues on a fact specific basis when he discovers a risk of harm to his economic interests, whether that be at the time of assessment or otherwise". [27] This language, while discussing the concept of accrual, is clearly couched in terms consistent with the discovery rule.

25 835 S.W.2d 668 (Tex.Ct.App.1992).
26 *Id.* at 672.
27 *Id.* at 673.

In *Bankruptcy Estate of Rochester v. Campbell,* [28] the Austin Court of Appeals found that a cause of action for accountant malpractice accrued when the taxpayer received a notice of deficiency from the IRS. The court applied the legal injury rule and concluded that the notice of deficiency gave rise to a concrete and specific risk of loss that was actionable. The court explained its reasoning:

> We hold that the formal IRS notice of [**13] deficiency triggers the requisite concrete risk of tax liability for purposes of the legal injury rule. Prior awareness of IRS activity, such as a preliminary notice of deficiency, informs the taxpayer of some risk, but the risk is not sufficiently definite or concrete until the IRS has issued its formal notice of deficiency. As a matter of policy, it is important that a taxpayer clearly know the time at which potential causes of action involving tax liability accrue[.] [29]

[*798] Again, this case is analyzed in terms of discovery of the injury. Discovery is relevant to the determination of when the statute of limitations begins to run, but it is not an element necessary for the cause of action to accrue for purposes beyond the statute of limitations.

28 910 S.W.2d 647 (Tex.Ct.App.1995).
29 *Id.* at 651-52.

Finally, in *Ponder v. Brice & Mankoff,* [30] the Houston Court of Appeals reached a decision similar to those cases we have just discussed. This case involved a cause of action for legal malpractice [**14] stemming from bad advice given in relation to the tax consequences of a partnership. The court found that the causes of action accrued for purposes of the statute of limitations when the taxpayer received the first notice of deficiency from the IRS. Relying upon *Hoover,* the court found that the taxpayer "knew or should have known that there was a risk of harm to his economic interest". [31] This too is language of discovery.

30 889 S.W.2d 637 (Tex.Ct.App.1994).
31 *Id.* at 643.

The three cases just cited show a natural tendency to blend the issue of accrual and the start of the statute of limitations because of the luxury of the discovery rule in a statute of limitations case. Even if a cause of action accrued before the receipt of the IRS's notices of deficiency in each of those cases, the discovery rule would toll the start of the statute of limitations until the assessment of the deficiency by the IRS. [32] Those courts did not need to separate the inquiry. In the present case, we have neither [**15] the luxury nor the margin for error provided by the discovery rule. We are determining when the causes of action accrued for purposes of ownership in a bankruptcy proceeding. The time of discovery of the injury is not relevant to this inquiry. A cause of action can accrue for ownership purposes before the statute of limitations for that cause of action has begun to run. Our focus, then, is upon the moment the injury occurred. The three statute of limitations cases cited are not helpful in this case because of their reliance upon discovery. [33]

32 *See e.g., Hoover v. Gregory,* 835 S.W.2d 668 (Tex.Ct.App.1992).

33 Based upon *Atkins* and subsequent cases applying the *Atkins* legal injury rule, Swift's causes of action were viable at the time his creditors objected to his exemption of his IRA. That does not end our inquiry, however, because we must determine whether those causes of action accrued earlier.

C.

In the present case, Swift maintains that his causes of action against State Farm accrued [**16] when his creditors objected to his bankruptcy exemption. He argues that he did not suffer any legal injury until this additional event because there was no concrete and specific risk of harm to his economic interests before this point. State Farm maintains that Swift's damages, if any, occurred at the moment his retirement plan failed to qualify as exempt.

From Swift's previous proceedings before this court, we take the following as given: (1) the Keogh plan that Swift participated in until 1990 was not qualified as exempt under the Internal Revenue Code as amended by the Tax Reform Act of 1986 and (2) Swift's IRA was not qualified as exempt under either the Texas Property Code or the Internal Revenue Code. [34] We conclude that Swift suffered damage sufficient to give rise to the current causes of action at the time he converted his Keogh plan to an IRA in 1990. [35]

34 *See In re Swift,* 124 B.R. 475 (Bankr.W.D.Tex.1991).

35 Swift's causes of action accrued before the filing of his petition in bankruptcy if the cause of action accrued at the time of the conversion. We need not look back any further in time. Therefore, we express no opinion as to whether Swift's damages occurred before the conversion in 1990. In determining whether Swift could have maintained a cause of action for State Farm's conduct at any point prior to his filing bankruptcy, we do not consider the effect of the subsequent filing of bankruptcy and loss of the funds from the defective IRA.

[**17] A retirement account is an unusual creature; it receives favorable treatment under both the tax code and the Texas Property [*799] Code. [36] Because Swift's retirement plan was defective, Swift suffered damage in at least two different ways: (1) Swift lost the tax advantages of the Keogh plan and the IRA, [37] and (2) he lost his bankruptcy exemption under Texas law. If either of these damages occurred pre-petition, the causes of action against State Farm accrued pre-petition.

36 *See* 26 U.S.C. § 408; Tex. Prop.Code. § 42.0021.

37 In the present action, Swift is seeking to recover for his lost bankruptcy exemption. He has not sued for lost tax benefits. We must consider the tax consequences anyway. A cause of action accrues when any damage is suffered, even if the injured party is not seeking recovery for those particular damages.

The lost bankruptcy exemption is easily analyzed so we begin there. Under the Bankruptcy Code, a claimed exemption is presumptively valid unless a creditor objects. [38] Only [**18] upon objection can the debtor lose his exemption. Conduct that ultimately results in the loss of an exemption is not unlawful in itself, as referred to in *Atkins,* because something more is needed to bring about the damage. Just as the tax claim did not accrue in *Atkins* until the deficiency was assessed, a cause of action to replace a lost bankruptcy exemption does not accrue until the creditors object to the exemption. By necessity, an objection can occur only after the bankruptcy petition is filed. This damage from the lost exemption, then, is post-petition and the causes of action accrued post-petition unless some other damage occurred before the filing.

38 11 U.S.C. § 522(*l*). That section provides:

> The debtor shall file a list of property that the debtor claims as exempt under (b) of this section.... Unless a party in interest objects, the property claimed as exempt on such list is exempt.

In this case, however, we must also consider the tax consequences of the defective retirement [**19] plan. Negligence can result in additional tax liabilities in at least two ways. First, negligence in the preparation or computation of tax liability can lead the IRS to assess a tax deficiency including interest and penalties. In this situation, the taxpayer is not injured by being forced to pay his back taxes. These taxes were already owed to the IRS. [39] Instead, the taxpayer's injury is the interest and penalties that the taxpayer must pay as a direct result of the late payment of his taxes, a payment that is late only because of the negligence in the preparation or computation of the taxpayer's tax liability. In these circumstances, an IRS assessment is a predicate to a finding of a legal injury because, in the absence of the assessment, no penalties or interest are owed. [40] This was the situation in *Atkins,* not the present case.

39 *See* 26 U.S.C. § 6151 (1997). "As of a certain date the taxpayer has a duty to file a return for the previous fiscal year and pay the amount of tax due for that year ... the taxpayer has a positive obligation to the United States; a duty to pay its tax." *Manning v. Seeley Tube & Box Co.,* 338 U.S. 561, 565-66, 70 S. Ct. 386, 389, 94 L. Ed. 346 (1950). *See also P.H. Glatfelter Co. v. Lewis,* 746 F. Supp. 511, 518-19 (E.D.Pa.1990).

[**20]

40 *See, e.g., Atkins v. Crosland,* 417 S.W.2d 150 (Tex.1967) (finding that a taxpayer's cause of action for negligence in the preparation of tax returns did not accrue until that IRS assessed a tax deficiency); *Streib v. Veigel,* 109 Idaho 174, 706 P.2d 63 (1985) (finding that a cause of action for professional malpractice in the preparation of tax returns did not accrue until the IRS assessed interest and penalties).

Damages can also arise from acts of negligence that result in the taxpayer owing additional tax liabilities that would not be owed in the absence of the negligence. No assessment for this liability is necessary because, under the Internal Revenue Code, taxes are owed and payable to the IRS at a given time. [41] A cause of action for this type of [*800] negligence, then, accrues on the date that the tax liability is owed to the IRS. The present case falls in this category. But for the negligence of State Farm, Swift would have no tax liability arising from his retirement plan. That is, without the negligence of State Farm, the gains on Swift's Keogh plan and the IRA would accumulate [**21] tax free, and Swift's contributions to the plan would be tax deductible. Because the Keogh plan was defective, however, Swift incurred an additional liability to the IRS due to the taxable nature of the income from the Keogh plan and the IRA. Swift incurred this liability even if he did not know or discover that he owed additional taxes. This is a legal injury that gave rise to a cause of action at least by the time he converted his Keogh plan into the defective IRA. [42] Even though the IRS has not assessed a deficiency for this liability, Swift was injured. [43] We shall not find a lack of injury merely because the taxpayer may be able to escape liability by continuing to violate the tax laws even if the violation is unintentional and undiscovered. [44] The amount, if any, that Swift ultimately pays to the IRS is relevant only in the computation of damages. The causes of action against State Farm accrued pre-petition.

41 In *Moran v. United States,* the Seventh Circuit Court of Appeals summed up the importance of a tax assessment rather succinctly. The Court wrote:

> An assessment is not a prerequisite to tax liability. Though the [taxpayers] make it out to be more, an assessment is only a formal determination that a taxpayer owed money. It is more or less a bookkeeping procedure that permits the government to bring its administrative apparatus to bear in collecting a tax. Indeed, our tax system would function poorly were not most taxes "self-assessed." A formal IRS assessment is an important determination in many cases, and the threat of one is a significant means of maintaining a system of voluntary compliance, but it is neither the beginning nor the end of tax liability.

63 F.3d 663, 666 (7th Cir.1995) (citations omitted). This language amplifies the distinctions we draw in the present case. Assessment is an effective tool for notifying a taxpayer of additional tax liabilities. It is a clear signal for when the statute of limitations begins to run. It also creates a concrete and specific risk that penalties and interest will be assessed. An assessment does not create or change the taxpayer's initial tax obligation that was owed, however.

[**22]

42 For purposes of this appeal, we have assumed that State Farm could repair the defective Keogh plan by adopting appropriate amendment. At the time the Keogh plan was converted, however, the liability was fixed. *See In re Swift,* 124 B.R. 475, 484 (Bankr.W.D.Tex.1991).

43 Our decision conflicts with that of the Texas Court of Civil Appeals in Dallas in *Philips v. Giles,* 620 S.W.2d 750 (Tex.Ct.App.1981). *Philips* involved a taxpayer who learned that she might owe additional taxes on a divorce settle-

ment even though she was previously advised that the settlement would result in no tax liability. The taxpayer paid the additional amounts even though the IRS had not assessed a deficiency. Then, she filed suit, attempting to recover the additional taxes she paid due to the bad advice she received regarding the settlement. The court, relying upon *Atkins v. Crosland,* dismissed the suit as premature. The court wrote:

> Although relator believes the taxes are due, she may be mistaken and, indeed, no tax liability, insofar as we know, may exist. Relator's cause of action against defendant, and her injury, if any, arise from her tax liability, rather than from the duty to report her income as she believes it to be, accurately. Since it has not been determined whether relator is liable for the taxes in question, she has not been harmed and, therefore, her cause of action has not accrued.

Id. at 751. Our trouble with this decision is on two levels. First, the court placed the taxpayer in an unfortunate "catch-22". She could choose to pay the IRS the money she thinks she owes without being able to recover from the party whose acts caused her to owe this liability, or she can deliberately defy the tax code by refusing to pay what she perceives to be her full tax liability. This is not a fair choice for the taxpayer because, either way, she loses. We also find the decision troubling in that the court dismissed the suit because of a lack of damages when there was a genuine issue of fact concerning the existence of damages. As such an early stage, it was premature for the court to make the assumption.

[**23]

44 We acknowledge that Swift's defective retirement plan may also result in additional tax consequences. We need to investigate these no further, however, because our analysis of the accrual of the causes of action against State Farm depends upon a finding of some damage. It does not depend upon the amount or extent of that damage. *Atkins,* 417 S.W.2d at 153.

Swift directs our attention to *Swift v. Seidler,* an unpublished opinion of this Court, in which we found that Swift's causes of action against Martin Seidler, his attorney, accrued post-petition. In reaffirming our previous decision, we note a few critical distinctions. In the present case, we find that the causes of action accrued prepetition because there was actual damage from State Farm's conduct before Swift filed for bankruptcy. Swift's causes of action against Seidler did not result in damage before the filing. Assuming that Swift has a viable cause of action against Seidler for malpractice, the attorney's malpractice resulted in damages stemming from the filing of bankruptcy and the loss of the IRA exemption. As we pointed [**24] out, this damage is without question a post-petition damage. The loss was not suffered until the creditor's objected to the exemption after Swift filed for bankruptcy. Unlike State Farm's actions, Seidler's conduct did [*801] not result in the loss of the tax advantages. The conduct giving rise to the tax losses occurred well before Swift contemplated filing for bankruptcy.

III.

Next, Swift argues that the causes of action against State Farm are themselves exempt property under Texas Prop.Code § 42.0021, the section which exempts qualified retirement accounts from the bankruptcy estate. In previous proceedings before this Court, we established that Swift's IRA was not exempt. Our previous decision did not address the status of any causes of action aimed at replacing the lost IRA. Today, we hold that Swift's causes of action against State Farm to replace the lost IRA are exempt property.

To prevent a down-on-his-luck debtor from becoming destitute, the Texas legislature enacted a scheme of exemptions that limits the ability of creditors to reach certain essential assets of the debtor. The decision to exempt property is an important one, recognizing that the exempt property is vital to [**25] the debtor's continued existence. The Texas legislature recognized the importance of retirement accounts and exempted them in Tex. Prop.Code § 42.0021. In addition, the legislature severely limited the circumstances in which a creditor can attach or garnish the proceeds of retirement accounts. [45] Neither provision expressly addresses causes of action arising out of exempt retirement accounts, however. And, we have been unable to find a Texas case that discusses this issue. Therefore, to determine whether the causes of action at issue in this case are exempt, we must look to Texas cases addressing the reach of other exemptions.

45 Tex. Civ. Prac. & Rem.Code § 31.002.

Texas courts construe the scope of exemptions liberally, with most doubts about the existence of an exemption resolved in favor of the debtor claiming the exemption. [46] The courts are driven by the purpose and intent of the exemption, not just the plain language of the statutes. [47] The Texas courts have made this point in numerous cases in [**26] which a specific exemption has been extended to include the proceeds from the disposition of exempt property. For instance, an exemption for household furniture included the proceeds from an insurance settlement after the furniture was destroyed, [48] an exemption for one "carriage" included the proceeds paid on an insurance policy after an automobile was damaged, [49] and the homestead exemption included the proceeds paid upon the forced disposition of the homestead as well as a cause of action filed to recover damages on a lost homestead. [50] One common theme runs through all of these decisions. The proceeds, insurance, cause of action, etc., are a substitute for the exempt property that is lost. To be effective, the substitute must be treated as if it were the lost item. [51] Otherwise, the protection provided by the exemption would be meaningless, and creditors could attack the unfortunate debtor more effectively than they could the average debtor who is less in need of the protection.

46 "Exemption statutes have been traditionally construed liberally by [Texas] courts. They are never restricted in their meaning and effect so as to minimize their operation upon the beneficent objects of the statutes, and questions regarding the extent of exemptions are generally resolved in favor of one claiming exemption." *Stephenson v. Wixom,* 727 S.W.2d 747, 749 (Tex.Ct.App.1987) (internal citations omitted).

[**27]

47 *See id.* at 749-50.

48 *Sorenson v. City Nat'l Bank,* 121 Tex. 478, 49 S.W.2d 718, 721 (Tex. Comm. App., Sec. A 1932).

49 *Willis v. Schoelman,* 206 S.W.2d 283 (Tex.Ct.App.1947).

50 *In re Osborn,* 176 B.R. 217, 219-20 (Bankr.E.D.Okla.1994).

51 In Tex. Civ. Prac. & Rem.Code § 31.002, the Texas legislature protected the proceeds of exempt property from the reach of creditors. That provision provides:

> A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code.

Tex. Civ. Prac. & Rem.Code § 31.002(f). This statute shows legislative approval of earlier decisions liberally construing the Texas exemptions.

[*802] When a retirement account that should have been exempt is lost, the cause of action to replace that account is exempt so that the injured party can be placed in a position that is as near as possible to his original or intended position. The fundamental purpose of a cause of action--to make an [**28] injured party whole--dictates this conclusion. State Farm maintains that Swift's causes of action are not exempt, however, because his IRA was defective at the time Swift's creditors objected to the exemption. State Farm's argument fails to account for one critical fact: Swift is seeking recovery for the original acts that made the account defective as well as the eventual loss of the bankruptcy exemption. State Farm cannot escape liability simply because its alleged actions resulted in damage at two separate stages. But for the actions of State Farm, or the failure to act by State Farm, Swift would have a valid, exempt IRA. Swift's causes of action against State Farm, then, are to replace what would have been a valid IRA, not the non-exempt account of which State Farm speaks. As a replacement for exempt property, we hold that Swift's causes of action are exempt property for purposes of his bankruptcy proceedings.

IV.

In conclusion, we find that Swift's causes of action against State Farm accrued before Swift filed his bankruptcy petition because he suffered actual damage before the filing. Those causes of action became the property of the bankruptcy estate under 11 U.S.C. § 541. [**29] But, they are exempt property under Texas Prop.Code § 42.0021. Swift has standing to pursue these causes of action against State Farm. The district court's decision is AFFIRMED.

LEXSEE 140 B.R. 891, 897

In re: WILL K. ELLWANGER and HELEN ELLWANGER, husband and wife, aka Wilhelm Karl Ellwanger and Helen Darline Ellwanger, Debtors. WILL K. ELLWANGER & HELEN ELLWANGER, Plaintiffs, v. BRIAN L. BUDSBERG, Trustee, Defendant.

No. 84-31238, ADVERSARY No. 92-31705

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON

140 B.R. 891; 1992 Bankr. LEXIS 722

May 6, 1992, Entered

COUNSEL: [**1] Brian L. Budsberg, Owens Davis Mackie, P.O. Box 187, Olympia, WA 98507, Trustee for Ellwanger Bankruptcy Estate.

Jay C. Immelt, P.O. Box 788, Corona, California 91718, Pro Per.

Arnold Kessler, Wilner, Klein & Siegel, 9601 Wilshire Boulevard, Suite 700, Beverly Hills, California 90210, Counsel for Meadows.

Gary C. Wunderlin, Allard, Shelton & O'Connor, 100 West Second Street, Sixth Floor, Pomona, California 91766, Counsel for McBroom Estate.

John T. Robson, Jr., Attorney at Law, 2603 Bridgeport Way, Suite C, Tacoma, Washington 98466, Counsel for Will Ellwanger.

Noel P. Shillito, Shillito & Giske, 2115 North 30th, Suite 202, Tacoma, Washington 98403, Counsel for Helen Ellwanger.

Charles A. Johnson, Office of U.S. Trustee, Park Place Building, Suite 600, 1200 Sixth Avenue, Seattle, Washington 98101, Assistant U.S. Trustee.

Kevin Lancaster, Veen & Associates, 711 Van Ness Avenue, Suite 220, San Francisco, California 94102, Special Counsel for Trustee in State Court Action.

JUDGES: Brandt

OPINION BY: PHILIP H. BRANDT

OPINION

[*893] DECISION: OWNERSHIP OF CAUSES OF ACTION

I. ISSUES

A. *Jurisdiction*: Whether the Bankruptcy Court has jurisdiction over a malpractice claim which arises out of legal [**2] representation both pre- and post-petition, but which became irremediable, and therefore accrued under state law, post-petition.

B. *Property of the Estate*: Whether that malpractice claim is property of the estate.

II. HISTORY

In 1981 Debtors Will and Helen Ellwanger, then married, lived in Gig Harbor, Washington. In late August of that year, Helen Ellwanger went to visit her terminally ill mother, Betty Joyce McBroom, who was hospitalized in California. During the visit, Ms. Ellwanger received a quitclaim deed to her mother's home. The mother's will, apparently also executed during the visit, provided for undivided one-fifth interests in her estate to go to her husband and each of her four children. Mrs. McBroom died a week later, and Helen Ellwanger was appointed administratrix.

Rather than probate the will, Helen Ellwanger recorded the quitclaim deed. Thereafter, other family members brought action against Helen Ellwanger in California Superior Court (*Estate of Betty Joyce McBroom*, No. PW 4011, San Bernadino County) to recover the residence. When Helen was sued by the new administrator, the Ellwangers retained James B. Eglin to represent her. Although Will [**3] Ellwanger was neither named a defendant nor served, Eglin entered a general appearance for both. After some initial activity in the case, Helen Ellwanger substituted herself for Eglin. In September of 1983, Roger Meadows was retained to represent Will Ellwanger in the suit.

After a four day trial, the Court found Helen Ellwanger had knowingly made false representations and obtained the residence by fraud and trickery. The Court ordered the property returned to the estate, and appointed Martin McBroom as administrator. Mr. McBroom then brought action against Helen Ellwanger under Cal. Prob. Code § 612 (West. 1989), which imposes a penalty of twice the value of property embezzled or concealed from decedent's estate. On 23 March 1984, the Superior Court entered judgment for a penalty of $ 240,000, plus a surcharge of $ 53,792.63 on [*894] Mr. McBroom's objection to Helen Ellwanger's inventory. [1]

1 The Bankruptcy Appellate Panel held the penalty dischargeable and the surcharge nondischargeable. *In Re Ellwanger*, 105 Bankr. 551 (9th Cir. BAP 1989).

[**4] Ellwangers filed for relief under Chapter 11 of the Bankruptcy Code [2] on 11 June 1984. Meadows continued to handle the McBroom Estate matter, initiating an appeal of the judgment. The McBroom Estate obtained relief from stay on 15 October 1984. On 30 October 1984, Helen Ellwanger filed a Motion to Maintain Stay, which was heard 6 November. Judge Robert W. Skidmore reinstated the stay until 15 November 1984; an Order so providing was entered 14 November 1984, and ends, ". . . at which time it shall be lifted without further order of this Court to allow proceedings in the Superior Court for the State of California to continue."

2 11 U.S.C.: references to "§ ", "Section" or to "Chapter", without more, are to the Bankruptcy Code.

On motion of the Creditors' Committee, Kenneth Graybeal was appointed trustee in the Chapter 11 by order entered 29 November 1984.

The Ellwangers' marriage was dissolved in late December of 1984.

On 29 January 1985, the trustee moved for an order authorizing him to discontinue the appeal, [**5] on the basis that the California court had sufficient evidence to make the findings it made. The motion was heard 12 February 1985, and Judge Robert W. Skidmore authorized the discontinuance if debtors did not make the necessary appeal arrangements and pay the costs by 20 February 1985, entering his Order re: Trustee's Motion to Discontinue Appeal on that date. The California Court of Appeals, Fourth District, dismissed the appeal 4 March 1985 for failure to pay transcript fees. Helen Ellwanger filed a Motion and Declaration to Reinstate Appeal, which was heard 3 May 1985; Judge Skidmore took the matter under advisement. There is no disposition of record of the Motion to Reinstate Appeal.

On the trustee's motion, the Ellwanger bankruptcy was converted to Chapter 7 on 11 June 1985.

Will Ellwanger filed a malpractice action against Eglin and Meadows, No. OCV 36849 in the Superior Court of California, San Bernadino County, on 31 October 1985, alleging legal malpractice committed by Eglin between January and August of 1983, legal malpractice by Meadows from September 1983 through February of 1985, and fraudulent concealment of material facts against Eglin, and breach of fiduciary [**6] obligation and conversion against Meadows (herein collectively the "malpractice claims" or "causes of action"). Ellwanger sought damages for "judgment for $ 240,000.00 against the plaintiff, injury to reputation, bankruptcy, loss of business, other past and future pecuniary loss, and past and future emotional distress and mental anguish." Helen Ellwanger evidently also filed her own separate malpractice actions against Meadows; the record here does not disclose when, the damages alleged, the identity of any other parties, or its disposition or present status, although at hearing counsel indicated that both Ellwangers are plaintiffs in the pending action: apparently, the two cases have been consolidated.

The malpractice claims were never scheduled as assets in the bankruptcy, nor were they disclosed to the trustee. The trustee's Final Report was approved on 27 August 1986, and an order approving his Amended Final Report was entered 24 November 1986. Debtors (at least Will Ellwanger), assert(s) that they (or he) requested the prior trustee to pursue the malpractice action, who declined, and that they (or he) believed it had been abandoned; Mr. Graybeal's affidavit is that he was [**7] unaware of any malpractice action. At the 12 February 1985 hearing, the Trustee's counsel indicated a willingness to abandon the estate's interest in the appeal of the California Superior Court decision, and the Order entered 20 February 1985 concludes:

> If the arrangements for the costs of appeal and the employing of an attorney for Feb 22, 1985, is not completed by [*895] February 20, 1985, the trustee may abandon the property involved in that appeal to the debtors and shall no longer be responsible for processing the appeal.

The docket discloses neither any notice of the trustee's intention to abandon such property, or any malpractice claim, nor any order or other document from the trustee actually abandoning the appeal, the property, or the malpractice claims.

Debtors' Discharge was entered 4 April 1988.

The malpractice cases went on independent of any bankruptcy proceedings until late 1990, when the McBroom Estate became aware that a settlement of Will Ellwanger's Eglin malpractice claim was in the offing. The McBroom Estate's counsel advised Mr. Ellwanger's counsel that the proceeds were property of the bankruptcy estate, and requested the settlement be turned over to [**8] the estate. Counsel declined to do so, at least without court order. Through Washington counsel, the McBroom Estate moved to reopen the bankruptcy. The Court determined that the case had not been closed, and appointed Brian Budsberg as successor trustee.

Mr. Budsberg commenced an adversary proceeding (*Budsberg, Trustee v. Will K. Ellwanger, et al.*, No. A90-34611) in this Court to determine the ownership of the Eglin malpractice claim. The day before he retired, on 31 January 1991, Judge Skidmore entered a Memorandum Decision determining that the settlement, to the extent it was for prepetition malpractice, was property of the estate. There were further proceedings to determine the extent to which the $ 200,000 settlement for Eglin's malpractice was, under Judge Skidmore's ruling, property of the estate. That issue was heard on summary judgment by the Honorable Frank D. Howard on 8 July 1991. On 29 August 1991, Judge Howard entered an Order on Summary Judgment determining all the Eglin settlement proceeds were property of the bankruptcy estate.

The inevitable fee applications followed, and on 23 January 1992, I entered an Order on Appointments and Fee Applications, appointing [**9] Ellwanger's California counsel as special counsel for the estate *nunc pro tunc* and awarding fees on the basis of the 50% contingency fee agreement signed 20 October 1985 by Mr. Ellwanger, and on counsel's reconstructed time records (which would support a greater fee on an hourly basis), proportionately discounted for clerical time and time spent opposing the estate in litigating the ownership of the Eglin cause of action. I also awarded fees to the McBroom Estate's counsel for assisting in recovery of substantial assets for the estate under § 503(b)(3)(B), with costs to each counsel. Finally, I entered an order appointing Ellwanger's California counsel as counsel for the estate in the ongoing case against Meadows, which remains pending, and is set for trial in San Bernadino County in early June 1992. I declined at that time to allocate ownership of the claim between the estate and Ellwangers. Ellwangers have since obtained new counsel in the California action.

III. PROCEDURE

On 5 March 1992, Jay C. Immelt filed his Motion and Declaration to Determine Ownership [of] Action, to Disallow Claim and to Vacate Fee Award and for Sanctions. Mr. Immelt, now married to Helen Ellwanger, [**10] was counsel for her in the bankruptcy and the appeal, *In re Ellwanger*, supra, at note 1. On 9 March, Helen Ellwanger joined in those motions; Meadows and Will Ellwanger joined in the motion to determine ownership on 9 and 20 March, respectively. The trustee and the McBroom Estate opposed the motion, the McBroom Estate seeking sanctions.

At hearing on 26 March 1992, I queried whether Bankruptcy Rule [3] 7001 did not require an adversary proceeding, and after hearing from counsel, decided that it did. Counsel then stipulated to my recasting the pertinent pleadings into adversary proceeding, and to treating the hearing as a trial on stipulated facts, rather than as a motion [*896] or cross motions for summary judgment. I entered the Order Opening Adversary Proceeding 8 April 1992.

3 Formally cited: Fed. R. Bankr. P.

IV. ANALYSIS

A. *Contentions*: Immelt, Meadows, and the Ellwangers ("movants") contend that the malpractice causes of action against Meadows did not exist at the time of the Ellwangers' [**11] petition, as they had not accrued under California law until the malpractice became irremediable upon dismissal of the appeal of the McBroom Estate action in March of 1985. They argue that the claims were not, at the time of filing, an interest in property comprehended by § 541(a). Alternatively, if Ellwangers had some interest in the malpractice claims at the time of their petition, the movants argue that, since legal malpractice claims are not voluntarily or involuntarily assignable under California law, the interest did not become property of the estate. Next, they assert that, if the interest did become property of the estate, it was abandoned, and finally, that the estate is equitably or collaterally estopped from claiming ownership of the malpractice claims. Counsel for Meadows further submits the Bankruptcy Court has no jurisdiction over the malpractice claims because of the California public policy against assignability of such claims.

The Trustee and the McBroom Estate question Immelt's and Meadows' standing and respond that, whatever may have been the case under § 70 of the Bankruptcy Act [4], nonassignability (for whatever reason) is irrelevant under the Bankruptcy [**12] Code, as is accrual under state law. They submit Ellwangers had a contingent or future interest in the malpractice claims at the time of their petition, which was never abandoned, and that no estoppel applies.

4 Which brought into the estate:

> property, including rights of action, which prior to the filing of the petition he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered. . . .

11 U.S.C. § 110(a)(5)(1966).

The McBroom Estate also seeks sanctions.

B. *Jurisdiction*: A Bankruptcy Court has jurisdiction to determine its jurisdiction. *Matter of Visioneering*, 661 F.2d 119 (9th Cir. 1981).

Ellwanger v. Meadows relates to both assets and liabilities of the estate, and the representation in question straddles the petition date. The suit's outcome will affect the administration of the estate, and therefore is within Bankruptcy Court jurisdiction. 28 [**13] U.S.C. §§ 1334(b) and 157(b); *Kaonohi Ohana, Ltd. v. Sutherland*, 873 F.2d 1302, 1306-1307 (9th Cir. 1989).

C. *Standing*: Ellwangers, as Debtors, and Mr. Budsberg, as trustee representing the estate, have standing to litigate the ownership of the malpractice claims.

Mr. Immelt, as a potential administrative claimant (although he has not yet requested payment, he indicates he will) has no standing in this proceeding to determine and collect property of the estate, which is exclusively in the trustee's purview. Section 704(1); *Matter of Perkins*, 902 F.2d 1254 (7th Cir. 1990). Parenthetically, while a potential administrative claimant could be expected to argue for bringing everything possible into the estate, Mr. Immelt's taking of the opposite position suggests that his "administrative claimant" posture is a false flag, and that his purpose is to further Helen Ellwanger's interest and his own as her spouse. Had Ellwangers not, through counsel, adopted Mr. Immelt's motion as their own, I would be inclined summarily to strike it and his supporting papers.

Similarly Meadows, as the adverse party in malpractice litigation, has no standing [**14] in this proceeding. His desire to know who, exactly, the opposing litigants are is insufficient. I understand, from argument, that Meadows has counterclaimed against Helen Ellwanger. If that counterclaim is based on her pre-petition conduct, it may be nugatory, as Meadows has never sought relief from stay or the post-discharge injunction of § 524(a)(2), nor has [*897] Meadows filed a proof of claim in the Ellwanger bankruptcy. In any event, the logical stance for Meadows as creditor to take would be to seek inclusion of the malpractice claims in the bankruptcy estate, rather than to exclude them. Meadows' stance appears tactical, seeking to choose his plaintiffs, rather than a principled legal position. This appearance is reinforced by the fact that Meadows has previously (evidently with other counsel) taken the position in the California courts that Helen Ellwanger had no standing to bring her malpractice action because it was part of the bankruptcy estate. See, *Helen Ellwanger v. Meadows*, discussed in part IV. D., below.

Although the McBroom Estate is a party in interest (and, refreshingly, acting consistently with its proclaimed status), it lacks standing for the same reason.

[**15] D. *Property of the Estate*: With exceptions not here pertinent, a bankruptcy estate consists of ". . . all legal or equitable interests of the debtor in property as of the commencement of the case." Section 541(a)(1).

Judge Skidmore, in his 31 January 1991 Memorandum Decision respecting the Eglin settlement proceeds, stated:

> Mr. Ellwanger argues that although Eglin and Meadows committed several acts of malpractice from the period when they were first retained until the appeal of the California case was dismissed in March, 1985, it was not until the damages became irredeemable that Wilhelm Ellwanger's case of action for legal negligence actually accrued. Ellwanger's appeal of the underlying judgment *In re Estate of McBroom*, became final on March 4, 1985 in the Court of Appeals, the debtor argues that it was not until the finality of this determination that his cause of action accrued. Thus, it is Ellwanger's position that since this date fell after the filing of the bankruptcy petition the cause of action cannot be considered an asset of the bankrupt estate. He relies mainly on the case of *Robinson v. McGuinn*, (1987) 195 Cal. App. 3d 66 [240 Cal. Rptr. 423] [**16] for establishing the time in which at which a cause of action for legal malpractice accrues.
>
> The debtor's position collapses into one analysis several distinct concepts of

> law. While state law defines the nature of a debtor's interest in property, whether this interest is property of the estate is a matter of federal bankruptcy law. The assets of the bankruptcy estate include "all legal or equitable interests of the debtor in property as of the commencement of the case." Bankruptcy Code 541(a)(1). Legislative history states that the scope of this paragraph is intended to be very broad.
>
> To attempt to define when the debtor's interest in the subject cause of action arose based on when it accrued for purposes of a state's statute of limitation is conceptually flawed. The debtor's cause of action involves legal representation which occurred pre-petition, if this representation was negligent the debtor had a contingent claim against his attorneys for these services then. Although, this contingent interest may never come to fruition if the harm is remedied before finality, this does not alter the fact that the debtor's contingent interest arose when the representation occurred. [**17] This contingent interest passed to the estate at the time of the bankruptcy filing. [citation completed]

Judge Skidmore ruled that the Eglin settlement was property of the estate except to the extent it related to post-petition negligence, and Judge Howard's Order on Summary Judgment held it entirely property of the estate.

In contrast, the California Court of Appeal, Fourth District Division Two, in an unpublished opinion filed 1 May 1989 in *Helen Ellwanger v. Roger Meadows, et al.*, No. E005581 (Superior Court No. OCV 36919), reversed summary judgment for Meadows, which the Superior Court had granted on the basis that the malpractice claim was an asset of the bankruptcy estate and not abandoned, and that Ms. Ellwanger therefore lacked standing, holding:

> [*898] If the cause of action did not accrue until after June 11, 1984 (the date of filing of bankruptcy), it did not exist "as of the commencement of the case" and is not property of the estate. Nor was it rendered property of the estate by the conversion of the proceeding to a Chapter 7 case on October 11, 1985. [citations omitted]

The Appellate Court reversed and remanded for determination of when damages were [**18] incurred, when they became irremediable, and if made necessary by those factual determinations, the transferability issue.

1. *Accrual/Interest in Property*: Movants correctly point out that, while § 541(a) is broad and all-embracing, neither that section nor any other Bankruptcy Code provision determines the threshold question of whether debtors have an interest in a particular item of property or the extent of that interest: those questions must be determined by non-bankruptcy (in this case, California) law. *In re Farmers Markets Inc.*, 792 F.2d 1400 (9th Cir. 1986); *In re FCX Inc.*, 853 F.2d 1149 (4th Cir. 1988). Movants argue that the California Court of Appeal was correct in *Helen Ellwanger v. Meadows*, quoted above, and that, since the damage became irremediable only after the petition date, there was no extant cause of action which could be an interest in property as of filing, citing *Collins v. Federal Land Bank of Omaha*, 421 N.W.2d 136 (Ia, 1988) for an application of the principle in the bankruptcy context. In *Collins*, the Supreme Court of Iowa held that a legal malpractice claim for improper advice regarding [**19] the plaintiff's choice of Chapter under which to file inherently could not accrue until the bankruptcy filing, and therefore debtor had no interest in that cause of action prior to filing.

With all respect to the California Court of Appeal, Judge Skidmore's ruling is consistent with controlling authority: *In re Neuton*, 922 F.2d 1379 (9th Cir. 1990) (affirming the Bankruptcy Appellate Panel in holding the bankruptcy estate included the debtor's contingent rights to share in a trust's income if he survived his wife and in the trust corpus if alive at the termination of the trust, when debtor's spouse died post-filing); *In re Ryerson*, 739 F.2d 1423 (9th Cir. 1984) (affirming the Bankruptcy Appellate Panel's holding that the bankruptcy estate included money debtor became entitled to eight months after his petition, although he had only an unvested contingent interest at the time of filing). See also, *Tignor v. Parkinson*, 729 F.2d 977, at 980-981 (4 Cir. 1984). *Collins*, even if it were binding, does not require a different result: the Iowa court did not analyze the implications of a possible inchoate or contingent interest.

[**20] If a bankruptcy estate includes a contingent claim vested only upon death of a debtor's spouse, I see no reason why this one does not include a contingent claim accruing upon death of debtors' appeal.

2. *Assignability/Public Policy*:

a. *Goodley's progeny*: The tactical nuke in movants' arsenal is their contention that, as a matter of public policy, claims for legal malpractice are inherently personal, and neither voluntarily nor involuntarily assignable. They rely principally upon the leading case of *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (Cal. App. 2 Dist. 1976) and its progeny, including *Jackson v. Rogers & Wells*, 210 Cal. App. 3d 336, 258 Cal. Rptr. 454 (Cal. App. 4 Dist. 1989) and *Kracht v. Perrin, Gartland & Doyle*, 219 Cal. App. 3d 1019, 268 Cal. Rptr. 637 (Cal. App. 4 Dist. 1990).

The *Goodley* Court stated its:

> . . . view that a chose in action for legal malpractice is not assignable is predicated on the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship [**21] arises, and public policy considerations based thereon.

133 Cal. Rptr. at 86.

Those considerations, in the *Goodley* Court's view, include the fiduciary nature of the attorney-client relationship, and the attorney's duty of ". . . most conscientious fidelity and undivided loyalty", the fact that their relationship is so confidential and personal that, absent client permission, the attorney's side of the attorney-client contract [*899] cannot be assigned, nor can the attorney substitute other counsel without client consent. Further, the attorney's duty to *Goodley's* assignor was purely personal to her, and the assignor was the only intended beneficiary of the attorneys' performance. After observing that the personal nature of the duty owed the client

> ". . . does not perforce convert the breach thereof to a 'tort of purely personal nature' on a par with those wrongs done to the person of the injured party or his reputation or feelings which fall within the exception to the general rule of assignability; . . . but neither does the damage alleged to be a direct consequence of defendants' negligent breach of duty converted to a claim 'for property [**22] damages' arising out of a 'non-personal tort' that is freely assignable[.],

> the Court articulated what did:

>> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The most certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, [**23] promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between at-

> torney and client. [footnotes omitted]

133 Cal. Rptr. at 87.

Jackson v. Rogers & Wells, at 458, indicates *Goodley* remained the law of California and a number of other states in 1989, notwithstanding the more commercial nature of current law practice (see footnote 3), and *Kracht v. Perrin, Gartland & Doyle* applied the principle to involuntary assignments, holding a judgment creditor obtained no right of action to sue with a statutorily-compelled assignment to her of her judgment debtor's legal malpractice claims. See also, *Bank IV Wichita, N.A. v. Arn, Mullins, Unruh, Kuhn & Wilson*, 250 Kan. 490, P.2d , 1992 WL 38591 (Kan.), R. Mallen and J. Smith, *Legal Malpractice* [**24] , 3d Ed. (West 1989), § 7.7, at pages 367-372 and 1991 pocket part, and annotation, *Assignability of Claim for Legal Practice*, 40 A.L.R.4th 684 and September 1991 Supplement. The two secondary sources note that nonassignability is not the law in all states, and that many courts have ruled on cases arising out of assigned legal malpractice actions without comment.

Movants claim the nonassignability policy directly or indirectly keeps such claims out of bankruptcy estates, citing, *inter alia*, *Christison v. Jones*, 83 Ill. App. 3d 334, 405 N.E.2d 8 (Ill. App. 3 Dist. 1980, 39 Ill. Dec. 560), *In re Baker*, 709 F.2d 1063 (6th Cir. 1983), and *Scarlett v. Barnes*, 121 Bankr. 578 (Bkrtcy., W.D. Mo. 1990).

b. *Operation of Law*: There are one and one-half defects in movants' position: taking the half first, it is not self-evident that, under California law, a claim for legal malpractice would not pass by operation of law, as, for example, to the malpractice plaintiff's heirs in the event of death, or to the successor of a corporate plaintiff merged out of existence or dissolved. As noted in *Jackson v.* [**25] *Rogers & Wells*, at 458, [*900] legal malpractice claims are not assignable under Illinois law. However, Appellate Court of Illinois held, overruling a dismissal, that the administrator of the estate could pursue a legal malpractice action after plaintiff's death. *Jones v. Siesennop*, 55 Ill. App. 3d 1037, 371 N.E.2d 892 (Ill. App. 1 Dist., 1977, 13 Ill. Dec. 800). A California court might reach a similar result.

Additionally, the California Court of Appeal, Fourth District, in a case affirming a summary judgment dismissing a legal malpractice case on the basis of a statute of limitations and the inapplicability of any waiver argument, stated:

> Konold and Loadman contend ABA lacks standing to prosecute this appeal because it filed for bankruptcy and a trustee has been appointed. A bankrupt's cause of action becomes part of the bankruptcy estate upon the filing of the petition in bankruptcy. [citations omitted]

ABA Recovery Services, Inc. v. Konold, 198 Cal. App. 3d 720, 244 Cal. Rptr. 27, 31 (Cal. App. 4 Dist. 1988).

The *Konold* court went on to say that, notwithstanding the transfer by operation of law, the original plaintiff [**26] could prosecute the action until the bankruptcy trustee took action.

Finally, the California Court of Appeal decision in *Helen Ellwanger v. Meadows* (quoted above) is nonsensical if her legal malpractice claim against Meadows could under no circumstances become an asset of the bankruptcy estate. Were that California law, when the claim accrued with relative to her filing in bankruptcy would be immaterial, and the remand pointless.

c. *Federal Law*: The more fundamental flaw in movants' position is that federal bankruptcy law, rather than assignability or public policy under state law, determines whether the malpractice claims are property of the estate. The Ninth Circuit examined Congress's expansion of the composition of the property of bankruptcy estates in enacting the Code in the Bankruptcy Reform Act of 1978, and held:

> Thus, regardless of whether a personal injury claim is transferable or assignable under state law, such claims become part of the bankruptcy estate under § 541.

Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 708- 709 (9th Cir. 1986).

In so doing, it rejected the Sixth Circuit's conclusion in *In re* [**27] *Baker, supra*. Notably, the Sixth Circuit has also explicitly rejected *Baker*, citing *Sierra Switchboard* with the same quotation. *In re Cottrell*, 876 F.2d 540 (6th Cir. 1989).

Although none of the circuits relied on or even cited § 541(c)(1), that section provides in pertinent part:

> . . . an interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in an agreement, transfer instrument, or applicable non-bankruptcy law -
>
> (A) that restricts or conditions the transfer of such interest by the debtor; . . .

California's nonassignability public policy appears to be precisely the sort of non-bankruptcy restriction on transfer which Congress invalidated.

Movants misapprehend *Scarlett v. Barnes, supra.* After the usual procedural explication, the Missouri District Court noted that the parties (Scarlett and her bankruptcy trustee)" . . . agree that the [legal malpractice] cause of action is property of the bankruptcy estate because it accrued prior to issuance of the final decree discharging Scarlett." [footnote omitted] 121 Bankr. at 579. [5] The Court went on [**28] to analyze whether or not the debtor was entitled to exempt property out of the estate under the Missouri exemption scheme, and concluded she could, because Missouri's statute allowed exemption of property exempt from attachment or execution. The Court also concluded Missouri would hold a legal malpractice claim nonassignable and exempt from execution. Will Ellwanger's Amended Schedule B-4, filed with his certification dated October 7, 1985, [*901] claims various exemptions under Chapter 6.16 of the Revised Code of Washington, none of which purport to include any cause of action. Nor is there an indication in the record that Helen Ellwanger ever attempted to exempt her malpractice claim. *Scarlett v. Barnes* does not reinforce movants' position.

> 5 Also the case here: the latest arguable date for accrual of the malpractice causes of action is in March of 1985; Ellwangers were not discharged until April of 1988.

Nor does *Christison v. Jones, supra*, gain movants anything: [**29] that was a state court's determination under the Bankruptcy Act, rather than the Bankruptcy Code; as noted in *Sierra Switchboard, supra*, Congress substantially broadened the ambit of property of the estate when it enacted the Code in 1978. Whatever force that case may have had, it has been eviscerated by the Code.

A number of state courts have recognized the primacy of federal law in determining malpractice causes of action were property of bankruptcy estates. The Iowa Supreme Court in *Collins v. Federal Land Bank, supra*, held five of the six causes of action at issue there were property of the estate, and upheld dismissal of the debtor's claims without prejudice to the bankruptcy trustee's right to seek recovery on them. Likewise, in New York, the Appellate Division has held malpractice causes of action accrued before discharge and neither scheduled in the plaintiffs' bankruptcies nor abandoned in those proceedings remain property of their bankruptcy estates. *DeLarco v. DeWitt*, 136 A.D.2d 406, 527 N.Y.S.2d 615, and cases cited at 616, *Quiros v. Polow*, 135 A.D.2d 697, 522 N.Y.S.2d 596 (1987), [**30] app. dism., 72 N.Y.2d 840, 530 N.Y.S.2d 555 (1988).

d. *Nonassignability Applied*: Finally, it is far from clear that a California court, applying the public policy considerations articulated in *Goodley* to the facts here, would conclude that the bankruptcy estate should not have the right to prosecute the Ellwangers' malpractice claims: Ellwangers have fiduciary duties to the estate, and a transfer by operation of law to an entity which is in essence their *alter ego* is not the equivalent of auctioning off such claims to strangers or factoring them, nor does it encourage unjustified suits or force attorneys to defend themselves against casual purchasers of causes of action.

In an analogous situation, the Supreme Court of Maine stated, in a case in which the plaintiff was a judgment creditor who had obtained in settlement the malpractice claim of her opponent in the underlying action:

> We hold first that there is no reason to prohibit the assignment of a legal malpractice claim in a situation such as this. We are not here confronted with the establishment of a general market for such claims; this assignee has an intimate connection with [**31] the underlying lawsuit. Although some cases from other jurisdictions flatly prohibit the assignment of any legal malpractice claim, e.g., *Goodley v. Wank and Wank, Inc.*, 62 Cal. App. 3d 389, 397, 133 Cal. Rptr. 83, 87 (1976); *Christison v. Jones*, 83 Ill. App. 3d 334, 338-39, 39 Ill. Dec. 560, 405 N.E.2d 8, 11 (1980), their reasoning is not persuasive. A legal malpractice claim is not for personal injury, but for economic harm. *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 517 Pa. 522, 526, 539 A.2d 357, 359 (1988). The argument that legal services are personal and involve confidential attorney-client relationships does not justify preventing a client like 3K from realizing the value of its malpractice claim in what may be the most efficient way possible, namely, its assignment to someone else with a clear interest in the

> claim who also has the time, energy and resources to bring the suit. The Superior Court properly denied the lawyer defendants' motion to dismiss.

Thurston v. Continental Casualty Co., 567 A.2d 922, 923 (Me. 1989).

e. *Reprise* [**32] : I conclude that, while California's public policy-based nonassignability might not preclude transfer of legal malpractice claims by operation of law, [6] federal law controls. I see no basis for distinguishing California's nonassignability [*902] of the emotional distress claims (which *Sierra Switchboard* held ineffective to keep such claims out of the bankruptcy estate), from its policy against assignability of legal malpractice claims (which, as the Maine Supreme Court noted in *Thurston*, are essentially economic: in the case at bar, the only non-economic damages sought are for emotional and mental distress).

> 6 If so in the probate context, the state's implicit public policy would promote lawyers' hiring assassins *ex post facto*, rather than obtaining malpractice coverage *ex ante*.

With exceptions not here pertinent, Congress, in § 541(c), unambiguously invalidated restrictions such as California's nonassignability of legal malpractice claims. There is nothing in the Bankruptcy Code to warrant my reading [**33] into it a public policy exception not clearly contemplated by Congress, and I am no more willing to do so than was the Ninth Circuit willing to read one not found in Washington law into the Revised Code of Washington in *Ikuno v. Yip*, 912 F.2d 306 (9th Cir. 1990). The Court there rejected arguments that the unique and personal nature of the attorney-client relationship prohibits execution on a legal malpractice claim under Washington statute, absent a clear prohibition.

Movants' tactical nuke is a Bent Spear. [7]

> 7 E. Semler, J. Benjamin, and A. Gross, *The Language of Nuclear War: An Intelligent Citizen's Dictionary*, 36, 198 (Harper & Row 1987)

3. *Abandonment*: Section 554 allows the trustee to abandon, or the court (on motion of a party in interest) to order the trustee to abandon, property burdensome or of inconsequential value and benefit to the estate, after notice and a hearing. Bankruptcy Rule 6007 requires notice to all creditors of a proposed abandonments.

There was no such notice [**34] given in this case respecting the malpractice claims, nor an order of abandonment. The Order re: Trustee's Motion to Discontinue Appeal of 20 February 1985 upon which movants rely, contemplates a possible future abandonment, and relates to "the property involved in that appeal", rather than any malpractice claim. While a notice of hearing of the trustee's motion was mailed to creditors 31 January 1985, that notice did not indicate the possible abandonment of property, and the underlying motion (evidently not mailed to creditors) told any creditor who looked at the court file or obtained a copy that the relief requested ". . . would result in certain property located in California to vest in the estate of Betty McBroom in which Helen Ellwanger has the potential one-sixth interest subject to any surcharge or offset the estate may assert against her." That is arguably sufficient notice of possible abandonment of particular California property (presumably Mrs. Ellwanger's mother's residence), but is not plausibly sufficient to inform creditors that malpractice causes of action might be abandoned. *Sierra Switchboard*, *supra*, at 709-710.

4. *Estoppel*: Although not explicitly [**35] briefed, movants have made both equitable and collateral estoppel arguments in support of their position. The equitable estoppel argument is, essentially, that even if the malpractice claims were not formally abandoned, the estate acted as if they had been, the Ellwangers were left to their own devices to pursue those claims, and that it is unfair for the estate now to assert an interest in those claims. The collateral estoppel argument is apparently predicated on the California Court of Appeal's decision in *Helen Ellwanger v. Meadows*, referenced above in part IV. D.

> a. *Detrimental Reliance*: Equitable estoppel requires:
>
> > (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.
>
> *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989).
>
> Further:
>
> > A finding of estoppel must rest on consideration of several factors. Of critical importance is a showing of the plaintiff's actual and reasonable [**36] reliance on the defendant's

> conduct or representations. [*903] Also important is evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct. And, with respect to a claim for either tolling or estoppel, the trier should consider the extent to which the purposes of the limitations period have been satisfied, notwithstanding the delay in filing. [citations and footnote omitted]

Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981).

As set forth in the preceding section, Ellwangers had no right to rely on an ambiguous and conditional "abandonment", absent explicit notice and an appropriate order. Nor did the trustee know of the malpractice claims, so he could not intend the Ellwangers to rely on the "abandonment". Ellwangers were not ignorant of the facts, and they could have moved at any time for an order requiring the trustee to abandon the malpractice claims. Three of the four elements of equitable estoppel are missing, and even the fourth is (detrimental reliance) is questionable: if the estate recovers on the Meadows claim, and there is a surplus after [**37] payment of their just debts and approved costs of administration, Ellwangers will get it.

Finally, under California law:

> The trustee may, among other things, allow the plaintiff to pursue the action and await the results, any recovery being first for the benefit of the estate.

ABA Recovery Services, Inc. v. Konold, *supra*, at 37.

b. *Relitigation*: Respecting collateral estoppel, or issue preclusion, the doctrine:

> . . . prevents relitigation of all 'issues of fact or law that were actually litigated and necessarily decided' in a prior proceeding. 'In both the offensive and defensive use situations the party against whom estoppel [issue preclusion] is asserted has litigated and lost in an earlier action.' The issue must have been 'actually decided' after a 'full and fair opportunity' for litigation. [citations omitted]

Robi v. Five Platters, Inc., 838 F.2d 318, 322, 5 U.S.P.Q.2D (BNA) 1709 (9th Cir. 1988).

The Ninth Circuit went on to say:

> Under the doctrine of issue preclusion, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause [**38] of action. The issue in the prior action must be identical to the issue for which preclusion is sought. Only a final judgment that is sufficiently firm can be issue preclusive. The party against whom issue preclusion is asserted must have litigated that issue in an earlier action and lost.

838 F.2d at 326.

Even if the California Court had jurisdiction to decide a core bankruptcy proceeding, and even if it had determined a factual issue (rather than simply finding there was a factual issue for trial) the trustee was not a party to the action, and is not precluded from now asserting ownership of the malpractice claims.

V. SANCTIONS

No party with standing in this proceeding having requested sanctions under Bankruptcy Rule 9001, I will not award any.

VI. CONCLUSION

To the extent Meadows committed legal malpractice:

a. on or before Ellwangers' petition for bankruptcy relief on 11 June 1984, or

b. is jointly or severally liable for malpractice committed by Eglin, or

c. committed post-petition malpractice which damaged property of the estate,

the causes of action asserted by Ellwangers in state court in California are property of this bankruptcy estate.

[**39] I do not now decide whether, because the causes accrued before Ellwangers' discharge, the entire claims are the estate's, or whether Ellwangers are entitled to exempt any portion of any award or settlement under § 522(d)(11)(E) or otherwise.

ENTERED: 6 May 1992.

Philip H. Brandt

Bankruptcy Judge

LEXSEE 739 F.2D 1423, 1425

In re LARRY E. RYERSON, DEBTOR; ALBERT M. RAU, Trustee/Appellee v. LARRY E. RYERSON, Debtor/Appellant

No. 83-2164

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

739 F.2d 1423; 1984 U.S. App. LEXIS 19773; Bankr. L. Rep. (CCH) P69,956; 11 Collier Bankr. Cas. 2d (MB) 121

March 16, 1984, Argued and Submitted
August 7, 1984

PRIOR HISTORY: [**1] Appeal from the United States Bankruptcy Appellate Panels of the Ninth Circuit.

COUNSEL: John N. Vogel, Esq., Scottsdale, Arizona, for Appellee.

Rodney M. Matheson, Esq., Mesa, Arizona, for Appellant.

JUDGES: Kennedy and Canby, Circuit Judges and Ryan, * District Judge.

> * The Honorable Harold Ryan, United States District Judge for the District of Idaho, sitting by designation.

OPINION BY: CANBY

OPINION

[*1424] CANBY, CIRCUIT JUDGE:

Ryerson appeals from a decision of by the Bankruptcy Appellate Panel. 30 Bankr. 541. The panel determined that money to which Ryerson became entitled upon the termination of his employment, some eight months following the filing of his petition in bankruptcy, should be included with the bankruptcy estate.

On January 12, 1977, Ryerson entered into an Appointment Agreement with the Farmers Insurance Company of Arizona appointing him to the position of District Manager for District 25. The Agreement provided that in the event of cancellation or other termination of the appointment "the Companies may at their option elect to pay 'contract value,' as hereinafter defined, to the District Manager." "Contract value" was defined as [**2] the service commission overwrite paid to the District Manager during the six months immediately preceding termination times a factor determined by the number of years of service as District Manager. Nothing was payable until the District Manager had served one full year. The Agreement further provided that as a condition precedent to the District Manager's right to receive "contract value" he must be in good standing with the Companies on the date of his termination and that he not have been guilty of certain specified forms of misconduct. Termination occurred upon the death of the District Manager, and the contract could be cancelled by either party without cause upon 30 days written notice.

Ryerson filed a chapter 7 bankruptcy proceeding on February 10, 1981. His appointment as District Manager for the Farmers Insurance Group terminated on November 1, 1981. The "contract value" on the date of termination was determined to be $18,588, which has not yet been paid to the debtor. Ryerson sought a declaratory [*1425] judgment from the bankruptcy court declaring that this sum was not property of the bankruptcy estate.

The old Bankruptcy Act provided that all "rights of action [**3] arising upon contracts" passed to the trustee in bankruptcy. 11 U.S.C. § 110(a)(6) (repealed). The current Bankruptcy Code defines the bankrupt estate as consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Among the debtor's legal interests that become a part of the bankruptcy estate under the Code are his choses in action and claims against third parties as of the commencement of the case. S. Rep. No. 989, 95th Cong., 2d Sess. 82, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5868. These choses in action and claims clearly include rights of action based upon contract. *See, e.g., Guarles House Apartments v. Plunkett (In re Plunkett)*, 23 Bankr. 392 (Bankr. E.D. Wis. 1982); *Varisco v. Oroweat (In re Varisco)*, 16 Bankr. 634 (Bankr. M.D. Fla. 1981).

Under the Appointment Agreement, the contract has value upon termination or cancellation after the District Manager completes one year of service in that position. At [**4] the time this case was commenced, Ryerson had served four full years as District Manager. He therefore had accumulated value to which he was entitled upon termination or cancellation of his Appointment Agreement. The debtor nevertheless argues that at the time of the filing of the bankruptcy petition his appointment had not yet been terminated or cancelled and that therefore he had no claim to the "contract value." He asserts that an unvested, contingent interest is not includable within the bankruptcy estate if it cannot be transferred by the debtor or levied upon or otherwise reached by the debtor's creditors. Under the Act, a contingent interest in personal property passed to the trustee only if it was capable of being assigned or was subject to execution, seizure, or sequestration. 4A *Collier on Bankruptcy* para. 70.37 at 453 (14th ed. 1978). However, the requirement that the debtor must be able to transfer the interest or that his creditors by some means must be able to reach it has been eliminated under the Code. 4 *id.* para. 541.08[1] (15th ed. 1984). By including all legal interests without exception, Congress indicated its intention to include all legally recognizable [**5] interests although they may be contingent and not subject to possession until some future time. H.R. Rep. No. 595, 95th Cong., 1st Sess. 175-76 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6136. We therefore conclude that Ryerson's interest in the "contract value," albeit contingent at the time of filing and not payable until such time as his appointment is terminated or cancelled, is includable within the bankruptcy estate pursuant to section 541(a)(1). [1]

1 The debtor makes much of the fact that "contract value" is payable only at the option of the Company. Even if the payment of the "contract value" were truly optional, the fact that the contingency may not occur would not render the debtor's interest unenforceable at common law. It is the nature of a contingent interest that it may never take effect in possession because of the failure of the specified event to occur. 2 *Powell on Real Property* para. 274 (1950). However, Ryerson's right to the "contract value" is not truly contingent. First, the termination or cancellation of the appointment is an event certain to occur. Therefore, Ryerson's right to the "contract value" is not made contingent by the fact that the appointment had not yet terminated at the time of bankruptcy filing. Second, the fact that the Company may elect not to pay the "contract value" does not necessarily have the effect of denying him the right to collect it: the Appointment Agreement permits Ryerson to recover the "contract value" from his successor in the event that the Company elects not to pay it. We therefore attach no significance to the fact that payment of the "contract value" is stated to be at the option of the Company.

[**6] Having concluded that Ryerson's right to "contract value" is property of the bankruptcy estate, we have no difficulty concluding that any payments paid upon termination of Ryerson's appointment are also property of the bankruptcy estate although paid after commencement of the case, at least to the extent the payments are related to prebankruptcy services. Section 541(a)(6) of the Code includes in the bankruptcy estate after-acquired property consisting of "proceeds, product, offspring, [*1426] rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6). It follows therefore that earnings from services performed prior to bankruptcy are includable within the bankruptcy estate. Under the Act, the test was whether the after-acquired property was "sufficiently rooted in the prebankruptcy past and so little entangled in the debtor's ability to make a fresh start that it should not be excluded from property of the estate." *Segal v. Rochelle*, 382 U.S. 375, 380, 15 L. Ed. 2d 428, 86 S. Ct. 511 (1966). [**7] The Code follows *Segal* insofar as it includes after-acquired property "sufficiently rooted in the prebankruptcy past" but eliminates the requirement that it not be entangled with the debtor's ability to make a fresh start. *See* S. Rep. No. 989, *supra* at 82, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5868. We think that the termination payments representing value for years of service completed prior to bankruptcy, and not being an arbitrary amount arising after bankruptcy, are "sufficiently rooted in the prebankruptcy past" as to be included within the bankruptcy estate. *See In re Durham*, 272 F. Supp. 205, 209 (S.D. Ill. 1967).

Our ruling does not necessarily mean that all of the $18,588 is property of the bankruptcy estate. The Bankruptcy Appellate Panel determined that only the debtor's interest at the time of bankruptcy is property of the estate; any interest attributable to post-filing services was expressly excluded from the estate. We agree. Section 541(a)(6) excludes from the estate " earnings from services performed by an individual debtor after the commencement of the case." Thus any portion of the $18,588 related to services performed [**8] after February 10, 1981 are not includable within the bankruptcy estate.

The judgment of the Bankruptcy Appellate Panel is therefore AFFIRMED.

VINCENT MAXWELL, ROCHELLE T. SPANN, WILLIAM BINION, PAMELA TERRELL, DESMON SMITH, EUGENE JOHNSON, KIM MCMICHAEL-JONES, YUMEIKA HUNT, NICOLE GREEN, SANDRA SAMPSON, SONYA L. HAWKINS, and ANGELA WALLER, Plaintiffs, v. MGM GRAND DETROIT, LLC, Defendant.

Case No. 03-73134

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2007 U.S. Dist. LEXIS 51056

July 16, 2007, Decided
July 16, 2007, Filed

SUBSEQUENT HISTORY: Motion denied by, Sanctions allowed by Maxwell v. MGM Grand Detroit, L.L.C., 2007 U.S. Dist. LEXIS 83724 (E.D. Mich., Nov. 13, 2007)

COUNSEL: [*1] For Vincent Maxwell, Rochelle T. Spann, Pamela Terrell, Melinda William, formerly known as Melinda Mial, Desmon Smith, Eugene Johnson, Kim McMichael-Jones, Daphne Springs, Yumeika Hunt, Nicole Green, Sandra Sampson, Sonya L. Hawkins, Angelena Waller, Plaintiffs: E. Powell Miller, LEAD ATTORNEY, The Miller Law Firm, Rochester, MI; Kenneth F. Neuman, LEAD ATTORNEY, Nathan, Neuman, Southfield, MI; Lynn H. Shecter, LEAD ATTORNEY, Roy, Shecter, Bloomfield Hills, MI; Michelle E. Vocht, LEAD ATTORNEY, Roy, Shecter, Bloomfield Hills, MI; Ann L. Miller, The Miller Law Firm, Rochester, MI; William A. Roy, Roy, Shecter, Bloomfield Hills, MI.

For William Binion, Plaintiff: E. Powell Miller, LEAD ATTORNEY, The Miller Law Firm, Rochester, MI; Ann L. Miller, The Miller Law Firm, Rochester, MI; William A. Roy, Roy, Shecter, Bloomfield Hills, MI.

For MGM Grand Detroit, L. L. C., Defendant: Lawrence G. Campbell, LEAD ATTORNEY, Dickinson Wright, Detroit, MI; Louis Theros, LEAD ATTORNEY, Dickinson Wright, Detroit, MI; Kathryn S. Wood, Dickinson Wright, Detroit, MI; Ryan K. Mulally, Dickinson Wright, Detroit, MI; Sherry D. O'Neal, Dickinson Wright, Detroit, MI; Tiffany A. Buckley, Dickinson Wright, Detroit, MI; [*2] Trent B. Collier, Dickinson Wright, Detroit, MI.

JUDGES: AVERN COHN, UNITED STATES DISTRICT JUDGE.

OPINION BY: AVERN COHN

OPINION

MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT ON THE BASIS OF JUDICIAL ESTOPPEL AGAINST PLAINTIFFS TERRELL AND SPANN

I. INTRODUCTION

This is an employment-based race discrimination case under 42 U.S.C. § 1981. Pamela Terrell (Terrell) and Rochelle Spann (Spann), two of the plaintiffs above, claim that defendant MGM Grand Detroit, LLC (MGM) engaged in discriminatory practices against African-American employees.

Before the Court are the defendant's motions for summary judgment against Terrell and Spann. MGM asks the Court to bar Terrell from maintaining her claim against it under the doctrine of judicial estoppel because she failed to disclose the case here as an asset in her Bankruptcy Schedules and Statements of Financial Affairs when filing for bankruptcy protection under Chapter 7. Likewise, MGM asks the Court to bar Spann from maintaining her claim against it because she failed to disclose the case here as an asset in her Bankruptcy

Schedules and Statements of Financial Affairs when filing for bankruptcy protection under Chapter 13.

Terrell and Spann argue that [*3] judicial estoppel is inappropriate because their failure to disclose their claims against MGM was due to mere advertence or mistake.

For the reasons that follow, the defendant's motions will be granted.

II. BACKGROUND

A. Pamela Terrell

Terrell, an African-American female, was employed by MGM from July 6, 1999 to September 10, 2001.

Terrell was a named plaintiff in a class action race-discrimination lawsuit under the Michigan Elliot-Larsen Civil Rights Act filed in Wayne County Circuit Court against MGM on October 25, 2001. Certification of the proposed class was denied and the case was dismissed on September 12, 2003.

Terrell was one of the plaintiffs who filed this case on August 18, 2003. Terrell alleges race discrimination in violation of 42 U.S.C. § 1981 with respect to certain promotions for which she was not selected.

On October 6, 2005 while the case was pending, Terrell filed for bankruptcy protection under Chapter 7 in the Bankruptcy Court for the Eastern District of Michigan (the bankruptcy court). The bankruptcy petition was filed by a different attorney than the attorneys representing her in this case.

As part of the required Bankruptcy Schedules and Statement of Financial Affairs, [*4] Terrell was asked to "[l]ist all suits and administrative proceedings to which the debtor is or was a party within one year immediately proceeding the filing of this bankruptcy case." Under penalty of perjury, Terrell responded: None.

Terrell was also required to identify any "[o]ther contingent and unliquidated claims of every nature[.]" Under penalty of perjury, Terrell responded: None.

On December 2, 2005 the Chapter 7 trustee issued a "no distribution" report, finding all of Terrell's assets to be exempt from distribution to her creditors. On February 2, 2006 Terrell's debts were discharged from bankruptcy, and her bankruptcy case was officially closed on March 29, 2006.

On April 13, 2007 MGM filed this motion for summary judgment.

On May 18, 2007 Terrell notified the Chapter 7 trustee of her claim against MGM and filed a motion to reopen her bankruptcy proceeding so that the bankruptcy court can administer this case as an asset.

On June 12, 2007 the bankruptcy court entered an order reopening her bankruptcy case. In her supplemental response in opposition to the defendant's motion for summary judgment, filed on June 14, 2007, Terrell stated that she planned to file the necessary amended [*5] schedules with the bankruptcy court before the June 19, 2007 deadline.

B. Rochelle Spann

Spann, an African-American female, was employed by MGM from May 25, 1999 to April 1, 2002.

Spann was a named plaintiff in a race discrimination class action lawsuit under the Michigan Elliot-Larsen Civil Rights Act filed in Wayne County Circuit Court against MGM on October 25, 2001. Certification of the proposed class was denied and the case was dismissed on September 12, 2003.

Spann was one of the plaintiffs who filed this case on August 18, 2003. Spann alleges race discrimination in violation of 42 U.S.C. § 1981 with respect to certain promotions for which she was not selected as well as alleged disparate discipline she received.

On August 13, 2004, while the case was pending, Spann filed for bankruptcy protection under Chapter 13 in the bankruptcy court. The bankruptcy petition was filed by a different attorney than the attorneys representing Spann in this case.

As part of the required Bankruptcy Schedules and Statement of Financial Affairs, Spann was specifically asked to "[l]ist all suits and administrative proceedings to which the debtor is or was a party within one year immediately proceeding [*6] the filing of this bankruptcy case." Under penalty of perjury, Spann responded: None.

Spann was also required to identify any "[o]ther contingent and unliquidated claims of every nature[.]" Under penalty of perjury, Spann responded: None.

On November 3, 2004, the bankruptcy court confirmed Spann's Chapter 13 reorganization plan.

On October 13, 2006 Spann responded to MGM's second set of interrogatories. She did not disclose her bankruptcy case in response to the following question:

> Has plaintiff ever been, or is Plaintiff currently, a Plaintiff or Defendant in any lawsuit or legal proceeding aside from this case, or has Plaintiff ever testified, in disposition [sic] or in court, in any lawsuit or legal proceeding aside from this case?

> ANSWER: See General Objections, including number 1. To the extent that this overbroad request can be narrowed to matters related to this lawsuit, other than the related Wayne county Circuit court matter, **plaintiff answers no.**

(Emphasis added).

On April 13, 2007 MGM filed this motion for summary judgment.

On June 1, 2007 Spann's bankruptcy attorney filed an amended schedule and a petition to reopen the bankruptcy case to list her claim against MGM as an asset.

III. [*7] STANDARD FOR SUMMARY JUDGMENT

Summary judgment will be granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The Court "must view the evidence in the light most favorable to the non-moving party." *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 101 (6th Cir. 1995). However, the nonmoving party may not rest upon his pleadings; rather, the nonmoving party's response "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

IV. DISCUSSION

A. The Doctrine of Judicial Estoppel

The doctrine of judicial estoppel "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." *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (citation omitted). The Supreme Court has described [*8] judicial estoppel as "an equitable doctrine invoked by the court at its discretion." *Id.* at 750.

The purpose of the doctrine of judicial estoppel is to "preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship." *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002). The Supreme Court has identified three considerations that are typically relevant in determining whether judicial estoppel should apply:

> (1) "a party's later position must be clearly inconsistent with its earlier position"; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceedings would create the perception that either the first or the second court was misled"; and (3) "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."

New Hampshire, 532 U.S. at 750-51 (internal quotations and citations omitted).

In applying this test to the issue of whether a party's failure to disclose pending or potential claims in their bankruptcy petitions bars [*9] her from pursuing that claim, the Court of Appeals for the Sixth Circuit has focused heavily on the first two factors. In *Browning*, 283 F.3d at 775 (citing *Teledyne Indus. Inc, v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990), the Court of Appeals stated that the doctrine of judicial estoppel bars a party from "(1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position 'either as a preliminary matter or as part of a final disposition.' " However, the *Browning* court also noted that judicial estoppel is inappropriate in cases of conduct amounting to nothing more than mistake or inadvertence. *Id.* at 776.

B. Whether Terrell and Spann Assert A Contrary Position to the Positions They Asserted Under Oath in Their Bankruptcy Proceedings

1. Argument

The Bankruptcy Code requires a debtor to file "a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." 11 U.S.C. § 521(1). A legal claim or cause of action is an asset that must be listed under § 521(1). See, *Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 897 (6th Cir. 2004). [*10] Moreover, "[t]he duty of disclosure is a continuing one, and a debtor is required to disclose all potential causes of action." *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir.1999) (citation omitted). MGM points out that the Court of Appeals for the Sixth Circuit has held that pursuing a cause of action not disclosed as an asset in a bankruptcy proceeding creates an inconsistency sufficient to support judicial estoppel as the debtor has already asserted the position that no such claims existed. *See Eubanks*, 385 F.3d at 898; *Browning*, 283 F.3d at 775. MGM argues that it follows that because Terrell and Spann also failed to disclose the case here as an asset during their bankruptcy proceedings, they asserted the contrary position that the case does not exist.

2. Resolution

The plaintiffs do not dispute that their bankruptcy filings do not list the pending claims and that they should have been listed. They argue instead that their omissions were inadvertent. Thus, the defendants have established that both Terrell and Spann assert before the Court a position that is contrary to the position they asserted under oath in their bankruptcy proceedings.

C. Whether the Bankruptcy Court Adopted [*11] the Contrary Positions of Terrell and Spann

1. Argument

MGM asserts that a bankruptcy court implicitly accepts a debtor's statements regarding the absence of any legal action on the schedules or financial statement when discharging a debt. *In re Johnson*, 345 B.R. 816, 822 (Bankr. W.D. Mich., 2006); *Reynolds v. Commissioner*, 861 F.2d 469, 473 (6th Cir. 1988). Therefore it follows that since the bankruptcy court discharged Terell's debts on February 3, 2006, it adopted her position that she had no claim pending against MGM.

Next, MGM argues that by confirming a Chapter 13 reorganization plan, the bankruptcy court adopts a debtor's statement that she has no potential or pending causes of action. *Reynolds*, 861 F.2d at 473. Therefore it follows that since the bankruptcy court confirmed Spann's Chapter 13 reorganization plan, it adopted Spann's position that she had no claim pending against MGM.

Terrell and Spann respond that they have sought and will likely be granted the right to reopen their bankruptcy proceedings and amend their schedules. Thus their "prior" position can be cured by amendment, and therefore the "position" has not been litigated/adopted by the bankruptcy court. The two point out [*12] that numerous courts have held that the amendment of bankruptcy filings cures the defect and results in there being no prior inconsistent position or adoption of the position. *See Lampl v. Smith*, 169 B.R. 432, 436 (Bankr. Dist. Colo. 1994) ("As between the reopened bankruptcy proceeding and the lawsuit, there is no inconsistency as would give rise to an application of the judicial estoppel doctrine."); *In re Daniel*, 205 B.R. 346, 348 (Bankr. N.D. GA. 1997) (where debtor sought to reopen case and amend schedules to add claim, the court found that "[t]he broad right to amend, together with the underlying policies of the bankruptcy systems, undermines any judicial estoppel argument in a chapter 7 case."); *Swearingen-El v. Cook County Sheriff's Dep't*, 456 F. Supp. 2d 986, 991 (N.D. Ill. 2006) (finding judicial estoppel inappropriate where debtor re-opened bankruptcy proceeding and case was being pursued for benefit of creditors). The plaintiffs assert that as their bankruptcy schedules are similarly being amended, any technical defect will likely be cured and judicial estoppel cannot be applied.

2. Resolution

The bankruptcy court adopted Terrell's contrary position when it discharged her [*13] debt. *Johnson*, 345 B.R. at 822; *Reynolds*, 861 F.2d at 473. The bankruptcy court likewise adopted Spann's contrary position when it approved her reorganization plan. *Id.*

The cases relied upon by the plaintiffs to support their argument that amending one's bankruptcy filings is sufficient to "cure" one's prior position are from different circuits and are contrary to the stance of the Court of Appeals for the Sixth Circuit and other courts within this circuit. In the recent case *Tyler v. Federal Express Corp.*, 420 F. Supp. 2d 849, 859 (W.D. Tenn. 2005), *aff'd*, 206 Fed. Appx. 500, 501 (6th Cir. 2006), the Court of Appeals upheld the dismissal of an employment discrimination case under the judicial estoppel doctrine notwithstanding the fact that after the defendant moved for summary judgment on the basis that the plaintiff had not disclosed the case as an asset in her bankruptcy filings, the plaintiff amended her bankruptcy schedules to include the case as an asset. The district court specifically rejected the plaintiff's argument that the application of judicial estoppel in this matter would be unduly harsh and inequitable because the bankruptcy proceeding has been amended to correct any [*14] deficiencies in her petition:

> [t]he success of our bankruptcy laws requires a debtor's full and honest disclosure. Allowing [plaintiff] to back-up, reopen the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets.

Id. at 859 (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir.2002)); *see also, Pate v. UPS*, 2006 U.S. Dist. LEXIS 50821, 2006 WL 2076795 at **2-3 (E.D. Tenn. July 24, 2006) (citing *Burnes*, 291 F.3d at 1286, in concluding that the plaintiff's effort to reopen his bankruptcy case does not preclude dismissal based on judicial estoppel); *Scott v. Dress Barn, Inc.*, 2006 U.S. Dist. LEXIS 19404, 2006 WL 962534 at *4 (W.D. Tenn. Apr. 12, 2006) (citing *Burnes*, 291 F.3d at 1286, in concluding that "the fact that Plaintiff amended her petition after the filing of Defendant's motion does not negate the *Browning* factors"); *Johnson*, 345 B.R. at 824 (citing *Burnes*, 291 F.3d at 1286, in concluding [*15] that a debtor who informed bankruptcy trustee of pending litigation after the defendants raised the issue of judicial estoppel did not preclude dismissal based on judicial estoppel); *In re Colvin*, 288 B.R. 477, 481 (Bankr. E.D. Mich. 2003) ("If debtors could omit assets at will, with the only penalty that they had to file an amended claim once caught, cheating would be altogether too attractive.")

D. Inadvertence, Mistake, or Lack of Bad Faith

1. Standard

In *Browning*, 283 F.3d at 776 (citing *In re Coastal Plains*, 179 F.3d at 210), the Court of Appeals for the Sixth Circuit held that a debtor's omission may be deemed inadvertent in two circumstances: (1) where the debtor lacked knowledge of the undisclosed claims; and (2) where the debtor had no motive for concealment.

Regarding inadvertence, "[t]he debtor need no know all the facts or even the legal basis for the cause of action rather, if the debtor has enough information ... to suggest that it may have a possible cause of action, then it is a 'known' cause of action such that it must be discharged." *In re Coastal Plains*, 179 F.3d at 208.

Regarding the motive for concealment, "[i]t is always in a [bankruptcy] petitioner's interest to minimize [*16] income and assets." *Lewis v. Weyerhaeuser Co.*, 141 Fed. Appx. 420, 426 (6th Cir. 2005). This is because damages recovered from a disclosed suit become property of the estate in bankruptcy, and any damages received will be used to satisfy the debts. *Wallace v. Johnston Coca-Cola Bottling Group, Inc.*, 2007 U.S. Dist. LEXIS 21170, 2007 WL 927929 at *3 (S.D. Ohio Mar. 26, 2007).

Additionally, the Court of Appeals for the Sixth Circuit recently noted that it will also consider the absence of bad faith in determining whether it should apply judicial estoppel. *Eubanks*, 385 F.3d at 894-895 (in which the plaintiffs took self-initiated steps to notify the trustee and bankruptcy court of pending litigation prior to the defendant's motion to dismiss on the basis of judicial estoppel.)

2. Argument

a.

Terrell asserts in a signed affidavit that her omission was inadvertent because her bankruptcy attorney failed to ask her whether she had any claims pending.

Spann asserts in a signed affidavit that her omission was inadvertent because while she told her bankruptcy attorney about her pending claim against MGM, he failed to include it in her bankruptcy schedules and financial statement.

Moreover, Terrell and Spann argue that the mere failure [*17] to disclose the case is not sufficient "proof" of lack of inadvertence, mistake, or bad faith. The two argue that MGM has the burden of proof to show that the omission was not due to inadvertence or mistake, and that they have failed to do so here.

b.

MGM replies they have met their burden in showing that Terrell and Spann's omissions were not inadvertent or by mistake. First, each plaintiff knew of the factual basis for her claim by virtue of the fact that they had joined in a class action and then filed this case. Moreover, MGM points out that Terrell verified responses to written discovery just three days after completing her bankruptcy schedules and statement of financial affairs and less than two weeks before filing her petition for bankruptcy protection. MGM also points out that Spann has been deposed in both the class action suit and in the case here and did nothing to amend her bankruptcy schedule until this motion was filed. Moreover, MGM argues that Spann's failure to disclose her bankruptcy proceeding during discovery of this case amounts to bad faith.

MGM also argues that Terrell and Spann had ample motive to conceal their claims because they want to keep any recovery for [*18] themselves.

Moreover, MGM argues that the plaintiffs' attempts to blame their bankruptcy attorneys for their failure to disclose this case fails to establish inadvertence, mistake, or lack of bad faith. First MGM point out that Terrell and Spann rely only on their affidavits, which MGM characterizes as conclusory and self-serving. MGM also points out that Terrell and Spann each signed an oath stating that they had read their filings and that the information in the documents was correct. MGM also says that the plaintiffs cannot claim confusion or misunderstanding of their duty to disclose the case because the statement of financial affairs clearly and plainly requires the debtor to "list all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case. *See Salyer v. Honda of Am. Mfg.*., 2006 U.S. Dist. LEXIS 80928, 2006 WL 3230807 at *7 (S.D. Ohio Nov. 6, 2006) ("there is nothing ambiguous about this question. It clearly states that the debtor must list all suits to which [s]he was a party within the past year.") MGM argues that given these circumstances it is fair to infer that the plaintiffs disregarded their duty to respond [*19] truthfully under oath in signing the schedules and financial statement. Consequently there is no reason to believe that they would take their duty seriously with respect to their affidavits and they should be disregarded.

Next, MGM says that even accepting the affidavits, the plaintiff's cannot establish inadvertence, mistake or lack of bad faith because the plaintiffs are bound by the actions of their attorneys. In *Scott*, 2006 U.S. Dist. LEXIS 19404, 2006 WL 962534 at * 4, the plaintiff asserted that she did not disclose her wrongful termination action on the advice of her bankruptcy attorney. The district court held that:

> This excuse carries no weight in these circumstances. The Supreme Court has held that a litigant is bound by the errors and omissions of his or her attorney. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734,(1962) (A litigant who voluntarily chooses an attorney as her representative cannot later "avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent ....")(additional citations omitted); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) [*20] (reiterating, in the context of determining whether failure to file a proof of claim before the bar date constituted excusable neglect, that clients are "held accountable for the acts and omissions of their chosen counsel"). Accordingly, the failure of the Debtor's attorney to schedule the wrongful discharge action despite the Debtor's assertion that she specifically advised him of the suit is "no pancea." *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1295 (11th Cir.2003).

Likewise, in *Lewis*, 141 Fed. Appx. at 427, the Court of Appeals for the Sixth Circuit stated that the plaintiff was held to the actions of her attorney in rejecting the plaintiff's assertion that she did not disclose her wrongful discharge action in her bankruptcy schedules because her attorney's paralegal advised her not to.

3. Resolution

The plaintiffs have failed to show that their failure to disclose the case here to the bankruptcy court was due to inadvertence, mistake, or lack of bad faith. Contrary to the plaintiffs' assertion, the burden is not on MGM to also establish Terrell and Spann's bad faith where they have already established that they possessed knowledge of factual basis of their claims and had [*21] a motive to conceal them from the bankruptcy court. In cases involving the omission of assets in a bankruptcy case, it has been held that intentional manipulation, as opposed to inadvertence, may be inferred from the record where knowledge and motive have been established. *Tyler*, 420 F. Supp. 2d. at 857 (citing *Burnes*, 291 F.3d at 1287).

The plaintiffs have not met their burden. The undisputed facts show that Terrell and Spann were aware of the factual basis of the case here when filing for bankruptcy. *In re Coastal Plains*, 179 F.3d at 208. The fact that both plaintiffs participated in discovery further negates their argument of inadvertence. Moreover, both plaintiffs had a motive to conceal their claims as a potential asset because in the event that they receive damages, their creditors would not know. *Lewis*, 141 Fed. Appx. at 426.

Next, even if it is true that Terrell's attorney never asked her whether she had a case pending, or that Spann's attorney ignored her when she told him that she had a case pending, these excuses are not sufficient as the plaintiffs are bound by the actions of their attorney. *Id.* at 427; *Scott*, 2006 U.S. Dist. LEXIS 19404, 2006 WL 962534, at * 4. Moreover, the plaintiffs each signed an oath [*22] swearing that she had personally reviewed the documents and found them to be truthful and accurate. In *Johnson*, the debtor similarly asserted that she told her attorney about her pending wrongful discharge action, and the attorney failed to mention suit in the bankruptcy filings. In rejecting this excuse the court commented that:

> It was the Debtor's responsibility to verify the accuracy of the information contained in her schedules and statement of financial affairs and she "had the duty to carefully consider all of the questions posed and to see that they [were] completely and correctly answered.

345 B.R. at 825.

Finally, the plaintiffs have not established a lack of bad faith as this case is readily distinguishable from the facts in *Eubanks*. As explained by the court in *Scott*, 2006 U.S. Dist. LEXIS 19404, 2006 WL 962534 at *4:

> Although the plaintiffs in *Eubanks* omitted their cause of action from the bankruptcy schedules, they (1) notified the bankruptcy trustee of the claim and the trustee requested all of the documents regarding the claim; (2) asked the trustee on several occasions whether he intended to pursue the claim on behalf of the estate; (3) moved the bankruptcy court for a status conference on the issue [*23] of the claim; (4) unsuccessfully moved to allow the trustee to be substituted for plaintiffs in their lawsuit after the trustee refused to abandon the claim in the bankruptcy proceeding; and (5) filed an amendment to their original bankruptcy petition to add the lawsuit to their bankruptcy schedules after the defendant filed a motion to dismiss on the basis of judicial estoppel. 385 F.3d at 895-97. The court held that, although the plaintiffs had knowledge of the potential claim during the pendency of the bankruptcy proceeding, the above listed actions demonstrated that their omission was in good faith and most likely inadvertent. *Id.* at 899 & n. 3.

The *Scott* court held that the plaintiff was distinguishable from the plaintiffs in *Eubanks* because "the plaintiff presented no evidence that she took steps to apprise the bankruptcy court of the case here until she was 'caught' concealing the asset." *Id.* Similarly, the plaintiffs here have not established a lack of bath faith as neither presented any evidence that she took steps to apprise the bankruptcy court of the case here until she was 'caught' concealing it.

E. Equitable Arguments

1. Argument

Finally, the plaintiffs contend that judicial [*24] estoppel should not be applied because they are no longer receiving an unfair advantage and MGM is not subject to any unfair detriment. The plaintiffs say that now that they have taken steps to rectify their omissions, any recovery will be used to pay their creditors and bankruptcy fees. In short, plaintiffs will not receive a windfall from their failure to disclose the case, but rather their creditors will receive payment on their debts. Thus barring the claims results in detriment to these creditors. *Shapp v. Oakwood United Hospitals*, 458 F. Supp. 2d 463, 473 (E.D. Mich, 2006) (refusing to bar a plaintiff from pursing personal injury claims not disclosed in a bankruptcy proceeding because declining to hear the case would allow the defendants, potential tort-feasors, to gain an undeserved windfall at the expense of the bankruptcy creditors.)

MGM responds that the issue is not whether plaintiff will ultimately derive an actual benefit from her misrepresentations, but whether she *could have* derived such a benefit. In *Johnson*, 345 B.R. at 823, the court noted that:

> If the Defendants had not discovered the Debtor's bankruptcy, raised the issue of judicial estoppel, and thereby compelled [*25] the Debtor to belatedly disclose the existence of the pending action to the Trustee, the Debtor would have strolled away from her chapter 7 case with a discharge of her debts. The Debtor would have retained any subsequent monetary recovery from the wrongful discharge action and her creditors would have received nothing.

The plaintiffs also say that MGM is seeking to have this Court "punish" them for an alleged fraud on the bankruptcy court. The plaintiffs suggest that if any court should "punish" them, it should be the bankruptcy court because it is in a better position to consider the equities of their case, including whether it believes that the plaintiffs' conduct was inadvertent, whether it relied upon the plaintiffs' omission, and the interest and rights of the creditors.

2. Resolution

The plaintiffs' arguments are unavailing: First, it must be emphasized that, "[T]he disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge." *Colvin*, 288 B.R. at 481. Second, it is not better for the bankruptcy court to determine whether the plaintiffs deserve to be [*26] "punished". "Judicial estoppel is a doctrine employed to protect the integrity of the judicial proceeding. *Browning*, 283 F.3d at 776. Moreover, as explained by *In re Dewberry*, 266 B.R. 916, 920 (Bankr. S.D. GA 2001):

No litigant engages in self-serving contradiction when the first representation is made to a Court. Here, when Debtor originally filed his bankruptcy petition and failed to schedule the claim against [the defendant], no judicial estoppel argument arose. Only when the subsequent representation was made (in the United States District Court case) did the estoppel issue arise. It seems self-evident that if the principle is invoked to protect the integrity of the judiciary, then it must be invoked in the Court in which the apparent self-serving contradiction occurred and in which the defense is first asserted.

Accordingly, regardless of what the bankruptcy court decides to do with regards to the plaintiffs' petitions to reopen their bankruptcy cases and amend their schedules and financial statements, *this* Court is the proper authority to determine whether judicial estoppel should be applied to dismiss their claims in the case here.

V. CONCLUSION

For the reasons explained above , [*27] MGM is GRANTED summary judgment against Terrell and Spann, and their cases are DISMISSED.

SO ORDERED.

s/ AVERN COHN

UNITED STATES DISTRICT JUDGE

Dated: July 16, 2007

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LEXSEE 266 B.R. 916, 920

In the matter of: JAMES R. DEWBERRY, Debtor

Chapter 7, Case Number 99-21608

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION

266 B.R. 916; 2001 Bankr. LEXIS 1441; 47 Collier Bankr. Cas. 2d (MB) 234

August 30, 2001, Decided
August 30, 2001, Filed

DISPOSITION: [**1] Debtor's motion to reopen was granted.

COUNSEL: For Debtor: WILLIAM S. ORANGE, BRUNSWICK, GA.

Trustee Assigned: R. MICHAEL SOUTHER, Brunswick, GA.

U. S. Trustee.

JUDGES: Lamar W. Davis, Jr., United States Bankruptcy Judge.

OPINION BY: Lamar W. Davis

OPINION

[*917] MEMORANDUM AND ORDER ON DEBTOR'S MOTION TO REOPEN

Debtor James R. Dewberry ("Debtor") filed a Chapter 7 bankruptcy case on December 29, 1999, and received a discharge April 27, 2000. Shortly before the filing of his petition, on November 2, 1999, Debtor filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The complaint alleged that Debtor's termination from employment, ostensibly for cause, occurred, in fact, because of his age and seniority with the company and that the Respondent, Atlanta Gas Light Company ("AGL"), was intentionally replacing personnel occupying positions such as Debtor's with younger people in violation of federal law.

When Debtor filed his bankruptcy case on December 29, 1999, he did not list his discrimination claim against AGL as an asset in his schedules. The only reference to AGL was in Schedule B-Personal Property, Item 11, which calls for Debtor to [*918] disclose interests [**2] in IRA, ERISA, Keogh, or other pension or profit sharing plans. He listed "retirement with Atlanta Gas Light" and listed the current market value of his interest at $ 50,000.00. The schedules were executed under penalty of perjury on December 16, 1999, only six weeks after his EEOC complaint was filed. In Item 4(a) of the Statement of Financial Affairs filed in connection with his petition which called for the listing of "all suits and administrative proceedings to which the Debtor is or was a party within one year immediately preceding the filing of this bankruptcy case," he failed to list the EEOC administrative proceeding and marked the "none" response.

On November 30, 2000, Debtor filed a complaint against the Atlanta Gas Light Company in the United States District Court for the Southern District of Georgia. He asserted that he had received a right to sue letter from the EEOC, alleged age discrimination, and sought a judgment, including back pay, injunctive relief, liquidated damages, restoration of all employment benefits, including pension, insurance, attorney's fees, costs, and other unspecified relief. The complaint was amended on January 31, 2001. AGL filed a motion to dismiss [**3] that case on May 14, 2001, alleging that Debtor--the plaintiff in that case--lacked standing to assert the prepetition claim which could be appropriately pursued, if at all, by the Chapter 7 Trustee, and alternatively that the doctrine of judicial estoppel should be interposed to prevent Debtor from pursuing the lawsuit which was not revealed to the Bankruptcy Court, the Trustee, or the creditors during the pendency of his case.

Apparently in response to this filing in the District Court, Debtor filed a Motion to Reopen on June 5, 2001, in order to amend the schedules and add the claim against AGL. AGL filed an objection to the Motion to Reopen on June 8, 2001, and the matter was set for oral argument. Debtor testified that he disclosed the nature of his claim against AGL to his bankruptcy counsel, William S. Orange, III, and assumed that it would be properly disclosed in the petition and schedules. However, at the time he executed the petition and schedules under oath, he either failed to read them or failed to question whether they were sufficient to place the Trustee or creditors on notice that a claim of potentially substantial magnitude against AGL existed. As a result of that [**4] omission, the case was administered as a "no-asset case" and closed on May 18, 2000, shortly after the expiration of the deadline for parties to object to the Debtor's discharge.

AGL takes the position that because of the sequence of events, Debtor could not reasonably be found to have omitted scheduling this claim in good faith, but rather must have been engaged in some fraud or intentional design to conceal it from his creditors. As a result, AGL argues that the Court should deny Debtor's Motion to Reopen.

Motions to reopen are governed by 11 U.S.C. § 350 which provides:

> (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.
>
> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

This Court has recently considered another Section 350 dispute and ruled that a debtor cannot show good faith when debtor's omission of a creditor from his or her schedules occurred because of fraud or intentional design, rather than through mere oversight, and that a motion to reopen can and should be denied. [**5] *See* In re Marshall Bruce Garrett, 266 B.R. 910, 2001 Bankr. LEXIS 1440 [*919] (Bankr. S.D. Ga. 2001)(order denying motion to reopen). In the instant case, there is evidence which would support a finding that Debtor acted without the requisite good faith in the omission of this claim from his petition either because he failed to fully apprise his counsel of the nature and magnitude of his claim or because he failed to review for accuracy the petition and schedules filed on his behalf by counsel. Assuming, without deciding, that Mr. Dewberry acted in bad faith or without the requisite good faith, I nevertheless conclude that this case should be reopened. Since in Garrett, supra, I concluded the opposite, an explanation is necessary.

Ultimately the decision to reopen is vested in the discretion of the Court. *See* Nintendo Co. v. Patten (In re Alpex Computer Corp.), 71 F.3d 353, 356 (10th Cir. 1995)("While the decision to reopen remains within the broad discretion of the bankruptcy court, it must be tethered to the parameters of § 350(b), or it is an abuse of discretion." (internal citation omitted)); Citizens Bank & Trust Co. v. Case (In re Case), 937 F.2d 1014, 1018 (5th Cir. 1991) [**6] ("The phrase 'or other cause' as used in Section 350(b) is a broad term which gives the bankruptcy court discretion to reopen a closed estate or proceeding when cause for such reopening has been shown. This discretion depends on the circumstances of the individual case and accords with the equitable nature of all bankruptcy court proceedings." (citations omitted)); Rosinski v. Boyd (In re Rosinski), 759 F.2d 539, 540-41 (6th Cir. 1985)("It is well settled that decisions as to whether to reopen bankruptcy cases and allow amendment of schedules are committed to the sound discretion of the bankruptcy judge and will not be set aside absent abuse of discretion." (citation omitted)). In exercising that discretion, I hold that the purpose underlying the motion to reopen is critical to a determination of whether the debtor's good faith is relevant.

In Garrett, the Motion to Reopen was an effort to "accord relief to the debtor" to pursue a lien avoidance and a dischargeability determination. I found, under Samuel v. Baitcher (In re Baitcher), 781 F.2d 1529 (11th Cir. 1986), and other decisions cited in Garrett, that the debtor lacked the requisite good [**7] faith to reopen in order to obtain relief for himself. *See* Garrett, 266 B.R. 910, 2001 Bankr. LEXIS 1440. An alternative basis for reopening a case under Section 350(b), however, is to "administer assets." Where the purpose for reopening is to administer an asset, "any advantage which Debtor may have gained by omitting the asset from [the debtor's] schedules is eliminated by . . . allowing the Chapter 7 Trustee to administer the asset." In re Daniel, 205 B.R. 346, 349 (Bankr. N.D. Ga. 1997).

I hold that a debtor's good faith or lack of good faith is irrelevant to the question of whether to reopen a case when the purpose of the reopening is for the administration of undisclosed assets of the bankruptcy estate. This Court is unwilling to punish Debtor's creditors based merely on the fact of Debtor's nondisclosure. *See* Travelers Indem. Co. of Ill. v. Griner (In re Griner), 240 B.R. 432, 439 (Bankr. S.D. Ala. 1999)(noting that "overly harsh and inequitable" position of defendant seeking to enjoin debtor from pursuing cause of action because debtor sought to add assets not disclosed on initial schedules "punishes the creditors of the nondisclosing debtor, [**8] not just the debtor" and stating that "the better result is to allow the claim to be prosecuted and collected, order the funds paid toward claims filed in the case, and punish the debtor another way"). [1] Here, neither the Trustee nor any [*920] creditor has been shown to have done anything in collusion with Debtor or Debtor's counsel which would suggest that they should be penalized by the failure to have this asset properly scheduled, analyzed by the Trustee, and administered for the benefit of creditors.

1 The issue addressed in Griner was whether to enjoin a debtor from prosecuting a state court claim which the debtor had failed to disclose on the initial schedules. The court held that the judicial estoppel doctrine was not applicable because the debtor had at that time amended his schedules to include the claim, thereby imposing no threat of impinging on the court's integrity. *See* id. at 438 ("[Debtors] have not yet received a discharge and they amended their bankruptcy papers to include the state court suit. The initial omission of the suit did not impinge upon this Court's integrity.").

[**9] I recognize that an underlying assumption on the part of Debtor and AGL is that granting the Motion to Reopen will emasculate AGL's assertion of judicial estoppel in the United States District Court action and that denying the motion will in effect work to grant AGL's motion on that ground in that Court. This assumption is widely held. *See* Daniel, 205 B.R. at 349 (noting that although reopening case "may be detrimental" to insurance company defending defendant in related lawsuit involving debtor "by depriving it of a judicial estoppel argument," creditors should not be deprived of opportunity to share in damages); In re Maloy, 195 B.R. 517, 519 (Bankr. M.D. Ga. 1996)(stating that judicial estoppel argument "would not be available" if debtor is permitted to reopen case and amend schedules to include cause of action); In re Koch, 229 B.R. 78, 86 (Bankr. E.D.N.Y. 1999)(stating that because bankruptcy court allowed debtor to amend schedules, state court defendant was "hindered" in utilizing judicial estoppel); *see also* Atlanta Gas Light Company's Objection to Debtor's Motion to Reopen the Case, P 7.

This assumption, however, [**10] is incorrect. Judicial estoppel is a doctrine employed to protect the integrity of the judiciary. *See* Daniel, 205 B.R. at 347 ("The primary purpose of the doctrine is not to protect the litigants, but to protect the integrity of the judiciary.")(quoting Southmark Corp. v. Trotter, Smith & Jacobs, 212 Ga. App. 454, 455, 442 S.E.2d 265 (1994) (interpreting federal judicial estoppel doctrine)); Hardy v. Hardy, 1997 U.S. Dist. LEXIS 23938,(1997)(noting that judicial estoppel doctrine is more concerned with protecting integrity of judicial process than protecting individual litigants). No litigant engages in self-serving contradiction when the first representation is made to a Court. Here, when Debtor originally filed his bankruptcy petition and failed to schedule the claim against AGL, no judicial estoppel argument arose. Only when the subsequent representation was made (in the United States District Court case) did the estoppel issue arise. It seems self-evident that if the principle is invoked to protect the integrity of the judiciary, then it must be invoked in the Court in which the apparent self-serving contradiction [**11] occurred and in which the defense is first asserted. As such, it is not for this Court to anticipate that Debtor's prior conduct in this forum was of such a character as to warrant the "death penalty" to his subsequent United States District Court case and bootstrap that belief into a conclusion that reopening should be denied. I hold that the Court where the age discrimination case is pending has exclusive jurisdiction to conclude whether Debtor's conduct here was so tainted as to warrant imposition of the rule in the case pending there.

Moreover, I would view my decision to reopen of only marginal, if any, relevance to that Court's decision. Debtor cannot un-ring the bell. Debtor omitted [*921] this claim from his schedules. He cannot change that fact. He now seeks, only after a Motion to Dismiss was filed pointing out the omission, to reopen and amend. He cannot change the fact that he did not realize his allegedly inadvertent omission and move to amend prior to being "prompted" to by AGL's motion. *See* Sanders v. Sanders, (In re Sanders), Ch. 7 Case No. 98-41683, Adv. No. 98-4195 (S.D.Ga. Feb. 4, 2000)(considering omitted assets, added by later amendment, as still relevant in [**12] determining whether debtor's omissions were made with fraudulent intent and denying debtor's discharge on those grounds).

In Booker T. Brown v. Savannah Rehabilitation & Nursing Center, Civ. No. 497-75, slip op. (S.D. Ga. filed July 16, 1997), the court focused on three factors to determine if a plaintiff was judicially estopped from bringing a suit that he failed to list as an asset in his bankruptcy schedules. The court looked to whether the claim accrued prior to the filing of the bankruptcy petition, the debtor's justification for its omission, and whether or not the petition was amended. Id. at 2-3. Under this multilayered analysis, the court viewed the debtor's omission in his bankruptcy case as an element-but not a dispositive element-in deciding the judicial estoppel issue. *See* id.; *see also* A.S. Deeks, Raising the Cost of Lying: Rethinking Erie for Judicial Estoppel, 64 U. Chi. L.R. 873, 876 (1997)("Courts appear consciously to leave the doctrine's boundaries vague, since it may be advisable not to prescribe too many rules for the application of a doctrine designed to protect the integrity of the courts." (quoting In re Cassidy, 892 F.2d 637, 642 [**13] (7th Cir.)), quoted with approval in Hardy, 1997 U.S. Dist. LEXIS 23938.

In this case, the Court in which the discrimination case is pending is fully equipped to view the Debtor's actions, weigh his testimony as to good faith, and reach a conclusion as to whether judicial estoppel should apply. That analysis might in fact be impacted if this Court finds that Debtor's good faith must be shown in order to grant the Motion to Reopen, as in Garrett, supra, and adjudicated his good faith or lack thereof in this order. I find, however, that when reopening of the case is sought for the purpose of administering a previously undisclosed asset, the question of debtor's good faith is irrelevant. Good faith is relevant, if at all, as it applies to the acts of the Chapter 7 Trustee.

If, as here, there is no suggestion that the Trustee acted in bad faith, then the test for reopening to administer assets is simply whether the administrative expense and inconvenience outweighs the potential benefit to the estate. Here, it does not. At this point, creditors holding scheduled claims in excess of $ 270,689.00 have received nothing. A case is pending which, if successful, will recover property of [**14] the estate. While what Debtor originally revealed was an exempt asset, his retirement, AGL has not demonstrated that a recovery in this case will be exempt from creditors. As such any recovery will be paid first to creditors, with any surplus paid to the Debtor. *See* 11 U.S.C. § 726(a)(1)-(6). Counsel has been employed in the case pending in the District Court. After the reappointment of a Trustee, the Trustee may determine whether to intervene and prosecute that case, including defense of the judicial estoppel motion, with existing counsel or to employ separate counsel, or to abandon the claim.

Here, to administer what is potentially a valuable asset and attempt to pay creditors, I find that the Motion to Reopen should be granted. As articulated above, I make no finding as to *Debtor's* good faith [*922] conduct in this Court, as it bears on AGL's Motion to Dismiss, which is properly adjudicated in the United States District Court. This case is reopened and the United States Trustee is directed to appoint a Trustee to administer assets in the case.

Lamar W. Davis, Jr.

United States Bankruptcy Judge

Dated at Savannah, Georgia

This 30th day of August, [**15] 2001.

LEXSEE

In re: PROCOPIO LOPEZ and YOLANDA LOPEZ, Debtors. YOLANDA LOPEZ, Appellant, v. SPECIALTY RESTAURANTS CORPORATION; Appellee.

BAP No. CC-01-1216-MoHK

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE NINTH CIRCUIT

283 B.R. 22; 2002 Bankr. LEXIS 1017; 40 Bankr. Ct. Dec. 49; 89 Fair Empl. Prac. Cas. (BNA) 1648; 2002 Cal. Daily Op. Service 9562; 2002 Daily Journal DAR 10755

May 23, 2002, Argued and Submitted at Pasadena, California
August 26, 2002, Filed

PRIOR HISTORY: [**1] Appeal from the United States Bankruptcy Court for the Central District of California. Bk. No. LA 99-17911-ER. Honorable Ernest M. Robles, Bankruptcy Judge, Presiding.

DISPOSITION: Bankruptcy court's order REVERSED with directions. Appeal from portion of order granting motion to intervene DISMISSED.

COUNSEL: Andrew P. Altholz, Santa Monica, CA, for Yolanda Lopez, Appellant(s).

Michael F. Wright, CASE, KNOWLSON, JORDAN & WRIGHT LLP, Los Angeles, CA, for Specialty Restaurants Corporation, Appellee(s).

JUDGES: Before: MONTALI, HOLMAN [1] and KLEIN, Bankruptcy Judges. KLEIN, Bankruptcy Judge, Concurring.

1 Hon. Thomas C. Holman, Bankruptcy Judge for the Eastern District of California, sitting by designation.

OPINION BY: Dennis Montali

OPINION

[*23] Before: MONTALI, HOLMAN [1] and KLEIN, Bankruptcy Judges.

1 Hon. Thomas C. Holman, Bankruptcy Judge for the Eastern District of California, sitting by designation.

MONTALI, Bankruptcy [**2] Judge:

Former debtor Yolanda Lopez ("Lopez") appeals from the bankruptcy court's order [*24] denying her motion to reopen her chapter 7 [2] case (the "Motion to Reopen") in an effort to bolster her ability to sue appellee Specialty Restaurants Corporation dba The Proud Bird ("Specialty") on a prepetition sexual harassment cause of action, and granting Specialty's motion to intervene (the "Motion to Intervene"). The bankruptcy court based its order, primarily, on the apparent expiration of the time for seeking to revoke Lopez' discharge under Section 727(e).

2 Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

We rule that adding a potentially valuable asset to the schedules is a valid ground to reopen a chapter 7 case, that expiration of the time to revoke the discharge is not a sufficient basis to preclude reopening, and that a former debtor's alleged bad faith [**3] is never a sufficient basis by itself to deny a motion to reopen to schedule an asset that has the potential to benefit creditors. Accordingly, because the Motion to Reopen should have been granted, the bankruptcy court's order will be REVERSED with directions to order the appointment of a chapter 7 trustee. The appeal from that portion of the order granting the Motion to Intervene will be dismissed as MOOT.

I. FACTS

Before filing their joint, voluntary chapter 7 petition, Lopez and her husband Procopio Lopez met with a non-attorney petition preparer, Abad Cabrera ("Cabrera"). On September 3, 1998, they signed a petition, schedules and statements. The schedules did not list any claim against Specialty as an asset, and Lopez and her husband did not claim any property as exempt. The bankruptcy petition was not filed at this time.

In or about December of 1998, Lopez spoke to Cabrera about a legal action for sexual harassment and Cabrera referred Lopez to an attorney. On December 31, 1998, Lopez signed a form provided by the California Department of Fair Employment and Housing (the "Department") alleging sexual harassment by her employer, Specialty, and requesting authorization [**4] to file a lawsuit (the "Administrative Request"). The Administrative Request was filed with the Department on February 11, 1999, and on February 16, 1999, the Department authorized Lopez to bring a civil action under California Government Code Section 12965(b).

The Lopez' bankruptcy petition was filed on March 3, 1999 (the "Petition Date"). The schedules and statements had not been revised to include anything about Lopez' claims against Specialty. Lopez alleges that she was not aware of the Petition Date, and that she thought the bankruptcy papers had been filed around the time they had been prepared. She does not deny, however, that she never amended her schedules to include anything about her claims against Specialty.

Shortly after the Petition Date, on March 22, 1999, Lopez and others filed an action against Specialty and other defendants in the Superior Court of the State of California, County of Los Angeles (Case No. BC 207443), seeking an unspecified amount of damages for sexual harassment, requiring plaintiffs to work over 40 hours per week without overtime pay, and other alleged wrongs (the "Action"). The Action was later consolidated with other cases (Case Nos. BC 215608 [**5] and BC 223482).

Meanwhile, on April 15, 1999, Lopez' chapter 7 trustee (the "Trustee") filed a "no asset" report, and on June 14, 1999, [*25] the bankruptcy court entered an order discharging Lopez and her husband of their debts under Section 727. On June 23, 1999, their chapter 7 case was closed.

On or about January 19, 2001, Specialty wrote to Lopez' attorney in the Action stating its intention to file a motion for summary judgment on the basis that Lopez is judicially estopped from pursuing her claims because she intentionally failed to list any claim against Specialty in her bankruptcy schedules and statements. The parties stipulated to a stay of the Action pending determination in the bankruptcy court of Lopez' authorization to prosecute the Action. [3] The parties filed their motions with the bankruptcy court, and on March 7, 2001, the bankruptcy court held a hearing on the Motion to Reopen and Specialty's Motion to Intervene. [4]

3 The stipulation stays proceedings in the Action, but provides for the trial to be re-set "upon notification to this Court that the Trustee in Bankruptcy has resolved the issue of Plaintiff's authorization to sue and proceed in this action."

[**6]

4 Lopez argues that the bankruptcy court erred by denying her request to continue the hearing on the Motion to Intervene and the Motion to Reopen. Lopez also raises evidentiary objections. Given our disposition of this appeal, we do not reach these issues.

On May 3, 2001, the bankruptcy court entered an order (the "Order") granting the Motion to Intervene and denying the Motion to Reopen. As to the Motion to Reopen, the bankruptcy court reasoned that creditors could not benefit from reopening because it was too late to revoke the discharge [5] and that it did not believe Lopez' assertion that she merely "forgot" to schedule the cause of action. The bankruptcy court cited *In re Koch,* 229 B.R. 78 (Bankr. E.D.N.Y. 1999). [6]

5 At the hearing on March 7, 2001, the bankruptcy court commented, "It appears to the Court that the ability of the trustee or other interested parties to seek a revocation of the discharge pursuant to [Section 727(e)] has passed. So I wonder how the Debtor here expects that creditors will benefit from reopening the case." Transcript (3/7/01) p. 5:17-21.

Lopez' counsel responded that, "First of all, under the 700 series and the case law that interprets it, there's always grounds to revoke a discharge on newly learned facts. Second, if a case is reopened, a new order of relief is granted. The trustee is then reappointed and has a clear right, if there is an asset potentially to be distributed to creditors, to give a notice of potential distribution asking for claims. And in the event the estate garners any money, it can then distribute the same." *Id.* pp. 5:23-6:6.

The bankruptcy court also asked Lopez' counsel, "Is the Debtor willing to voluntarily revoke her discharge to allow the value, if any, of this lawsuit to go to her creditors?" Lopez' counsel said he had not discussed it with Lopez, "so I really couldn't say yes or no." *Id.* p. 6:7-11.

We express no opinion whether such a revocation of discharge would be appropriate or enforceable. *Cf. Hayhoe v. Cole (In re Cole),* 226 B.R. 647, 651-54 (9th Cir. BAP 1998) (public policy makes debtor's *pre*-bankruptcy stipulation to nondischargeability of debts unenforceable); *and* 11 U.S.C. § 727(d) (case trustee, United States Trustee, and creditor, but not debtor, listed as parties who may request revocation of discharge).

[**7]

6 The Order gives no indication that the interests of any persons other than Lopez and Specialty are at issue -- except perhaps its reference to the *Koch* case, 229 B.R. 78 -- and the bankruptcy court clearly was not sympathetic to the former debtor. We remain puzzled, however, why the United States Trustee has not been involved in this matter to protect the interests of creditors, especially because we were advised at oral argument that Lopez' counsel had asked the United States Trustee to become involved. This is all the more puzzling because, as discussed below, creditors might well be paid in full if the case is reopened and they will receive nothing if Specialty has its way and the bankruptcy court's decision is affirmed.

Lopez filed a timely notice of appeal.

[*26] II. ISSUES

7

7 Lopez' standing is not an issue in this case. On January 7, 2002, the Clerk of the Bankruptcy Appellate Panel ("BAP") issued a Clerk's Order requiring Lopez to file a written response demonstrating how she meets the "person aggrieved" test so as to have standing in this appeal. Lopez filed a response on January 22, 2002, in which she argued that her secured debt had been eliminated by surrender of her former house, her unsecured debt was less than $ 6,000, and the value of the Action is at least $ 70,000 to $ 125,000. Therefore, she alleged, she could show "a reasonable possibility of a surplus after satisfying all debts, and accordingly has shown a pecuniary interest." *See Matter of Andreuccetti,* 975 F.2d 413, 416 (7th Cir. 1992). On January 28, 2002, the BAP Clerk issued a notice that Lopez' response appeared to satisfy the concerns raised in her earlier order (subject to our review and modification). We agree.

Lopez cites the evidence she submitted on this matter, regarding the potential value of the Action, in support of her arguments on this appeal for reopening her case, and she includes the evidence in her excerpts of record even though it does not appear to have been before the bankruptcy court. Specialty has not objected to our consideration of this evidence, and we make reference to it below to illustrate that the Action *could* have value. We do not rely on the evidence, however, in reaching our conclusion.

[**8] 1. Did the bankruptcy court abuse its discretion by denying Lopez' Motion to Reopen?

2. Is Specialty's Motion to Intervene moot?

III. STANDARDS OF REVIEW

A decision regarding reopening of a case based upon allegations of additional assets "is committed to the sound discretion of the bankruptcy court, and will not be set aside absent an abuse of discretion." *Kozman v. Herzig (In re Herzig),* 96 B.R. 264, 266 (9th Cir. BAP 1989). "A bankruptcy court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. The Panel also finds an abuse of discretion if it has a definite and firm conviction the court below committed a clear error of judgment in the conclusion it reached." *Palm v. Klapperman (In re Cady),* 266 B.R. 172, 178 (9th Cir. BAP 2001) (citations and quotation marks omitted). Mootness is a jurisdictional issue we consider sua sponte and review de novo. *See Paulman v. Gateway Venture Partners III, L.P. (In re Filtercorp, Inc.),* 163 F.3d 570, 576 (9th Cir. 1998).

IV. DISCUSSION

We start with the Motion to Reopen. Section 350(b) provides that "[a] case may be reopened in the court [**9] in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). Rule 5010 provides:

> A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

Fed. R. Bankr. P. 5010.

Under the above provisions, reopening a case is typically ministerial and "presents only a narrow range of issues: whether further administration appears to be warranted; whether a trustee should be appointed; and whether the circumstances of reopening necessitate payment of another filing fee." *Menk v. LaPaglia (In re Menk),* 241 B.R. 896, 916-17 (9th Cir. BAP 1999). *Cf. Beezley v. California Land Title Co. (In re Beezley),* 994

F.2d 1433, 1434 (9th Cir. 1993) (denying reopening to [*27] schedule creditor in no-asset case, because "dischargeability is unaffected by scheduling; amendment of Beezley's [**10] schedules would thus have been a pointless exercise.").

Therefore, although a motion to reopen is addressed to the sound discretion of the bankruptcy court, "the court has the duty to reopen an estate whenever prima facie proof is made that it has not been fully administered." *Herzig,* 96 B.R. 264 at 266. In particular, it is an abuse of discretion to deny a motion to reopen where "assets of such probability, administrability, and substance" appear to exist "as to make it unreasonable under all the circumstances for the court not to deal with them." *Id.* (quotation marks and citation omitted). A motion to reopen can be denied, however, where the chance of any substantial recovery for creditors appears "'too remote to make the effort worth the risk.'" *Id.* (citation omitted).

Specialty has argued before the bankruptcy court and on this appeal that further administration was not warranted because creditors could not benefit from reopening since the time to revoke Lopez' discharge has expired under Section 727(e). Assuming the time to revoke the discharge has indeed run, [8] we disagree with Specialty's conclusion that creditors could not benefit from reopening. [9] [**11]

8 We do not decide this issue. The bankruptcy court stated that "it appears" the ability to seek revocation of the discharge "has passed" pursuant to Section 727(e). We note that most courts appear to reject any extension of the time limits in Section 727(e), although a minority view would either extend the overall time or hold that closing of a case interrupts the running of that time period. *See generally* Rosemary Williams, *Creditor's Right to Have Bankruptcy Discharge of Individual Debtor Revoked, Vacated, and Set Aside,* 138 A.L.R. Fed. 253, text accompanying nn. 47-94 (1997); *Hadlock v. Dolliver (In re Dolliver),* 255 B.R. 251 (Bankr. D. Me. 2000) (rejecting cases holding that § 727(e) time limits can be equitably tolled or have not expired, in a case with hidden assets, because such a case supposedly is not "validly" closed); *Towers v. Boyd (In re Boyd),* 243 B.R. 756, 759-65 (N.D. Cal. 2000)(rejecting various arguments for evading time limits in § 727(e)). *Cf. Davis v. Johnson (In re Johnson),* 187 B.R. 984, 986-88 (Bankr. S.D. Cal. 1995) (equitable tolling could not extend one-year period in § 727(e), but closing case interrupted running of limitations period).

[**12]

9 We do not decide whether Specialty had standing and a sufficient interest to intervene on this issue and argue against reopening. Although we doubt it, we assume so for purposes of this discussion.

On the one hand, an argument in favor of Specialty's standing might be that it could lose a judicial estoppel defense if a chapter 7 trustee prosecutes the Action instead of Lopez. *See Haley v. Dow Lewis Motors, Inc.,* 72 Cal. App. 4th 497, 511, 85 Cal. Rptr. 2d 352, 361 (1999) ("judicial estoppel is rarely appropriate in a chapter 7 context ..."); *In re Tarrer,* 273 B.R. 724, 735 (Bankr. N.D. Ga. 2001) (defendants in unscheduled arbitration had sufficient "personal stake" to have standing to object to reopening, because they might lose judicial estoppel defense and had an interest in "avoiding a long and potentially expensive litigation on the merits"). *Cf. Paine,* 250 B.R. 99 at 105 (no appellate standing where no defenses are lost); *Menk,* 241 B.R. at 917 (same).

On the other hand, any judicial estoppel defense would seem to arise not because Lopez misled Specialty by failing to list the Action in her bankruptcy papers -- Specialty was not a party to the bankruptcy case -- but because Lopez allegedly "played fast and loose" and otherwise misled the courts. *Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778, 782-85 (2001). In other words, Specialty's possible judicial estoppel defense is a windfall that would bar what might be a successful claim for sexual harassment. The potential loss of that defense seems no greater harm than what is faced by any potential defendants in actions unique to bankruptcy, such as avoidance actions. We question whether this is the sort of harm that would give Specialty a right to intervene or standing to oppose reopening. *See generally Fondiller v. Robertson (In re Fondiller),* 707 F.2d 441, 442 (9th Cir. 1983) (limitations on appellate standing in bankruptcy context); *Menk,* 241 B.R. at 915-17 (prospective defendant in adversary proceeding did not have standing to appeal order granting reopening). *See also McColgan v. Clark (In re Snyder),* 4 F.2d 627, 628 (9th Cir.), *cert. denied,* 269 U.S. 556, 70 L. Ed. 409, 46 S. Ct. 19 (1925) (questioning prospective defendant's standing to oppose reopening under Bankruptcy Act of 1898). *Cf. In re Dewberry,* 266 B.R. 916, 920-22 (Bankr. S.D. Ga. 2001) (decision to reopen is "of only marginal, *if any,* relevance" to judicial estoppel decision, because having omitted cause of action from schedules debtor "cannot un-ring the bell") (emphasis added).

[**13] [*28] As Lopez points out, Specialty's argument is a non-sequitur. Lopez' discharge affects her personal liability, but if the Action has any value then creditors stand to benefit regardless whether her discharge can be revoked. That is true because the Action became property of the bankruptcy estate as of the Petition Date, even though the Action was not listed in the schedules, and property that is neither abandoned nor administered remains property of the estate even after the case is closed. *See* 11 U.S.C. § 541 (property of estate) and § 554(d) (property not abandoned or administered remains property of estate); *Pace v. Battley (In re Pace),* 146 B.R. 562, 564-66 (9th Cir. BAP 1992), *aff'd,* 17 F.3d 395 (9th Cir. 1994) (table) (unscheduled property remains in estate after case is closed).

In other words, the Action belongs to the estate, not to Lopez. Lopez conceded this in her Motion to Reopen and at the hearing in the bankruptcy court, and specifically asked to reopen not just so she could amend her schedules but also so that a chapter 7 trustee could administer the Action.

Although we make no assumption about what actual [**14] value the Action might have, we note that it does not appear on its face to be valueless or unworthy of consideration by a chapter 7 trustee. Unlike the situation in *Herzig,* it does not appear to be barred by a limitations period -- it has survived in the state court since at least March of 1999 without having been dismissed -- nor has a chapter 7 trustee or its counsel already "thoroughly" investigated and decided not to pursue it. *See Herzig,* 96 B.R. 264 at 265-66. [10] As we observed in *Menk,* the decision whether to reopen should not become a battleground for litigation of the underlying merits. *Menk,* 241 B.R. at 915-17. Neither the Action nor its possible value should be litigated in order to decide whether to reopen the bankruptcy case.

10 On this appeal Lopez argues that the Action is worth at least $ 70,000 to $ 125,000, based on an offer under California Code of Civil Procedure Section 998 and the opinion of her counsel in the Action, respectively. In contrast, she claims that unsatisfied creditors' claims amounted to less than $ 6,000 when her bankruptcy case was pending. In other words, according to Lopez, creditors could be paid in full.

Lopez' evidence and arguments as to value were not before the bankruptcy court and we do not rely on them. We mention them only to illustrate that there is potential for the Action to have value for the benefit of creditors.

[**15] For all of these reasons, further administration is warranted. If the case is reopened a chapter 7 trustee can be appointed, investigate whether the Action has value, and then prosecute it, settle it, abandon it, or arrange for Lopez to prosecute it in exchange for the estate receiving a share of the proceeds. The chapter 7 trustee can also notify creditors to file claims if it appears the estate may have any assets, and can make distributions on those claims out of any eventual recovery. *See Dolliver,* 255 B.R. at 258 (although § 727(e) prevented revocation of discharge, case could be reopened to recover and administer concealed assets); Fed. [*29] R. Bankr. P. 3002(c)(5) (notice to creditors if trustee notifies court that payment of dividend appears possible).

The bankruptcy court appeared to be motivated in part by a desire to sanction Lopez for not previously disclosing the Action. At the hearing on March 7, 2001, the bankruptcy court commented, "the Court cannot accept the proffered testimony and argument of [Lopez] that somehow she simply ... forgot to put [the Action] down [on her schedules and statements]." Transcript (3/7/01) p. 8:1-4.

Assuming without [**16] deciding that Lopez intentionally omitted the Action from her schedules and statements, that is not a sufficient ground to deny the Motion to Reopen. That approach would risk harming creditors in an attempt to punish a former debtor.

The *Koch* decision, on which the bankruptcy court relied, is distinguishable. As Lopez points out, in *Koch* the debtor avoided appointment of a chapter 7 trustee by converting to chapter 11 immediately after the case was reopened. The *Koch* court later vacated its reopening order on the ground that under chapter 11 the creditors would not benefit from reopening because only the former chapter 7 trustee could prosecute the omitted action. *Koch,* 229 B.R. at 87. Assuming without deciding that the *Koch* court's analysis of standing was correct, [11] no such facts are present in this case. As we have already noted, there is no evidence that the Action is valueless and therefore the bankruptcy court cannot presume that creditors will not benefit from reopening Lopez' chapter 7 case. *See Tarrer,* 273 B.R. 724 at 735 (distinguishing *Koch* as a case in which creditors would not benefit from reopening).

11 We question whether, in circumstances such as those in *Koch,* a chapter 11 debtor in possession would lack standing to prosecute an action that has been added to the schedules and statements. We also note that there may be practical benefits from proceeding in chapter 11 instead of chapter 7.

For example, in chapter 7 there might be no way to fund the litigation costs of an omitted action other than engaging counsel on a contingency basis who would advance the costs, whereas in chapter 11 a plan of reorganization might let some creditors fund the legal fees and costs in exchange for a greater share of any proceeds. If no such advantages were apparent in the *Koch* case, there were alternatives other than vacating the order reopening the case. In appropriate circumstances the case could have been converted back to chapter 7 or a chapter 11 trustee could have been appointed. These and perhaps other alternatives could have preserved a potentially valuable asset for the benefit of creditors. The *Koch* court did not address these considerations, and seems to have been motivated by annoyance with the debtor and perhaps doubt about the actual value of the omitted action, rather than by the interests of creditors. *Koch,* 229 B.R. 78 (passim).

[**17] There may be other circumstances in which creditors would not benefit from reopening, but again the facts on this appeal do not show any such circumstances. One court has held, for example, that where the former debtor admitted that his exemption would exceed the value of the omitted action, his lack of good faith and the prejudice to the defendant were sufficient to preclude reopening. *In re Maloy,* 195 B.R. 517, 520 (Bankr. M.D. Ga. 1996). Lopez claims, however, that the value of the Action far exceeds her exemption. *Cf. Maloy,* 195 B.R. 517 at 520 ("to reopen the case now in anticipation of the possibility that Debtor's contention may be incorrect [i.e. that the action could have some value above the exemption] is a step too far beyond the bounds of foreseeable reality"). *See Tarrer,* 273 B.R. 724 at 735 (distinguishing *Malloy* as a case in which creditors would not benefit from reopening).

At least one court has held that where it appears creditors may benefit from reopening, [*30] a former debtor's good faith is irrelevant. *Dewberry,* 266 B.R. at 921 ("when reopening of the case is sought for the purpose of administering [**18] a previously undisclosed asset, the question of debtor's good faith is irrelevant").

We do not decide whether a former debtor's alleged bad faith or lack of good faith is a factor at all when creditors' interests are at stake. Assuming it is a factor, we hold that it is insufficient to preclude reopening if there is prima facie proof from which a chapter 7 trustee could reasonably determine that administering a previously undisclosed asset could benefit creditors. *See Herzig,* 96 B.R. 264 at 266.

We note that any legitimate concerns about a former debtor's misconduct can be addressed by other methods, rather than refusing to reopen a bankruptcy case. In appropriate situations a debtor can be subject to prosecution and penalties. *See, e.g.,* 18 U.S.C. §§ 152 and 3571. If a debtor shows bad faith, or if third parties are prejudiced by nondisclosure of an asset, then the bankruptcy court can exercise its discretion to disallow any claimed exemption in the asset, in whole or in part. *See Arnold v. Gill (In re Arnold),* 252 B.R. 778 (9th Cir. BAP 2000). In the circumstances of this appeal, where all creditors might get paid in full, [**19] Lopez still might receive a substantial portion of any recovery in the Action (11 U.S.C. § 726(a)(6)), but presumably that recovery would be because the Action had merit, not because Lopez gained any advantage by failing to list the Action.

Moreover, the court hearing the Action could impose any appropriate sanctions against Lopez (either as a current litigant, if the Action is abandoned to her, or perhaps as a former litigant, if it is not). That court could also rule that she is judicially estopped from asserting her claims. We express no opinion whether any such judicial estoppel would bar Lopez or her chapter 7 trustee from prosecuting the Action for the benefit of creditors, or from recovering anything from Specialty above some limit, such as what it would take to pay creditors in full. These are matters for that court to decide, and for a chapter 7 trustee to consider. *See Hamilton,* 270 F.3d 778, 782-85 (judicial estoppel barred former debtor from asserting claims not disclosed in bankruptcy schedules); *Conrad v. Bank of America Nat. Bank & Sav. Assoc.,* 45 Cal. App. 4th 133, 146-55, 53 Cal. Rptr. 2d 336, 347-50 (1996) [**20] (same), *rejected on other grounds by Lovejoy v. AT&T Corp.,* 92 Cal. App. 4th 85, 93-94, 111 Cal. Rptr. 2d 711, 717 (2001). *But cf. Haley,* 72 Cal. App. 4th 497, 511, 85 Cal. Rptr. 2d 352, 361 (1999) ("judicial estoppel is rarely appropriate in a chapter 7 context in a case in which the debtor has failed to schedule a claim .... The debtor will lack standing to sue so the suit can be maintained only if the bankruptcy trustee substitutes in or abandons the claim. There is no possibility of unfair advantage because the bankruptcy court will take appropriate actions to promote the goals of bankruptcy and protect the process.") (citations omitted). *See generally* Hon. William Houston Brown, Lundy Carpenter, Donna T. Snow, *Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums,* 75 Am. Bankr. L.J. 197 (2001). [12]

12 We have recognized in footnote 9, above, that Specialty's asserted judicial estoppel defense arguably would be lost or diminished by reopening. *See generally Haley,* 72 Cal. App. 4th at 511. We also recognized, in the same footnote, that the defense is a windfall to Specialty. If the court try-

ing the Action determines that loss of this windfall is appropriate, that is hardly a reason to deny creditors the opportunity to share in the proceeds of a potentially meritorious action. *See In re Daniel,* 205 B.R. 346, 349 (Bankr. N.D. Ga. 1997) ("reopening may be detrimental to [the defendant] by depriving it of a judicial estoppel argument but this court cannot countenance depriving Debtor's creditors of the opportunity to share in damages to which Debtor is entitled in order to preserve [the defendant's] judicial estoppel argument").

[**21] [*31] For all of these reasons, the bankruptcy court abused its discretion by denying the Motion to Reopen. Lopez' bankruptcy case should have been reopened and a chapter 7 trustee appointed. In light of that conclusion, any issues concerning the Motion to Intervene are moot.

V. CONCLUSION

The Action is a potentially valuable asset that should be administered for the benefit of creditors. Denial of the Motion to Reopen cannot be justified on the ground that § 727(e) might bar revocation of Lopez' discharge. Nor can it be justified by any desire to punish Lopez for failing to disclose her claims against Specialty in her original schedules. The portion of the Order denying the Motion to Reopen is REVERSED, the appeal from the portion of the Order granting the Motion to Intervene is DISMISSED as MOOT, and the case is remanded for appointment of a chapter 7 trustee and further proceedings.

CONCUR BY: KLEIN

CONCUR

KLEIN, Bankruptcy Judge, Concurring:

I join the majority decision and write separately to emphasize salient practice points about the problem of unscheduled causes of action that is increasingly a headache for nonbankruptcy courts and litigants so that they may have more sophisticated [**22] insights about how to deal with the problem.

It has become increasingly popular to interpose judicial estoppel as a defense to a lawsuit by a former debtor who did not schedule the cause of action in the bankruptcy case. The theory is one of inconsistent positions: the debtor, by not scheduling the cause of action in the bankruptcy case, impliedly contended that it did not exist or was valueless, which position was accepted by the bankruptcy court when the case was closed without the unscheduled asset being administered. Then, inconsistently, the debtor sues on the cause of action. Defendants rightly smell something rotten. Nonbankruptcy courts are rightly reluctant to tolerate such "fast and loose" litigation tactics.

Yet, the judicial estoppel defense to the basic unscheduled cause of action is meretricious and potentially inexpedient in two respects.

First, the unscheduled cause of action is still property of the bankruptcy estate after a chapter 7 bankruptcy case is closed, not property of the debtor, regardless of whether the case is reopened and regardless of whether schedules are amended after reopening.

Upon closing a case, correctly scheduled property not otherwise administered [**23] by the trustee is abandoned to the debtor. 11 U.S.C. § 554(c).

Property that was not correctly scheduled remains property of the estate forever (until administered or formally abandoned by the trustee), regardless of whether it is scheduled after the case is reopened. [13] 11 U.S.C. § 554(d); *cf.* Helbling & Klein, *The Emerging Harmless Innocent Omission Defense to Nondischargeability under Bankruptcy Code § 523(a)(3)(A): Making Sense of the Confusion over Reopening Cases and Amending Schedules to Add Omitted Debts,* 69 AM. BANKR. L.J. 33, 37-47 (1995).

13 For this reason, the debtor's desire to "schedule" the cause of action in this case was misconceived.

[*32] Thus, in the case of an omitted cause of action, the trustee is the real party in interest and the more correct defenses are that the action is not being prosecuted by the real party in interest and that the debtor lacks standing. *Haley v. Dow Lewis Motors, Inc.,* 72 Cal. App. 4th 497, 511 (Cal. Ct. App. 1999). [**24]

The purpose of reopening the bankruptcy case in this context is to permit the appointment of a trustee to deal with the property of the estate. At the time of reopening, the court must determine whether a trustee should be appointed because the original trustee is ordinarily relieved at the time the case is closed. Fed. R. Bankr. P. 5010. If the purpose of the reopening is to deal with unscheduled assets as property of the estate, then it is per se an abuse of discretion not to order appointment of a trustee.

The second difficulty with the judicial estoppel defense is that the automatic stay remains in effect to protect property of the estate so long as it is property of the estate, even after the bankruptcy case is closed. 11 U.S.C. § 362(c)(1). Thus, dismissing the action probably violates the automatic stay. The practical consequence is futility because acts in violation of the automatic stay are void ab initio. *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 574-75 (9th Cir. 1992).

If one is determined to impose judicial estoppel, the better course is to use it as a device to require that the action be prosecuted by the real [**25] party in interest- a bankruptcy trustee.

Reopening does not bring property back into the estate nor does it cause the automatic stay to be revived. The unscheduled asset never lost its character as property of the estate and the automatic stay, which otherwise terminated on closing the case, never ceased to remain applicable to protect (and render void any act against) the property of the estate. It is for this reason that it is often difficult to perceive non-obfuscatory merit in a defendant's opposition to reopening; [14] it ought to be in the interest of defendant to be in a position to have a definitive resolution of the matter.

14 Speciality's argument in opposition to reopening that creditors would have no interest because their claims have been discharged is even more misconceived than the former debtor's assumption that scheduling the asset would improve her rights in the cause of action.

Under black-letter bankruptcy law, the fact that the debtor is discharged from personal liability on claims has no effect on the rights of the claimants to be paid on their allowed claims from the bankruptcy estate. 11 U.S.C. § 726. In fact, the creditors holding discharged claims have an intense interest in a reopening that may lead to funds coming into the estate and being available for distribution to creditors because that is the only way they will be paid on their discharged claims.

Likewise, Speciality's further assertion that because it is too late to revoke the discharge "all of the money obtained from Lopez's claim against Specialty will ultimately go to Lopez, not her creditors" misstates the law.

Under the bankruptcy distribution scheme (absent either a specific compromise approved by the court or a successful claim of exemption), the debtor would receive nothing until after all administrative expenses and all claims are paid in full with interest at the legal rate from the date of the filing of the petition. 11 U.S.C. § 726(a)(6).

[**26] The expedient solution to this dilemma is to require the parties to return to bankruptcy court for reopening so that a trustee can be appointed to deal with the cause of action that is property of the estate. The trustee has authority to act for the benefit of the estate and may sell the cause of action, prosecute it in nonbankruptcy court, [15] settle it, or abandon it to [*33] the debtor as of inconsequential value to the estate. [16]

15 The trustee is authorized to employ the debtor's trial counsel with court approval. 11 U.S.C. § 327(e).

16 If it is abandoned to the debtor, the debtor thenceforth owns the cause of action and must be prepared to deal with all defenses, including estoppel.

The worst thing the parties can do is to ignore the property of the estate problem. The worst thing a bankruptcy court can do is to frustrate the process by refusing to reopen and order the appointment of a trustee who can definitively deal with property of the estate.

LEXSEE 273 B.R. 739, 743

IN RE PAMELA G. LEWIS, DEBTOR.

CASE NUMBER A97-70635-ADK, IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

273 B.R. 739; 2001 Bankr. LEXIS 1778

October 1, 2001, Decided
October 2, 2001, Date Opinion Filed

DISPOSITION: [**1] Debtor's motion to reopen her bankruptcy case granted.

COUNSEL: JAMES H. HOWARD, Esq., THE HOWARD LAW FIRM, J. R. GRAY, Esq., Tucker, GA, for Debtor.

JASON H. WATSON, Esq., LISA FARMER, Esq., BERNARD TAYLOR, Esq., ALSTON & BIRD LLP, ROLFE M. MARTIN, Esq., OWEN, GLEATON, EGAN, JONES, et al., Atlanta, GA, for Wrongful Death, Defendant.

ROBERT TRAUNER, Esq., TRAUNER, COHEN & THOMAS, Atlanta, GA, Chapter 7 Trustee.

JUDGES: W. HOMER DRAKE, JR., UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: W. HOMER DRAKE, JR.

OPINION

[*741] **ORDER**

Before the Court is the Motion of Pamela G. Lewis (hereinafter the "Debtor") to reopen her Chapter 7 case. After a hearing on July 25, 2001, the Court took the case under advisement. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), and the Court has jurisdiction over it pursuant to 28 U.S.C. § 157(b)(1) and 28 U.S.C. § 1334. Based on the record in this case, the testimony of the Debtor at the hearing, and for cause shown, the Court's findings and conclusions are as follows.

FINDINGS OF FACT

The Debtor filed a petition for relief under Chapter 7 of the United States Bankruptcy [**2] Code on June 13, 1997. On August 22, 1997, the Chapter 7 Trustee filed his report of no distribution and on December 16, 1997, the Debtor received her discharge. On June 5, 2001, the Debtor filed a motion to reopen her case for the purpose of disclosing a pre-petition asset. According to the Debtor's motion, she seeks to reopen her case because she "has learned of a pre-petition wrongful death cause of action in which she has a partial interest" (Debtor's Motion to Reopen, June 5, 2001). The cause of action for wrongful death arises from the pre-petition death of the Debtor's spouse in September 1996. In August 1998, subsequent to the entry of discharge in the Debtor's case, the Debtor commenced an action for her spouse's alleged wrongful death in the State Court of Fulton County, Georgia against Sherman Hoover, M.D., Southeast Permanente Medical Group, Inc. and Kaiser Foundation Health Plan of Georgia, Inc., Linda Guydon, M.D., Scott Carroll, [*742] M.D., and Atlanta Allergy Clinic, P.A. (the "Wrongful Death Defendants").

The Wrongful Death Defendants oppose the reopening of the Debtor's case. On May 4, 2001, the Wrongful Death Defendants filed a motion for summary judgment in the Debtor's [**3] state court action to bar the Debtor's claim on the grounds of "judicial estoppel." As part of their judicial estoppel defense, the Wrongful Death Defendants argue that the Debtor is barred from pursuing her claim because she has taken a position in her bankruptcy case (that she had no unliquidated pre-petition tort claim), inconsistent with the position taken in her state court case (that she has a pre-petition wrongful death claim). The Wrongful Death Defendants allege that the Debtor did not recently learn of the potential claim, but in fact, knew that she had a claim as early as

September 1997 when her attorney sent a demand letter to the Wrongful Death Defendants.

On July 25, 2001, the Court held a hearing on the Debtor's motion to reopen. In addition to the issues raised by the parties in their briefs, the Court inquired into the issue of whether the Wrongful Death Defendants had standing to contest the reopening of the Debtor's bankruptcy case. Following the hearing, the Wrongful Death Defendants and the Debtor filed supplemental briefs as directed by the Court.

CONCLUSIONS OF LAW

As a preliminary matter, the Court must determine whether the Wrongful Death Defendants [**4] have standing to appear in this bankruptcy matter and oppose the reopening of the Debtor's case. Standing is defined as "a party's right to make a legal claim or seek judicial enforcement of a duty or right." BLACK'S LAW DICTIONARY 1413(7th ed. 1999). A court may consider the issue of a party's standing *sua sponte*. *Bischoff v. Osceola County, Florida*, 222 F.3d 874 (11th Cir. 2000). "The question of standing is not subject to waiver . . . . The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 132 L. Ed. 2d 635, 115 S. Ct. 2431 (1995).

The United States Supreme Court has articulated a three-factor test for meeting the constitutional requirements of standing: 1) the party asserting standing must have suffered actual injury or threatened injury; 2) the injury must be fairly traceable to the conduct at issue; and 3) a demonstration must be made that the requested relief is likely to redress the injury. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982); [**5] *see also E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 984 (11th Cir. 1990). Essentially, a party asserting standing must have a "personal stake in the outcome" of a case. *Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962).

Unlike a traditional two-party lawsuit, determining whether a party has standing in a bankruptcy proceeding is a somewhat esoteric question. A bankruptcy proceeding is not about just the interests of a plaintiff and a defendant whereby one party alleges an injury caused by conduct of another party. A bankruptcy proceeding involves the rights and obligations of a debtor, creditors, and trustee, among others. Moreover, bankruptcy involves the administration of an estate's property and necessarily affects other parties rights and interests vis-a-vis that property. Thus, while the Wrongful Death Defendants have an "interest" in Debtor's bankruptcy case in a general sense, the Court must [*743] determine whether their interest rises to a level which warrants their ability to appear and be heard in the bankruptcy case.

Chapter 11 of the Bankruptcy Code refers to a party who may appear and be heard as a "party in interest. [**6] " 11 U.S.C. § 1109(b). While the term is confined to Chapter 11, and this is a Chapter 7 proceeding, the Court finds guidance in its determination of the Wrongful Death Defendants standing by looking to the definition of the term and the interpretation of the term "party in interest." Section 1109(b) provides

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b). Who may be a party in interest is non-exclusive. *See* 11 U.S.C. § 102(3) ("'includes' and 'including' are not limiting"). One court has noted that the "circumstances of the case determines who qualifies as a party in interest." *In re Koch*, 229 B.R. 78, 82 (Bankr. E.D.N.Y. 1999) (*citing In re American Motor Club, Inc.*, 149 B.R. 317, 322 (Bankr. E.D.N.Y. 1993)). In addition, courts have found that a party in interest is "generally understood to include all persons whose pecuniary [**7] interests are directly affected by the bankruptcy proceedings." *Nintendo Co., Ltd. v. Patten (In re Alpex Computer Corp.)*, 71 F.3d 353, 356 (10th Cir. 1995); *Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson)*, 5 F.3d 750, 756 (4th Cir. 1993).

Based on the circumstances of this case, the Court is persuaded that the Wrongful Death Defendants have standing to appear and be heard on the Debtor's motion to reopen her case. While the Wrongful Death Defendants are potentially indebted to the Debtor (or, perhaps, more appropriately, the Debtor's estate), this factor alone is not sufficient to create standing in this case. For example, had the Debtor properly disclosed her unliquidated tort claim at the time she filed her bankruptcy case, the Wrongful Death Defendants would not have had standing to move for dismissal of her case or object to her discharge. However, the *current* procedural posture of both the bankruptcy case and the state court case give the Wrongful Death Defendants standing to appear and be heard on the Debtor's motion to reopen because of the potential impact her motion has in both forums, and particularly because of the impact [**8] it may have on the continuation of the state court action. Having determined that the Wrongful Death Defendants have standing to raise their objection, the Court now turns to the Debtor's motion to reopen her case.

Bankruptcy Rule 5010 states that a case may be reopened on motion of the debtor or other party in interest pursuant to Section 350(b) of the Bankruptcy Code. Section 350(b) of the Bankruptcy Code provides, "[A] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350. This court has broad discretion in determining whether to reopen a case under § 350(b). *See Faden v. Insurance Co. of N. Am. (In re Faden)*, 96 F.3d 792, 796 (5th Cir. 1996); *In re Bianucci*, 4 F.3d 526, 528 (7th Cir. 1993); *In re McDaniel*, 217 B.R. 348, 352 (Bankr. N.D. Ga. 1998). "The bankruptcy court should exercise its discretion, based upon the peculiar facts present and determine if cause exists and how ultimately to dispose of the case." *In re Koch*, 229 B.R. 78, 88 (Bankr. E.D.N.Y. 1999). [*744]

A newly discovered unadministered [**9] asset is a basis for reopening a bankruptcy case. A pre-petition asset which was not properly disclosed in a debtor's schedules is not deemed abandoned and remains property of an estate which can be administered if the case is reopened. 11 U.S.C. § 554(d) ("property of the estate that is not abandoned under [§ 554] and that is not administered in the case remains property of the estate"); *see In re Arboleda*, 224 B.R. 640 (Bankr. N.D. Ill. 1998); *In re Peebles*, 224 B.R. 519 (Bankr. D. Mass. 1998); *In re Winburn*, 167 B.R. 673 (Bankr. N.D. Fla. 1993).

Section 521(1) of Title 11 requires a debtor to "file a . . . schedule of assets and liabilities . . . and a statement of the debtor's financial affairs." 11 U.S.C. § 521(1). Schedule B enumerates a list of categories of assets and includes a provision for the disclosure of all "contingent and unliquidated claims of every nature." *See* FED. R. BANKR. P. 9009; OFFICIAL BANKR. FORMS 6, SCHEDULE B, P 20. Despite the Debtor's assertion to the contrary, the Debtor's wrongful death cause of action is a pre-petition asset that should have been [**10] disclosed in the Debtor's petition at the time of filing, or by amendment prior to the discharge and closing of the case. The Debtor takes the position that she did not know she had a potential claim at the time she filed her case (Affidavit of Pamela Gordon Lewis, June 1, 2001, P 3 and Corrected Affidavit of Pamela Gordon Lewis, June 29, 2001, P 3), and that even if she discovered a potential claim post-petition, she was under no obligation to disclose it to the trustee. However, there is no legal or factual basis for the Debtor's position. Thus, having established that the Debtor had a pre-petition asset which she failed to disclose, the question is whether the Debtor should now be permitted to reopen her case to rectify the problem.

In determining whether to permit a debtor to reopen her case to disclose a pre-petition asset, courts have looked at several factors: the benefit to the debtor; the prejudice to the defendant; and the benefit to other creditors. *In re Koch*, 229 B.R. 78, 85-86 (Bankr. E.D.N.Y. 1999); *In re Maloy*, 195 B.R. 517, 518 (Bankr. M.D. Ga. 1996); *see generally* Judge William Houston Brown, Lundy Carpenter & Donna T. Snow, [**11] *Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197 (2001).

The first two factors, it would seem, are inextricably linked. If reopening the case benefits the debtor, it necessarily prejudices the defendant; if not reopening the case benefits the defendant, it necessarily prejudices the debtor. However, the benefits and detriments are not based solely on the reopening of the case. The benefits and detriments arise from the *impact* of the court's ruling on the debtor's claim and defendant's judicial estoppel argument in state court. Put in its simplest terms, the Debtor takes the position that if her case is reopened, she may overcome the judicial estoppel argument because she is no longer advocating inconsistent legal positions. Alternatively, if the case is not reopened, she most surely will lose at the summary judgment stage because of the application of judicial estoppel by Georgia courts. *See Wolfork v. Tackett*, 273 Ga. 328, 540 S.E.2d 611 (Ga. 2001). The Wrongful Death Defendants argument is, essentially, the mirror image of the Debtor's. The Wrongful Death Defendants contend that [**12] the benefit to the Debtor from reopening the case undermines, if not negates, their judicial estoppel argument.

The Wrongful Death Defendants rely on *In re Maloy* and *In re Koch* to support [*745] their argument against reopening the Debtor's case. In *Maloy*, the Debtor omitted from his schedules a cause of action under the Fair Debt Collection Practices Act ("FDCPA"), which arose after the filing of his Chapter 13 case but prior to the conversion of the case to Chapter 7. The court found that the Debtor was aware of the FDCPA claim during his bankruptcy case and, in fact, the debtor's attorney made a settlement demand on the defendant during the bankruptcy case. After the case was closed, the debtor filed a FDCPA action in the district court in his own name. Six months after filing his lawsuit, the debtor moved to reopen his bankruptcy case, apparently to defeat the defendant's affirmative defense of judicial estoppel. The *Maloy* court denied the debtor's motion to reopen in light of the three factors set forth *supra*. The court found that because any benefit to one party results in a detriment to the other, the focus should be on "whether the detriment of reopening the case [**13] as to [defendant] would be *fairly incurred.*" *Maloy*, 195 B.R. at 518 (emphasis added). The Court found, based on the debtor's conduct and intentions, that such a result to defendant would not be fairly incurred. Specifically, the *Maloy* court found that "Debtor and his attorney made a conscious determination to try and capitalize on the value of an asset without having previously made that asset available to his creditors in the bankruptcy case" and that the debtor's motive in reopening the case was not a desire for honest disclosure, but a desire to defeat the defendant's judicial estoppel argument. *Id.* at 519. The court also found that debtor's conduct in not disclosing the asset during his bankruptcy or at least in moving to reopen the bankruptcy case prior to filing his FDCPA action did not meet the "requisite good faith on the part of a debtor which must precede the reopening of a bankruptcy case." *Id.*

Similarly, in *In re Koch*, 229 B.R. 78 (Bankr. E.D.N.Y. 1999), the court denied the debtor's motion to reopen after weighing the benefit to the debtor, the harm to defendants, and the benefit to creditors. In *Koch*, the [**14] debtor, a professional sports photographer, sought Chapter 7 relief. The Chapter 7 Trustee filed a no asset report, and the case was discharged and closed. Approximately a year and a half later, the debtor commenced a state court action against the National Basketball Association in which he sought the return of over 2,000 slides from the NBA and punitive damages. The NBA moved to dismiss the debtor's state court complaint on the ground that the debtor lacked standing in the state court action because he had lost all rights to the slides or their value when ownership of the assets passed to his bankruptcy estate. The debtor then moved to reopen his bankruptcy case to disclose the prepetition assets as property of his estate.

The *Koch* court found that the prejudice to the NBA was "abundantly clear" in that a reopening of the bankruptcy case hindered the effort to dismiss the debtor's state court action via summary judgment. *Koch*, 229 B.R. at 86. Further, the court found that the NBA had expended considerable time and expense, both in the bankruptcy court and the state court. *Id.*

As for the benefit to the debtor and the creditors from reopening the case, the [**15] Court found that, while superficially, the debtor appeared to benefit, since it would permit him to appear as plaintiff in the state court action, in actuality, "reopening the case did not benefit nor should it benefit him at all." *Id.* This, the court reasoned, was due to debtor's deceptive attempt to convert his reopened Chapter 7 case to a Chapter 11 reorganization plan. The conversion to Chapter 11 would have allowed the debtor to avoid the appointment [*746] of a trustee who could investigate and evaluate the asset, and would have "prevented the creditors from participating in any recovery." *Id.* at 87. Finally, the court found that the debtor's lack of good faith suggested "an all too casual disregard for the disclosure requirements of this Court, and the fair and equitable treatment of Koch's creditors as called for by the Bankruptcy Code, since they did not benefit from the reopening." *Id.* at 87-88. Based on these facts, the court found that reopening the debtor's bankruptcy case had not cured the "the defect that exist[ed] in the action to the extent . . . that Koch neither was, nor is, a real party in interest as plaintiff in the action." *Id.* at 88. [**16]

While the Court is mindful of the rulings in *Maloy* and *Koch*, this Court is not persuaded that a similar result, in this case, is just. As a practical matter, there are significant differences between the facts of this case and those of *Koch* and *Maloy*. In *Koch*, the court specifically found that the creditors would not benefit from reopening the case. If the instant case were reopened, a Chapter 7 Trustee would be appointed to evaluate the Debtor's claim and determine whether to pursue it or abandon it. For all intents and purposes, the claim does not belong to the Debtor, but is a pre-petition asset of her estate over which the Trustee has the final say. [1] In the *Maloy* case, the court also found that there was no potential benefit for creditors because the debtor's exemption claim would have exhausted the value of the asset. However, in the instant case, neither party has made the argument that the asset is without value to the estate.

1 Whether the Debtor has standing to pursue her state court action against the Wrongful Death Defendants is not an issue before this Court. The Court observes, however, that a prepetition cause of action is property of the estate, and the Chapter 7 Trustee has standing exclusively to pursue it unless abandoned by the Trustee pursuant to Section 554.

[**17] In addition, both the *Koch* and *Maloy* courts found evidence to indicate that the debtors had deliberately omitted the pre-petition causes of action from their petitions. In *Maloy*, the court found that the debtor failed to list his claim against the defendant in either his Chapter 13 schedules or in his Chapter 7 schedules upon conversion. The court found that the debtor's bankruptcy attorney wrote a letter demanding settlement during the pendency of the debtor's case, but never amended the debtor's schedules to disclose the existence of the claim. The *Maloy* court found that the debtor and his attorney "made a conscious determination to try to capitalize on the value of an asset without having previously made that asset available to his creditors in the bankruptcy case." *Maloy*, 195 B.R. at 519. The court further found that it was the debtor's "obvious intention to realize the benefit of the asset after the bankruptcy was closed" and that such behavior did not comport with good faith. *Id.*

In *Koch*, the debtor pursued not an inchoate claim, but, instead, sought the recovery of over 2,000 photographic slides, which the debtor had provided to the [**18] NBA pursuant to an alleged verbal agreement with the NBA regarding the use of the slides. The *Koch* court stated that "it is with great difficulty that this Court can believe that the slides had no value when [the debtor] went into bankruptcy, when it is quite clear that eventually he commenced the state court action to recover from NBA millions of dollars for the slides." *Koch*, 229 B.R. at 87. The court further found that debtor's lack of disclosure of the asset in his schedules, his failure to notify the former trustee of the asset before commencement of his state [*747] court case, and the debtor's subsequent attempt to convert to Chapter 11 for the purpose of maintaining his capacity to pursue the state court action in his own name demonstrated a lack of good faith. *Id.* at 87-88.

The instant case is not as clear. There is no question that the Debtor's wrongful death cause of action was a pre-petition asset. However, the Debtor avers that she did not know at the time she filed that she had a potential lawsuit against the Wrongful Death Defendants. At some point prior to the discharge of her bankruptcy case, she retained an attorney to represent her [**19] in her lawsuit against the Wrongful Death Defendants, and she even sent a demand letter to the Wrongful Death Defendants prior to the discharge of her case. There is, however, no evidence that her bankruptcy attorney was aware of any of these occurrences. Nor is there evidence that the attorney representing her in the wrongful death suit was aware that the Debtor was in a bankruptcy case at the time he took the case. While the Debtor herself was involved in all of these activities, the Court is unwilling to assume a sinister motive on the part of the Debtor based upon circumstantial evidence. For better or worse, many debtors are quite naive about the law, especially the stringent requirements of the bankruptcy system.

Nevertheless, in spite of (or, perhaps, because of) the strict disclosure requirements of the Bankruptcy Code, both the Code and the Bankruptcy Rules allow for a great deal of flexibility in amending and modifying a debtor's schedules. *See* FED. R. BANKR. P. 1009 (debtor may amend bankruptcy schedules "as a matter of course"). Because of the flexibility built into the Bankruptcy Code and Rules, "it does not appear that the integrity of either the bankruptcy court [**20] nor the state court is undermined by allowing the Debtor to amend her bankruptcy petition to add the lawsuit as an asset." *In re Daniel*, 205 B.R. 346, 348-349 (Bankr. N.D. Ga. 1997); *see also* *In re Griner*, 240 B.R. 432 (Bankr. S.D. Ala. 1999) (citing a debtor's ability under Rule 1009 to amend schedules to include assets previously omitted).

Furthermore, a review of the *Koch* and *Maloy* cases, compared with the facts of this case, leads the Court to the realization that whether there is a benefit to the Debtor or a detriment to the Wrongful Death Defendants should not be the Court's main concern. A benefit to one necessarily results in a detriment to the other, and these benefits and detriments will arise, not in a bankruptcy forum, but, ultimately, in the state court case. Consequently, it is not this Court's role to determine the outcome of a state court proceeding, *i.e.*, whether the claim has merit or whether a judicial estoppel argument should apply. The role of this Court is to oversee the bankruptcy case and the rights, obligations, and conduct of the parties before it. From this perspective, the persuasive factor for the Court to [**21] weigh in deciding whether to reopen this case is not its effect upon the Debtor or upon the Wrongful Death Defendants in a state court forum, but rather the effect a reopening would have on the creditors of the Debtor's estate.

In *In re Daniel*, 205 B.R. 346 (Bankr. N.D. Ga. 1997) (Murphy, J.), the bankruptcy court focused not on the Debtor's conduct or on the impact on the state court defendants, so much as it focused on the consequences to the bankruptcy participants, namely, the creditors. In *Daniel*, the debtor filed a motion to reopen her Chapter 7 bankruptcy case in order to add a prepetition personal injury claim arising from an automobile accident. Subsequent to the closing of the Chapter 7 case, but prior to the filing of the debtor's motion to [*748] reopen, the debtor commenced a lawsuit in the state court. The insurance company representing the defendant in the state court action opposed the debtor's motion to reopen, arguing that reopening the case would deprive it of its judicial estoppel defense in state court. The *Daniel* court found that such a reason did not merit denial of the debtor's motion to reopen. The court found that the most important focus [**22] was on the creditors of the debtor's estate inasmuch as a "denial in the instant case of Debtor's motion to reopen would deprive Debtor's creditors of an opportunity to share in the fruits of any recovery Debtor may obtain." *Daniel*, 205 B.R. at 348. Further, the court rejected the defendant's argument that the debtor's conduct amounted to bad faith:

> In the instant case, [defendant] points only to Debtor's conduct and seeks to establish a tier of inferences that would result in the conclusion that Debtor acted fraudulently and in bad faith--more specifically, that Debtor sought to conceal her personal injury claim in order to reserve the benefit of any recovery for herself and deprive creditors of the opportunity to share in that recovery. Then, only when the success of the Lawsuit was threatened by her failure to list the asset in her bankruptcy schedules did Debtor file this motion to reopen. However, Debtor's

> conduct can equally be explained as honest error. Debtor now seeks to cure her earlier omission and, most significantly, intends to share the fruits of any recovery with her prepetition creditors. Any advantage which Debtor may have gained by omitting [**23] the asset from her schedules is eliminated by reopening, amending the schedules and allowing the Chapter 7 Trustee to administer the asset.

Daniel, 205 B.R. at 349.

This Court agrees with the court's finding in *In re Daniel* that "reopening may be detrimental to [the defendant] by depriving it of a judicial estoppel argument[,] but this court cannot countenance depriving Debtor's creditors of the opportunity to share in damages to which Debtor is entitled in order to preserve [defendant's] judicial estoppel argument." *Daniel*, 205 B.R. at 349. The remedy for failing to disclose a pre-petition asset should not be one which punishes creditors; to this Court, such a result is absurd and undermines the purpose of the bankruptcy system. To deny reopening the case so that the Wrongful Death Defendants can pursue their judicial estoppel argument in state court is "overly harsh and inequitable[,]" because to do so results in a situation in which "everyone, except [the defendant] loses." *Griner*, 240 B.R. at 439. Although the time for revoking the Debtor's discharge has expired under 11 U.S.C. § 727(e), [**24] if the evidence shows that the Debtor knowingly and intentionally omitted a prepetition asset from her schedules, the Court is quite capable of fashioning a punishment which will redress her lack of timely disclosure. *See, e.g.*, FED. R. BANKR. P. 9011; 11 U.S.C. § 105; 18 U.S.C. § 152. Nevertheless, to deny creditors the potential of recovery in order to teach the Debtor a lesson for failing to disclose her claim is a remedy which this Court will not endorse. Accordingly,

IT IS ORDERED that the Debtor's Motion to Reopen her bankruptcy case is **GRANTED** and the Debtor's case is **REOPENED** to permit the Debtor to amend her schedules and to permit the transaction of such other business as is permitted by Title 11 of the United States Code; and

IT IS FURTHER ORDERED that the former Chapter 7 Trustee shall be **REAPPOINTED.**

IT IS SO ORDERED.

At Atlanta, Georgia, this 1 day of October, 2001.

W. HOMER DRAKE, JR.

UNITED STATES BANKRUPTCY JUDGE

LEXSEE 279 B.R. 900

IN RE DONNA H. BARGER, DEBTOR.

CASE NUMBER R01-41926

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION

279 B.R. 900; 2002 Bankr. LEXIS 924; 48 Collier Bankr. Cas. 2d (MB) 1663

June 18, 2002, Decided
June 19, 2002, Entered on Docket

SUBSEQUENT HISTORY: Related proceeding at Barger v. City of Cartersville, 348 F.3d 1289, 2003 U.S. App. LEXIS 22038 (11th Cir. Ga., 2003)

DISPOSITION: [*1] Debtor's motion to reopen her bankruptcy case GRANTED.

JUDGES: PAUL W. BONAPFEL, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: PAUL W. BONAPFEL

OPINION

ORDER

Donna H. Barger (the "Debtor") has moved to reopen her Chapter 7 case to amend her Statement of Financial Affairs to set forth a claim in a lawsuit that she had filed in the United States District Court against the City of Cartersville two months before she filed her bankruptcy petition. Although she brought the existence of this claim to the attention of the Chapter 7 Trustee at the § 341(a) meeting of creditors, she did not thereafter amend her bankruptcy filings. The motion seeks to reopen the case so that this claim can be administered in it. [1]

1 The motion states that Debtor also seeks to reopen the case to file an Application to Employ Special Counsel for the purpose of litigating the claim against the City of Cartersville. Of course, if the case is reopened, the Trustee, rather than Debtor, will be responsible for prosecuting the claim and for employing special counsel, if appropriate, pursuant to 11 U.S.C. § 327(e). It is clear from the record that Debtor desires the case to be reopened so that the claim can be administered in accordance with the Bankruptcy Code.

[*2] In the District Court litigation, the City contends that Debtor's failure to list the claim against the City in her bankruptcy papers precludes its assertion under the doctrine of judicial estoppel. The City objects to reopening of her case on the same ground. This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(A), and the Court has jurisdiction pursuant to 28 U.S.C. § 157 (b)(1) and 28 U.S.C. § 1334.

The Court held a hearing on June 5, 2002, at which Debtor and the City submitted the matter for determination based on the materials filed in this case by the Debtor and the City and the argument of counsel at the hearing. Based on the record before the Court, the Court made oral findings of fact and conclusions of law at the hearing pursuant to FED. R. CIV. P. 52(a), applicable to this contested matter pursuant to FED.R.BANKR.P. 7052, which are supplemented in this Order.

Section 350 of the Bankruptcy Code, 11 U.S.C. § 350(b), permits the reopening of a closed bankruptcy case "to administer assets, to accord relief to the debtor, or for other cause." The claim against the City [*3] is an asset that was property of Debtor's estate under 11 U.S.C. § 541(a). The Court's docket does not indicate that the claim was abandoned or otherwise administered. Because the claim against the City was not scheduled, it was not abandoned under § 554(c) of the Bankruptcy Code. 11 U.S.C. § 554(c). Therefore, the claim remains property of the estate. § 554(d). Under these provisions, the Court should reopen the case so that a Chapter 7 Trustee may take charge of the claim as property of the estate and so that Debtor's creditors may benefit from any recovery there may be on the claim. *In re Tarrer,* 273 B.R. 724, 732 (Bankr. N.D. Ga. 2001) (Drake, J.).

Whether the doctrine of judicial estoppel is applicable to preclude assertion of the claim appears to be a question for the tribunal in which the claim is being asserted. *See In re Lewis,* 273 B.R. 739, 747 (Bankr. N.D. Ga. 2001) (Drake, J.); *In re Tarrer,* 273 B.R. 724, 733 (Bankr. N.D. Ga. 2001) (Drake, J.). Nevertheless, because the City has presented the question in opposition to the motion to reopen, it is appropriate to address it. [*4] As explained below, Debtor did not conceal the claim or attempt to obtain an unfair advantage for herself. To the contrary, the record shows that the failure to amend her bankruptcy papers *after disclosure to the Chapter 7 Trustee* is the result of counsel's inadvertence that had no substantive effect on the prior proceedings in this case. The judicial estoppel issues raised by the City thus provide no basis for denying the motion to reopen.

Based on the Court's findings of fact and conclusions of law, therefore, the Court will grant Debtor's Motion.

I.

On July 18, 2001, Debtor filed a lawsuit against the City of Cartersville and others in the United States District Court for the Northern District of Georgia, Rome Division, that being *Donna Barger v. City of Cartersville et al.,* Case Number 4:01-CV-201-HLM (the "Litigation"). In the lawsuit, Debtor alleges that she was demoted by her employer, the City of Cartersville, in violation of the Americans with Disabilities Act, the Family and Medical Leave Act, and the Age Discrimination in Employment Act.

Debtor filed a petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 *et seq.,* on September 4, 2001. Debtor [*5] did not list the Litigation as required by Question 4 of the Statement of Financial Affairs, nor did she disclose it as a contingent or unliquidated claim as required by Question 20 of Schedule B of her Schedules of Assets and Liabilities. [2] These documents are submitted under penalty of perjury. Debtor did not initially inform her bankruptcy attorney of the Litigation, but her litigation counsel did. (Barger Affidavit, P 7, Freeman Affidavit P 6). [3]

2 A debtor is required to file Schedules of Assets and Liabilities and a Statement of Financial Affairs in compliance with Official Forms 6 and 7, respectively, prescribed by the Federal Rules of Bankruptcy Procedure. FED. R. BANKR. P. 1007(b). The Official Forms are appended to the Federal Rules of Bankruptcy Procedure. These required documents are sometimes referred to, collectively, as "schedules."

3 The Affidavit of Debtor is attached as Exhibit 9 to the City's Opposition filed in the Bankruptcy Court on April 30, 2002 and the affidavit of her litigation counsel, Alysa Freeman, is attached as Exhibit 10 to that Opposition.

[*6] On November 8, 2001, Debtor attended the meeting of creditors held pursuant to § 341(a) of the Bankruptcy Code. 11 U.S.C. § 341(a). The bankruptcy judge is not permitted to attend this meeting. 11 U.S.C. § 341(c). This meeting includes an examination of the debtor under oath. FED. R. BANKR. P. 2003(b)(1). Immediately prior to this meeting, Debtor discussed the Litigation with her bankruptcy counsel. At the meeting, Debtor told the Chapter 7 Trustee about the Litigation. Specifically, she recounts the meeting and her testimony as follows:

> In November 2001, I attended my § 341 meeting of creditors with Mr. Lea [Debtor's bankruptcy counsel] before Trustee Jeff MacLeod. Before my name was called to appear, I explained the lawsuit to Mr. Lea and told him how much I was hoping to be reinstated with the City of Cartersville. Mr. Lea did not ask for additional information about this lawsuit. During the § 341 meeting of creditors, I was sworn in, and my testimony was recorded in the presence of the trustee and Mr. Lea. Trustee MacLeod specifically asked about the lawsuit that I filed against my former employer for discrimination. When [*7] I explained the circumstances of the filing, he asked me if I was "going to get a big settlement from this lawsuit in the next week?" I said no. There were no further questions asked during this hearing about my lawsuit against the City of Cartersville. [4]

This evidence demonstrates a voluntary and truthful disclosure of the Litigation at the § 341(a) meeting.

4 Barger Affidavit P 7.

The Trustee states that he asked Debtor for the monetary amount of the lawsuit, and she informed him that she sought reinstatement of her previous position with the City. [5] A transcript of the § 341(a) meeting is not available [6] and the Trustee was not present at the hearing to provide additional information about the § 341 meeting or any other facts relating to this matter. The Trustee was aware that the Litigation was not listed in the Schedules. [7] The Trustee does not oppose reopening of the case. [8]

5 MacLeod Affidavit P 4, attached as Exhibit 11 to the City's Opposition.

[*8]

6 The United States Trustee is responsible for maintaining records of § 341(a) meetings. FED. R. BANKR. P. 2003(c). At the hearing, the parties advised the Court that circumstances beyond the control of any of the parties have precluded the availability of a transcript of Debtor's § 341(a) meeting of creditors.

7 MacLeod Affidavit P 5.

8 MacLeod Affidavit P 7.

Because Debtor did not list the claim against the City on her schedules, she also did not seek to keep all or any part of it by claiming it as exempt as required by FED. R. BANKR. P. 4003(a). As the record currently stands, therefore, Debtor would not have an interest in any monetary recovery based on prepetition claims unless all creditors are paid, with interest. 11 U.S.C. § 726(a)(6).

Debtor's bankruptcy counsel, Garland Lea, was aware of the Litigation, having been advised of it by Debtor's litigation counsel. Bankruptcy counsel admits that the failure to list the Litigation in Debtor's schedules was the result of counsel's oversight.

On November 9, 2001, the day after the § 341 (a) meeting, [*9] the Trustee filed his Report of No Distribution, indicating that there were no assets that could be recovered for the benefit of creditors. No objections to Debtor's discharge were filed by the Trustee or any other party in interest within the time permitted by FED. R. BANKR. P. 4004(a) and the court automatically granted a discharge to Debtor on January 12, 2002 as required by 11 U.S.C. § 727.

In the course of discovery in the Litigation, the City discovered that Debtor had filed bankruptcy but had not listed the Litigation in her schedules. The City filed a motion for summary judgment in the district court on the grounds of judicial estoppel due to Debtor's representations in her bankruptcy case. Thereafter, on April 4, 2002, Debtor filed her motion to reopen and also responded to the City's motion for summary judgment.

II.

The reopening of a case is governed by Section 350(b) of the Bankruptcy Code, 11 U.S.C. § 350(b):

> A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

This Court has broad discretion in determining whether to reopen [*10] a case under § 350(b). *See Faden v. Insurance Co. of N. Am. (In re Faden),* 96 F.3d 792, 796 (5th Cir. 1996); *In re Bianucci,* 4 F.3d 526, 528 (7th Cir. 1993); *In re McDaniel,* 217 B.R. 348, 352 (Bankr. N.D. Ga. 1998) (Drake, J.). "The bankruptcy court should exercise its discretion, based upon the peculiar facts present and determine if cause exists and how ultimately to dispose of the case." *In re Lewis,* 273 B.R. 739, 743 (Bankr. N.D. Ga. 2001) (Drake, J.) (*quoting In re Koch,* 229 B.R. 78, 88 (Bankr. E.D.N.Y. 1999)).

Although Debtor disclosed the existence of the Litigation to the Trustee, she did not list it in her schedules. Regardless of whether the claim was scheduled, it was property of her estate under 11 U.S.C. § 541(a). The claim was not abandoned by the Trustee or at the request of any other party in interest under 11 U.S.C. § 554(a) or (b). The Trustee did nothing with the claim and, therefore, it was not administered. [9] Because Debtor did not schedule the claim and it was not otherwise administered, inaction did not result in it's abandonment. [*11] § 554(c). This unscheduled and unadministered claim, therefore, remains property of the estate under § 554(d). A pre-petition asset which was not properly disclosed in a debtor's schedules and remains property of an estate can be administered if the case is reopened. 11 U.S.C. § 554(d); *see In re Arboleda,* 224 B.R. 640 (Bankr. N.D. Ill. 1998); *In re Peebles,* 224 B.R. 519 (Bankr. D. Mass. 1998); *In re Winburn,* 167 B.R. 673 (Bankr. N.D. Fla. 1993).

9 The Trustee's filing of a Report of No Distribution is effectively an administrative notice to the bankruptcy court and clerk that the Trustee does not intend to administer anything in the case. It is not equivalent to, or a substitution for, an abandonment an asset, whether or not scheduled.

From the foregoing analysis, it would ordinarily follow that the case should be reopened to administer the claim for the benefit of creditors of Debtor. *See In re Tarrer,* 273 B.R. 724, 732 (Bankr. N.D. Ga. 2001). [*12] Whether that administration would also benefit Debtor remains to be seen. As noted above, Debtor has not scheduled this claim, or any recovery obtained thereon, as property that she can keep as exempt property. Unless she is entitled to exempt the claim, creditors will receive the benefit of any recovery, after payment of fees and expenses of administering the case and pursuing the Litigation, under the distributive provisions of 11 U.S.C. § 726.

The City contends, however, that Debtor's conduct, which the City argues will preclude pursuit of the claim in the Litigation on the ground of judicial estoppel, also requires denial of her motion to reopen the case. Application of the judicial estoppel doctrine to preclude litigation of the claim on the merits appears to be an issue for the District Court in which the claim is pending. *See In re Lewis,* 273 B.R. 739, 747 (Bankr. N.D. Ga. 2001); *In re Tarrer,* 273 B.R. 724, 733 (Bankr. N.D. Ga. 2001). Nevertheless, because the City has raised the issue and because Debtor's conduct in question goes, at least in part, to the administration of her bankruptcy case in this court, it is appropriate [*13] to address the City's argument.

The Eleventh Circuit recently addressed judicial estoppel in the bankruptcy context in *Burnes v. Pemco Aeroplex, Inc.,* 2002 WL 1011339 (11th Cir. May 20, 2002). In that case, the plaintiff debtor had filed an employment discrimination action in federal district court during the pendency of his Chapter 13 case but did not amend his Chapter 13 schedules to disclose the litigation. When he later converted the case to Chapter 7, he again did not disclose the claim on his schedules. No assets were administered in the case and he received a discharge. Thereafter, the district court applied the doctrine of judicial estoppel to bar the plaintiff debtor's claims.

The Eleventh Circuit affirmed with regard to the monetary claims, [10] applying a two part test for the applicability of judicial estoppel announced in *Salomon Smith Barney, Inc., v. Harvey, M.D.,* 260 F.3d 1302, 1308 (11th Cir. 2001). For the doctrine to be applicable, the *Burnes* court ruled, it must be shown (1) that allegedly inconsistent positions were made under oath in a prior proceeding and (2) that such inconsistencies were calculated to "make a mockery of [*14] the judicial system." *Burnes, supra,* at *2. Concluding that the failure to disclose a claim in a bankruptcy case was inconsistent with its assertion in another forum, the court turned to the issue of the plaintiff debtor's intent. *Id* at *3.

10 The court found judicial estoppel inapplicable to the claims for injunctive relief because those requests for relief did not provide the prospect for monetary relief that would have benefited the bankruptcy estate. *Id.* at *7.

On the issue of intent, the court observed that the doctrine of judicial estoppel applies in situations involving intentional contradictions, not simple error or inadvertence. *Id.* at *4. [11] With regard to the issue of judicial estoppel and the omission of assets in a bankruptcy case, the court found that deliberate or intentional manipulation can be inferred from the record and that a debtor's failure to satisfy the statutory duty of disclosure is "inadvertent" only when "in general, the debtor either lacks knowledge [*15] of the undisclosed claims or has no motive for their concealment." *Id.* at *4. [12]

11 The court cited *In re Coastal Plains, Inc.,* 179 F.3d 197, 206 (5th Cir. 1999); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.,* 81 F.3d 355, 362-63 (3d Cir. 1996); *In re Cassidy,* 892 F.2d 637, 642 (7th Cir. 1990); and *American Nat. Bank of Jacksonville v. FDIC,* 710 F.2d 1528, 1536 (11th Cir. 1983).

12 The court quoted the Fifth Circuit's decision in *In re Coastal Plains,* 179 F.3d 197, 210 (5th Cir. 1999).

Applying these standards, the Eleventh Circuit court found that the plaintiff debtor had knowledge of the employment discrimination claims and had a motive for their concealment that required application of the judicial estoppel doctrine. With regard to motive, the court found, *id.* at *6:

> As to motive, it is undisputed that [the debtor] stood to gain an advantage by concealing the claims from the bankruptcy court. [*16] It is unlikely he would have received the benefit of a conversion to Chapter 7 followed by a no asset, complete discharge had his creditors, the trustee, or the bankruptcy court known of a lawsuit claiming millions of dollars in damages.

The court also rejected the debtor's argument that he should be allowed to re-open his bankruptcy case to amend his schedules to include the omitted claim. The court reasoned, *id.* at *6:

> Allowing [the debtor] to back-up, reopen the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets.

The facts here are different from those presented in *Burnes.* As an initial matter, Debtor in the instant case voluntarily disclosed the claim to the Chapter 7 Trustee who is responsible for pursuing it on behalf of creditors and the estate. There was no concealment. Debtor was not "caught" after being challenged. In addition, unlike the [*17] facts as found in *Burnes,* the amendment of

Debtor's schedules after the disclosure would have made no difference in the conduct of this case or the grant of her discharge; her failure to amend did not affect those outcomes, either. [13]

13 These circumstances also distinguish this case from *Scoggins v. Arrow Trucking Co.*, 92 F. Supp2d 1372 (S.D. Ga. 2000) and *Traylor v. Gene Evans Ford, LLC,* 185 F. Supp2d 1338 (N.D. Ga. 2002).

The Debtor's failure to *schedule* the claim is not equivalent to a *concealment* of it, which is the critical concern in the *Burnes* case. Proper bankruptcy practice quite clearly requires proper listing of the claim in the Statement of Financial Affairs and in the Schedule of Assets, [14] but the Federal Rules of Bankruptcy Procedure permit amendments before the case is closed. FED. R. BANKR. P. 1009(a). Debtor should have amended her schedules; having disclosed the claim at her meeting of creditors, she had no reason not to. Moreover, amending [*18] the schedules would be to her advantage because, if the Trustee did nothing with the claim as scheduled, it would be abandoned to her under 11 U.S.C. § 554(c).

14 See Note 2 *supra.*

In any event, although Debtor did not amend her schedules to list the Litigation as a matter of technical bankruptcy pleading, her voluntary disclosure of it to the Chapter 7 Trustee at the § 341 meeting had the same substantive effect of an amendment from the standpoint of the Chapter 7 Trustee's knowledge and duties. The claim was (and is) property of the estate under 11 U.S.C. § 541, and the Trustee had authority to pursue it under FED. R. BANKR. P. 6009. Ultimately, it is the Trustee's duty to investigate the lawsuit as property of the estate -- its merits, its posture, and its value to the estate. Debtor's amendment of her schedules would not have changed the Trustee's knowledge of the claim or his duties.

The record demonstrates that Debtor thought she was complying with all [*19] applicable disclosure requirements when she advised her bankruptcy counsel of the litigation prior to the § 341(a) meeting and when she testified, under oath, about the existence of the Litigation and her understanding of it before the bankruptcy trustee at the § 341 meeting of creditors. The City contends that Debtor was misleading because she did not fully describe the details of her monetary demand and because she expressed her interest in the lawsuit as being limited to reinstatement. The record, however, indicates that the Trustee did not ask for any details about the Litigation. Even if Debtor's responses were somewhat limited, that does not convict her of concealment. It is the responsibility of a Chapter 7 trustee to investigate a potential claim once it is disclosed and to pursue it if there is benefit to the estate in doing so. A bankruptcy trustee should not rely on an individual debtor's ability to determine what relief a debtor is entitled to in litigation any more than competent litigation counsel should accept a client's understanding of the law and facts in framing the client's demand for relief in the litigation. Even a cursory review of the pleadings or discussion [*20] with Debtor's litigation counsel would have made him more aware of the merits and value of the litigation than a brief inquiry of Debtor at the § 341(a) meeting.

Moreover, to this debtor, the *value to her* of the Litigation may in fact be the possibility of reinstatement. What a lawsuit is worth from the perspective of a debtor and from the perspective of a trustee are quite likely two completely different things. Having been notified on the record under oath by the Debtor of the existence of her District Court action, it was incumbent on the Trustee to do more than rely on a layperson or her bankruptcy attorney who does not perform employment discrimination work to determine the value of the lawsuit.

It is not reasonable to expect an individual debtor to understand the extent of her rights to relief or whether such relief can be obtained for her benefit or the estate's. The Court is mindful that the requirements of the legal system, including the bankruptcy court, are overwhelming and intimidating to a layperson. As the court observed in *In re Lewis,* 273 B.R. 739, 747 (Bankr. N.D. Ga. 2001) (Drake, J.), "for better or worse, many debtors are quite naive about [*21] the law, especially the stringent requirements of the bankruptcy system."

Debtor had litigation counsel and bankruptcy counsel who were advising her as to her rights and duties. Had her counsel prepared an amendment to her schedules for her, she would presumably have signed it and it would have been filed, as the Federal Rules of Bankruptcy Procedure authorize. FED. R. BANKR. P. 1009(a). Because counsel did not prepare an amendment, admittedly because of oversight, she justifiably could have concluded that she had no further obligations. It would be patently unfair to attribute counsel's error to Debtor in these circumstances. Her counsel's failure to amend the schedules does not render Debtor's conduct offensive and, in the circumstances of this case, was nothing more than inadvertence on counsel's part. Clearly, neither Debtor nor Debtor's counsel acted with an intentional or manipulative disregard of the legal system.

The fact that, to date, Debtor's claim has not been administered in this case is the responsibility of the Chapter 7 Trustee, who knew of the pendency of the claim early on, not of the Debtor. Given the initial lack of interest by the Chapter 7 Trustee in pursuing [*22] the claim after its disclosure to him, it is impossible to conclude that Debtor's amendment of her bankruptcy papers would have made any difference to date in the administration of this case.

In this regard, the court takes into consideration the important fact that it is the bankruptcy trustee who is the "point person" in a bankruptcy case from the standpoint of administering the case. The court has no discretion to investigate whether a discharge should or should not be granted in the absence of a timely objection to the discharge filed by the Trustee or another party in interest. *See* 11 U.S.C. § 727(a); FED. R. BANKR. P. 4004(c). Thus, a bankruptcy court routinely grants discharges and has no duty or reason to look at the debtor's schedules unless they are relevant in litigation brought before it. Had this claim been shown on Debtor's schedules, either as originally filed or through an amendment, she still would have received a discharge in the usual course unless the Trustee or another party objected. [15] In any event, this Court is not offended by Debtor's conduct in this case and cannot conclude that it has been misled in any way.

15 Debtor's failure to amend her schedules to show the Litigation after she openly disclosed the Litigation at the § 341(a) meeting, in fact, was definitively not in her best interest. At that point, the Trustee knew of the claim and could proceed to administer it, whether or not scheduled. At the same time, Debtor was exposed to an allegation that her discharge should be denied because she had made a false oath in not listing it. *See* 11 U.S.C. § 727(a)(4). Moreover, had she scheduled it and the Trustee declined to pursue the matter, the claim would have been abandoned. 11 U.S.C. § 554(c).

[*23] Based on all of the foregoing, the Court concludes that Debtor did not operate with an intentional or manipulative disregard of the legal system or the bankruptcy processes in this Court. She truthfully and voluntarily disclosed the existence of the Litigation to the Trustee, the person responsible for pursuing it, whether or not it had been scheduled. Her counsel's failure to amend her schedules could not, and did not, gain any advantage for her and, indeed, that failure was actually adverse to her interests. Her counsel has admitted that this failure was inadvertent oversight and there is nothing in the record or this Court's experience that would indicate otherwise.

The Federal Rules of Bankruptcy Procedure are to be construed "to secure the just, speedy, and inexpensive determination of every case and proceeding." FED.R.BANKR.P. 1001. It would not serve the objectives of those Rules to hold that, in these circumstances, Debtor's failure to amend schedules to list a claim that had been voluntarily disclosed to the Chapter 7 Trustee at the § 341(a) meeting of creditors should preclude reopening of the case to correct that failure. To the contrary, because the voluntary disclosure [*24] to the trustee served the same substantive purpose as an amendment, because Debtor did not and could not benefit by the failure to amend, and because the failure is due to inadvertence, the just determination of this case requires reopening so that the claim can be administered.

It is also appropriate to note that application of judicial estoppel to prevent administration of the claim in this case could inflict the remedy of judicial estoppel on parties who had nothing to do with the conduct the remedy is designed to deter, and who should be the beneficiaries of proper disclosure, namely, Debtor's creditors. If there are adverse consequences that a debtor should suffer due to omission of a scheduled claim, there are punishments other than judicial estoppel that can be directed at a debtor, rather than the estate and creditors, such as sanctions under Fed. R. Bankr. P. 9011, revocation of the discharge, or denial of any exemption in the claim and its proceeds. *See In re Lewis,* 273 B.R. 739, 748 (Bankr. N.D. Ga. 2001). In considering application of a discretionary doctrine such as judicial estoppel, the important interests of creditors militate against its application.

[*25] This court cannot, and this Order does not, determine the applicability of the City's judicial estoppel defense in the pending litigation. The analysis above, however, shows that the doctrine does not preclude reopening of this case.

In determining whether to permit a debtor to reopen her case to disclose a pre-petition asset, courts have looked at several factors: the benefit to the debtor; the prejudice to the defendant; and the benefit to the creditors. *E.g., In re Lewis,* 273 B.R. 739, 744 (Bankr. N.D. Ga. 2001) (Drake, J.); *In re Tarrer,* 273 B.R. 724 (Bankr. N.D. Ga. 2001) (Drake, J.). As the court noted in *Lewis,* the first two factors are intertwined because "if reopening the case benefits the debtor, it necessarily prejudices the defendant [and] if not reopening the case benefits the defendant, it necessarily prejudices the debtor." *Lewis,* 273 B.R. at 744. The benefits and detriments arise not so much in the bankruptcy case, however, but in the forum where the claim is pending and the judicial estoppel argument is applicable. If Debtor is permitted to reopen her case, she is no longer advocating inconsistent legal positions [*26] and, therefore, judicial estoppel may not be applicable to the Litigation. Indeed, if the case is reopened, her bankruptcy trustee will be entitled to pursue her claims to the extent they are property of the estate. FED. R. BANKR. P. 6009. On the other hand, if Debtor is barred from reopening her case, the City may well prevail on a judicial estoppel argument and in any event there will be no possibility for her trustee to recover anything for creditors.

The most persuasive factor for this court to weigh is the potential effect a reopening would have on the creditors of Debtor's estate. *See Lewis,* 273 B.R. at 747 ("the persuasive factor for the Court to weigh in deciding whether to reopen this case is not its effect upon the Debtor or upon the [defendants] in a state court forum, but rather the effect a reopening would have on the creditors of the Debtor's estate"); *Tarrer,* 273 B.R. at 735. It is incongruous to punish Debtor's creditors and impair their prospects for a potential recovery in the bankruptcy case in order to improve the City's judicial estoppel argument in District Court. In *In re Daniel,* 205 B.R. 346 (Bankr, N.D. [*27] Ga. 1997) (Murphy, J.), the court observed that reopening a bankruptcy case in order for a debtor to disclose an asset is appropriate even if it deprives a defendant of a judicial estoppel defense. The *Daniel* court noted, *id.* at 349:

> Debtor now seeks to cure her earlier omission and, most significantly, intends to share the fruits of any recovery with her prepetition creditors. Any advantage which Debtor may have gained by omitting the asset from her schedules is eliminated by reopening, amending the schedules and allowing the Chapter 7 Trustee to administer the asset.

In accordance with *Lewis, Tarrer,* and *Daniel,* this Court concludes that the interests of Debtor's creditors override any detriment that the City may sustain as a result of reopening the case and that the Debtor's conduct does not preclude such reopening.

III.

It is proper under the circumstances to allow Debtor to reopen her Chapter 7 case to permit Debtor to disclose the lawsuit against the City of Cartersville by amending her schedules and statement of financial affairs, to permit administration of the claim asserted in the Litigation as property of her bankruptcy estate, [*28] and to otherwise conduct administration of this case as appropriate. Based on the foregoing,

IT IS ORDERED that the Debtor's motion to reopen her bankruptcy case is **GRANTED** and Debtor's case is **REOPENED.**

The Clerk is hereby **directed** to serve a copy of this Order on the Debtor, counsel for the Debtor, counsel for the City of Cartersville, the former Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Rome, Georgia, this 18th day of June, 2002.

PAUL W. BONAPFEL

UNITED STATES BANKRUPTCY JUDGE

LEXSEE 317 B.R. 446, 451

IN RE: CAROLYN DENISE UPSHUR, Debtor.

CASE NO. 03-82229, CHAPTER 7

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

317 B.R. 446; 2004 Bankr. LEXIS 1801

October 15, 2004, Decided

DISPOSITION: Motion to reopen case granted.

COUNSEL: [**1] For Carolyn Denise Upshur, Debtor: Lorna Sills Katica, Katica & Associates LLC, Atlanta, GA.

For Tamara Miles Ogier, Trustee: Ellenberg, Ogier & Rothschild, P.C., Atlanta, GA.

JUDGES: JOYCE BIHARY, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: JOYCE BIHARY

OPINION

[*448] **ORDER**

JUDGE BIHARY

This Chapter 7 case is before the Court on the debtor's motion to reopen the case to add an asset in the form of an employment discrimination claim filed by the debtor in the United States District Court. The debtor seeks to reopen the case so that a Chapter 7 trustee can administer the asset. The defendants in the district [*449] court action oppose debtor's motion to reopen the bankruptcy case, arguing that they have filed a motion to dismiss in the district court in which they contend that the claims are barred by the doctrine of judicial estoppel. They ask the bankruptcy court to defer any ruling on the debtor's motion to reopen until the district court has ruled on their motion to dismiss. After carefully considering the motion to reopen, the objection filed by the district court defendants, the replies filed by both parties, the record of this case and the applicable law, the Court concludes that debtor's motion [**2] to reopen should be GRANTED.

The debtor Carolyn Denise Upshur (hereinafter "Debtor" or "Ms. Upshur") filed a *pro se* Chapter 7 case on November 13, 2003. Tamara Miles Ogier was appointed as the Chapter 7 trustee. With her initial petition, Debtor filed schedules of assets and liabilities. In Schedule B, which includes a listing of personal property, Debtor checked "None" next to the type of property listed as follows:

> 20. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to set off claims. Give estimated value of each.

On November 24, 2003, Ms. Upshur signed a request for notice of right to sue with the Equal Employment Opportunity Commission (EEOC) in which she stated a charge based on race discrimination and disability against National Asset Recovery, Inc. On December 11, 2003, the EEOC issued to Debtor a notice of her right to sue advising her that any claim under Title VII of the Civil Rights Act or the Americans with Disabilities Act must be filed within 90 days of her receipt of the notice or the right to sue based on those charges would be lost. Approximately one month later, on December 26, 2003, Debtor [**3] filed some amendments to her schedules in the bankruptcy case. Among the restated schedules was Schedule B, but Debtor still answered "None" to question No. 20 in Schedule B.

The docket shows that the trustee conducted the first meeting of creditors on January 14, 2004. On February 13, 2004, Debtor resubmitted Schedule C dealing with exempt property and filed a revised Schedule F of creditors holding unsecured claims. She did not file any revised Schedule B to list any claim against National Asset Recovery, Inc. or Trauner, Cohen and Thomas, LLP.

On March 8, 2004, Debtor received a discharge under 11 U.S.C. § 727. It appears from the schedules that she discharged approximately $ 34,000.00 in debt, approximately 45% of which related to medical expenses. [1] On March 22, 2004, the trustee in this bankruptcy case submitted a No Distribution Report indicating that there was no property available for distribution, and the bankruptcy case was closed on June 3, 2004.

1 These amounts are taken from Ms. Upshur's schedules filed with the court. Creditors have not filed proofs of claim in this case, because in no-asset Chapter 7 cases, creditors are advised not to file proofs of claim unless and until it later appears that assets are available to pay creditors, at which time they are sent a notice with a deadline for filing proofs of claims.

[**4] In the meantime, before the trustee filed her report of no assets, Debtor, along with two other plaintiffs, Kimberly Weekes and Hayward Harris, filed a complaint on March 10, 2004, in the United States District Court for the Northern District of Georgia against Trauner, Cohen and Thomas, LLP, and National Asset Recovery, Inc. (the "District Court Defendants"), Civil Action No. 1-04-cv-0686-CC. The [*450] complaint was filed through counsel, Lorna Sills Katica, and alleges claims under Title VII of the Civil Rights Act and the Americans with Disabilities Act, for overtime pay under the Fair Labor Standards Act, for intentional infliction of emotional distress under Georgia law, and alleged violations of the Family Medical Leave Act. On June 8, 2004, during a deposition in the district court action, Debtor acknowledged having filed the instant bankruptcy case and having not disclosed these claims in her schedules or statement of financial affairs. On June 16, 2004, Debtor filed a motion to reopen this bankruptcy case to add the claims as an asset, and the motion was filed through Debtor's counsel in the district court action, Ms. Katica. The District Court Defendants filed a response opposing [**5] the reopening. On June 23, 2004, the District Court Defendants filed a motion to dismiss the claims asserted by Ms. Upshur in the district court on the grounds that she is judicially estopped from asserting the claims by virtue of her failure to disclose the claims in this bankruptcy case.

The motion before the bankruptcy court is the motion by Ms. Upshur to reopen the bankruptcy case to add the claims asserted in the district court as an asset and to appoint a trustee to administer the asset. The motion before the district court is the motion filed by the District Court Defendants to dismiss Ms. Upshur's claims on the grounds of judicial estoppel.

A motion to reopen a bankruptcy case is governed by 11 U.S.C. § 350(b) and Federal Rule of Bankruptcy Procedure 5010. "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." § 350(b). Motions to reopen are made for a variety of reasons, and they can be made by the debtor, the trustee, or any party in interest. Fed. R. Bankr. P. 5010. The decision on whether to reopen a case is within the sound discretion of the bankruptcy court. [**6] *Lopez v. Specialty Restaurants Corporation (In re Lopez)*, 283 B.R. 22, 27 (BAP 9th Cir. 2002); *In re Rochester*, 308 B.R. 596, 600 (Bankr. N.D.Ga. 2004); *In re Daniel*, 205 B.R. 346, 348 (Bankr. N.D.Ga. 1997).

The most common reasons that a debtor might seek to reopen a case are to add a creditor, to file a motion to avoid a judicial lien, or to add an omitted asset. In deciding whether to grant a motion to reopen to add a creditor, courts often look at whether the party affected by the reopening has been prejudiced in some way or whether the debtor was intentionally committing fraud. For example, in *In re Baitcher*, 781 F.2d 1529, 1534 (11th Cir. 1086), when a debtor sought to reopen a bankruptcy case to add a creditor, the Court found the debtor could reopen her Chapter 7 case as long as her failure to list the creditor originally was due to an "honest mistake, not fraud or intentional design.'" *See also Rosinski v. Boyd (In re Rosinski)*, 759 F.2d 539, 541 (6th Cir. 1985). [2] But when the purpose of the motion to reopen is to add an undisclosed asset, the most important consideration is the benefit [**7] to the creditors. *In re Rochester*, 308 B.R. 596, 601 (Bankr. N.D.Ga. 2004)(granting debtor's motion to reopen a Chapter 7 case to schedule undisclosed products liability claims, stating that the potential benefit to creditors appears to be the most important factor in the analysis); *In re Lewis*, 273 B.R. 739, 747 (Bankr. N.D.Ga. 2001)(granting [*451] debtor's motion to reopen to administer an undisclosed interest in a wrongful death action); *See also Daniel*, 205 B.R. 346 (Bankr. N.D.Ga. 1997) (granting debtor's motion to reopen to add undisclosed personal injury claim); *Cf. In re Dewberry*, 266 B.R. 916, 921 (Bankr. S.D.Ga. 2001) (granting debtor's motion to reopen to add an age discrimination claim, stating that "the test for reopening to administer assets is simply whether the administrative expense and inconvenience outweighs the potential benefit to the estate" and "debtor's good faith is irrelevant").

2 Some courts question whether any purpose is served by reopening a case to add an omitted creditor in a no-asset Chapter 7 case, but that debate is not relevant to the instant situation. *See Judd v. Wolfe*, 78 F.3d 110, 115 (3rd Cir. 1996).

[**8] The law governing a motion to reopen a bankruptcy case to administer an undisclosed lawsuit is perhaps best explained in *In re Lopez*, 283 B.R. 22 (9th

Cir. BAP 2002). There, the debtor, Lopez, filed a motion to reopen her Chapter 7 bankruptcy case to add a prepetition sexual harassment claim. The debtor had failed to include anything about the sexual harassment claim against her employer in her bankruptcy filings. In fact, three months before filing bankruptcy, the debtor had signed a form alleging sexual harassment by her employer and requesting authorization to file a lawsuit from the California Department of Fair Employment and Housing. Prior to filing the bankruptcy, she received the right to sue letter from that body, and shortly after filing the bankruptcy petition, Lopez and others filed an action against her employer. Unaware of this action, the Chapter 7 trustee in the bankruptcy case filed a no asset report, a discharge was entered, and the case was closed. The bankruptcy court denied the motion to reopen, and the debtor appealed. The Bankruptcy Appellate Panel reversed the bankruptcy court and held that a potentially valuable asset is a valid ground to [**9] reopen a Chapter 7 case and that a former debtor's alleged bad faith is never a sufficient basis by itself to deny a motion to reopen to schedule an asset that has potential benefit to creditors.

In discussing the applicable law, the *Lopez* Court began by stating that under § 350(b) of the Bankruptcy Code and Bankruptcy Rule 5010, reopening a case is typically ministerial. Although a motion to reopen is addressed to the sound discretion of the bankruptcy court, the court in fact has a duty to reopen the estate whenever there is proof that it has not been fully administered. The proper focus is on the benefit to the creditors, so that if the action has any value, the case should be reopened. The Court in *Lopez* recognized that the sexual harassment claim became property of the bankruptcy estate even though it was not listed on the debtor's schedules, and property that is neither abandoned nor administered by the trustee remains property of the estate after the case is closed.

In a concurring opinion, Judge Klein noted that it has become increasingly popular to raise judicial estoppel as a defense to a lawsuit by a former debtor who failed to schedule the cause of action in [**10] a bankruptcy case. Judicial estoppel is a court developed equitable doctrine, fashioned to protect the integrity of the court system and not the litigants. It precludes "a party . . . from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'" *Billups v. Pemco Aeroples, Inc. (In re Burnes)*, 291 F.3d 1282, 1285 (11th Cir. 2002) (citation omitted). Judge Klein's explanation of why the defense of judicial estoppel to the undisclosed cause of action is problematic is instructive here. The undisclosed cause of action is still property of the estate even after the Chapter 7 bankruptcy case is closed. Property that is not correctly scheduled remains property of the estate forever, until administered [*452] or formally abandoned by the trustee. Thus, in the case of an omitted cause of action, the trustee is the real party in interest and the correct defense is one of standing, i.e., the action is not being prosecuted by the real party in interest which is the trustee, not the debtor. Cases like this must be reopened to permit the trustee to deal with the property of the estate.

Judge Klein correctly notes that the [**11] solution to the problem is to require the parties to return to bankruptcy court for a reopening of the case, to appoint a trustee to deal with the cause of action that is property of the estate, and to allow the trustee to sell the cause of action, prosecute it, settle it or abandon it to the debtor if it is of no value to the estate. But denying the motion to reopen and ignoring the property of the estate problem is not a solution. "The worst thing a bankruptcy court can do is to frustrate the process by refusing to reopen and order the appointment of a trustee who can definitively deal with property of the estate." *Lopez*, at 33.

The legal reasoning in a recent Eleventh Circuit judicial estoppel case is consistent with the reasoning in *Lopez* and supports the reopening of the case at bar. In *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268 (2004), the Eleventh Circuit held that judicial estoppel did not apply to bar a Chapter 7 trustee from pursuing an employment discrimination action previously brought by the debtor, when the debtor did not disclose her interest in the cause of action as an asset on her bankruptcy schedules. The district court had held that judicial [**12] estoppel prevented the trustee from pursuing the action. The Circuit Court reversed the district court, recognizing that the party pursuing the case against Wendy's was not the debtor, but was the trustee who had not made any inconsistent statements to the court.

The complaint in *Wendy's* was for racial discrimination and retaliation under Title VII. The debtor, Ms. Parker, did not disclose the claim in her schedules, and she received a discharge. Ms. Parker's attorney in the discrimination case asked the district court for a continuance of the trial, stating that the bankruptcy trustee needed to be advised of the discrimination action in order to reopen the bankruptcy case as there had been an inadvertent failure to disclose the existence of the case. The Chapter 7 trustee moved to reopen the bankruptcy case to allow for further administration of the asset, the bankruptcy court granted the motion to reopen, and the Chapter 7 trustee moved to intervene in the district court case. When the employer defendants moved to dismiss the employment discrimination case in district court, the Chapter 7 trustee argued that judicial estoppel could not apply because, among other things, it would [**13] result in an injustice to the innocent creditors who could be denied the possibility of actually recovering some money.

Reversing the district court, the Eleventh Circuit reviewed some fundamental concepts under bankruptcy law, including the following:

1. When a bankruptcy case is filed, virtually all of the debtor's assets vest in the bankruptcy estate. 11 U.S.C. § 541(a)(1). Such property includes causes of actions belonging to a debtor at the commencement of a case.

2. A trustee is the only proper party in interest with standing to prosecute causes of action belonging to the estate. 11 U.S.C. § 323.

3. Under 11 U.S.C. § 554, once an asset becomes part of the bankruptcy estate, the debtor's rights in the asset are extinguished unless the asset is abandoned back to the debtor.

[*453] 4. When a bankruptcy case is closed, property of the estate that is not abandoned under § 554 and that is not administered in the bankruptcy proceeding remains property of the estate. § 554(d).

5. When an interest or claim is not listed on a bankruptcy schedule, and the case is closed, that interest or claim remains in the bankruptcy [**14] estate.

Id., at 1272.

Recognizing these basic principles, the *Wendy's* Court held that the discrimination claim was an asset of the bankruptcy estate, that the trustee was the real party in interest in the discrimination suit, that he had never abandoned the claim, and thus could not be judicially estopped from pursuing it. These are the same legal principles recognized in *Lopez*, where the Ninth Circuit Bankruptcy Appellate Panel held that the bankruptcy court had to reopen the estate so a trustee could deal with the claim.

Prior to *Wendy's*, the Eleventh Circuit issued two opinions addressing when and whether the doctrine of judicial estoppel precludes a lawsuit based on a claim that was not disclosed in a plaintiff's Chapter 7 bankruptcy case. *Billups v. Pemco Aeroples, Inc. (In re Burnes)*, 291 F.3d 1282 (11th Cir. 2002); *Barger v. City of Cartersville*, 348 F.3d 1289, 1293-94 (11th Cir. 2003). [3] In both *Burnes* and *Barger*, the Court found that judicial estoppel precluded the debtor from pursuing employment discrimination claims for monetary relief, [4] and in *Burnes* the Court suggested that debtors should [**15] not be permitted to reopen their cases to add previously undisclosed lawsuits. However, in *Wendy's*, the Court held that the application of judicial estoppel in *Burnes* was questionable and that the more appropriate defense in *Burnes* was that the debtor lacked standing. *Barger* relied on *Burnes*, and so the application of judicial estoppel there is equally questionable. Interestingly, the Court in *Barger* acknowledged that the trustee was the real party in interest and had exclusive standing to assert any claim, but went on to apply judicial estoppel without considering some of the relevant principles of bankruptcy law.

3 In *DeLeon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11th Cir. 2003), the Court extended *Burnes* to plaintiffs who had filed Chapter 13 cases.

4 In both *Burnes* and *Barger*, the Eleventh Circuit limited the application of judicial estoppel to claims for monetary relief and allowed the debtor's undisclosed claims for injunctive relief to proceed.

[**16] Following *Lopez* and the reasoning in *Wendy's*, this Court concludes that a motion to reopen a Chapter 7 case to add undisclosed claims should generally be granted so that the claim can either be liquidated for the benefit of creditors or released from the estate. If the case is not reopened and the claim belongs to the estate, then the non-bankruptcy action brought by the debtor as plaintiff has to be dismissed on the ground of standing. The only way the proper party can be brought into the action is to reopen the bankruptcy case to see if the trustee wishes to intervene. If the case is reopened and the trustee intervenes, then under *Wendy's*, judicial estoppel will generally not apply. The exception might be if the trustee recovered more than the amount necessary to satisfy all creditors. In that event, the defendants could invoke judicial estoppel to try to limit any monetary recovery to the amount needed to satisfy creditors and the trustee's expenses. This possibility was recognized by the Court in *Wendy's. Id.*, at 1273 n.4. If, on the other hand, the trustee chooses to abandon the asset to the debtor, then the district court could consider [*454] whether the facts warrant [**17] the application of judicial estoppel to preclude the debtor from pursuing the claim. But if the bankruptcy court refuses to reopen the case to allow the trustee to make a decision whether to pursue the asset for the benefit of creditors or whether it is of limited value and should be abandoned back to the debtor, then the property of the estate problem identified in *Lopez* remains and the claim cannot be dealt with definitively.

The District Court Defendants contend that the bankruptcy court should defer any ruling on the debtor's motion to reopen until the district court rules on their judicial estoppel argument. This contention is without merit. Procedurally, the motion to reopen should be decided first by the bankruptcy court. Again, this is because there is currently an unadministered asset which must either be abandoned or administered. It will then be up to the district court to decide if judicial estoppel should be applied.

In summary, the Court concludes that further administration is warranted in this case. The motion to reopen is granted, and the United States Trustee is directed to order the appointment of a Chapter 7 trustee to administer this asset. The Chapter 7 [**18] trustee should investigate whether the action has value, decide whether to prosecute, resolve it, or abandon it. If it appears the estate may have any assets, the Chapter 7 trustee can request a bar date for creditors to file claims.

By reopening this bankruptcy case, the Court is not making any findings with respect to Debtor's good faith, whether Ms. Upshur understood her disclosure obligations, or whether Ms. Upshur intentionally omitted the claim from her schedules. These factual issues are relevant to a judicial estoppel argument which is or will be before the district court, not the bankruptcy court. The debtor's lack of good faith would not be a sufficient ground to deny this motion to reopen; again, the key issue here is the benefit to creditors. [5] In granting this motion to reopen, the Court is also not making any findings as to whether Ms. Upshur's claims pending in the district court have any merit. As the Court noted in *Lopez*, the decision whether to reopen a bankruptcy case cannot and "should not become a battleground for litigation on the underlying merits." *Lopez*, 283 B.R. at 28 (citation omitted).

5 If the trustee abandons the claim here or if the trustee recovers more than is necessary to pay creditors and the district court is asked to apply the judicial estoppel doctrine to bar any monetary recovery by Ms. Upshur as a result of her nondisclosure in this bankruptcy case, then the parties might find it helpful to determine what Ms. Upshur told the original Chapter 7 trustee and what was said at the first meeting of creditors on the subject of contingent claims.

[**19] Finally, in Debtor's response, she asks for an award of attorneys fees against the District Court Defendants for responding to the pleadings in opposition to the motion to reopen. This request is DENIED.

IT IS SO ORDERED, this 15th day of October, 2004.

JOYCE BIHARY

UNITED STATES BANKRUPTCY JUDGE

LEXSEE 978 F.2D 555, 557

ALAN HAY, WILLIAM HAY, and DESERT MOUNTAIN FOREST PRODUCTS, INC., a Montana corporation, Plaintiffs-Appellants, v. FIRST INTERSTATE BANK OF KALISPELL, N.A., KALTANA CORPORATION, a Montana corporation, and DONALD WHALEY, Defendants-Appellees.

No. 91-35811

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

978 F.2d 555; 1992 U.S. App. LEXIS 28277; Bankr. L. Rep. (CCH) P75,009; 92 Cal. Daily Op. Service 8946; 92 Daily Journal DAR 14800

October 9, 1992 *, Submitted, San Francisco, California

* Pursuant to Ninth Circuit Rule 34-4, the panel unanimously finds this case suitable for disposition without oral argument.

November 2, 1992, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Montana, Missoula Division. D.C. No. CV 89-79-M-CCL. Charles C. Lovell, District Judge, Presiding.

COUNSEL: Stephen M. Barrett, Kirwan & Barrett, Bozeman, Montana, for the plaintiffs-appellants.

C. Eugene Phillips, Murphy, Robinson, Heckathorn & Phillips, Kalispell, Montana, for defendant-appellee First Interstate Bank of Kalispell, N.A.

Richard DeJana, Kalispell, Montana, for defendants-appellees Kaltana Corporation and Donald Whaley.

JUDGES: Before: Jerome Farris, Edward Leavy, and Stephen S. Trott, Circuit Judges.Opinion by Judge Farris.

OPINION BY: FARRIS

OPINION

[*556] OPINION

FARRIS, Circuit Judge:

Desert Mountain Forest Products, Inc., appeals a grant of summary judgment entered on behalf of defendants First Interstate Bank of Kalispell, Kaltana Corporation, and Donald Whaley, in Desert Mountain's action for "bad faith," breach of contract, and civil conspiracy. Desert Mountain acknowledges that its action is an asset of its bankruptcy estate, but argues that the equities favor its proceeding for the benefit of creditors whose shares of the estate may thereby be enhanced. We understand but reject the argument.

BACKGROUND

Between March 1985 and December [**2] 1986, Desert Mountain and First Interstate entered into more than twenty loan transactions. During the course of their business relationship, First Interstate advised Desert Mountain to retain the services of Donald Whaley of Kaltana Corporation to assist Desert Mountain in preparing an application for long-term financing. After paying Kaltana $ 36,000 for its services, Desert Mountain obtained the services of another loan packager. Kaltana then resigned. Three days later, Desert Mountain was notified that its loan application had been rejected.

On December 24, 1986, Desert Mountain petitioned for relief in the United States Bankruptcy Court, filing for a Chapter 11 reorganization. Desert Mountain listed First Interstate as a secured creditor and Kaltana as an unsecured creditor in the schedules accompanying its statement of financial affairs. The schedules did not list as an asset any claim or counterclaim against First Interstate, Kaltana, or Whaley.

Desert Mountain filed: 1) a Plan of Reorganization on July 17, 1987, and 2) a Disclosure Statement on July 20, 1987. An Amended Disclosure Statement and an Amended Plan were filed on January 15, 1988. First Interstate and Desert Mountain [**3] negotiated a settlement of First Interstate's secured claim, which settlement was approved by the bankruptcy court on March 9, 1988.

On March 29, 1988, a Second Amended Plan and an addendum to the Disclosure Statement were filed. The Amended Disclosure Statement was approved March 30, 1988. The Second Amended Plan was approved on May 4, 1988. On August 17, 1988, a Final Decree issued, closing the bankruptcy case.

Sometime during the course of the bankruptcy, Alan Hay, President of Desert Mountain, discovered that Kaltana was deeply indebted to First Interstate at the time that Desert Mountain was "advised" by the Bank to hire Kaltana. This led Hay to reflect on the events of 1986 and to conclude, in April of 1988, that the Bank and Kaltana had "taken advantage" of Desert Mountain.

As a result of Hay's discovery, Desert Mountain filed the present action in the United States District Court for the District of Montana on May 3, 1989. The complaint set forth several causes of action, [*557] each of which arose out of events that occurred either prior to, or during the pendency of, the Desert Mountain bankruptcy.

On October 30, 1990, a United States magistrate judge recommended summary judgment [**4] on behalf of all the defendants. The district court reviewed the magistrate judge's findings and recommendations de novo and granted summary judgment on behalf of the defendants in its Opinion and Order of April 15, 1991.

DISCUSSION

We review de novo a grant of summary judgment. *Jones v. Union Pacific R.R.,* 968 F.2d 937, 940 (9th Cir. 1992); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 629 (9th Cir. 1987). The proper inquiry is whether, viewing the evidence in a light most favorable to the nonmoving party, there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. *Federal Deposit Ins. Corp. v. O'Melveny & Meyers,* 969 F.2d 744, 747 (9th Cir. 1992).

The record establishes that plaintiff Alan Hay learned of the facts that led to the discovery of Desert Mountain's claims sometime during the month preceding the month in which Desert Mountain's reorganization plan was confirmed. This was some four months prior to the close of the bankruptcy case.

We recognize that *all* facts were not known to Desert [**5] Mountain at that time, but enough was known to require notification of the existence of the asset to the bankruptcy court. *See generally,* Fed. R. Bankr. P. 1007(b)(1) (debtor must file a schedule of assets and liabilities and a statement of financial affairs); Fed. R. Bankr. P. 1009(a) (schedules may be amended as a matter of course before case is closed); 11 U.S.C. § 1125(b) (1988) (debtor must provide claimants with a disclosure statement containing "adequate information"); *Monroe County Oil Co. v. Amoco Oil Co.,* 75 Bankr. 158, 162 (S.D. Ind. 1987) ("Among other things, the debtor must disclose any litigation likely to arise in a nonbankruptcy context" (internal quotation omitted)).

Failure to give the required notice estops Desert Mountain and justifies the grant of summary judgment to the defendants. *See Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 417 (3rd Cir.) (citing with approval *Monroe County Oil,* 75 Bankr. at 162), *cert. denied,* 488 U.S. 967, 102 L. Ed. 2d 532, 109 S. Ct. 495 (1988).

We make no ruling on the rights of the creditors themselves [**6] to move to reopen the bankruptcy proceedings.

AFFIRMED.

In the Matter of: David Marvin SWIFT, doing business as State Farm Insurance Companies, Debtor. STATE FARM LIFE INSURANCE COMPANY, Appellant, v. David Marvin SWIFT, Appellee.

No. 96-50917.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

129 F.3d 792; 1997 U.S. App. LEXIS 34313; Bankr. L. Rep. (CCH) P77,572; 12 Tex. Bankr. Ct. Rep. 22

December 8, 1997, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Texas. SA-96-CV-917. H. F. Garcia, US District Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For STATE FARM LIFE INSURANCE COMPANY, Appellant: Laurie A. Weiss, Fulbright & Jaworski, San Antonio, TX.

For DAVID MARVIN SWIFT, Appellee: Charles M. Jefferson, Robert E. Golden, San Antonio, TX.

JUDGES: Before WISDOM, JOLLY and EMILIO M. GARZA, Circuit Judges.

OPINION BY: WISDOM

OPINION

[*794] WISDOM, Circuit Judge:

This bankruptcy case presents a complex issue of ownership of causes of action against the State Farm Insurance Co. (State Farm) for its alleged negligence and breach of fiduciary duty that resulted in the loss of a bankruptcy exemption claimed by David Swift, the debtor. We hold that the causes of action became property of the bankruptcy estate but are exempt under Tex. Prop.Code § 42.0021. We AFFIRM the district court's decision.

I.

Swift was a State Farm insurance agent who participated in a Keogh retirement plan administered by State Farm. [1] In 1986, Congress substantially revised the federal tax code. As of February 1990, State Farm had not amended its Keogh plan to comply with the new laws. In February 1990, Swift contemplated filing bankruptcy. Fearing that his Keogh plan would not qualify as exempt property under the Texas bankruptcy exemptions, Swift converted his Keogh plan into a self-directed Individual Retirement Account (IRA).

1 A Keogh plan is a retirement plan for self-employed individuals that was authorized by the Self-Employed Individuals Tax Retirement Act of 1962. Bittker and Lokken, *Federal Taxation of Income, Estates, and Gifts* (2d ed.) P 62.2 (1990). This plan allows the self-employed taxpayer to deduct certain contributions made to qualifying retirement plans from the taxpayer's annual tax return. It also allows for the deferral of taxes on the contributions and the gains attributable to the retirement plan until such time as the taxpayer receives a distribution from the plan. *See id.* at P 61.1.1.

[**2] On or about March 1, 1990, Swift filed a voluntary petition for bankruptcy under Chapter 7. Swift elected to take the Texas bankruptcy exemptions. [2] He asserted that his IRA valued at $ 126,798.02 at that time, was exempt. [3] Two creditors objected. The bankruptcy court found that the IRA was not exempt and, therefore, was part of the estate available for distribution to Swift's creditors. [4] The bankruptcy court also denied discharge [*795] of the creditors' claims against Swift because it found that Swift transferred, concealed, or disposed of property within one year of filing bankruptcy with the intent to hinder, delay, or defraud creditors. [5] We affirmed the denial of discharge. [6]

2 *See* 11 U.S.C. § 522(b)(1).

3 Tex. Prop.Code. Ann. § 42.0021 (West 1997).