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## Recent Developments in Estoppel and Preclusion Doctrines in Consumer Bankruptcy Cases; Volume I of II: Estoppel

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# RECENT DEVELOPMENTS IN ESTOPPEL AND PRECLUSION DOCTRINES IN CONSUMER BANKRUPTCY CASES; VOLUME I OF II: ESTOPPEL \*

K.M. LEWIS \*\* & PAUL M. LOPEZ \*\*\*

Since the last major article on estoppel and preclusion doctrines in bankruptcy law was released in 2005,<sup>1</sup> courts have issued a number of decisions that have affected the operation of estoppel and preclusion principles in consumer bankruptcy cases. If practitioners do not keep abreast of these developments, they run the risk that unclear language in

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Kevin would additionally like to thank his family, friends, and former professors, as well as Paul, Karen, and Judge Lynn for supporting him throughout the article-writing process. He dedicates this article to the memory of Michele Gustafson.

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1. See Christopher Klein et al., *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 AM. BANKR. L.J. 839 (2005); see also, e.g., Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1 (2005); David Gray Carlson, *The Res Judicata Worth of Illegal Bankruptcy Reorganization Plans*, 82 TEMP. L. REV. 351 (2009); James D. Walker, Jr. & Amber Nickell, *Judicial Estoppel and the Eleventh Circuit Consumer Bankruptcy Debtor*, 56 MERCER L. REV. 1115 (2005); Robert F. Dugas, Note, *Honing a Blunt Instrument: Refining the Use of Judicial Estoppel in Bankruptcy Nondisclosure Cases*, 59 VAND. L. REV. 205 (2006); Eric Hilmo, Note, *Bankrupt Estoppel: The Case for a Uniform Doctrine of Judicial Estoppel As Applied Against Former Bankruptcy Debtors*, 81 FORDHAM L. REV. 1353 (2012); Steven Jackson, Comment, *Heavy Backpacks: Res Judicata and Appropriate Notice to Creditors During a Student Loan Discharge in Bankruptcy*, 12 U. PA. J. BUS. L. 235 (2009).

court filings or inadvertent (or advertent) omissions at the beginning of a bankruptcy case will return to haunt both them and their clients. This danger is especially acute in the bankruptcy context because estoppel and preclusion are partially uncodified common law doctrines. As such, they are easily overlooked by bankruptcy practitioners, who are understandably accustomed to working within a closed statutory code.<sup>2</sup>

It is not enough, however, to know that these doctrines exist; the practitioner must also understand the nuances of each and the differences between them.<sup>3</sup> Each has distinct elements, and different policies and theories underlie them. The failure to distinguish between varieties of estoppel or preclusion in court filings may result in the court applying a doctrine that the litigant did not intend to plead.<sup>4</sup>

This article, presented in two volumes, canvasses post-2005 consumer<sup>5</sup> bankruptcy decisions on the subjects of judicial estoppel, equitable estoppel, claim preclusion (also known as *res judicata*<sup>6</sup>), and issue preclusion (also known as collateral estoppel<sup>7</sup>). The former two doctrines will be discussed in this volume; the latter two will be discussed in a future volume. The article will treat each preclusive doctrine in a separate part. Each part will first define the doctrine and distinguish it from similar but distinct doctrines and then briefly summarize cases of interest. Each part will conclude with important takeaways not only for attorneys who practice in the field of consumer bankruptcy, but also for nonbankruptcy attorneys representing consumers who have gone through bankruptcy, are currently in bankruptcy, or who may declare bankruptcy in the future. Where possible

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2. See Klein et al., *supra* note 1, at 839-40.

3. “Incantations such as *res judicata*, *collateral estoppel*, *judicial estoppel*, or *equitable estoppel*, often lead courts into summary resolution of actions without being precise about the niceties of the doctrines being invoked. Imprecision, while expedient, tends to produce unfortunate consequences in the case at hand and future actions.” *Id.* at 839.

4. See Sharpe v. Wells Fargo Home Mortg. (*In re Sharpe*), 391 B.R. 117, 164 (Bankr. N.D. Ala. 2008) (“The plaintiffs do not identify the type of estoppel the Court should apply. There are many. Based on the complaint, the Court presumes it is one of the two most frequently raised. Those are ‘judicial estoppel’ and ‘equitable estoppel.’”).

5. For recent developments on these topics in the field of corporate bankruptcy, see *Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009); *Jones v. Estate of Cole*, 483 F. App’x 468 (10th Cir. 2012); *Adelphia Recovery Trust v. HSBC Bank USA* (*In re Adelphia Recovery Trust*), 634 F.3d 678 (2d Cir. 2011); *Logan Med. Found., Inc. v. Hayflich & Steinberg* (*In re Logan Med. Found., Inc.*), 346 B.R. 184 (Bankr. S.D. W.Va. 2006).

6. CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 722-23 (5th ed. 1994) (citing D. Allan Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U. L.J. 29 (1964)).

7. *Id.* (citing Vestal, *supra* note 6).

and appropriate, the article offers theories for reconciling doctrinal divisions and suggestions for reform.

### I. Judicial Estoppel

#### A. Definition

Judicial estoppel, also known as the “*doctrine of the conclusiveness of the judgment*”<sup>8</sup> or the “*doctrine of preclusion of inconsistent positions*,”<sup>9</sup> is a “judicially created doctrine” that “seeks to prevent a litigant from asserting a position that is inconsistent with one asserted in the same or a previous proceeding.”<sup>10</sup> If a party takes an inconsistent position in the same or a prior proceeding,<sup>11</sup> and a court had previously adopted the former position, then an opposing party can raise judicial estoppel as a defense or the court may dismiss the case sua sponte.<sup>12</sup>

Judicial estoppel differs in relevant respects from claim preclusion, commonly known as *res judicata*. Whereas claim preclusion is “designed to protect the finality of judgments,” judicial estoppel “is concerned not with the repose of individual claims but with the ability of courts to render their

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8. BLACK’S LAW DICTIONARY 554 (9th ed. 2009) (emphasis added).

9. *Id.* (emphasis added). “Judicial estoppel” is by far the most common of these three terms, and it is also the shortest and most convenient. Accordingly, this article will use that term to the exclusion of the other two.

Note, however, that in a few jurisdictions the doctrine of inconsistent positions is a distinct doctrine that “is broader than judicial estoppel and may apply to positions taken outside of litigation.” *Timberland Bancshares, Inc. v. Garrison (In re Garrison)*, 462 B.R. 666, 683 (Bankr. W.D. Ark. 2011) (citation omitted).

10. *E.g.*, *Price v. Kuchaes*, 950 N.E.2d 1218, 1227 (Ind. Ct. App. 2011) (quoting *Morgan Cnty. Hosp. v. Upham*, 884 N.E.2d 275, 280 (Ind. Ct. App. 2008)). For the historical development of judicial estoppel, see Dugas, *supra* note 1, at 211-16.

11. “[Judicial estoppel] is not only limited to asserting inconsistent positions in the same litigation, but also is appropriate to bar litigants from making incompatible statements in two different cases.” *Schneider v. Unum Life Ins. Co. of Am.*, No. CV 05-1402-PK, 2008 WL 109065, at \*4 (D. Or. Jan. 8, 2008) (citation omitted).

The more common approach is to allow the application of judicial estoppel in either the same proceeding or a prior one, but some courts hold that judicial estoppel can apply only in a later proceeding. *See In re Shethi*, 389 B.R. 588, 607 (Bankr. N.D. Ill. 2008); *Beiner & Chapman, supra* note 1, at 68-69 (contending that judicial estoppel makes more sense in the context of alleged inter-case inconsistencies than intra-case inconsistencies).

12. William Houston Brown et al., *Debtors’ Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197, 197-202 (2001); *see also In re Boates*, No. Civ.A. 05-4353, 2006 WL 166569, at \*3 (E.D. Pa. Jan. 23, 2006) (citing *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 121-22 (3d Cir. 1992)); Dugas, *supra* note 1, at 208.

decisions based on faithful representations by counsel.”<sup>13</sup> “[T]he doctrine of judicial estoppel has broader preclusive effects than . . . issue preclusion,” insofar as judicial estoppel “bar[s] not only an inconsistent position with respect to [a legal issue] but also all successive claims inconsistent with that representation.”<sup>14</sup>

“[N]o single or uniform set of judicial estoppel elements exists” at present.<sup>15</sup> In *New Hampshire v. Maine*,<sup>16</sup> a nonbankruptcy case, the Supreme Court established “several factors [that] typically inform the decision whether to apply the doctrine in a particular case,”<sup>17</sup> be that case a bankruptcy case or otherwise:

1. a party has taken a position in a legal proceeding that is “clearly inconsistent”<sup>18</sup> with a position that party has taken previously in either the same or a separate legal proceeding;

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13. *Adelphia Recovery Trust v. HSBC Bank USA (In re Adelphia Recovery Trust)*, 634 F.3d 678, 697 (2d Cir. 2011). One commentator wrote:

Among the various preclusive doctrines, that of *res judicata* [also known as claim preclusion] is most similar to judicial estoppel, though there are important distinctions. Unlike *res judicata*, judicial estoppel does not require a “final judgment” in a prior proceeding to be invoked. Likewise, the doctrine is often invoked where the estopped party’s prior inconsistent position was advanced in a nonjudicial proceeding. Judicial estoppel may bar subsequent litigation even where the preceding legal action was unrelated to the present case. Thus, unlike *res judicata*, nonparties with no expressed interest in the prior litigation may invoke judicial estoppel in the second proceeding.

Hilmo, *supra* note 1, at 1359-60 (citations omitted).

14. Hilmo, *supra* note 1, at 1358-59 (citations omitted) (internal punctuation omitted).

15. Brown et al., *supra* note 12, at 199; accord Alec P. Ostrow, *Nondisclosure as a Basis for Judicial Estoppel in Bankruptcy, or Estop Me If You Haven’t Heard This Before*, in *NORTON ANNUAL SURVEY OF BANKRUPTCY LAW* 123, 142 (William L. Norton, Jr. ed., 2011 ed.) (claiming “there are no universally accepted elements of the [judicial estoppel] doctrine”); Dugas, *supra* note 1, at 209 (“[T]he doctrine of judicial estoppel stands for different principles in different jurisdictions.”).

16. 532 U.S. 742 (2001).

17. *Id.* at 750.

18. For a helpful analysis of what it means for two positions to be clearly inconsistent, see *Cotter v. Skylands Cmty. Bank (In re Cotter)*, Bankr. No. 08-12504, Adversary No. 11-01619, 2011 WL 5900811, at \*6-7 (Bankr. D.N.J. Oct. 24, 2011).

In the context of the inconsistent position element, some courts have stated that “if the statements or positions in question can be reconciled in some way, estoppel does not apply.” *Negron v. Weiss*, No. 06-CV-1288(CBA), 2006 WL 2792769, at \*4 (E.D.N.Y. Sept. 27, 2006) (citing *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72-73 (2d Cir. 1997)).

2. that 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;’” and

3. that party “would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”<sup>19</sup>

Despite articulating this list of factors, the Supreme Court conceded that “[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.”<sup>20</sup> The Court therefore emphasized: “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.”<sup>21</sup> As a result, some circuits consider additional elements in the bankruptcy context.<sup>22</sup> The most common additional elements are whether the party’s assertion of an inconsistent position was inadvertent,<sup>23</sup> and whether “the facts at issue are the same in both cases.”<sup>24</sup> Other circuits

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19. *New Hampshire*, 532 U.S. at 750-51 (citations omitted).

20. *Id.* at 750 (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)).

21. *Id.* at 751; *accord Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002).

22. *See, e.g., Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012) (citing *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc) (adding the element of advertence); *Mayer v. Walgreen Co.*, No. 08 CV 5105, 2009 WL 1312957, at \*3 (N.D. Ill. May 11, 2009) (citing *United States v. Christian*, 342 F.3d 744, 747 (7th Cir. 2003)) (adding the element that the facts at issue must be the same in both cases); *Stramiello-Yednak v. Perl*, No. Civ.A. 05-517, 2006 WL 1158123, at \*3 (W.D. Pa. Apr. 28, 2006) (citing *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 319 (3d Cir. 2003)) (adding the element that “no less sanction would adequately remedy the damage done by the litigant’s misconduct”). *But see Arkison v. Ethan Allen, Inc.*, 160 P.3d 13, 17 (Wash. 2007) (Sanders, J., concurring) (“The three core factors as set forth by the United States Supreme Court and relied on by the majority supply all the elements a trial court needs to determine whether judicial estoppel applies. Rather than crafting additional considerations, trial courts should simply rely upon these three factors to guide their analysis.”).

23. *See, e.g., Love*, 677 F.3d at 261 (citing *Reed*, 650 F.3d at 574).

24. *Mayer*, 2009 WL 1312957, at \*3 (citing *Christian*, 342 F.3d at 747); *see also Biggs v. AM Gen., LLC*, No. 3:07-CV-28 JVB, 2008 WL 1957864, at \*3 (N.D. Ind. May 1, 2008); *Swearingen-El v. Cook Cnty. Sheriff’s Dep’t*, 456 F. Supp. 2d 986, 990 (N.D. Ill. 2006); *accord Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 793 (D.C. Cir. 2010) (“There must be a discernible connection between the two proceedings. . . . [A] court may not invoke judicial estoppel against a party who has engaged in misconduct in a separate proceeding if that

inquire whether “the risk of inconsistent results with its impact on judicial integrity is certain.”<sup>25</sup> Still other courts, particularly in the Third Circuit, follow the additional requirement that judicial estoppel may not be employed “unless it is tailored to address the harm identified and no less sanction would adequately remedy the damage done by the litigant’s misconduct.”<sup>26</sup> In some jurisdictions, such as the Fourth Circuit, “the position sought to be estopped must be one of fact rather than law or legal theory.”<sup>27</sup>

Unlike equitable estoppel,<sup>28</sup> judicial estoppel is intended to protect the integrity of the judicial system, not the litigants.<sup>29</sup> Accordingly, whether any party “relie[s] on [the position advanced by the party sought to be estopped] is irrelevant because detrimental reliance is not a required element of judicial estoppel.”<sup>30</sup>

Interestingly, several circuits and districts, at least in the bankruptcy context, have occasionally *eliminated*, or at least diminished the importance of, some of the elements set forth by the Supreme Court in *New Hampshire*, particularly the “unfair advantage”/“unfair detriment” prong.<sup>31</sup> Eliminating

proceeding is unrelated to the current proceeding.”). *But see* *Hansford v. Bank of Am.*, Civ. Action No. 07-4716, 2008 WL 4078460, at \*9 n.5 (E.D. Pa. Aug. 22, 2008) (“[B]ecause the doctrine aims to protect the court’s interest, rather than any individual party’s, it is *not* necessary that the two proceedings . . . be related . . .” (emphasis added)).

25. *Adelphia Recovery Trust v. HSBC Bank USA (In re Adelphia Recovery Trust)*, 634 F.3d 678, 696 (2d Cir. 2011) (quoting *DeRosa v. Nat’l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010)).

26. *Stramiello-Yednak*, 2006 WL 1158123, at \*3 (citing *Krystal*, 337 F.3d at 319); *accord Hansford*, 2008 WL 4078460, at \*10 (citing *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 779-80 (3d Cir. 2001)); *In re Boates*, No. Civ.A. 05-4353, 2006 WL 166569, at \*3 (E.D. Pa. Jan. 23, 2006) (citing *Montrose*, 243 F.3d at 784-85).

27. *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996) (citations omitted).

28. *See infra* Part II.

29. *E.g.*, *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, 698 F.3d 231, 235 (5th Cir. 2012) (citing *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 205 (5th Cir. 1999)).

30. *Hancock Bank v. Bates (In re Bates)*, Bankr. No. 09-51279-NPO, Adversary No. 09-05092-NPO, 2010 WL 2203634, at \*14 (Bankr. S.D. Miss. May 27, 2010).

31. *See* *Beiner & Chapman, supra* note 1, at 11-12 (citing *Wakefield v. SWC Sec., Inc. (In re Wakefield)*, 293 B.R. 372, 378 (N.D. Tex. 2003)); *see also* *Guay v. Burack*, 677 F.3d 10, 16-17, 19 (1st Cir. 2012); *Rodal v. Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 118 (2d Cir. 2004); *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1293-94 (11th Cir. 2003); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002); *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002).

*But see Oparaji*, 698 F.3d at 235 (noting that judicial estoppel is “particularly” appropriate “where ‘intentional self-contradiction is being used as a means of obtaining

or deemphasizing this element has some logical appeal, even if doing so is in tension with binding Supreme Court precedent and has been derided by some commentators.<sup>32</sup> If the purpose of judicial estoppel is to protect the courts rather than the litigants, then it seems somewhat irrelevant whether any of the litigants have been unfairly disadvantaged or harmed.<sup>33</sup>

More troublingly, some courts have applied judicial estoppel without considering the element of judicial acceptance.<sup>34</sup> If judicial estoppel is intended to preserve the integrity of the courts, then it seems incredibly problematic to prevent a litigant from having her day in court without considering whether a court has accepted an inconsistent opinion made by that litigant.

State courts sometimes have idiosyncratic sets of judicial estoppel elements; this can make the question of whether the court should apply federal or state law in any given case particularly important.<sup>35</sup>

Given the foregoing, this article's first takeaway is that practitioners should not necessarily feel restricted by the way that courts in their jurisdiction have defined the elements of judicial estoppel. In other words, if a particular element would particularly help or harm one's case, and if there is a good faith legal argument for adopting it in the case at hand,<sup>36</sup> the practitioner should not hesitate to respectfully request that the court consider or disregard that element in the interests of equity and tailor the doctrine to the particular facts of each case.

Given the looseness of the judicial estoppel inquiry, courts considering whether to dismiss a claim on judicial estoppel grounds are typically guided by policy considerations. These include (1) "preserv[ing] the sanctity of litigants' oaths," (2) avoiding inconsistent results or multiple recoveries, (3)

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*unfair advantage* in a forum provided for suitors seeking justice'" (emphasis added) (quoting *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008)); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362-64 (3d Cir. 1996); *Beiner & Chapman*, *supra* note 1, at 20 (citing *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006) as an example of a case retaining the unfair advantage/unfair detriment element).

32. See *Beiner & Chapman*, *supra* note 1, at 11-12.

33. See *Hilmo*, *supra* note 1, at 1377.

34. See *Thompson v. O'Bryant*, No. 08 C 68, 2008 WL 1924954 (N.D. Ill. Apr. 30, 2008).

35. See, e.g., *Garcia v. BNSF Ry. Co.*, 387 S.W.3d 763, 766 n.1 (Tex. Ct. App., Feb. 22, 2012); *Markley v. Markley*, 198 P.2d 486, 491 (Wash. 1948) (listing six factors). See generally *Hilmo*, *supra* note 1.

36. See FED. R. BANKR. P. 9011(b)-(c); FED. R. CIV. P. 11(b)-(c). Hereinafter, "RULE" or "RULES" shall refer to the Federal Rules of Bankruptcy Procedure, while the Federal Rules of Civil Procedure will be cited as normal.

preventing litigants from misleading courts, (4) preventing litigants “from using the judicial system for undeserved personal gain,” and (5) “minimiz[ing] the misuse of judicial resources.”<sup>37</sup>

Pleading in the alternative generally does not trigger judicial estoppel.<sup>38</sup> “[I]t is *winning*, twice, on the basis of incompatible positions’ that offends the doctrine.”<sup>39</sup>

In some circuits, primarily the Second Circuit, the “subjective intent” to assert inconsistent positions before the court is far less important to the judicial estoppel inquiry than “objective conduct.”<sup>40</sup> An outright lie to the court is often sufficient, but not necessary, to trigger the application of judicial estoppel.<sup>41</sup>

In most circuits, whether to dismiss on judicial estoppel grounds is putatively committed to the court’s discretion.<sup>42</sup> Indeed, several courts have exercised discretion to refuse to apply judicial estoppel in the bankruptcy

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37. Ashley S. Deeks, Comment, *Raising the Cost of Lying: Rethinking Erie for Judicial Estoppel*, 64 U. CHI. L. REV. 873, 875-76 (1997).

38. See Hilmo, *supra* note 1, at 1360-61. That said, some courts have held that “[t]he doctrine extends to inconsistent positions of law as well as fact.” Harris Bank, N.A. v. Werner (*In re Werner*), 386 B.R. 684, 699 (Bankr. N.D. Ill. 2008) (citing *In re Cassidy*, 892 F.2d 637, 642 (7th Cir. 1990)).

39. Brown, *supra* note 12, at 201 (quoting *Astor Chauffeured Limousine Co. v. Runnfeltd Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990)); accord *In re Kelly*, 350 B.R. 778, 792 (Bankr. N.D. Ill. 2006) (stating that judicial estoppel is inappropriate in “situations where the party did not prevail in the first matter” (citing *United States v. Newell*, 239 F.3d 917, 921 (7th Cir. 2001))). *But see* Hilmo, *supra* note 1, at 1362 (“[J]udicial estoppel may be applied in cases where a litigant did not ultimately prevail on his case in chief, but convinced a tribunal to rely on his representation to reach some conclusion in a prior case.” (citing *Guinness PLC v. Ward*, 955 F.2d 875, 899-900 (4th Cir. 1992))).

40. *Adelphia Recovery Trust v. HSBC Bank USA (In re Adelphia Recovery Trust)*, 634 F.3d 678, 696 (2d Cir. 2011); accord *Becker v. Verizon North, Inc.*, 2007 WL 1224039, at \*1 (7th Cir. Apr. 25, 2007); *Rose v. Beverly Health & Rehab. Servs., Inc.*, 356 B.R. 18, 26 (E.D. Cal. 2006); *Price v. Kuchaes*, 950 N.E.2d 1218, 1228 (Ind. Ct. App. 2011). *But see* *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361-65 (3d Cir. 1996); *Taylor v. Comcast Cablevision of Ark., Inc.*, 252 F. Supp. 2d 793, 796 (E.D. Ark. 2003) (requiring “*intentional or deliberate manipulation*” (emphasis added)).

41. *E.g.*, *Adelphia*, 634 F.3d at 696; see also *Guay v. Burack*, 677 F.3d 10, 16, 20 n.7 (1st Cir. 2012) (“[P]laying fast and loose with the courts’ . . . [is] not a prerequisite for application of [judicial estoppel]. ‘A party is not automatically excused from judicial estoppel if the earlier statement was made in good faith.’” (citations omitted)). *But see* *Ryan Operations*, 81 F.3d at 361-65.

42. *E.g.*, Brown, *supra* note 12, at 201. See also *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 797 (D.C. Cir. 2010) (citing numerous cases for the proposition that abuse of discretion is the majority position). *But see* *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002) (applying a de novo standard of review).

context even after finding that all elements of judicial estoppel recognized in the relevant jurisdiction were met.<sup>43</sup>

Nevertheless, even though appellate courts purportedly employ a highly deferential standard when reviewing a lower court's decision to judicially estop a litigant or not,<sup>44</sup> appellate courts regularly reverse judicial estoppel decisions in the consumer bankruptcy context for abuse of discretion.<sup>45</sup> The standard of review actually applied in consumer bankruptcy-related judicial estoppel cases appears much closer to de novo; courts review applicable case law and then state as a matter of law that judicial estoppel is either warranted or not.<sup>46</sup> Indeed, some circuits, particularly the Sixth Circuit, explicitly review judicial estoppel decisions de novo,<sup>47</sup> and other courts occasionally review judicial estoppel determinations either (1) without articulating a standard of review<sup>48</sup> or (2) using the typical standard of review for a motion for summary judgment or motion to dismiss without indicating that the presence of a discretionary judicial estoppel determination affects the standard applied.<sup>49</sup> The D.C. Circuit has explicitly

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43. See, e.g., *Byrd v. Wyeth, Inc.*, 907 F. Supp. 2d 803, 805 (S.D. Miss. 2012); *Gilbreath v. Averitt Express, Inc.*, Civ. Action No. 09-1922, 2010 WL 4554090, at \*7-10 (W.D. La. Nov. 3, 2010).

44. Cf. *In re Boates*, No. Civ.A. 05-4353, 2006 WL 166569, at \*2 (E.D. Pa. Jan. 23, 2006) (“The burden for showing an abuse of discretion is heavy; abuse is found ‘only where no reasonable man would take the view adopted by the [lower] court.’” (quoting *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir. 1976))).

45. See, e.g., *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, 698 F.3d 231, 235, 238 (5th Cir. 2012); *Kane v. Nat’l Union Fire Ins. Co.*, 535 F.3d 380, 383-84 (5th Cir. 2008); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1053 (8th Cir. 2006); *Parker v. Wendy’s Int’l, Inc.*, 365 F.3d 1268, 1269, 1271 (11th Cir. 2004). Cf. *Ryan Operations*, 81 F.3d at 365 (reversing lower court’s judicial estoppel decision in chapter 11 corporate reorganization case).

In addition, courts sometimes reverse a lower court’s decision to judicially estop a litigant on the grounds that the litigant was not “given the opportunity to present exculpatory evidence” showing “mistake or inadvertence.” *Rossi v. Westenhoefer (In re Rossi)*, No. 11-8048, 2012 WL 913732, at \*9 (B.A.P. 6th Cir. Mar. 20, 2012).

46. See, e.g., *Muse v. Accord Human Res., Inc.*, 129 F. App’x 487 (11th Cir. 2005).

47. See, e.g., *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 897 (6th Cir. 2004); *Browning*, 283 F.3d at 775.

48. See, e.g., *Phillips v. Flying J Inc.*, 375 S.W.3d 367, 368-70 (Tex. Ct. App. 2012).

49. See, e.g., *Becker v. Verizon N., Inc.*, No. 06-2956, 2007 WL 1224039, at \*1 (7th Cir. Apr. 25, 2007); *Guerra v. Lehman Commercial Paper, Inc.*, Civ. Action No. H-06-1444, 2007 WL 419517, at \*2 (S.D. Tex. Feb. 5, 2007); *Price v. Kuchaes*, 950 N.E.2d 1218, 1225-26 (Ind. Ct. App. 2011); *Garcia v. BNSF Ry. Co.*, 387 S.W.3d 763, 766 (Tex. Ct. App. 2012); *Norris v. Brookshire Grocery Co.*, 362 S.W.3d 226, 229 (Tex. Ct. App. 2012). *But see* *Guay v. Burack*, 677 F.3d 10, 15 (1st Cir. 2012) (“Typically, a district court’s grant of

refused to decide the applicable standard of review.<sup>50</sup> Our research has not revealed any cases in which an appellate court stated that it might reach a different result on the judicial estoppel question were it considering the question de novo, but nonetheless deferred to the lower court's judgment, though we certainly do not rule out the possibility that cases along these lines may exist.

Thus, practitioners seeking to reverse adverse judicial estoppel judgments on appeal should not allow the rhetoric of discretion to deter them from tactfully asking the appellate court to scrutinize the lower court's decision. Note, however, that reviewing judicial estoppel decisions de novo, whether explicitly or sub rosa, appears inconsistent with the Supreme Court's admonition in *New Hampshire v. Maine* that "judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'"<sup>51</sup>

Like many equitable remedies, one may not invoke judicial estoppel with unclean hands,<sup>52</sup> such as where the party seeking estoppel has suborned perjury in a prior, related proceeding.<sup>53</sup> One need not have been a party to the prior proceeding to invoke judicial estoppel; nor is there any requirement that the entity seeking to invoke judicial estoppel be in privity to a party in the prior proceeding.<sup>54</sup>

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summary judgment is reviewed de novo. However, when reviewing application of the doctrine of judicial estoppel 'the applicable rubric is abuse of discretion.' . . . [T]he abuse of discretion standard is appropriate even when reviewing a judicial estoppel ruling on a motion for summary judgment." (citations omitted)).

50. *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 797 (D.C. Cir. 2010).

51. 532 U.S. 742, 750 (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). In dicta of an unpublished opinion, a panel of the Sixth Circuit noted this tension with binding Supreme Court precedent, as well as the fact that the Sixth Circuit's use of a de novo standard of review is far and away the minority position. *See Lewis v. Weyerhaeuser Co.*, 141 F. App'x 420, 423-24 (6th Cir. 2005) ("In light of *New Hampshire* and the extensive contrary authority, we question the continued use of the de novo standard in the context of judicial estoppel. Nevertheless, because we find that the district court's ruling was proper under either standard, we need not resolve the issue here.").

52. *See, e.g., Schneider v. Unum Life Ins. Co. of Am.*, No. CV 05-1402-PK, 2008 WL 109065, at \*7 n.3 (D. Or. Jan. 8, 2008); *Mason v. Lowe (In re Mason)*, Bankr. No. 11-10251, Adversary No. 11-1042, 2012 WL 733834, at \*7-9 (Bankr. E.D. Tenn. Mar. 6, 2012).

53. *See, e.g., Mason*, 2012 WL 733834, at \*8.

54. *E.g., Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358-61 (3d Cir. 1996).

### B. Recent Developments

Within the consumer bankruptcy context, the most common application of judicial estoppel occurs when a debtor fails to satisfy the disclosure requirements established by the Bankruptcy Code (the Code)<sup>55</sup> and Federal Rules of Bankruptcy Procedure (the Rules).<sup>56</sup>

In return for the bankruptcy relief debtors receive through gaining a discharge, the [Code] requires disclosure of all interests in property, the location of all assets, prior and ongoing business and personal transactions, and, foremost, honesty. The failure to comply with the requirements of disclosure and veracity necessarily affects the creditors, the application of the [Code], and the public's respect for the bankruptcy system as well as the judicial system as a whole. . . . The Code requires nothing less than a full and complete disclosure of any and all apparent interests of any kind.<sup>57</sup>

Accordingly, the Code requires all debtors to file a “schedule of assets and liabilities . . . [and] a statement of the debtor’s financial affairs.”<sup>58</sup> Property of the bankruptcy estate is “construed as broadly as possible”<sup>59</sup> to include not only “claims or causes of action existing at the time the bankruptcy case is filed,”<sup>60</sup> but also certain post-bankruptcy causes of action.<sup>61</sup> A debtor’s duty to disclose assets is therefore “ongoing.”<sup>62</sup> Consequently, “Schedule B” of a debtor’s bankruptcy schedules requires the debtor “to list all ‘contingent and unliquidated claims of every nature, . . . counterclaims of the debtor, and rights to setoff claims.’”<sup>63</sup> At least one court has interpreted the word “and” in “contingent and unliquidated . . . as being disjunctive so that the petitioner is directed to list all contingent claims *and* all unliquidated claims,” rather than conjunctive

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55. Hereinafter, we shall use “CODE” to refer to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 (2012).

56. Brown, *supra* note 12, at 202. *See generally* Ostrow, *supra* note 15; Dugas, *supra* note 1.

57. Fokkena v. Tripp (*In re* Tripp), 224 B.R. 95, 98 (Bankr. N.D. Iowa 1998) (citations omitted).

58. CODE § 521(a)(1)(B) (2012).

59. *In re* Stewart, 452 B.R. 726, 741 (Bankr. C.D. Ill. 2011).

60. Brown, *supra* note 12, at 202 (citing CODE § 541(a)(1) (1994)).

61. *See* CODE §§ 1207(a)(1); 1306(a)(1) (2012).

62. Jethroe v. Omnova Solutions, Inc., 412 F.3d 598, 600 (5th Cir. 2005) (citing *Kamont v. West*, 83 F. App’x 1, 3 (5th Cir. 2003)).

63. Brown, *supra* note 12, at 203 (quoting OFFICIAL BANKR. FORMS, FORM 6, ¶ 20).

such that the petitioner need only disclose claims that are *both* contingent and unliquidated.<sup>64</sup> “The obvious thrust of the question is to elicit a complete disclosure of all potential assets that could be marshaled to satisfy the bankruptcy estate’s obligations . . . . Any more restrictive interpretation would be clearly contrary to controlling case law.”<sup>65</sup>

Failure to make these disclosures can result in dismissal of the debtor’s bankruptcy case pursuant to § 521(i) of the Code.<sup>66</sup> “Additionally, courts have ample power to punish debtors who wrongfully conceal assets”<sup>67</sup> with sanctions,<sup>68</sup> conversion to a chapter 7 liquidation,<sup>69</sup> or denial/revocation of discharge.<sup>70</sup> But the punishments do not end there: as will become apparent in the following text and footnotes, many courts have held that “[j]udicial estoppel is particularly appropriate where . . . a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset.”<sup>71</sup>

That said, the doctrine of judicial estoppel in consumer bankruptcy is in a state of disarray.<sup>72</sup> Circuit splits abound. Even within the same circuit it is often difficult to predict how a given court will rule in a particular case. As one court pithily described in a recent decision:

Disagreement among jurists and discord in [judicial estoppel] case outcomes has been caused by a motley assortment of suspicious behavior by suspected dissembling debtors; a group of technical, inscrutable, overlapping, and inconsistent

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64. *Rose v. Beverly Health & Rehab. Servs., Inc.*, 356 B.R. 18, 26 (E.D. Cal. 2006).

65. *Id.*

66. Code § 521(i) provides a mechanism for dismissal of the bankruptcy case itself. It is therefore distinct from dismissal of a subsequent lawsuit on judicial estoppel grounds.

67. *Valdez v. JDR LLC*, No. CV 04-1620-PHX-JAT, 2006 WL 2038456, at \*3 (D. Ariz. July 20, 2006).

68. *See* RULE 9011.

69. *E.g.*, CODE § 1307(c) (2012).

70. *E.g.*, *id.* § 1328(e).

71. *E.g.*, *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005).

72. *Contra* Hilmo, *supra* note 1, at 1353-54, 1363, 1373-74 (arguing that federal judicial estoppel law in the consumer bankruptcy context is largely uniform). Mr. Hilmo’s article is useful and very well written, but we think it overstates the degree of uniformity between the various federal jurisdictions, even while acknowledging interjurisdictional doctrinal variation. We do agree with Mr. Hilmo’s argument that federal judicial estoppel doctrine is at least more uniform than it used to be, however. *See id.* at 1373-74. We also agree that some aspects of judicial estoppel law are increasingly treated in a uniform manner, especially on the issue of whether an innocent trustee should be estopped because of a culpable debtor’s nondisclosure. In many other areas, however, lack of uniformity is the norm.

bankruptcy statutes; an ignorance of bankruptcy procedures and practicalities by non-bankruptcy courts and practitioners; . . . and an endless variance in the circumstances of individual cases.<sup>73</sup>

This brings us to another preliminary takeaway: *panta rhei*.<sup>74</sup> For nearly every “thrust” a practitioner may make for her client, there exists an equal and opposite “parry” that her opponent may cite.<sup>75</sup> This article provides citations for many potential thrusts and parries so that debtors’ and creditors’ attorneys alike may assemble their arsenal from the footnotes. Nonetheless, some aspects of judicial estoppel are clear, and even where courts remain divided, useful guidance for practitioners can be gleaned from the chaos. The article also offers guidance regarding how judges should apply judicial estoppel in consumer bankruptcy cases.

*1. An Innocent Chapter 7 Trustee May Pursue a Claim That a Debtor Fails to Disclose*

In 2011, the Fifth Circuit, in an en banc opinion reversing a three-judge panel of the court, ruled in *Reed v. City of Arlington* that judicial estoppel did not bar a chapter 7 bankruptcy trustee from pursuing and collecting a consumer debtor’s judgment against his former employer, the City of Arlington, Texas, under the Family and Medical Leave Act (FMLA).<sup>76</sup> The debtor “concealed the judgment during bankruptcy” from both the court and his bankruptcy attorney by failing to list on his bankruptcy schedules either the judgment against the city or his associated legal fees.<sup>77</sup> Therefore, the debtor was judicially estopped from pursuing the claim himself,<sup>78</sup> a result in accord with case law of numerous jurisdictions.<sup>79</sup> Nevertheless, the court

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73. *Thompson v. Quarles*, 392 B.R. 517, 526 (S.D. Ga. 2008). One might fairly accuse the court in *Thompson* of further exacerbating rather than mitigating said disagreement and discord. *See infra* note 117.

74. “All things are in flux;” literally, “everything flows.” *See Heraclitus*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Heraclitus#Panta\\_rhei.2C\\_.22everything\\_flows.22](http://en.wikipedia.org/wiki/Heraclitus#Panta_rhei.2C_.22everything_flows.22) (last visited Dec. 19, 2013).

75. *Cf.* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes Are to Be Construed*, 3 VAND L. REV. 395 (1950).

76. 650 F.3d 571 (5th Cir. 2011) (en banc).

77. *Id.* at 572-73.

78. *Id.*

79. *See Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006) (“All six appellate courts that have considered [the] question [as of 2006, *i.e.*, the First, Third, Fifth, Eighth, Ninth, and Eleventh Circuits,] hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends.”). The Seventh Circuit joined these six circuits in *Cannon-Stokes*. *Id.*;

held as “a general rule that, absent unusual circumstances, an innocent trustee can pursue for the benefit of creditors a judgment or cause of action that the debtor fails to disclose in bankruptcy.”<sup>80</sup>

The debtor in *Reed* had received a no-asset discharge, and his bankruptcy case had been closed.<sup>81</sup> When the debtor’s nondisclosure came to light, however, the trustee reopened the case pursuant to Code § 350(b), successfully obtained a revocation of the debtor’s discharge, and substituted herself as the real party in interest in the FMLA litigation against the City.<sup>82</sup> The City argued that the debtor’s wrongdoing barred the trustee from collecting the judgment on judicial estoppel grounds.<sup>83</sup>

The Fifth Circuit disagreed. The court explained that in the bankruptcy context judicial estoppel must be applied “‘against the backdrop of the bankruptcy system and the ends it seeks to achieve.’”<sup>84</sup> Under the Code, the debtor is a distinct entity from the debtor’s estate, and the chapter 7 trustee’s duty is to maximize the value of the latter to thereby maximize creditor return.<sup>85</sup> Recognizing that a debtor’s “failure to fully and honestly disclose all [of his or her] assets undermines the integrity of the bankruptcy system,” the court concluded that “judicial estoppel must be applied in such a way as to deter dishonest debtors . . . while protecting the rights of creditors to an equitable distribution of the assets of the debtor’s estate.”<sup>86</sup>

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*cf. In re Williams*, 310 B.R. 442, 444 (Bankr. N.D. Ala. 2004) (allowing trustee to reopen bankruptcy case to pursue omitted cause of action but “limit[ing] the trustee’s recovery to the amount of the unsecured claim . . . plus reasonable attorneys’ fees, and reasonable expenses” because “the debtors [sic] failure to disclose [could not] be considered inadvertent”).

The district court in *Reed* reached this result as well. *See Reed v. City of Arlington*, 765 F. Supp. 2d 775, 778-79 (N.D. Tex. 2008) (“Former plaintiff . . . is estopped from collecting or receiving any money from the judgment against Defendant. The bankruptcy estate, represented by [the trustee], is not estopped from pursuing or collecting on this judgment against Defendant. Any funds collected from the judgment shall go to the bankruptcy estate for administration and distribution . . . . After distribution, any remaining funds shall be refunded to Defendant and not to former plaintiff . . .”).

80. *Reed*, 650 F.3d at 573 (emphasis added).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 574 (quoting *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 208 (5th Cir. 1999)).

85. *Id.* at 574-75.

86. *Id.* at 574.

The court extensively quoted dicta from a Seventh Circuit opinion<sup>87</sup> that aptly explained why judicial estoppel is inappropriate in such instances:

[The debtor's] nondisclosure in bankruptcy harmed his creditors by hiding assets from them. Using this same nondisclosure to wipe out his [tort] claim would complete the job by denying creditors even the right to seek some share of the recovery. . . . *Judicial estoppel is an equitable doctrine, and using it to land another blow on the victims of bankruptcy fraud is not an equitable application.* Instead of vaporizing assets that could be used for the creditors' benefit, district judges should discourage bankruptcy fraud by revoking the debtors' discharges and referring them to the United States Attorney for potential criminal prosecution.<sup>88</sup>

Because “[e]stopping the [t]rustee from pursuing the judgment against the City would thwart one of the core goals of the bankruptcy system—obtaining a maximum and equitable distribution for creditors—by unnecessarily ‘vaporizing’ the assets effectively belonging to innocent creditors,” employing judicial estoppel in this case would effect an inequitable result.<sup>89</sup>

The court also noted that a chapter 7 trustee who receives causes of action from a debtor's estate is generally subject only to “*pre*-petition defenses . . . that would have been applicable to a debtor if no bankruptcy case had been filed.”<sup>90</sup> Because the debtor's nondisclosure constituted

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87. See *Biesek v. Soo Line R.R. Co.* 440 F.3d 410 (7th Cir. 2006). Due to the unusual procedural posture in *Biesek*, the Seventh Circuit did not have occasion to decide the judicial estoppel question. See *id.* at 411-14. *Biesek* has nonetheless been widely cited in judicial estoppel cases; it may therefore be properly considered a fundamental recent development in the area of consumer bankruptcy judicial estoppel decisions.

88. *Reed*, 650 F.3d at 576 (quoting *Biesek*, 440 F.3d at 413).

89. *Id.* (quoting *Biesek*, 440 F.3d at 413).

90. *Id.* at 575 (emphasis added) (quoting *Riazuddin v. Schindler Elevator Corp. (In re Riazuddin)*, 363 B.R. 177, 188 (B.A.P. 10th Cir. 2007)). “Generally speaking, a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it.” *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004) (citing *Barger v. City of Cartersville*, 348 F.3d 1289, 1292 (11th Cir. 2003)). In a chapter 7 case, the chapter 7 trustee, “as the representative of the bankruptcy estate, is the proper party in interest, and is the only party with standing to prosecute causes of action belonging to the estate.” *Id.* (citing CODE § 323 (2000); *Barger*, 348 F.3d at 1292). “Once an asset becomes part of the bankruptcy estate, all rights held by the debtor in the asset are extinguished unless the asset is abandoned back to the debtor.” *Id.* (citing CODE § 554).

“*post*-petition misconduct,” the trustee received the judgment “free and clear of a [judicial estoppel] defense that arose exclusively from [the debtor’s] post-petition actions.”<sup>91</sup>

By reaching this result in *Reed*, the Fifth Circuit joins other appellate courts (including the Sixth, Tenth, and Eleventh Circuits and the D.C. Circuit), district courts in numerous other circuits, and state courts that have either held or noted in dicta that a debtor’s misconduct should not judicially estop an innocent trustee from pursuing claims for the benefit of creditors.<sup>92</sup>

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91. *Reed*, 650 F.3d at 574-75 (emphasis added).

92. See *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 794 (D.C. Cir. 2010) (affirming district court decision that held, *inter alia*, that judicial estoppel “only applied to the extent that [the nondisclosed claim] was ‘prosecuted by [the debtor] on his own behalf,’” and did not apply to the trustee (citations omitted)); *Parker*, 365 F.3d at 1269 (“[B]ecause the party pursuing this case . . . is not [the debtor], but is instead the bankruptcy trustee—who did not make any inconsistent statements to the courts—we hold that judicial estoppel does not apply.”); *Piper v. Dollar Gen. Corp.*, No. 3:11-554, 2011 WL 4565432, at \*6-7 (M.D. Tenn. Sept. 29, 2011); *Elkins v. Summit Cnty.*, Ohio, No. 5:06-CV-3004, 2008 WL 622038, at \*6 (N.D. Ohio Mar. 5, 2008); *Caldwell v. Malloy (In re Quarles)*, No. 06-CV-0137-CVE-SAJ, 2007 WL 171913, at \*5-7 (N.D. Okla. Jan. 18, 2007); *Stramiello-Yednak v. Perl*, No. Civ.A. 05-517, 2006 WL 1158123, at \*3-5 (W.D. Pa. Apr. 28, 2006); *Martin v. U.S. Bank*, No. 4:04CV01527AGF, 2005 WL 3107722, at \*5-6 (E.D. Mo. Nov. 18, 2005); *Wood v. Household Fin. Corp.*, 341 B.R. 770, 773-74 (W.D. Wash. 2006).

See also *Stephenson v. Malloy*, 700 F.3d 265, 271-72, 275 (6th Cir. 2012) (adopting *Reed* but holding that the debtor could not be judicially estopped regardless of whether the trustee intervened); *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1155 n.3 (10th Cir. 2007) (noting in dicta that “[q]uite likely the district court’s application of judicial estoppel against the trustee was inappropriate, at least to the extent [the debtor’s] personal injury claims were necessary to satisfy his debts”); *Harrah v. DSW Inc.*, 852 F. Supp. 2d 900, 907-08 (N.D. Ohio 2012) (suggesting in dicta the court would adopt *Reed*); *Gilman v. Target Corp.*, Civ. Action No. 09-cv-00669-ZLW-KMT, 2009 WL 4611474, at \*3 (D. Colo. Dec. 1, 2009) (“[T]he doctrine of judicial estoppel does not apply to claims by the Bankruptcy Trustee.”); *Rose v. Beverly Health & Rehab. Servs., Inc.*, 356 B.R. 18, 27 (E.D. Cal. 2006) (stating in dicta that “this court’s determination that judicial estoppel operates in this case to prevent Plaintiff from advancing her claims on her own behalf does not necessarily mean that an appointed trustee of the bankruptcy estate may not advance claims belonging to Plaintiff for the benefit of the bankruptcy estate”); *Ruffin v. Kinder Morgan Liquids Terminal, LLC*, 2009 WL 17887, at \*7 (N.J. Super. Ct. App. Div. Jan. 2, 2009); *Arkison v. Ethan Allen, Inc.*, 160 P.3d 13, 14-16 (Wash. 2007).

*Cf.* *Javaid v. Allied-Barton Sec. Servs.*, No. CIV S-07-0386 FCD GGH PS, 2008 WL 1925233, at \*10 (E.D. Cal. Apr. 30, 2008) (“Nor does the court consider whether plaintiff’s claims warrant the trustee’s reopening of plaintiff’s bankruptcy proceeding for the purpose of pursuing these claims on behalf of plaintiff’s creditors.” (citations omitted)), *findings and recommendation adopted by* No. CIV-S-070386 FCD GGH PS, 2008 WL 2261297 (E.D. Cal. Jun. 2, 2008); *In re FV Steel & Wire Co.*, 349 B.R. 181, 189 (Bankr. E.D. Wis. 2006)

The Fifth Circuit's en banc decision in *Reed* signals a step away from an aggressively applied judicial estoppel doctrine, toward a more nuanced approach that takes the interests of third parties into account. Although many courts, to the dismay of several commentators, had previously applied judicial estoppel in a strict fashion, effectively depriving "creditors of any proceeds resulting from [the] undisclosed cause of action,"<sup>93</sup> *Reed* represents a movement toward the correct understanding that in bankruptcy law, "multiple parties' claims create an interconnected web in which a loss or recovery by one reverberates throughout."<sup>94</sup> Thus, in the future, practitioners should expect courts to inquire into the effects of judicial estoppel on not only the debtor-plaintiff and the defendant in the subsequent lawsuit, but also the bankruptcy creditors.

In light of *Reed*, courts are more likely to recognize that an innocent trustee should not be tainted by a debtor's wrongdoing. Also, courts are less likely to dismiss a case on judicial estoppel grounds when doing so would reduce the ultimate recovery for creditors and allow a tortfeasor to escape

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(holding that the nondisclosure of consumer debtor "[did] not apply to bar the claim as to [the debtor's] trustee, who ha[d] taken no inconsistent position").

*But see* *Marshal v. Electrolux Home Prods., Inc.*, No. 605CV-1587ORL-18KRS, 2006 WL 3756574, at \*3 (M.D. Fla. Dec. 19, 2006) (applying judicial estoppel against chapter 7 trustee when trustee moved to intervene only after defendant raised judicial estoppel defense against plaintiff). Note that the Middle District of Florida is in the Eleventh Circuit, and that this opinion came down after *Parker* was already decided. *Marshal* is therefore in tension with controlling precedent.

Several commentators have looked favorably upon courts' increasing unwillingness to visit the sins of the consumer debtor upon the innocent bankruptcy trustee. *See, e.g.*, Dugas, *supra* note 1, at 246-48; Jonathan M. Hiltz, Casenote, *Killing Two Birds With One Stone – The Proper (Non)Application of Judicial Estoppel: Parker v. Wendy's International, Inc.*, 365 *F.3d* 1268 (11th Cir. 2004), 30 U. DAYTON L. REV. 401, 407-16 (2005).

93. Dugas, *supra* note 1, at 208; *accord* Beiner & Chapman, *supra* note 1, at 7 ("Even if a . . . plaintiff might be estopped rightfully in certain cases from proceeding inconsistently, this still leaves creditors with unpaid debts. . . . [S]uccessful invocation of judicial estoppel creates a windfall for the defendant . . ."); Brown, *supra* note 12, at 205-08, 215-16; Dugas, *supra* note 1, at 241-42 ("The majority analysis [that was] applied in the Third, Fifth, and Sixth Circuits [as of 2006] . . . applie[d] judicial estoppel to trump [the rights of] bankruptcy creditors . . . [and] le[ft] in place the original fraud committed by the failure to disclose assets."); *cf.* Walker & Nickell, *supra* note 1, at 1127 ("If judicial estoppel is successfully invoked, the defendant will benefit by escaping accountability for his negligent or bad acts to the detriment of innocent third parties, including the debtor's creditors and the debtor's family.").

94. *See* Dugas, *supra* note 1, at 207; *see also* *Arkison*, 160 P.3d at 14-16.

unscathed.<sup>95</sup> On the other hand, where a debtor stands to benefit from her prior nondisclosure, a court will be more likely to find that judicial estoppel is warranted.<sup>96</sup>

For example, in *Love v. Tyson Foods, Inc.*, a case decided post-*Reed*, the Fifth Circuit held that the district court did not abuse its discretion in dismissing, on the basis of judicial estoppel, a chapter 13 debtor's civil rights action against his former employer that he failed to disclose in both his bankruptcy schedules and his chapter 13 plan.<sup>97</sup> Because, under the terms of the debtor's chapter 13 plan, any potential recovery against the former employer "would go to [the debtor] to the exclusion of his creditors,"<sup>98</sup> the court found the case sufficiently distinguishable from *Reed* to warrant the application of judicial estoppel.<sup>99</sup>

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95. See *Taylor v. Comcast Cablevision of Ark., Inc.*, 252 F. Supp. 2d 793, 798-99 (E.D. Ark. 2003); see also *Hiltz*, *supra* note 92, at 411-13. But see *Guay v. Burack*, 677 F.3d 10, 16-17, 19 (1st Cir. 2012) ("[T]he integrity of the bankruptcy process is sufficiently important that we should not hesitate to apply judicial estoppel even where it creates a windfall for an undeserving defendant."); *Sharp v. Oakwood United Hosps.*, 458 F. Supp. 2d 463, 473-74 (E.D. Mich. 2006) (refusing to estop a litigant when "[a]pplication of judicial estoppel" to a wrongful death action "would most certainly harm [a litigant's] 'next of kin'").

96. See *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 387 (5th Cir. 2008) (noting that judicial estoppel is warranted where "debtors st[and] to benefit directly from pursuing their [nondisclosed] claim at the expense of their creditors," but not where the debtors "stand to benefit only in the event that there is a surplus after all debts and fees have been paid"); *Spicer v. Laguna Madre Oil & Gas II, LLC (In re Tex. Wyo. Drilling, Inc.)*, 422 B.R. 612, 635 (Bankr. N.D. Tex. 2010); see also *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 266 (5th Cir. 2012) (distinguishing *Reed* and finding judicial estoppel warranted because "unlike the instant case where [the debtor] could potentially share in the gains from his lawsuit, only the creditors stood to benefit in *Reed*").

Some commentators have advocated:

[A]llowing the trustee to intervene and carry out a lawsuit on behalf of the plaintiff, but . . . only allow a damages award to the extent necessary to repay the creditors. The nondisclosing debtor would only be precluded from receiving the residual amount of the award that is over and above the debt if he [or she] is found to have *intentionally* failed to disclose a cause of action.

*Hiltz*, *supra* note 92, at 408; see also *id.* at 413-16.

97. *Love*, 677 F.3d at 260-61.

98. *Id.* at 264 (citing CODE §§ 554(c), 1329 (Supp. III 2009)).

99. The *Love* court wrote:

[U]nlike the instant case where *Love* could potentially share in the gains from his lawsuit, only the creditors stood to benefit in *Reed*. . . . [T]he dissent correctly notes that the effect of judicial estoppel on creditors is a consideration that could discourage courts from applying the doctrine. We do not mean to diminish the weight that courts should give to creditors' interests when determining whether judicial estoppel should apply. We merely hold that the

## 2. *The Presumption of Advertent Nondisclosure*

As described above, although the judicial estoppel doctrine lacks a rigid set of requisite elements, courts frequently inquire whether the party's assertion of an inconsistent position in a subsequent legal proceeding was inadvertent. The Fifth Circuit, in a decision prior to *Love* entitled *Browning Manufacturing v. Mims (In re Coastal Plains, Inc.)*, held that "in considering 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."<sup>100</sup>

*Love* is notable because it built on *Coastal Plains* by firmly establishing a strong presumption, albeit a rebuttable one, that a debtor's nondisclosure in bankruptcy will be deemed *advertent*, which weighs heavily in favor of judicially estopping that debtor.<sup>101</sup> *Love* approvingly quoted a decision from the Southern District of Mississippi, stating that "the motivation sub-element" of the *Coastal Plains* inadvertence analysis "is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court. Motivation in this context is self-evident because of potential financial benefit resulting from the nondisclosure."<sup>102</sup> Thus, notwithstanding the summary judgment procedural posture of *Love*,<sup>103</sup> once the debtor's former employer "set forth a motivation for [the debtor] to keep his claims concealed—the prospect that [he] could keep any recovery for himself," "it fell to [the debtor] to show that the omission of his claims from his schedule of assets was inadvertent."<sup>104</sup> On appeal, the debtor failed to mention inadvertence in his response to his former employer's motion

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district court did not abuse its discretion in applying judicial estoppel to Love's claims . . . .

*Id.* at 266 (citations omitted).

100. 179 F.3d 197, 210 (5th Cir. 1999) (emphasis added); see also *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600-01 (5th Cir. 2005). Where a debtor "could not have foreseen" the claims at issue arising, judicial estoppel is unwarranted. *Dorbeck v. Sykora*, No. 09-cv-14646, 2010 WL 3245327, at \*2 (E.D. Mich. Aug. 16, 2010). The court in *Dorbeck* did apply judicial estoppel, but it did so on other grounds. *Id.* at \*3.

101. See *Love*, 677 F.3d at 262.

102. *Id.* (emphasis added) (quoting *Thompson v. Sanderson Farms, Inc.*, No. 3:04CV837-WHB-JCS, 2006 U.S. Dist. LEXIS 48409, at \*12-13 (S.D. Miss. May 31, 2006) (citation omitted)).

103. The dissent in *Love* accused the majority of "improperly plac[ing] the summary judgment burden of th[e] affirmative defense [of judicial estoppel] on [the debtor]." *Id.* at 266 (Haynes, J., dissenting). For the majority's response to the dissent, see *id.* at 263-66.

104. *Id.* at 262 (citing *Jethroe*, 412 F.3d at 600-01).

for summary judgment.<sup>105</sup> Consequently, the court ruled that the debtor failed to rebut the presumption, and therefore the district court did not abuse its discretion by granting summary judgment to the employer on judicial estoppel grounds.<sup>106</sup>

A bankruptcy court aptly described the Fifth Circuit's decision in *Love*—and the presumption of advertence it creates—as follows:

In *Love*, the Fifth Circuit articulated a very high standard for any debtor to show that he had no motive to conceal. . . . [I]t will almost always be the case that nondisclosure automatically equates to an affirmative motive to conceal.

The Fifth Circuit left the door only slightly open for a debtor to overcome this high hurdle. With its use of the words “almost always,” the Fifth Circuit left open the possibility that certain circumstances could exist where nondisclosure does not automatically constitute motive; however, the Fifth Circuit did not elaborate on these circumstances.<sup>107</sup>

Thus, *Love* rendered the judicial estoppel doctrine in the Fifth Circuit not only stricter, but also more uncertain regarding how a debtor may escape the application of judicial estoppel.

Several other circuits are in accord with the results reached by the Fifth Circuit in *Love* and *Coastal Plains*.<sup>108</sup> In *Eastman v. Union Pacific Railroad Co.*,<sup>109</sup> a case factually analogous to *Love* in all pertinent respects,<sup>110</sup> the

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105. *Id.* at 263. Interestingly, the debtor was represented by counsel in both his civil rights action and chapter 13 case but chose to appear pro se on appeal. *Id.* at 261 n.1, 263.

106. *Id.* at 263.

107. *In re Watts*, No. 09-35864, 2012 WL 3400820, at \*8 (Bankr. S.D. Tex. Aug. 9, 2012) (emphasis added); *cf.* Beiner & Chapman, *supra* note 1, at 12 (“An analysis under *Coastal Plains* inevitably leads to the conclusion that all debtors have a motive for concealment.”).

108. *Contra* Hilmo, *supra* note 1, at 1374, 1379 (arguing that federal courts “allow[] for flexible application of judicial estoppel in unusual circumstances” and “that the standards applied are not to be enforced mechanistically”). In actuality, it appears that many courts are moving toward reining in flexibility and discretion by presuming advertence on the part of nondisclosing consumer debtors, although counterexamples surely exist.

109. 493 F.3d 1151 (10th Cir. 2007).

110. Although the plaintiff in *Eastman*, unlike the plaintiff in *Love*, filed bankruptcy under chapter 7 rather than chapter 13, both he and the plaintiff in *Love* were judicially estopped from bringing a tort action against their respective former employers due to their failure to disclose their claims. *Compare id.*, 493 F.3d at 1153-55, with *Love*, 677 F.3d at 260-61.

Tenth Circuit noted that although “it *may* be appropriate to resist application of judicial estoppel when a party’s prior position was based on inadvertence or mistake,” courts properly “infer deliberate manipulation” in cases “[w]here a debtor has both knowledge of the claims and a motive to conceal them.”<sup>111</sup> The court, applying this presumption of advertence, found that “the only reasonable inference to be drawn from the evidence” was that the debtor “knew of his pending lawsuit and simply did not disclose it to the bankruptcy court.”<sup>112</sup> Because the debtor “had been seriously injured in an auto accident and sued his employer along with eight other co-defendants for thousands of dollars,”<sup>113</sup> the *Eastman* court found it “impossible to believe that such a sizable claim . . . could be overlooked when [the debtor] was filling in the bankruptcy schedules.”<sup>114</sup>

The Eleventh Circuit has likewise repeatedly affirmed that nondisclosure will be presumed to be advertent when the debtor has both knowledge of the claims and a motive to conceal them.<sup>115</sup> As one commentator explains

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Courts have held that judicial estoppel applies equally in chapter 7 and chapter 13 for the most part. *See, e.g.,* *De Leon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1291 (11th Cir. 2003); *Javaid v. Allied-Barton Sec. Servs.*, No. CIV S-07-0386 FCD GGH PS, 2008 WL 1925233, at \*4 n.8 (E.D. Cal. Apr. 30, 2008), *report and recommendation adopted by* No. CIV-S-07-0386 FCD GGH PS, 2008 WL 2261297 (E.D. Cal. Jun. 2, 2008); *Biggs v. AM Gen., LLC*, No. 3:07-CV-28 JVB, 2008 WL 1957864, at \*2 n.3 (N.D. Ind. May 1, 2008) (citing *Becker v. Verizon N., Inc.*, 2007 WL 1224039, at \*1 (7th Cir. Apr. 25, 2007)). *But see* *Snowden v. Fred’s Stores of Tenn., Inc.*, 419 F. Supp. 2d 1367, 1371 n.6 (M.D. Ala. 2006) (noting that the result reached in *Parker* (and, by analogy, *Reed*) is inapplicable to chapter 13 because “[i]n Chapter 7 cases, all pre-petition causes of action . . . generally must be prosecuted by the trustee,” whereas “a chapter 13 debtor maintains control over all assets . . . and therefore has standing to bring suit in his own right” (citation omitted)).

Whether judicial estoppel applies equally in *chapter 11* cases is another matter. *See* *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002) (suggesting in dicta that the answer is no). *See also* *Hansford v. Bank of Am.*, Civ. Action No. 07-4716, 2008 WL 4078460, at \*10 (E.D. Pa. Aug. 22, 2008) (distinguishing chapter 11 from chapter 13 cases for judicial estoppel purposes).

111. *Eastman*, 493 F.3d at 1157 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 753 (2001)).

112. *Id.* at 1159.

113. *Id.*

114. *Id.* (quoting *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006)).

115. *See* *Muse v. Accord Human Res., Inc.*, 129 F. App’x 487, 488 (11th Cir. 2005) (“In the context of a bankruptcy case, judicial estoppel bars a plaintiff from asserting claims previously undisclosed to the bankruptcy court where the plaintiff both knew about the claims and had a motive to conceal them from the bankruptcy court.”); *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1295-96 (11th Cir. 2003); *De Leon*, 321 F.3d at 1291;

[B]y inferring bad intent by any debtor who had knowledge of his claim and who stood to benefit financially by omitting it, the Eleventh Circuit discourages an inquiry into the debtor's actual motives. It is unclear under the Eleventh Circuit standard when, if ever, the omission can be deemed inadvertent.<sup>116</sup>

Note, however, that several district courts within the Eleventh Circuit have resisted and attempted to limit these appellate decisions.<sup>117</sup>

Additionally, district courts within the Second Circuit have adopted the presumption of advertence.<sup>118</sup> The Seventh Circuit also appears to have

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*Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1287 (11th Cir. 2002) (citing *Browning Mfg. v. Mims (In re Coastal Plains)*, 179 F.3d 197, 210 (5th Cir. 1999)).

Note, however, that “the Eleventh Circuit standard for showing inadvertence appears less demanding than the standard applied in the Fifth Circuit.” *Guerra v. Lehman Commercial Paper, Inc.*, Civ. Action No. H-06-1444, 2007 WL 419517, at \*8 (S.D. Tex. Feb. 5, 2007). This statement was made before the Fifth Circuit decided *Love*; thus, any disconnect between the Eleventh and Fifth Circuits that existed at the time *Guerra* was decided is now even more pronounced.

116. Walker & Nickell, *supra* note 1, at 1128.

117. Intriguingly, some district courts within the Eleventh Circuit have interpreted *Burnes* and its progeny to establish only a “permissive rather than mandatory” presumption of advertence that does not “require a court to infer an intent to mislead the bankruptcy court when . . . the plaintiff was aware of the claims and had a motive to mislead the bankruptcy court.” *Snowden v. Fred’s Stores of Tenn., Inc.*, 419 F. Supp. 2d 1367, 1373 (M.D. Ala. 2006). This reading of binding Eleventh Circuit precedent strikes us as strained. For the district court’s response to the argument that the rejection of the presumption of advertence is inconsistent with binding appellate court precedent, *see id.* at 1373 n.9.

Similarly, in *Thompson v. Quarles*, 392 B.R. 517 (S.D. Ga. 2008), the court stated:

While [intent to deceive] can be inferred from the circumstances, such as where a debtor stands to gain financially from failing to disclose a cause of action, Defendants have pointed to no authority suggesting that such an inference *must* be drawn in any particular case, such as this one, and the Court has uncovered none.

*Id.* at 527. It is puzzling that neither the court nor the defendants in *Thompson* located *Eastman*, *Muse*, *Jethroe*, or *Coastal Plains* in their research; all of those cases strongly suggest that a powerful presumption of advertence (albeit one that is possible to rebut) exists, and all of those cases had been decided before *Thompson* in 2008. To be sure, some of those cases are from other circuits and thus are merely persuasive authority. Moreover, those that were from the Eleventh Circuit were unpublished and therefore lacked precedential effect. Nevertheless, the cases did exist at the time, and they do appear to suggest that the inference of advertence is mandatory.

118. “[E]ven where the omission in a bankruptcy filing was based on mistake or ignorance, judicial estoppel should apply. . . . Even if mistake were sufficient reason to decline to apply judicial estoppel, it *only exists where the party lacked knowledge of the claim or had no motive for concealment.*” *Galín v. United States*, No. 08-CV-

adopted a doctrine approximating a presumption of advertence, although the precise contours are presently unclear; some courts show an increasing willingness to infer advertence, although there remains room for inquiry into a debtor's actual intent.<sup>119</sup> The same may be said of the Ninth Circuit.<sup>120</sup> Likewise, though the First Circuit has explicitly left open the

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2508(JFB)(ETB), 2008 WL 5378387, at \*11 (E.D.N.Y. Dec. 23, 2008) (emphasis added) (citations omitted); *cf.* Galin v. IRS, 563 F. Supp. 2d 332, 340-41 (D. Conn. 2008) (applying judicial estoppel against debtor even where debtor had no knowledge of her claims and omitted them solely on the basis of a good faith mistake).

119. The Seventh Circuit has given some guidance:

*It is impossible to believe* that such a sizable claim—one central to her daily activities at work—could have been overlooked when [the debtor] was filling in the bankruptcy schedules. And if [the debtor] 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. [The debtor] never did that; she wants every penny of the judgment for herself.

*Cannon-Stokes*, 453 F.3d at 448-49 (first emphasis added); *see also* Biggs v. AM Gen., LLC, No. 3:07-CV-28 JVB, 2008 WL 1957864, at \*4 (N.D. Ind. May 1, 2008) (“Inadvertence or mistake exists where (1) the plaintiff lacked knowledge of the undisclosed claim or (2) had no motive to conceal the claim.” (citing *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007))).

*But see* Swearingen-El v. Cook Cnty. Sheriff's Dep't, 456 F. Supp. 2d 986, 991 (N.D. Ill. 2006) (appearing to require affirmative showing of intent to deceive the court); *In re FV Steel and Wire Co.*, 349 B.R. 181, 188-89 (Bankr. E.D. Wis. 2006) (same); Beiner & Chapman, *supra* note 1, at 20 (describing the Seventh Circuit's judicial estoppel standard as “more plaintiff-friendly”). Note also that the Seventh Circuit has stated that judicial estoppel should be “applied with caution to avoid impinging on the truthseeking function of the court.” *Levinson v. United States*, 969 F.2d 260, 265 (7th Cir. 1992) (quoting *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218-19 (6th Cir. 1990)).

120. “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.” *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784-86 (9th Cir. 2001) (emphasis added) (citing *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992)).

*See also* *Javaid v. Allied-Barton Sec. Servs.*, No. CIV S-07-0386 FCD GGH PS, 2008 WL 1925233, at \*10 (Apr. 30, 2008) (noting that a subjective intent to mislead is not a prerequisite to applying judicial estoppel), *findings and recommendation adopted by* No. CIV S-07-0386 FCD GGH PS, 2008 WL 2261297 (E.D. Cal. Jun. 2, 2008); *Rose v. Beverly Health & Rehab. Servs., Inc.*, 356 B.R. 18, 26-27 (E.D. Cal. 2006) (same).

*But see* *Kinnee v. Shack, Inc.*, Civ. No. 07-1463-AC, 2008 WL 4899204, at \*5 (D. Or. Nov. 12, 2008); *Schneider v. Unum Life Ins. Co. of Am.*, No. CV 05-1402-PK, 2008 WL 109065, at \*6 (D. Or. Jan. 8, 2008) (holding that even though *Hamilton* “did not discuss or analyze the debtor's intent . . . one can infer from *Hamilton* that intent was a factor in that

question of whether there is a presumption of advertence, it has also signaled that it might favor such a presumption.<sup>121</sup> Some state courts have very clearly adopted a strong (albeit rebuttable) presumption of advertence as well.<sup>122</sup>

With respect to judicial estoppel against consumer debtors, even historically lenient circuits have adopted a presumption of inadvertence (or at least something approximating one) in recent years. A comparison between the Third Circuit's decision in *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*,<sup>123</sup> and its subsequent decision in *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*,<sup>124</sup> is illustrative. Although both of these cases are corporate rather than consumer cases, both are frequently cited in consumer bankruptcy opinions.<sup>125</sup> In *Ryan Operations*, the Third Circuit explicitly refused to adopt a presumption of advertence.<sup>126</sup> The court "reject[ed] [the] argument that intent may be inferred for purposes of judicial estoppel solely from nondisclosure notwithstanding the affirmative disclosure requirement of the [Code]."<sup>127</sup> Even though the debtor in *Ryan Operations* undeniably "violated these statutory duties of full disclosure,"<sup>128</sup> the court held that judicial estoppel

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decision"); *Moreno v. Autozone, Inc.*, No. C05-04432 MJJ, 2007 WL 1063433, at \*7 (N.D. Cal. Apr. 9, 2007) (suggesting in dicta that judicial estoppel may be inappropriate where "the value of [the undisclosed] claims is uncertain, and the effect, if any, that disclosure would have had on the course of the bankruptcy proceedings is purely speculative"); *Valdez v. JDR LLC*, No. CV 04-1620-PHX-JAT, 2006 WL 2038456, at \*2-3 (D. Ariz. July 20, 2006) (interpreting *Hamilton* to require an affirmative showing of intent before judicial estoppel is triggered).

121. See *Guay v. Burack*, 677 F.3d 10, 20, 20 nn.7-8 (1st Cir. 2012).

122. For example, one Indiana court wrote:

An inference of bad faith arises when the party asserting judicial estoppel demonstrates that a debtor-plaintiff has knowledge of an unscheduled claim and motive for concealment in the face of a duty to disclose. If the party asserting judicial estoppel establishes knowledge of a claim and motive for concealment, the debtor-plaintiff then has the burden of coming forth with evidence indicating that the nondisclosure was made in good faith.

*Price v. Kuchaes*, 950 N.E.2d 1218, 1228 (Ind. Ct. App. 2011) (quoting *Morgan Cnty. Hosp. v. Upham*, 884 N.E.2d 275, 280 (Ind. Ct. App. 2008)).

123. 81 F.3d 355 (3d Cir. 1996).

124. 337 F.3d 314 (3d Cir. 2003).

125. See, e.g., *Castillo v. Coca-Cola Bottling Co. of E. Great Lakes*, Civ. Action No. 06-183, 2006 WL 1410045, at \*2 (E.D. Pa. May 22, 2006).

126. *Ryan Operations*, 81 F.3d at 364-65.

127. *Id.* at 365.

128. *Id.* at 362.

could not be applied absent a finding of “bad faith” or “intentional wrongdoing.”<sup>129</sup> The court explained:

[P]olicy 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 . . . .<sup>130</sup>

On the other hand, in *Krystal*, the Third Circuit held that “a rebuttable 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,”<sup>131</sup> and that the debtor did indeed have the requisite motive to conceal.<sup>132</sup> Many, although not all, district courts in the Third Circuit appear more inclined to follow *Krystal* than *Ryan Operations*.<sup>133</sup>

Not all courts have adopted a strong presumption of advertence, however. Courts in the Eighth Circuit<sup>134</sup> and the Fourth Circuit<sup>135</sup> have not

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129. *Id.*; accord *Hansford v. Bank of Am.*, Civ. Action No. 07-4716, 2008 WL 4078460, at \*9 (E.D. Pa. Aug. 22, 2008) (holding that judicial estoppel requires the party to be estopped to “have behaved in a manner that is somehow culpable”).

130. *Ryan Operations*, 81 F.3d at 364.

131. *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003) (emphasis added) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416-18 (3d Cir. 1988)).

132. *Id.* at 323-24.

133. See, e.g., *DePasquale v. Morgan Stanley Smith Barney LLC*, Civ. No. 10-6828 (WJM-MF), 2011 WL 3703110, at \*5 (D.N.J. Aug. 23, 2011); *Clark v. Strober-Haddonfield Grp. Inc.*, Civ. No. 07-910 (RBK), 2008 WL 2945972, at \*3 (D.N.J. July 29, 2008) (“[A]s a person seeking to discharge his debts in bankruptcy, he had a motive to conceal potential assets to prevent them from being available for distribution to creditors. Because Plaintiff knew about his discrimination claim and had a motive to conceal it from his creditors, bad faith may be inferred.” (emphasis added) (citing *Krystal*, 337 F.3d at 321, 323)). But see *Hansford*, 2008 WL 4078460, at \*8 n.3 (stating that “the cases from other jurisdictions” that stand “for the proposition that a debtor’s failure to list a claim in the mandatory bankruptcy filings is tantamount to a representation that no such claim existed are inapposite” in the Third Circuit (internal quotation marks omitted)); *Cotter v. Skylands Cmty. Bank (In re Cotter)*, Bankr. No. 08-12504, Adversary No. 11-01619, 2011 WL 5900811 at \*6-8 (Bankr. D.N.J. Oct. 24, 2011).

134. See *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006); *Taylor v. Comcast Cablevision of Ark., Inc.*, 252 F. Supp. 2d 793, 799 (E.D. Ark. 2003) (“The mere failure to list the EEOC charge in the bankruptcy proceeding will not support a finding of intent.”).

accepted the presumption of advertence. It is unclear whether the Sixth Circuit has accepted the presumption; the law in that circuit appears to be in a state of flux.<sup>136</sup> The D.C. Circuit has addressed judicial estoppel in

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135. The Fourth Circuit appears to require an affirmative showing of bad faith to trigger judicial estoppel. *See, e.g., Whitten v. Fred's, Inc.*, 601 F.3d 231, 241-42 (4th Cir. 2010) (citing *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007)), *abrogated on other grounds by Vance v. Ball State Univ.* 133 S. Ct. 2434 (2013).

136. *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002), favorably cited the restrictive definition of inadvertence established in *In re Coastal Plains, Inc.*, but ultimately opted not to apply judicial estoppel in part because the omission at issue there was “*as consistent with inadvertence as it is with an affirmative assertion.*” *Id.* at 775 (emphasis added). Such language is, by definition, at odds with a presumption of advertence. “[T]he [*Browning*] Court noted that it had not decided whether bad faith or an attempt to mislead the court were prerequisites for the application of judicial estoppel, but did hold that it was inappropriate where the failure to disclose was due to mistake or inadvertence.” *Wallace v. Johnston Coca-Cola Bottling Grp., Inc.*, No. 1:06-cv-875, 2007 WL 927929, at \*2 (S.D. Ohio Mar. 26, 2007) (citing *Browning*, 283 F.3d at 776). In any event, because the court held that the claims at issue were barred on res judicata grounds, the judicial estoppel analysis in *Browning* is dicta. *See Browning*, 283 F.3d at 771-75.

*Eubanks v. CBSK Financial Group, Inc.*, 385 F.3d 894 (6th Cir. 2004), appears to require some degree of “fraudulent intentions toward the court” before judicial estoppel can be applied, which would preclude a presumption of advertence. *Id.* at 899. However, there appears to be some tension between the judges regarding how much weight to give the language in *Coastal Plains* that suggests advertence should be presumed when the debtor stands to enjoy a windfall from nondisclosure. *Compare id.* at 898 (Clay, J., for the court), *with id.* at 899-900 (McCalla, J., dissenting).

*Lewis v. Weyerhaeuser Co.*, 141 F. App'x 420 (6th Cir. 2005), an unpublished opinion, holds that a court *may, but need not*, presume advertence when the movant demonstrates both knowledge and motive to conceal, and reaffirms the importance of bad faith to the judicial estoppel inquiry. *Id.* at 426-27. However, in *Jackson v. Communicare Health Services*, No. 1:06 CV 1948, 2009 WL 455410 (N.D. Ohio Feb. 23, 2009), the United States District Court for the Northern District of Ohio characterized Sixth Circuit precedent as holding “that the *only* basis for finding judicial estoppel to be inappropriate in such a context would be where (1) the debtor lacks knowledge of the factual basis of the undisclosed claim or (2) the debtor has no motive for concealment.” *Id.* at \*4 (emphasis added).

*White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472 (6th Cir. 2010), appears to require some showing of bad faith before judicial estoppel may be applied, but appears to place the burden of showing an *absence* of bad faith on the *plaintiff*. *Id.* at 476-87; *accord Harrah v. DSW Inc.*, 852 F. Supp. 2d 900, 905 (N.D. Ohio 2012) (citing *White*, 617 F.3d at 479). With respect to satisfying this burden, “the timing of correction efforts is ‘significant,’ with affirmative efforts that pre-date a ‘judicial estoppel’ motion from the defendant being ‘more important’ than efforts generated in response to a dispositive motion.” *Id.* (quoting *White*, 617 F.3d at 480).

*Stephenson v. Malloy*, 700 F.3d 265 (6th Cir. 2012), the Sixth Circuit’s most recent statement on judicial estoppel in the consumer bankruptcy context, ultimately held that judicial estoppel was inapplicable because “the bankruptcy trustee was told of [the

consumer bankruptcy cases, but it has not opined on the propriety of a presumption of advertence one way or another.<sup>137</sup>

*a) Takeaways for Practitioners*

Although courts are moving away from an application of the judicial estoppel doctrine that could operate to the detriment of trustees and creditors, the doctrine nevertheless remains strict as a general matter in several circuits. Many courts will not hesitate to estop a debtor who stands to directly benefit from her nondisclosures in bankruptcy. Accordingly, they will impute the intent not to disclose to any debtor with (1) knowledge of her claims and (2) the potential to benefit from their nondisclosure.<sup>138</sup> Courts are “unsympathetic to what appear to be honest mistakes by debtors.”<sup>139</sup>

This imposes important duties on the bankruptcy practitioner. The practitioner must stress to the client not only that the client has a continuing duty to disclose any and all pending and potential lawsuits, but also that the court will likely deem advertent even an unthinking failure to disclose a cause of action.

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nondisclosed] lawsuit long before Defendants sought summary judgment on judicial estoppel grounds,” but included language that the debtor-plaintiff “presumably had a motive to conceal the claims: ‘wanting to keep any settlement or judgment to himself.’” *Id.* at 274. This suggests that motive to conceal will be presumed in bankruptcy.

As the United States District Court for the Eastern District of Michigan stated in *Riddle v. Chase Home Finance*, No. 09-11182, 2010 WL 3504020 (E.D. Mich. Sept. 2, 2010), “Leniency has not been the watchword that characterizes the Sixth Circuit’s treatment of judicial estoppel claims in the bankruptcy context. . . . White represents a harsh application of the judicial estoppel doctrine . . . .” *Id.* at \*3-\*4 (emphasis added). Some district courts in the Sixth Circuit have expressly held that “motive to conceal assets *is always present* in a Chapter 13 case, because it is ‘always in a Chapter 13 petitioner’s interest to minimize income and assets.’” *Harrah*, 852 F. Supp. 2d at 905 (quoting *Lewis*, 141 F. App’x at 426). This would imply a presumption of advertence analogous to *Love* in chapter 13 cases. *See also Jackson*, 2009 WL 455410, at \*4 (“Permitting [the debtor] to avoid the consequences of judicial estoppel here on the grounds of mere oversight, *no matter the cause*, would unfairly benefit her . . . .” (emphasis added)); *Wallace*, 2007 WL 927929, at \*3 (appearing to presume motive to conceal).

137. *See Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 799-800 (D.C. Cir. 2010).

138. *See, e.g., Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012); *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007); *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1295-96 (11th Cir. 2003). *See also supra* Part I.B.2.

139. *Beiner & Chapman, supra* note 1, at 12.

Conversely, even though judicial estoppel is purportedly “not intended as an offensive weapon available to defeat plaintiffs’ claims,”<sup>140</sup> decisions like *Love* render judicial estoppel an incredibly powerful tool in the hands of alleged tortfeasors.<sup>141</sup> Counsel *opposing* an individual consumer plaintiff would be wise to investigate whether the plaintiff was previously or presently in bankruptcy, and if so whether the plaintiff-debtor had disclosed the lawsuit at issue in its bankruptcy filings.<sup>142</sup> If the plaintiff-debtor did not, and if she (rather than her creditors) stood to benefit from that nondisclosure, it is likely that the defendant could successfully dismiss the case on judicial estoppel grounds.

That said, judicial estoppel is no panacea for defendants. For instance, though judicial estoppel will frequently bar plaintiffs “from pursuing claims for monetary damages,” some courts have held that “the doctrine d[oes] not prohibit [the plaintiff] from pursuing claims which add no monetary value to the bankruptcy estate,” such as claims for reinstatement or other injunctive relief.<sup>143</sup> However, other courts disagree.<sup>144</sup>

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140. *Snowden v. Fred’s Stores of Tenn., Inc.*, 419 F. Supp. 2d 1367, 1375 (M.D. Ala. 2006); *accord* *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3d Cir. 1996) (“Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to ‘secure substantial equity.’”) (quoting *Gleason v. United States*, 458 F.2d 171, 175 (3d Cir. 1972)).

141. *See* *Beiner & Chapman*, *supra* note 1, at 6 (“[T]he beauty of judicial estoppel from an employer’s perspective is that it allows the employer to win an employment discrimination case before the court reaches the merits of the claim.”). Professors Beiner and Chapman emphatically do not consider this “beauty” of judicial estoppel a good thing. *See id.* at 6-7.

142. *See* Zachary D. Fasman, *Taking the Plaintiff’s Deposition: The Defense Viewpoint*, 712 PLI/LIT 513, 521 (2004) (“Do a complete file search [on the plaintiff] . . . to obtain all . . . bankruptcy filings . . . [or] other litigation filed, etc. Find out anything and everything about the plaintiff that may be relevant to the case.”); *see also* *Moses*, 606 F.3d at 793-94.

143. *Barger*, 348 F.3d at 1297 (citing *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1288-89 (11th Cir. 2002)); *accord* *Matthews v. Potter*, 316 F. App’x 518, 523-24 (7th Cir. 2009); *Clark v. Strober-Haddonfield Grp. Inc.*, Civ. No. 07-910 (RBK), 2008 WL 2945972, at \*3 (D.N.J. July 29, 2008); *see also* *Javaid v. Allied-Barton Sec. Servs.*, No. CIV S-07-0386 FCD GGH PS, 2008 WL 1925233, at \*10 (E.D. Cal. Apr. 30, 2008) (agreeing in dicta), *report and recommendation adopted by* 2008 WL 2261297 (E.D. Cal. Jun. 2, 2008).

The court in *Castillo v. Coca-Cola Bottling Co. of Eastern Great Lakes*, Civ. Action No. 06-183, 2006 WL 1410045 (E.D. Pa. May 22, 2006), adopted an interesting variant to this approach, whereby the court held that the debtor was not permitted to pursue compensatory or punitive damages, but was permitted to “purse [sic] equitable relief, and . . . also seek backpay and/or frontpay, if appropriate.” *Id.* at \*4-\*5. In other words, it may be appropriate to allow judicially estopped debtors to pursue some but not all types of monetary damages,

*b) Of Theory and Policy*

Courts have largely adopted the presumption of advertence,<sup>145</sup> and practitioners are accordingly advised to tread lightly. But does the presumption of advertence make sense as a matter of theory or policy? We conclude it does not. This article therefore advises courts to reconsider the presumption's propriety.

For one, judicial estoppel is an equitable doctrine,<sup>146</sup> and a presumption is by definition inconsistent with notions of equity.<sup>147</sup> As commentators have noted, equitable considerations undergird bankruptcy law.<sup>148</sup> “[I]t is the historic purpose of equity to ‘secur[e] complete justice,’”<sup>149</sup> and fulfilling this purpose requires that the court have the freedom to weigh the equities in order to reach an independent decision about what justice requires in any given case.<sup>150</sup> If “equity means the power to . . . mitigate the

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rather than simply permit the plaintiff to seek injunctive relief but bar all claims for monetary relief.

144. See *Piper v. Dollar Gen. Corp.*, No. 3:11-554, 2011 WL 4565432, at \*7 n.6 (M.D. Tenn. Sept. 29, 2011) (“[T]he Sixth Circuit would not allow a judicially estopped plaintiff . . . who asserted *both* monetary and equitable claims at the onset of litigation, to proceed with her equitable claims.”).

145. See *supra* Part I.B.2.

146. *E.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citing *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)); Hilmo, *supra* note 1, at 1354.

147. To be sure, a presumption is also by definition rebuttable; presumptions may be trumped by sufficiently compelling circumstances and therefore may still be consistent with equitable principles. The point is that, by placing a thumb firmly on the scale in favor of estopping litigants, judges—especially lower court judges—are restricted from arriving at the result they would otherwise be inclined to reach.

148. See, *e.g.*, Hiltz, *supra* note 92, at 410-11 (citing Marcia S. Krieger, “*The Bankruptcy Court Is a Court of Equity*”: *What Does That Mean?*,” 50 S.C.L. REV. 275, 276 (1999)).

149. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

150. See Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 609 (1997) (“[E]quity means the power to adapt the relief to the circumstances of the particular case, ‘individualized justice,’ in effect.”); see also *New Hampshire*, 532 U.S. at 751 (“In this case, we simply observe that the factors above *firmly tip the balance of equities* . . . .” (emphasis added)). There are certainly valid concerns that judges, drunk with the intoxicating power of discretion, may wield equitable power inconsistently, capriciously, tyrannously, or with bias.

However, equity jurisprudence is not an open-ended system of boundless discretion vested in a single judge. . . . [E]quity is not a roving commission that empowers a judge to dispense his or her own brand of justice in a particular case as he or she sees fit. . . . While one of the hallmarks of equity is its flexibility, it is a flexibility that is exercised against a backdrop of specific

rigidity of strict legal rules,”<sup>151</sup> then there is supreme irony in straitjacketing equity by means of a rigid, strict legal rule like the presumption of advertence.<sup>152</sup>

The presumption of advertence is not only inconsistent with principles of equity. It is also inconsistent with binding Supreme Court precedent. To reiterate, the Supreme Court emphasized in *New Hampshire* that “judicial estoppel ‘is an equitable doctrine invoked by a court at its discretion.’”<sup>153</sup> The Court went on to state that judicial estoppel is “probably not reducible to any general formulation of principle”<sup>154</sup> and lacks “inflexible prerequisites or an exhaustive formula.”<sup>155</sup> The presumption of advertence amounts to exactly the sort of discretion-restricting exhaustive formula that the Supreme Court sought to avoid.

Furthermore, recall that the stated purpose of judicial estoppel is not to protect the parties, but rather to “prevent ‘improper use of judicial machinery.’”<sup>156</sup> If advertence is presumed from the bare facts of knowledge and motivation, then the court has no occasion to evaluate whether the litigant to be estopped has truly played “fast and loose” with the judicial system.<sup>157</sup> In other words, without earnestly examining whether or not the nondisclosure was truly advertent, the court cannot gauge the extent to which the judicial system’s integrity has been tarnished. Therefore, the presumption of advertence is not only inconsistent with equity and binding precedent; it is also inconsistent with the very purpose of judicial estoppel itself.

In many ways, the presumption of advertence may be viewed as another skirmish in the ever-present “rules versus standards” war that echoes throughout numerous areas of the law.<sup>158</sup> Should judicial estoppel be governed by a rule promulgated *ex ante*, which “entail[s] an advance determination of what conduct is permissible, leaving only factual issues

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rules . . . .

Kennedy, *supra*, at 609-10.

151. Kennedy, *supra* note 150, at 609.

152. See *infra* notes 158-164 and accompanying text.

153. *New Hampshire*, 532 U.S. at 750 (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

154. *Id.* (citations omitted).

155. *Id.* at 751.

156. *Id.* at 750 (quoting *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980)). See also *supra* notes 28-30 and accompanying text.

157. See, e.g., *Scarano v. Central R. Co. of N.J.*, 203 F.2d 510, 513 (3d Cir. 1953).

158. See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

for the adjudicator?”<sup>159</sup> Or should it be governed by an *ex post* standard, which “leav[es] both specification of what conduct is permissible and factual issues for the adjudicator?”<sup>160</sup> By adopting the presumption of advertence, courts have eschewed an *ex post*, open-ended standard for an *ex ante* rule with formal-logic-style rigidity:<sup>161</sup> *if knowledge and motivation, then advertent*. Although rules have definite advantages in other contexts,<sup>162</sup> this article contends that they are inappropriate in the judicial estoppel context. This is because (1) the underlying facts, (2) the debtor’s relative culpability and duplicitousness, (3) and the threat to the integrity of the judiciary vary between cases. Increased accuracy may therefore be gained from particularized judgments.<sup>163</sup> Put differently, because judicial estoppel cases are relatively heterogenous, the presumption of advertence is likely to be markedly overinclusive; more debtors will be estopped than would occur under a more discretionary inquiry.<sup>164</sup>

To be sure, courts that have adopted the presumption of advertence insist that the presumption is rebuttable under certain circumstances. However, these circumstances remain largely undefined. In the absence of a clear signal regarding how the presumption may be rebutted, the presumption remains a rigid, inflexible rule, and it is subject to the criticisms discussed above.

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159. *Id.* at 560.

160. *Id.*

161. *See id.* at 559-62.

162. *See id.* at 563-65. In particular, when choosing between whether to promulgate a rule or a standard to govern behavior, “the frequency of individual behavior and of adjudication is of central importance.” *Id.* at 563. “If there will be many enforcement actions, the added cost from having resolved the issue on a wholesale basis at the promulgation stage [by promulgating a rule] will be outweighed by the benefit of having avoided additional costs repeatedly incurred in giving content to a standard on a retail basis.” *Id.* Although debtors are frequently caught concealing assets, and it is impossible to tell exactly how often debtors fail to disclose causes of action and other assets on their schedules, when one considers the sheer number of consumer bankruptcy cases pursued to completion without incident each year, judicial estoppel determinations and nondisclosures are, in the grand scheme of things, relatively infrequent. This further supports the argument that a standard, not a rule, should govern judicial estoppel determinations.

163. *Contra* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 228-29 (2006) (discussing a different context in administrative law in which a rule is preferable to a standard).

164. *See* Kaplow, *supra* note 158, at 565 (noting that although rules are not necessarily over and under inclusive relative to standards because both rules and standards can be either simple or complex, a simple rule is more likely to be over- and under-inclusive than a complex standard).

For these reasons, this article urges judges to think twice before applying the presumption of advertence. To be clear, this article does not argue that nondisclosing debtors should go unpunished; nor does it argue that judicial estoppel should be severely curtailed.<sup>165</sup> The article does not dispute that the Code—and the functioning of the bankruptcy system in general—depend on full disclosure by debtors,<sup>166</sup> or that disincentives to nondisclosure are necessary. Indeed, this is not even to say that courts can never infer advertence from the circumstantial evidence of knowledge plus motivation. This article merely argues that courts, before applying judicial estoppel, should make an independent determination that weighs the particular facts, the balance of equities, and the risk of harm to judicial integrity in each case, instead of automatically applying a rigid, virtually irrebuttable presumption. Judicial estoppel should remain a viable defense, but it should also remain a flexible, discretionary doctrine employed only when appropriate.

Finally, it is worthwhile to note that courts have tools other than judicial estoppel to deter dissembling debtors and to mitigate nondisclosure's negative consequences. These include revocation of discharge,<sup>167</sup> the reopening of the bankruptcy case under Code § 350(b),<sup>168</sup> criminal penalties under 18 U.S.C. § 152,<sup>169</sup> and others.<sup>170</sup> Thus, courts have a wide variety of alternatives at their disposal, some more lenient than judicial estoppel, some harsher. Rather than applying judicial estoppel mechanically and unthinkingly, courts should carefully decide which remedy would best

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165. *Contra* Beiner & Chapman, *supra* note 1, at 2 (“Judicial estoppel, an old and arguably outdated court-created procedural tool, relegates parts of the Federal Rules of Civil Procedure and [the Code] to the status of guidelines rather than actual rules. Because of judicial estoppel, employers are getting away with acts of discrimination, creditors are missing out on opportunities to be repaid, and employment discrimination victims are losing their day in court.”).

166. *E.g.*, Fokkena v. Tripp (*In re Tripp*), 224 B.R. 95, 98 (Bankr. N.D. Iowa 1998).

167. Dugas, *supra* note 1, at 251 (citing FED. R. CIV. P. 60(b)).

168. *E.g.*, Christopher W. Frost, *Applying Judicial Estoppel to Protect the Interests of Creditors*, BANKR. L. LETTER, Oct. 2010, 5, available at 30 NO. 10 BLL 2 (Westlaw). Code § 350(b) provides that “[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.” CODE § 350(b) (2012).

169. Dugas, *supra* note 1, at 251 (citing *Greenheart Durawoods, Inc. v. PHF Int’l Corp.*, No. 91 Civ. 3731, 1994 WL 652434, at \*5 (S.D.N.Y. Nov. 18, 1994)). Title 18 U.S.C. § 152 (2012) provides for fines and imprisonment for concealment of assets and false oaths and claims in bankruptcy.

170. *See* Beiner & Chapman, *supra* note 1, at 57-59 (describing “a procedural alternative to the use of judicial estoppel” (citing *Dunmore v. United States*, 358 F.3d 1107 (9th Cir. 2004))).

effectuate the purposes and policies embodied by the Code and other applicable law.<sup>171</sup> “As courts have announced, but not adequately applied, judicial estoppel should not be employed unless it is ‘tailored to address the harm identified’ and ‘no lesser sanction would adequately remedy the damage done by the litigant’s misconduct.’”<sup>172</sup>

*3. A Debtor’s Failure to Immediately Amend a Newly Discovered Cause of Action May Not Necessarily Trigger Judicial Estoppel*

So far this article has discussed cases in which a consumer debtor failed to disclose a *preexisting* cause of action on her bankruptcy schedules. Where a cause of action arises *after* the debtor has already filed her schedules, however, some courts approach the judicial estoppel calculus differently.

*a) Delay in Amending Schedules*

One court has held that “a plaintiff who fails to amend her bankruptcy schedules to include her FLSA [Fair Labor Standards Act of 1938] claims within four months of learning of the claims’ existence” is “*not* barred by judicial estoppel” from pursuing those claims.<sup>173</sup> Where, however, the

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171. *See* Dugas, *supra* note 1, at 252.

172. *Id.* at 251 (quoting *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 319 (3d Cir. 2003)).

173. *Snowden v. Fred’s Stores of Tenn., Inc.*, 419 F. Supp. 2d 1367, 1369 (M.D. Ala. 2006) (emphasis added). Because the debtor’s claims against her employer “did not exist when she filed bankruptcy documents under oath,” and because the debtor “did not file any documents with the bankruptcy court stating that the claims did not exist after she learned about the claims,” the defendant seeking to apply judicial estoppel could not demonstrate the plaintiff had taken inconsistent positions under oath with an intent to mislead the court. *Id.* at 1371. The court recognized

that a delay in amending bankruptcy filings can be probative of a party’s intent, and a lengthy delay alone could warrant a finding that the plaintiff intended to mislead the bankruptcy court. However, four months, without more evidence indicating an intent to mislead, is too short a time to be conclusive, particularly when applying such an extraordinary remedy as judicial estoppel.

*Id.* at 1374. Thus, even though the debtor “certainly could have moved more expeditiously in amending her bankruptcy schedule after” first learning about her claims, the court concluded that judicial estoppel was unwarranted. *Id.* Other courts in similar cases have reached similar results. *See* *Thompson v. Quarles*, 392 B.R. 517 (S.D. Ga. 2008) (refusing to bar, on judicial estoppel grounds, claim that arose after schedules were filed but before plan confirmation).

Practitioners should not, however, assume that *Snowden* creates a *per se* rule that any delay of less than four months will be excused. The *Snowden* court emphasized that “courts ‘must always give due consideration to all of the circumstances of a particular case’” when deciding whether to apply judicial estoppel, which would preclude any hard and fast rule.

debtor “had knowledge of [a] claim for an extended period of time”—in this case, a year and a half<sup>174</sup>—“before finally amending [his or] her bankruptcy petition, only disclosing it three weeks after Defendants moved to dismiss,” a court has found judicial estoppel warranted.<sup>175</sup>

*b) The Duty (or Lack Thereof) to Disclose Post-Confirmation, Predischarge Claims*

Courts have reached divergent results regarding whether a chapter 13 debtor is obligated to disclose a claim that accrues *post-confirmation* but *predischarge*. Some courts hold that the cause of action need not be disclosed at all; the debtor will not be judicially estopped from pursuing that cause of action.<sup>176</sup> Others hold that “bankruptcy debtors have an ongoing duty to amend their schedule of assets . . . including those acquired after a bankruptcy court has confirmed a bankruptcy plan,”<sup>177</sup> and the failure to fulfill this duty can trigger the application of judicial estoppel if the equities warrant.<sup>178</sup> The split results in part from a textual conflict

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419 F. Supp. 2d at 1370 (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002)). Moreover, the court in *Snowden* did suggest that a sufficiently long delay before amending could trigger the application of judicial estoppel. *Id.* at 1374. Finally, *Snowden* is obviously merely persuasive authority in all jurisdictions other than the Middle District of Alabama. Thus, even though *Snowden* suggests that courts will be more forgiving of a debtor who neglects to amend her schedules to include a newly discovered claim than a debtor who omits a preexisting claim from her schedules, debtors’ attorneys should nevertheless urge their clients to amend their schedules as promptly as possible should a new claim arise during the course of the debtor’s bankruptcy.

174. *See* *DePasquale v. Morgan Stanley Smith Barney LLC*, Civ. No. 10–6828 (WJM–MF), 2011 WL 3703110, at \*1 (D.N.J. Aug. 23, 2011).

175. *Id.* at \*6; *see also* *Elkins v. Summit Cnty., Ohio*, No. 5:06–CV–3004, 2008 WL 622038, at \*5 (N.D. Ohio Mar. 5, 2008).

176. *See, e.g.,* *Muse v. Accord Human Res., Inc.*, 129 F. App’x 487, 488–90 (11th Cir. 2005).

177. *Gilbreath v. Averitt Express, Inc.*, Civ. Action No. 09–1922, 2010 WL 4554090, at \*7 (W.D. La. Nov. 3, 2010) (quoting *Henry v. Kan. City S. Ry. Co.*, Civ.A. 10–0469, 2010 WL 3613795 (W.D. La. Sept. 8, 2010)); *see also* *Batten v. Cardwell (In re Batten)* 351 B.R. 256, 259 (Bankr. S.D. Ga. 2006); *cf.* *Riddle v. Chase Home Fin.*, No. 09–11182, 2010 WL 3504020, at \*5 (E.D. Mich. Sept. 2, 2010) (“Here, the plaintiff failed to supplement her disclosures to identify the present cause of action, even though the action was pending . . . by the time the plaintiff obtained a discharge of her debts from the bankruptcy court.”). *Riddle* does not specify, however, whether these post-petition claims arose pre- or post-confirmation. The magistrate judge’s report and recommendation, 2010 WL 3504030 (E.D. Mich. Jan. 13, 2010), which the district court adopted, 2010 WL 3504020, at \*1, does not resolve the question either.

178. *See, e.g., In re Adams*, 481 B.R. 854, 859–61 (Bankr. N.D. Miss. 2012); *Gilbreath*, 2010 WL 4554090, at \*7.

between two arguably contradictory sections of chapter 13 of the Code, namely §§ 1306 and 1327.<sup>179</sup> Courts have attempted to resolve this textual conflict in several ways.<sup>180</sup> Given the split in authority, several courts, particularly district courts in the Fifth Circuit, have held that the very existence of doctrinal uncertainty regarding whether a debtor is duty-bound to disclose a cause of action that arises post-confirmation is a factor that strongly weighs against the application of judicial estoppel.<sup>181</sup> The rationale is that a debtor should not be judicially estopped for failing to comply with uncertain, poorly defined, and contested legal obligations.

Given this confusion, courts have attempted to reconcile § 1306 with § 1327 of the Code.<sup>182</sup> Section 1306(a) provides that “[p]roperty of the estate includes, in addition to the property specified in section 541 . . . all property . . . the debtor acquires after the commencement of the case.” On the other hand, § 1327(c) of the Code states, “Except as otherwise provided in the plan or order confirming the plan, the property vesting in the debtor . . . is free and clear of any claim or interest of any creditor provided for by the plan.”

Courts have developed many approaches to reconcile the two, and the “reconciliation approach” has gained the most support among courts, including the First, Eighth, and Eleventh Circuits.<sup>183</sup> Under this approach, “property that exists at confirmation vests in the debtor under section 1327,

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179. Code § 1306(a)(1) “states that the bankruptcy estate includes property ‘that the debtor acquires after the commencement of the case but before the case is *closed, dismissed, or converted.*’” *Gilbreath*, 2010 WL 4554090, at \*4. Code § 1327(b)-(c) “provides, ‘Except as otherwise provided in the plan or the order confirming the plan, *the confirmation of a plan* vests all of the property of the estate in the debtor . . . free and clear of any claim or interest of any creditor provided for by the plan.’” *Id.* “Thus, while Section 1306 indicates that the bankruptcy estate continues to accrue assets after confirmation of a debtor’s Chapter 13 plan, a plausible reading of Section 1327 is that any property a debtor acquires post-confirmation is owned free and clear by the debtor and excluded from the bankruptcy estate.” *Id.* (citing *Woodard v. Taco Bueno Rests., Inc.*, Civ. Action No. 4:05-CV-804-Y, 2006 WL 3542693, at \*5 (N.D. Tex. Dec. 8, 2006)). As a result, these two sections have been described as “facially inconsistent.” *Woodard*, 2006 WL 3542693, at \*4.

180. For a concise but useful summary of these approaches, see, for example, *Byrd v. Wyeth, Inc.*, 907 F. Supp. 2d 803, 804-09 (S.D. Miss. 2012); *Gilbreath*, 2010 WL 4554090, at \*3-7; *Woodard*, 2006 WL 3542693, at \*4-11; *In re Powers*, 435 B.R. 385, 387-88 (Bankr. N.D. Tex. 2010).

181. See, e.g., *Byrd*, 907 F. Supp. 2d at 804-07; *Gilbreath*, 2010 WL 4554090, at \*3-7; *Woodard*, 2006 WL 3542693, at \*4-11.

182. See, e.g., *Powers*, 435 B.R. at 387-89; *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1241-43 (11th Cir. 2008).

183. See *Waldron*, 536 F.3d at 1241-43; see also *Barbosa v. Solomon*, 235 F.3d 31 (1st Cir. 2000); *Sec. Bank of Marshalltown, Iowa v. Neiman*, 1 F.3d 687 (8th Cir. 1993).

but property acquired after confirmation funds the chapter 13 estate, which continues to exist post-confirmation.”<sup>184</sup> To illustrate, an estate is created upon the filing of the bankruptcy petition by virtue of § 541 of the Code, which consists of “all legal or equitable interest of the debtor in property as of the commencement of the case.”<sup>185</sup> Section 1306 expands the definition of the estate as provided by § 541 to broadly include “all property” that a “debtor acquires *after* the commencement of the case, *but before* the case is closed, dismissed, or converted.”<sup>186</sup> Section 1327 operates to determine the status of estate property as it exists on the date of confirmation.<sup>187</sup> Therefore, under this approach, any property (including claims) that arises post-confirmation, which by definition is not contemplated by Code § 1327, is subsumed by Code § 1306 and becomes estate property. Courts seem to favor this approach because “it gives effect to the language of both sections 1306(a) and 1327(b).”<sup>188</sup>

Thus, while the fact remains that some courts are still split on this issue, the reconciliation approach is the most logical approach to deal with claims that arise during the pendency of a debtor’s bankruptcy case. However, given the uncertainty surrounding the issue, this article recommends that debtor’s attorneys encourage their clients to disclose claims that accrue post confirmation as soon as possible. Note, however, there does not appear to be a duty to disclose claims that arise post-*discharge*, as they are not property of the bankruptcy estate.<sup>189</sup>

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184. *Powers*, 435 B.R. at 388 (citing *Rodriguez v. Countrywide Home Loans, Inc.* (*In re Rodriguez*), 421 B.R. 356, 374 (Bankr. S.D. Tex. 2009)).

185. CODE § 541(a)(1).

186. *Id.* § 1306(a)(1) (emphasis added).

187. “Except as otherwise provided in the plan or the order confirming the plan, *the confirmation of a plan* vests all of the property of the estate in the debtor . . . free and clear of any claim or interest of any creditor provided for by the plan.” *Id.* § 1327(b)-(c) (emphasis added).

188. *In re Hymond*, No. 09-45346-dml-13, 2012 WL 6692196, at \*3, (Bankr. N.D. Tex. Dec. 21, 2012) (citing *Powers*, 435 B.R. at 388).

189. *See Biggs v. AM Gen., LLC*, No. 3:07-CV-28 JVB, 2008 WL 1957864, at \*3-4 (N.D. Ind. May 1, 2008); *see also Galin v. United States*, No. 08-CV-2508, 2008 WL 5378387, at \*11 (E.D.N.Y. Dec. 23, 2008). For an interesting case splitting groups of plaintiffs into subgroups on the basis of timing of discharge/timing of closing of the bankruptcy case (but, troublingly, not on the basis of timing of confirmation), *see Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2009 WL 790107, at \*10-12 (M.D. Tenn. Mar. 24, 2009).

c) *Statutes of Limitation: When Does a Claim Arise?*

In *Kaufman v. Robinson Property Group, L.P.*, the Northern District of Mississippi ruled that a chapter 7 consumer debtor's personal injury claim was barred on judicial estoppel grounds for failure to list the claim on her schedules.<sup>190</sup> What sets *Kaufman* apart from the cases previously discussed is that the statute of limitations period for the claim had expired prior to the debtor's bankruptcy filing.<sup>191</sup> Because the defendant casino "had agreed to settle [the debtor's] claim but delayed settlement by various means until the limitations period expired," the claim was revived by equitable estoppel.<sup>192</sup> Thus, argued the debtor-plaintiff, the claim was not a live asset of the estate at the time of filing, and therefore it did not need to be listed on her bankruptcy schedules.<sup>193</sup> The court disagreed: "[T]he plaintiff was aware of she [sic] had contingent and unliquidated claims arising from her alleged injury . . . and that she pursued those claims . . . well after she filed her bankruptcy petition and ultimately filed a lawsuit well after she received her discharge."<sup>194</sup> Quoting Fifth Circuit precedent, the court noted that "[a]lleged confusion as to a limitations period does not evince a lack of knowledge as to the existence of the claim."<sup>195</sup> Thus, reasoned the court, the debtor was required to disclose the claim, the failure to disclose the claim was advertent, and the debtor was therefore judicially estopped from pursuing it.<sup>196</sup>

The foregoing analysis presents the question—when does a claim arise such that the debtor's bankruptcy schedules might need to be amended to reflect the newly arising claim? According to some courts, a claim accrues for judicial estoppel purposes when the debtor suffers the wrongful conduct, rather than when the debtor has exhausted her remedies.<sup>197</sup> "A debtor 'need not know all the facts or even the legal basis for the cause of action;'" if the debtor has sufficient information before confirmation to

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190. 661 F. Supp. 2d 622, 626-27 (N.D. Miss. 2009), *motion to amend denied*, Civ. Action No. 2:07CV048-P-A, 2009 WL 3003261 (N.D. Miss. Sept. 16, 2009), *aff'd* 373 F. App'x. 494 (5th Cir. 2010).

191. *Id.* at 624.

192. *Id.*

193. *Id.*

194. *Id.* at 627.

195. *Id.* (quoting *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 335 (5th Cir. 2004)).

196. *Id.* at 626-27.

197. *Harrah v. DSW Inc.*, 852 F. Supp. 2d 900, 906 (N.D. Ohio 2012) (citing *Wallace v. Johnston Coca-Cola Bottling Grp., Inc.*, 2007 WL 927929, at \*4 (S.D. Ohio Mar. 26, 2007)).

indicate that a cause of action may exist, “then the debtor has a ‘known’ cause of action that must be disclosed.”<sup>198</sup>

*4. Creditors Are Not Subject to the Same Disclosure Obligations as Debtors*

The previous cases have involved nondisclosure of assets by a consumer *debtor* in bankruptcy. What happens when a *creditor* fails to disclose the full amount of its claims against the debtor in debtor’s bankruptcy? Is the creditor judicially estopped from asserting the full amount in the subsequent lawsuit? The sections below discuss how some courts have answered these questions.

*a) Wells Fargo Bank, N.A. v. Oparaji*

In 2012, on the facts of *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, the Fifth Circuit ruled that judicial estoppel was not warranted.<sup>199</sup> The debtor took out a home mortgage from the creditor but soon fell behind on his payments.<sup>200</sup> The debtor accordingly filed bankruptcy (the First Bankruptcy) under chapter 13 of the Code.<sup>201</sup> Throughout the First Bankruptcy, the creditor filed multiple proofs of claim, but did not include the full amount of post-petition arrearages owed to it by the debtor in each amended proof of claim.<sup>202</sup> The First Bankruptcy was then dismissed without granting the debtor a discharge, because the debtor “was in default of \$7,809.18 in plan payments and the case had exceeded the statutory time limit set by [Code section] 1322(d).”<sup>203</sup>

The debtor continued to fall behind on mortgage payments and property taxes, and therefore filed bankruptcy again (the Second Bankruptcy).<sup>204</sup> The

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198. *Smith v. Rosenthal Collins Grp., LLC*, No. 03-2360 M1/AN, 2005 WL 2210208 (W.D. Tenn. Sept. 10, 2005), at \*4 (quoting *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 208 (5th Cir. 1999)).

199. 698 F.3d 231, 239 (5th Cir. 2012).

200. *Id.* at 233.

201. *Id.*

202. *Id.* at 236. The Fifth Circuit’s opinion does not specify or speculate why the creditor did not include the entirety of the post-petition arrearages in its amended proofs of claim, but notes that “[t]he District Court speculate[d] that [the creditor] wanted to ‘facilitate the success of [Debtor’s] bankruptcy, believing that a successful bankruptcy plan would result in a higher payoff to [the creditor].’” *Id.* at 238 (quoting *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, 458 B.R. 881, 896 (S.D. Tex. 2011)). The court noted that the creditor “waived the issue of inadvertence” on appeal by “choosing not to address the issue in its briefing to this Court.” *Id.* at 236 n.1.

203. *Id.* at 234.

204. *Id.*

creditor filed a claim in the Second Bankruptcy that included amounts that were not, but could have been, claimed in the First Bankruptcy.<sup>205</sup>

The bankruptcy court and the district court, analogizing to the cases where a debtor fails to satisfy its disclosure requirements in bankruptcy, ruled that the creditor was judicially estopped from asserting a claim for the remainder of the arrearages.<sup>206</sup> The Fifth Circuit reversed for abuse of discretion.<sup>207</sup> The court first explained that judicial estoppel is generally predicated upon a court's acceptance of a party's legally inconsistent position,<sup>208</sup> but in this case the creditor asserted no legally inconsistent position.<sup>209</sup> The court held, contrary to the district court's conclusion, that creditors are not subject to precisely the same disclosure requirements in chapter 13 as debtors, and are therefore not "legally required to include all accrued post-petition arrearages in each amended claim they submit."<sup>210</sup>

Notably, Code § 1305(a) states that a "proof of claim *may*," not shall, "be filed by any entity that holds a claim against the debtor."<sup>211</sup> According to the Fifth Circuit, the lower courts failed to identify any law that would require the creditor to "seek the full amount to which it is entitled in each amended claim."<sup>212</sup> Moreover, the court noted an important

difference between a debtor who has failed to disclose an asset and a creditor who has failed to include all accrued interest in each revised claim. In the first instance, the creditor has no way of knowing about the concealed asset except through the debtor's disclosure. In the second instance, however, the debtor has the ability and responsibility to keep track of his outstanding debt.<sup>213</sup>

Thus, because the creditor had not violated any disclosure obligations imposed by chapter 13, it did not assert a legally inconsistent position in the Second Bankruptcy, so judicial estoppel could not be applied.<sup>214</sup>

Having thus disposed of the case, the court nonetheless proceeded to explain in dicta that the movant had also failed to satisfy the element of

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205. *Id.*

206. *Id.* at 236.

207. *Id.* at 237.

208. *Id.* at 235 (citing *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012)).

209. *Id.*

210. *Id.* at 236.

211. *Id.* at 236 n.2.

212. *Id.* at 236.

213. *Id.*

214. *Id.* at 237.

judicial acceptance.<sup>215</sup> The court stated that the element of judicial acceptance “ensures that judicial estoppel is only applied in situations where the integrity of the judiciary is jeopardized” by the “risk of inconsistent results.”<sup>216</sup> The court then explained that although the bankruptcy court had initially accepted the legal position inherent in the creditor’s claims in the First Bankruptcy, that acceptance was “revoked when [the First Bankruptcy] was dismissed without a discharge,”<sup>217</sup> because pre-discharge dismissal of a bankruptcy case “undo[es] the bankruptcy case, as far as practicable,” and “restores the *status quo ante*.”<sup>218</sup>

The court concluded by explaining why principles of equity counseled against the application of judicial estoppel in this case. Characterizing “a Chapter 13 plan as an ‘exchanged for bargain between the debtor and the debtor’s creditors,’”<sup>219</sup> the court explained that the debtor failed to fulfill his end of the bargain “when his failure to make payments resulted in the bankruptcy’s [sic] being dismissed without a discharge.”<sup>220</sup> As a result, equity did not permit the debtor to hold the creditor to the terms of the plan of the First Bankruptcy.<sup>221</sup> Furthermore, the court found no evidence in the record that the creditor received a disproportionate or unfair benefit at the debtor’s expense.<sup>222</sup>

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215. *Id.* at 237-38.

216. *Id.* at 237 (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)).

217. *Id.* at 238; see also *infra* Part I.B.7.

218. *Oparaji*, 698 F.3d at 238 (quoting *In re Sanitate*, 415 B.R. 98, 105 (E.D. Pa. 2009)).

219. *Id.* (quoting *In re Hufford*, 460 B.R. 172, 177 (Bankr. N.D. Ohio 2011)).

220. *Id.*

221. *Id.*

222. *Id.* The court explained:

In an attempt to justify its decision to apply judicial estoppel, the District Court notes several possible motives behind Wells Fargo’s submission of the incomplete arrearage claims in the First Bankruptcy. None of them, however, demonstrate that Wells Fargo received a disproportionate benefit from its actions. The District Court speculates that Wells Fargo wanted to “facilitate the success of [Debtor’s] bankruptcy, believing that a successful bankruptcy plan would result in a higher payoff to Wells Fargo.” But, taken as true, this still does not show that Wells Fargo gained an unfair benefit at Debtor’s expense. At best, it shows that Wells Fargo sought to promote the success of the bankruptcy for its benefit and the much greater benefit of Debtor. Thus, even if the Bankruptcy court’s dismissal of the First Bankruptcy had not negated its earlier acceptance, equity would still counsel against the application of judicial estoppel.

*Id.* (citations omitted).

b) *In re Munoz: The Relevance of Dismissal of a Prior Bankruptcy Case*

Although dismissal of a bankruptcy “returns the parties . . . to the position they were in at the time of filing with respect to their property rights[, i]t does not erase all history. Parties may still face consequences as a result of the earlier bankruptcy.”<sup>223</sup> Indeed, some courts have held that when a debtor’s chapter 13 plan is dismissed after confirmation, a creditor will be judicially estopped from taking an inconsistent position regarding the nature of its claim in a subsequent bankruptcy case.<sup>224</sup>

For example, in *Munoz*, the United States Bankruptcy Court for the Southern District of Texas held that when a creditor filed a proof of claim as a secured creditor, accepted multiple payments under a confirmed chapter 13 plan, and never objected to its treatment under such plan, it would be judicially estopped in a subsequent bankruptcy case from claiming that the same underlying debt is a lease and not a secured claim.<sup>225</sup>

c) *Conclusion*

The foregoing demonstrates that although judicial estoppel is a strong weapon for creditors to use against debtors, it is not always readily available for debtors to use against creditors. While creditors’ disclosure obligations are not as stringent as those imposed upon debtors in bankruptcy, courts will not allow a creditor to change the nature of its claim in a separate proceeding to gain an unfair advantage.<sup>226</sup> Nevertheless, *Oparaji*, coupled with *Reed* and the presumption of advertence cases, represents a pro-creditor trend in judicial estoppel cases, which arguably further reflects what many commentators perceive to be recent pro-creditor trends in bankruptcy and debtor-creditor law generally.<sup>227</sup>

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223. *In re Munoz*, 459 B.R. 621, 623 (Bankr. S.D. Tex. 2011) (quoting *Oparaji*, 454 B.R. at 731).

224. *See, e.g., Munoz*, 459 B.R. at 623; *see also In re Alaniz*, No. 11-20475, 2012 WL 3862622 (Bankr. S.D. Tex. Sept. 5, 2012).

225. *In re Munoz*, 459 B.R. at 623.

226. *Compare Oparaji*, 698 F.3d at 236, with *Munoz*, 459 B.R. at 623.

227. *See, e.g.,* Lawrence B. Gutcho & David A. Fidler, *Purchasing Claims to Block Bankruptcy “Cramdown” Plans: A New Weapon for Creditors*, 115 BANKING L.J. 4, 10 (1998); Richard P. Tobin, Note, *Bankruptcy – Excusable Neglect – Consideration of Equitable Factors Is Permitted for Late Chapter 11 Proof of Claim Filings Under Bankruptcy Rule 9006(b)(1) to Determine if Filer’s Conduct Constituted Excusable Neglect – Pioneer Inv. Servs. v. Brunswick Assocs.*, 113 S. Ct. 1489 (1993), 24 SETON HALL L. REV. 1056, 1085 (1993); Brian K. Van Engen, *Nobelman v. American Savings Bank: The Supreme Court’s Answer Raises More Questions*, 20 J. CORP. L. 363, 386 (1995). *But see* Jonathan Remy Nash & Rafael I. Pardo, *Does Ideology Matter in Bankruptcy? Voting*

*5. Attorney Error Will Not Necessarily Protect a Nondisclosing Party from Judicial Estoppel*

Even where a debtor fails to disclose an asset or claim on her schedules due to erroneous legal advice, many courts have not hesitated to visit the sins of the attorney upon the debtor, and have applied judicial estoppel regardless.<sup>228</sup>

A particularly egregious case illustrating this principle is *Galin v. IRS*.<sup>229</sup> In *Galin*, the debtor was a seventy-three-year-old divorcee left responsible for massive criminal liabilities incurred by her estranged husband.<sup>230</sup> The debtor omitted certain property interests from her bankruptcy petition after

*Behavior on the Courts of Appeals*, 53 WM. & MARY L. REV. 919 (2012) (examining empirical evidence and finding “no evidence that circuit court judges engage in ideological voting in bankruptcy cases”).

In particular, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub L. 109-8, 119 Stat. 23, was generally considered to be a pro-creditor development. See, e.g., Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 PENN ST. INT’L L. REV. 497, 533 n.138 (2006); Assaf Lichtash, *Realigning the American Consumer Bankruptcy System with the Goals of the Fresh-Start Doctrine: A Global Comparative Analysis*, 34 LOY. L.A. INT’L & COMP. L. REV. 169, 190 (2011); Shaun Mulreed, *In re Blair Misses the Mark: An Alternative Interpretation of the BAPCPA’s Homestead Exemption*, 43 SAN DIEGO L. REV. 1071, 1074-75 (2006); Bruce C. Scalabrino, *Bankruptcy Reform for Non-Bankruptcy Lawyers*, 93 ILL. B.J. 518 (2005); Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. KAN. L. REV. 553, 574-83 (2010).

228. See *Cannon-Stokes v. Potter*, 453 F.3d 446, 448-49 (7th Cir. 2006).

In the district court [the debtor] filed an affidavit asserting that her false statement on the bankruptcy schedules was the result of good-faith . . . legal advice. . . . Yet bad legal advice does not relieve the client of the consequences of her own acts. . . . Whether the bankruptcy fraud was [the debtor’s lawyer’s] suggestion . . . or [the debtor’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 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.

*Id.*; accord *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1295 (11th Cir. 2003) (holding that “[a]lthough it is undisputed that Barger’s attorney failed to list Barger’s discrimination suit on the schedule of assets despite the fact that Barger specifically told him about the suit, the attorney’s omission” does not preclude the application of judicial estoppel); *Lewis v. Weyerhaeuser Co.*, 141 F. App’x 420, 427-29 (6th Cir. 2005); *In re Williams*, 310 B.R. 442, 443-44 (Bankr. N.D. Ala. 2004). *But see infra* note 246 and accompanying text.

229. 563 F. Supp. 2d 332 (D. Conn. 2008).

230. *Id.* at 334-35.

she was advised by her attorney at the outset of her bankruptcy case that she had no legal interest or claim of ownership in the property at issue.<sup>231</sup> Acknowledging that advertence is presumed in many courts only when the debtor has knowledge of her claims,<sup>232</sup> the United States District Court for the District of Connecticut “accept[ed] that [the debtor] *had no knowledge* of her potential property interest and her bankruptcy attorney did not advise her of any such interest.”<sup>233</sup> Though the court appeared to accept that the debtor’s failure therefore constituted a good faith mistake,<sup>234</sup> it nonetheless applied judicial estoppel against the debtor on the grounds that “legal advice and ignorance of the law are not defenses to judicial estoppel.”<sup>235</sup> Per the court:

The Court regrets coming to this conclusion and denying a remedy to Mrs. Galin who, after being betrayed and bankrupted by her husband’s misconduct, also appears to have been misled by ill-informed legal counsel. But as sympathetic a plaintiff as Mrs. Galin is, the law does not permit her to turn around and assert a claim to the [property] after failing to disclose her ownership interest in her bankruptcy proceeding.<sup>236</sup>

Accordingly, the court judicially estopped the debtor from asserting her claim to the property.<sup>237</sup>

*Galín* is disturbing in several respects. First, the court knew, and explicitly stated, that “[j]udicial estoppel . . . is an equitable doctrine invoked by a court at its discretion.”<sup>238</sup> If the court “regret[ted] coming to

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231. *Id.* at 335.

According to her affidavit . . . [debtor] states that she had been advised that New York and Connecticut are both “title” states, meaning that she had no interest in the [property] because her verbal lease with [her estranged husband] . . . was unenforceable pursuant to the Connecticut statute of frauds. . . . Not until she initiated divorce proceedings several years later did she learn that she could assert an equitable ownership interest in her marital property dating back to its purchase date.

*Id.* at 335-36.

232. *Id.* at 340-41 (citing cases discussed *supra* Part I.B.2).

233. *Id.* at 340 (emphasis added).

234. *See id.* at 340-41.

235. *Id.* at 341 (citing *Negron v. Weiss*, No. 06-CV-1288 (CBA), 2006 WL 2792769, at \*5 (E.D.N.Y. Sept. 27, 2006); *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006)).

236. *Id.*

237. *Id.*

238. *Id.* at 339 (emphasis added) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)).

this conclusion,<sup>239</sup> it could have—and should have—exercised its discretion not to estop the debtor. This is not necessarily to say that attorney error should always absolve a debtor, or that courts should never apply judicial estoppel when doing so makes them queasy; it is merely to say that the decision to apply judicial estoppel is never inevitable. Indeed, case law from other jurisdictions establishes that a court may decline to apply judicial estoppel even when all of the elements are met.<sup>240</sup> To be sure, as noted previously, many appellate courts either explicitly or implicitly treat judicial estoppel as a nondiscretionary doctrine to be reviewed *de novo*.<sup>241</sup> We also recognize and accept that because judicial estoppel is designed to protect the courts rather than to protect the parties or to punish wrongdoing, courts will occasionally judicially estop sympathetic litigants and bamboozled septuagenarians. We merely note that the decision to estop the debtor in *Galín* was not inevitable, and courts should be wary of following *Galín*'s rationale.

The other major problem with *Galín* is that it appears to transform the already very strong presumption of advertence into a super-presumption. Whereas most of the presumption of advertence cases previously discussed establish that a failure to disclose assets will be deemed inadvertent when the debtor has either no knowledge of the assets or no motive to conceal them,<sup>242</sup> *Galín* expressly holds that a nondisclosing debtor may be estopped *even when* the debtor has no knowledge of her assets.<sup>243</sup> This is particularly troubling given that many courts are beginning to presume that the *motive* to conceal virtually always exists, as discussed previously.<sup>244</sup> The combined effect of *Galín* and the aforementioned Fifth Circuit presumption cases, if the rationales of those cases were adopted by other courts, would be to make the presumption of advertence not merely *virtually* irrebuttable, but *actually* irrebuttable. Both knowledge and motive would become completely irrelevant, and any nondisclosure would automatically trigger judicial estoppel.

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239. *Id.* at 341.

240. *See, e.g.*, *Byrd v. Wyeth, Inc.*, 907 F. Supp. 2d 803 (S.D. Miss. 2012); *Gilbreath v. Averitt Express, Inc.*, Civ. Action No. 09-1922, 2010 WL 4554090, at \*8 (W.D. La. Nov. 3, 2010).

241. *See supra* Part I.B.2.

242. *See supra* Part I.B.2.

243. *See Galín*, 563 F. Supp. 2d at 340-41.

244. *See supra* Part I.B.2.

However, not every court follows the harsh analysis of *Galin*, or even the more moderate result reached by other courts.<sup>245</sup> Some have held or suggested that judicial estoppel may indeed be inapplicable when the nondisclosure had its genesis in attorney error.<sup>246</sup>

That said, when a litigant is judicially estopped from bringing a claim due to a failure to disclose stemming from attorney error, that litigant does not necessarily lack a remedy, as that attorney may be subject to malpractice liability to the litigant.<sup>247</sup> Counsel must therefore take caution.

Paradoxically, in some circumstances, judicial estoppel for nondisclosure in bankruptcy can *protect* attorneys from malpractice actions. In *In re Alan DeAtley Litigation*,<sup>248</sup> an individual (Alan) alleged legal malpractice on the part of his prior litigation counsel (Prior Counsel) for reasons unrelated to nondisclosure of claims in bankruptcy.<sup>249</sup> Alan had retained Prior Counsel to pursue a claim against his father (the Underlying Claim).<sup>250</sup> However, Alan had previously declared personal bankruptcy under chapter 7 and received a discharge.<sup>251</sup> Even though the Underlying Claim existed at the time Alan filed for bankruptcy, he knowingly failed to list the Underlying Claim on his schedules or amend them to include it.<sup>252</sup> The court therefore held that Alan's *malpractice* claim against Prior Counsel must fail, because

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245. See, e.g., *supra* note 228 and accompanying text.

246. See *Sharp v. Oakwood United Hosps.*, 458 F. Supp. 2d 463, 473 (E.D. Mich. 2006) (holding judicial estoppel inapplicable where the court is “persuaded by Plaintiff’s assertion that she relied in good faith on the advice of her counsel”); *Taylor v. Comcast Cablevision of Ark., Inc.*, 252 F. Supp. 2d 793, 796-99 (E.D. Ark. 2003) (concluding that judicial estoppel is unwarranted in part because of debtor’s reliance on attorney’s conduct); see also *Beiner & Chapman*, *supra* note 1, at 21-22 (describing cases in which courts “have been more understanding towards pro se debtors, those justifiably relying on the legal advice of counsel, and those otherwise lacking legal sophistication”).

247. *Arruda v. C & H Sugar Co.*, No. 2:06-cv-2308-MCE-EFB, 2007 WL 754627, at \*6 (E.D. Cal. Mar. 8, 2007) (citing *Estel v. Bigelow Mgmt. Inc.*, 323 B.R. 918 (E.D. Tex. 2005)).

248. No. CV-06-0278-JLQ, 2008 WL 4153675 (E.D. Wash. Aug. 29, 2008).

249. *Id.* at 2.

The malpractice alleged to have occurred involved the failure of counsel to diligently prepare [Alan’s] case by allegedly failing to retain accounting and handwriting/authentication experts, failing to oversee associates working on the case, failing to disclose they were closing their office, failing to adequately conduct discovery, neglecting to file motions, losing original documents, and trying to cover up their actions.

*Id.*

250. *Id.* at \*1.

251. *Id.* at \*3-4.

252. *Id.* at \*3-4, \*15-18.

as a matter of law Alan could not prove that he would have succeeded in the litigation against his father had Prior Counsel acted differently.<sup>253</sup> The applicable test for malpractice “require[d] the former client prove that *but for* the attorney’s negligence,” the former client “would have been *successful* in the prosecution of the original suit.”<sup>254</sup> Because the Underlying Claim would be barred by judicial estoppel, Alan could not possibly have succeeded in the prior litigation, and thus Prior Counsel could not be found liable for malpractice.<sup>255</sup>

6. *Appearing Pro Se Generally Does Not Excuse Nondisclosure*

Most courts hold that just as attorney error will generally not preclude the application of judicial estoppel, a nondisclosing pro se debtor will not be subject to a more lenient standard than represented litigants.<sup>256</sup> Per the United States District Court for the Eastern District of Michigan, “if the Court were to equate lack of legal training regarding a statutory duty to disclose or absence of affirmative efforts to conceal the claim with excusable mistake or inadvertence, it would undermine the familiar maxim

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253. *Id.* at \*9.

254. *Id.* at \*6 (emphasis added) (citing *Schmidt v. Coogan*, 173 P.3d 273, 274 (Wash. 2007)).

255. *Id.* at \*16-18.

[Prior Counsel] has met its prima facie burden of showing that Alan’s breach of contract claims would not have been viable against his father because . . . his attempt would have been judicially estopped. Moreover, Alan has not demonstrated there would have been sufficient evidence to avoid summary judgment in the underlying action. There is no escape from the conclusion herein that Alan is unable to establish the essential element of his malpractice claim which requires he prove on a more probable than not basis that but for his attorneys’ negligence, he would have fared better in the underlying action. Accordingly, Alan’s legal malpractice counterclaim is dismissed in its entirety.

*Id.* at \*18. The court additionally held that Alan would be barred from pursuing the Underlying Claim on the grounds of standing. *Id.* at \*11-14.

256. *See, e.g.,* *Banh v. Bank of Am., N.A.*, No. C11-05744 HRL, 2012 WL 1670211, at \*2 (N.D. Cal. May 14, 2012) (“The fact that [the debtors] proceeded pro se in their bankruptcy matters does not, by itself, insulate them from application of [judicial estoppel].”); *see also* *Caviness v. England*, No. CIV S-04-2388 GEB DAD PS, 2007 WL 1302522, at \*7, \*13 (E.D. Cal. May 3, 2007) (judicially estopping a plaintiff despite the plaintiff’s request that the court afford him a greater degree of solicitude because he had previously appeared pro se), *findings and recommendations adopted* by 2007 WL 1577707 (E.D. Cal. May 31, 2007); *cf.* *Clark v. Strober-Haddonfield Grp. Inc.*, Civ. No. 07-910 (RBK), 2008 WL 2945972, at \*1-4 (D.N.J. July 29, 2008) (applying judicial estoppel against pro se litigant without analyzing whether the litigant’s pro se status should affect the court’s analysis). *But see infra* note 259 and accompanying text.

that, even for *pro se* litigants, ignorance of the law is no excuse.<sup>257</sup> Nor will neglect due to high stress excuse a *pro se* litigant from fulfilling her bankruptcy obligations.<sup>258</sup> Other courts, however, appear to disagree.<sup>259</sup>

*7. Judicial Acceptance and the Effect of Dismissal, Settlement, or Amendment*

As discussed above, one of the elements typically applied in the judicial estoppel inquiry is judicial acceptance; the movant must show that the party to be estopped previously convinced a court to adopt her earlier position, such “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.’”<sup>260</sup> “[J]udicial estoppel is not appropriate if the litigant was unable to convince the court of its initial position.”<sup>261</sup> In the consumer bankruptcy context, the judicial acceptance element can be satisfied “in many ways,” such as when a court “lift[s] a stay based in part on the debtor’s nondisclosure in its bankruptcy schedules;” “approve[s] the debtor’s plan of reorganization;” or “approve[s] [the debtor’s] amended schedules and modifie[s] her Chapter 13 plan of reorganization.”<sup>262</sup>

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257. *Riddle v. Chase Home Fin.*, No. 09-11182, 2010 WL 3504020, at \*6 (E.D. Mich. Sept. 2, 2010) (citing *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561-62 (6th Cir. 2000)); *cf.* *Arruda v. C & H Sugar Co.*, No. 2:06-cv-2308-MCE-EFB, 2007 WL 754627, at \*1, at \*6 (E.D. Cal. Mar. 8, 2007) (applying judicial estoppel against a litigant with an alleged mental disability, holding that the litigant could not claim the failure to list his claims was a mistake or the product of inadvertence).

258. *See Jackson v. Communicare Health Servs.*, No. 1:06 CV 1948, 2009 WL 455410, at \*4 (N.D. Ohio Feb. 23, 2009).

259. *See, e.g., Schneider v. Unum Life Ins. Co. of Am.*, No. CV 05-1402-PK, 2008 WL 109065, at \*7 (D. Or. Jan. 8, 2008) (“A *pro se* bankruptcy applicant’s failure to declare two exempt assets is not sufficient evidence for a finding of bad faith.”); *Taylor v. Comcast Cablevision of Ark., Inc.*, 252 F. Supp. 2d 793, 796-99 (E.D. Ark. 2003); *see also Beiner & Chapman, supra* note 1, at 21-22 (describing cases in which courts “have been more understanding towards *pro se* debtors, those justifiably relying on the legal advice of counsel, and those otherwise lacking legal sophistication”).

260. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (citations omitted).

261. *Cotter v. Skylands Cmty. Bank*, Bankr. No. 08-12504, Adversary No. 11-01619, 2011 WL 5900811 at \*6 (Bankr. D.N.J. Oct. 24, 2011) (citing *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247, 262 (3d Cir. 2009)).

262. *Simoneau v. Nike, Inc.*, No. 04-CV-1733-BR, 2006 WL 977302, at \*3 (D. Or. Apr. 6, 2006) (citing *Hailton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 210 (5th Cir. 1999); *Donaldson v. Bernstein*, 104 F.3d 547, 555-56 (3d Cir. 1997)).

As noted in the discussion of *Oparaji*,<sup>263</sup> that court held that although the bankruptcy court had initially accepted the creditor's legal position, that acceptance was "revoked when [the First Bankruptcy] was dismissed without a discharge,"<sup>264</sup> because pre-discharge dismissal of a bankruptcy case "undo[es] the bankruptcy case, as far as practicable," and "restores the *status quo ante*."<sup>265</sup> In other words, *Oparaji* holds that dismissal of the bankruptcy case can circumvent the judicial acceptance element of judicial estoppel.

Other courts agree with this proposition.<sup>266</sup> For example, in *Perez v. Wells Fargo Bank, N.A.*,<sup>267</sup> the United States District Court for the Northern District of California refused to apply judicial estoppel where the debtor allegedly failed to disclose her claims to the bankruptcy court, but the bankruptcy case was dismissed prior to plan confirmation or discharge:

Defendants cannot establish that the bankruptcy court accepted or relied upon [the plaintiff-debtor's] representation as to whether she had any claims. . . . [T]he bankruptcy action . . . was dismissed as a result of [the plaintiff-debtor's] failure to submit required documents and appear at required hearings. As a result, there is no danger of inconsistent outcomes. Further, in light of the fact that the bankruptcy proceeding was dropped before any bankruptcy plan was adopted, there is no unfairness to [the Defendants] that will result from allowing [the plaintiff-debtor] to proceed with the claims in this case.<sup>268</sup>

The *Perez* court further "reject[ed] the assertion" that the judicial acceptance element was met solely on the grounds the plaintiff-debtor "benefitted from the bankruptcy proceeding by obtaining an automatic stay against their creditors."<sup>269</sup> Judicial estoppel could not be predicated solely

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263. See *supra* Part I.B.4.a.

264. 698 F.3d 231, 238 (5th Cir. 2012).

265. *Id.* (quoting *In re Sanitate*, 415 B.R. 98, 105 (Bankr. E.D. Pa. 2009)).

266. See, e.g., *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2009 WL 790107, at \*11 (M.D. Tenn. Mar. 24, 2009) ("Opt-Ins whose bankruptcy proceedings were terminated or dismissed—will not be judicially estopped from proceeding in this case because they did not succeed in persuading a prior court of a position inconsistent with the one being asserted here."); *Ben-Ami v. Katz (In re Ben-Ami)*, 348 B.R. 320, 326 (Bankr. E.D. Va. 2006) (holding the element of judicial acceptance not met where first bankruptcy case "dismissed without confirmation of a plan").

267. No. C-11-02279 JCS, 2011 WL 3809808 (N.D. Cal. Aug. 29, 2011).

268. *Id.* at \*12.

269. *Id.*

on the entry of the automatic stay because “[a] stay would have been entered in the bankruptcy action regardless of whether [the plaintiff-debtor] listed any claims in her bankruptcy filings.”<sup>270</sup> In other words, the bankruptcy court did not rely on any position taken by the debtor when deciding whether to stay creditor actions—the automatic stay is, as the name suggests, automatic. Thus, the mere fact that a debtor benefits from the automatic stay cannot satisfy the judicial acceptance prerequisite for judicial estoppel.

This is true even if the debtor’s failure to disclose is indisputable. As the United States Bankruptcy Court for the District of Massachusetts noted in *DiVittorio v. HSBC Bank, USA, N.A. (In re DiVittorio)*,<sup>271</sup>

Without question, no such claim appeared on the Debtor’s schedules, but unlike the cases which have applied the doctrine, I have not granted the Debtor any relief, such as a discharge, based upon representations made in them. Indeed, the Debtor could still amend his schedules and Chapter 13 plan to reflect an omitted asset if necessary. For that reason, confirmation of the Debtor’s plan would not amount to “acceptance of a position” in the same manner.<sup>272</sup>

The *DiVittorio* court likewise stated that “a court does not accept the legal or factual allegations of the underlying matter” for judicial estoppel purposes “by approving a settlement.”<sup>273</sup> Thus, neither a settled nor a dismissed bankruptcy case can satisfy the judicial acceptance element. The same may be said of stipulations and modifications, which are “[b]oth . . . in the nature of a settlement.”<sup>274</sup>

Some courts hold that judicial estoppel is not warranted where (1) the debtor amends her schedules to list a previously undisclosed preexisting claim subsequent to filing but prior to discharge; and (2) the movant fails to

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270. *Id.*

271. 430 B.R. 26 (Bankr. D. Mass. 2010).

272. *Id.* at 48 (citations omitted).

273. *Id.* (citing *Fleet Nat’l Bank v. Gray (In re Bankvest Capital Corp.)*, 375 F.3d 51, 61 (1st Cir. 2004)); accord *Hilmo, supra* note 1, at 1362 (citing *In re Allegiance Telecom, Inc.*, 356 B.R. 93, 106-07 (Bankr. S.D.N.Y. 2006)).

274. *DiVittorio*, 430 B.R. at 48. Note, however, that the *DiVittorio* court ultimately ruled in favor of the lender and against the debtor, even though it ruled against the lender on the judicial estoppel issue. *Id.* at 55-56. The court’s statements regarding judicial estoppel may therefore be dicta.

identify any court order demonstrating that the court relied upon the information in the debtor's initial, allegedly defective schedules.<sup>275</sup>

Some courts suggest that where "the Debtor's bankruptcy case is still pending, assets have not been distributed, debts have not been discharged, and her case has not yet been closed," judicial estoppel is generally inappropriate.<sup>276</sup> Per the United States Bankruptcy Court for the Southern District of Mississippi, "[t]o judicially estop the Debtor from pursuing her counterclaims against" a defendant at a "relatively early stage of her bankruptcy case would turn the doctrine on its head."<sup>277</sup>

Predictably, not all courts agree with the foregoing. In particular, courts in the Ninth Circuit have repeatedly stated that the subsequent dismissal of the bankruptcy case does *not* render the judicial acceptance element unsatisfied.<sup>278</sup> Likewise, in *Clark v. Strober-Haddonfield Group Incorporated*,<sup>279</sup> the United States District Court for the District of New Jersey found that the fact that a nondisclosing debtor-plaintiff's bankruptcy case was dismissed without a discharge was irrelevant to the judicial estoppel inquiry.<sup>280</sup> Additionally, some cases flag the issue that a prior dismissal might affect the judicial estoppel calculus, but then proceed to estop the litigant without expressly analyzing why the element of judicial

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275. *Hancock Bank v. Bates (In re Bates)*, Bankr. No. 09-51279-NPO, Adversary No. 09-05092-NPO, 2010 WL 2203634, at \*14 (Bankr. S.D. Miss. May 27, 2010).

276. *See id.* at \*15. Although the *Bates* court made this statement in the context of analyzing the unfair advantage element, this language appears more relevant to the issue of judicial acceptance. Note that *Bates* states that "[t]he mere fact of nondisclosure is not in itself sufficient to infer an intent to mislead or deceive the Court." *Bates*, 2010 WL 2203634, at \*15. The Southern District of Mississippi is within the Fifth Circuit; it is therefore possible that *Bates* does not survive the Fifth Circuit's opinion in *Love v. Tyson Foods, Inc.*, 677 F.3d 258 (5th Cir. 2012). *See supra* Part I.B.2.

277. *Bates*, 2010 WL 2203634, at \*15.

278. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001) (citing *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992)); *see also, e.g., Banh v. Bank of Am., N.A.*, No. C11-05744 HRL, 2012 WL 1670211 (N.D. Cal. May 14, 2012).

279. Civ. No. 07-910 (RBK), 2008 WL 2945972 (D.N.J. July 29, 2008).

280. *Id.* at \*3 ("Plaintiff's failure to properly list his claim as a potential asset in his bankruptcy filings undermines the disclosure requirements, which are 'are crucial to the effective functioning of the federal bankruptcy system.' *This is true regardless of the outcome of the bankruptcy proceeding.*" (emphasis added) (citations omitted)); *see also Pryor v. Deberry (In re Pryor)*, 341 B.R. 571, 575-77 (Bankr. N.D. Miss. 2006) (applying judicial estoppel even though prior discharge vacated). Note, however, that as an unpublished opinion the persuasive effect of *Clark* is limited.

acceptance remains satisfied notwithstanding the dismissal of the bankruptcy case.<sup>281</sup>

Judicial estoppel's status as an equitable doctrine allows courts to reach such divergent results based on each unique set of facts before them. Due to the split in opinion, this article presents two different arguments regarding the interplay between the judicial estoppel doctrine and the judicial acceptance element below. The first argues that the dismissal of a bankruptcy case entails that a subsequent court should not judicially estop litigants on the basis of positions taken during that case, even if that case was confirmed prior to dismissal. The opposite argument is that dismissal should be irrelevant to the judicial acceptance inquiry; if the bankruptcy court confirmed the case, then it relied upon positions advanced by the debtor in her petition and subsequent court filings, and the judicial acceptance element is met even if the case was dismissed prior to the completion of the confirmed plan.

*a) Subsequent Dismissal Should Entail That the Prior Court Never Accepted the Prior Inconsistent Position*

The first approach relies on the policy of the Code's equitable principles to guide a judicial acceptance analysis. The judicial acceptance inquiry is particularly difficult in the consumer bankruptcy context due to, among other things, the debtor's right to amend "[a] voluntary petition, list, schedule, or statement . . . at any time before the case is closed."<sup>282</sup> A case is "closed" pursuant to Code § 350 "after the estate is fully administered."<sup>283</sup> As this article has previously discussed, the "general effect of an order of dismissal is to restore the status quo ante; it is as though the bankruptcy case had never been brought."<sup>284</sup> Further, the Rules are replete with instances where the term "dismissed or closed" is used.<sup>285</sup>

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281. See *Caviness v. England*, No. CIV S-04-2388 GEB DAD PS, 2007 WL 1302522, at \*8, \*10-13 (E.D. Cal. May 3, 2007) (flagging the issue but judicially estopping the former debtor without analyzing the effect of the previous dismissal of that debtor's case), *findings and recommendation adopted* by 2007 WL 1577707 (E.D. Cal. May 31, 2007).

282. See RULE 1009(a).

283. CODE § 350(a) (2012).

284. *Christie v. First State Bank of Stratford (In re Keener)*, 268 B.R. 912, 920 (Bankr. N.D. Tex. 2001) (citing *In re Lewis & Coulter, Inc.*, 159 B.R. 188 (Bankr. W.D. Pa. 1993)); see also CODE § 349; *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, 698 F.3d 231, 238 (5th Cir. 2012).

285. See, e.g., RULE 1017(b)(2) (beginning "[i]f the case is *dismissed or closed* without full payment of the filing fee" (emphasis added)); RULE 7004(b)(9) (stating that service may be made upon a debtor "until the case is *dismissed or closed*" (emphasis added)).

This indicates that the right to amend, as provided by Rule 1009, does not expire upon dismissal of the case, but only after such case has been “closed” (i.e., fully administered).<sup>286</sup> Read together, the Code and the Rules seem to contemplate and approve of an amendment or addition of a later claim provided that such amendment or addition is done prior to full administration of the estate.

Further, permitting a debtor to add a claim to her schedules in a subsequent bankruptcy case would potentially allow for a greater return to creditors if the debtor or trustee later prevails in the cause of action. Moreover, the inclusion of a cause of action in a debtor’s estate would provide an additional incentive for creditors that stand to benefit from the potential return to support a debtor’s successful completion of her plan.

Thus, a debtor’s right to add a claim in a subsequent bankruptcy case not only encourages full disclosure, but also promotes the “two competing goals of bankruptcy and reorganization. One is the satisfaction of valid claims against the estate. The other is to allow the debtor a ‘fresh start’” through a discharge.<sup>287</sup>

Furthermore, allowing a debtor to include a claim or cause of action in her bankruptcy schedules that she previously failed to disclose in a prior confirmed bankruptcy plan where such prior case was dismissed prior to discharge arguably does not threaten judicial integrity. Courts have held that no judicial acceptance of an inconsistent position may be found if such bankruptcy case is dismissed prior to discharge.<sup>288</sup>

However, even if the confirmation of a bankruptcy plan constitutes “judicial acceptance,” the subsequent dismissal of the case without a discharge “undo[es] the bankruptcy case, as far as practicable, and [] restore[s] all property rights to the position in which they were found at the commencement of the case.”<sup>289</sup> Therefore, as mentioned above, the subsequent dismissal negates any previous judicial acceptance.<sup>290</sup> While

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286. See *In re Raggie*, 389 B.R. 309 (Bankr. E.D.N.Y. 2008), for an in depth discussion regarding the definition of a “closed” bankruptcy case and the interplay between Rule 1009 and Code § 350.

287. *Fin. Sec. Assurance, Inc. v. T-H New Orleans Ltd. P’ship (In re T-H New Orleans Ltd. P’ship)*, 188 B.R. 799, 807 (E.D. La. 1995), *aff’d*, 116 F.3d 790 (5th Cir. 1997); see also *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

288. See, e.g., *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006).

289. *Oparaji*, 698 F.3d at 238 (quoting *In re Sanitate*, 415 B.R. 98, 105 (Bankr. E.D. Pa. 2009)).

290. *Id.*

this “policy approach” may allow a debtor to benefit from an advertent nondisclosure, the court is certainly not left without options.<sup>291</sup>

Hence, under this approach, one could argue that equity prevents a bankruptcy court from estopping a trustee *or debtor*<sup>292</sup> from pursuing a claim—even if such claim was undisclosed in a prior confirmed plan—that would satisfy valid claims of the estate that may have not have otherwise been satisfied.<sup>293</sup>

*b) Dismissal Is Irrelevant to Judicial Acceptance*

The riposte to the argument that a subsequent dismissal should nullify the applicability of judicial estoppel is based on the idea that judicial estoppel, at least in theory, is designed to protect the integrity of the judiciary.<sup>294</sup> When a bankruptcy court confirms a debtor’s plan, it makes that decision on the basis of all documents filed in the case, including the debtor’s schedules. If the court surveys the schedules and does not find, say, a cause of action that could be used to satisfy creditors’ claims, then the court will be more inclined to confirm a plan that is more favorable to debtors and less favorable to creditors. In this way, the court has made a decision on the basis of the information in the schedules and has therefore accepted the information within; if a cause of action is not listed, the court has no way of knowing that it exists. In this way, the court’s integrity has been damaged—it has been misled into confirming a plan that it might not have confirmed had the court known the true facts. This damage is not erased if the court dismisses the case before the debtor has completed the confirmed plan; the fact remains that at some point, a judge made a decision on the basis of information that was incomplete or inaccurate.

A possible criticism of this approach to judicial acceptance is that it treats debtors and creditors too harshly. The obvious response to that criticism is that judicial estoppel is designed to protect the judiciary, not the

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291. *See supra* note 79.

292. *Olick v. Parker & Parsley Petrol. Co.*, 145 F.3d 513, 515-16 (2d Cir. 1998) (noting that legislative history supports the view that chapter 13 debtor’s may pursue a cause of action on their own); *In re Wirmel*, 134 B.R. 258, 260 (Bankr. S.D. Ohio 1991) (noting, in dicta, that ownership of a cause of action ultimately belongs to the chapter 13 debtor); *see also* CODE § 1306(b) (2012).

293. Indeed, “[e]stopping the [t]rustee from pursuing [a claim] would thwart one of the core goals of the bankruptcy system—obtaining a maximum and equitable distribution for creditors—by unnecessarily ‘vaporizing’ the assets effectively belonging to innocent creditors.” *Reed v. City of Arlington*, 650 F.3d 571, 576 (5th Cir. 2011) (quoting *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 413 (7th Cir. 2006)).

294. *See supra* notes 28-30 and accompanying text.

parties.<sup>295</sup> Moreover, the argument goes, if estopping a debtor for an inconsistent position taken in a case that has been dismissed post-confirmation leads to harsh results, then there are other ways to mitigate that harshness. As this article has already advocated,<sup>296</sup> judges are free to decide that the equities do not warrant the application of judicial estoppel even where all the judicial estoppel elements are met. As this article has also urged, the court should closely scrutinize whether the failure to disclose was advertent.<sup>297</sup> But the court should not distort the meaning of judicial acceptance simply because it strikes the court as unseemly to apply judicial estoppel on the basis of a previously dismissed case. Judicial acceptance simply means: Did a judge accept the inconsistent position? Under this approach, if the case was confirmed, the answer to that question must be yes.

*c) Conclusion*

Both arguments have merit, which is why the courts have split on the question. Practitioners are advised to familiarize themselves with these arguments, utilize the one that favors their client, and prepare themselves to respond to the opposing side.

*8. A Brief Note on Claims Versus Assets*

The foregoing analysis has largely involved cases where debtors fail to disclose *legal claims* on their bankruptcy schedules. However, where a debtor fails to disclose *personal property interests*, or anything else of value, the same principles apply:

The fact that an asset is a litigation claim, ownership of a corporate interest, a patent interest, real property or something else of value is irrelevant; what is significant is that there is a known asset and that the asset is disclosed for the benefit of the creditors. Accordingly, the . . . failure to disclose [such assets] involves the same principles, and is subject to the same analysis, as the failure to disclose litigation claims.<sup>298</sup>

Thus, just as a practitioner should stress to her clients the importance of disclosing all claims, she should also ensure that her clients disclose all

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295. See *supra* notes 28-30 and accompanying text.

296. See *supra* Part I.B.2.b.

297. See *supra* Part I.B.2.b.

298. Dorbeck v. Sykora, No. 09-cv-14646, 2010 WL 3245327, at \*3 (E.D. Mich. Aug. 16, 2010).

assets as well. Otherwise, a subsequent claim predicated on the existence of that nondisclosed asset could be subject to judicial estoppel.

*9. Other Recent Developments Regarding Nondisclosure*

Although a debtor is required to disclose each of her claims in bankruptcy or risk being judicially estopped from bringing suit on that claim, some courts have held that the debtor need *not* necessarily “identify every potential *defendant* to that claim” in her bankruptcy schedules.<sup>299</sup> For instance, at least one court has held that where a debtor discloses a potential claim against a defendant but fails to disclose a “seemingly identical claim” against the individual agents of that defendant, the debtor is not judicially estopped from suing those individual defendants.<sup>300</sup> The court reasoned that Code § 521(1) only requires the disclosure of a potential claim so that the court and creditors may be aware of that claim’s existence and the proceeds of that claim may be distributed fairly to creditors.<sup>301</sup> It does not necessarily require the disclosure of anyone who might be a proper defendant to that claim.<sup>302</sup> Of course, to be safe, the debtor should identify as many defendants as possible in her schedules. The same may not be said of the flipside of this scenario, however: a court has held that where a debtor-plaintiff discloses some but not all of the *types* of claims she intends to assert against a *single* defendant, she will not be allowed to bring the nondisclosed claims.<sup>303</sup>

Several courts have held that a debtor-plaintiff’s failure to disclose claims in his bankruptcy schedules is by itself insufficient to create federal question jurisdiction, even though bankruptcy law is exclusively federal.<sup>304</sup> This seems obviously correct: because judicial estoppel is a defense, it cannot appear on the face of a well-pleaded complaint; therefore, asserting

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299. Nance v. City of Elgin, No. 06 CV 6608, 2008 WL 1805382, at \*2 (N.D. Ill. Apr. 18, 2008) (emphasis added).

300. *Id.*

301. *See id.*

302. *See id.*

303. *See* Wietecha v. Dollarhide Fin. Grp., Inc., No. CV 04-1862-PHX-DGC, 2006 WL 1794752, at \*1-3 (D. Ariz. June 27, 2006). The plaintiff disclosed his wrongful termination claim against his former employer, but failed to disclose the “conceptually distinct” claims of defamation, negligence, and violations of the Family Medical Leave Act. *Id.* at \*3.

304. *See* Nguyen v. Regions Bank, Civ. No. 1:10cv253-HSO-JMR, 2010 WL 5071173, at \*7 (S.D. Miss. Dec. 7, 2010) (citing *Champions Truck & Equip., Inc. v. Patterson*, Civ. Action No. H-08-0108, 2008 WL 2810608, at \*4 (S.D. Tex. July 21, 2008)).

judicial estoppel on the grounds of nondisclosure in bankruptcy cannot confer federal arising-under jurisdiction.<sup>305</sup>

Some courts have held that merely disclosing claims and assets to the trustee and creditors orally or by mail (as opposed to formally disclosing the claims or assets on the bankruptcy schedules) will not preclude the application of judicial estoppel.<sup>306</sup> Other courts disagree and hold that informing the trustee of otherwise undisclosed claims or assets at the meeting of the creditors does indeed render judicial estoppel inappropriate,<sup>307</sup> assuming that the litigant seeking to not be estopped takes “steps to disclose his claims to the bankruptcy court [*before*] circumstances force[] him to do so” rather than after getting caught.<sup>308</sup> These courts reason that a plaintiff that places the trustee on notice is obviously not trying to defraud the court.<sup>309</sup>

Where a debtor fails to disclose a claim that “would most likely be an exempt asset and thus would not pass on to her creditors,” some courts have held that judicial estoppel is unwarranted because “the threat to the integrity

305. *See, e.g.*, *Franchise Tax Bd. of the State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9-10 (1983) (citing *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)).

306. *See, e.g.*, *Guay v. Burack*, 677 F.3d 10, 19-20 (1st Cir. 2012); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001); *Arruda v. C & H Sugar Co.*, No. 2:06-cv-2308-MCE-EFB, 2007 WL 754627, at \*5 (E.D. Cal. Mar. 8, 2007).

307. *See, e.g.*, *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 897 (6th Cir. 2004) (debtors not judicially estopped because they “made numerous attempts through their counsel to advise the court and the Trustee of their claim”).

308. *Wallace v. Johnston Coca-Cola Bottling Group, Inc.*, No. 1:06-cv-875, 2007 WL 927929, at \*3 (S.D. Ohio Mar. 26, 2007) (emphasis added) (citations omitted).

309. *See Eubanks*, 385 F.3d at 898 n.1 (citing *Period Homes, Ltd. v. Wallick*, 569 S.E.2d 502 (Ga. 2002); *Sports Page, Inc. v. First Union Mgmt., Inc.*, 438 N.W.2d 428 (Minn. Ct. App. 1989)). Another court wrote:

[C]ourts should not apply judicial estoppel to efforts to enforce claims omitted from the bankruptcy petition’s schedule of assets where the debtor notified the trustee and all involved parties of the existence of such claims during the pendency of the bankruptcy case and where, therefore, it is highly unlikely that the omission in the petition was intentional.

*Riddle v. Chase Home Fin.*, No. 09-11182, 2010 WL 3504020, at \*4 (E.D. Mich. Sept. 2, 2010) (citing *Eubanks*, 385 F.3d at 898-99, 898 n.1); *accord Matthews v. Potter*, 316 F. App’x 518, 522-23 (7th Cir. 2009) (holding that although judicial estoppel may be appropriate “where the debtor informed the trustee but misrepresented or denied the monetary value of the claims,” where there is “no suggestion” of such a misrepresentation, disclosure of previously undisclosed claims or assets to the trustee at the meeting of the creditors under Code § 341 precludes the application of judicial estoppel).

of the system is less than if the debtor had failed to disclose a non-exempt asset.”<sup>310</sup>

At least one court, when considering whether to dismiss a case with prejudice due to the debtor’s bad faith where the debtor, inter alia, failed to timely disclose a claim, has imported elements of judicial estoppel into its analysis.<sup>311</sup> In other words, the judicial estoppel analysis may be relevant even outside the judicial estoppel context.

#### *10. Judicial Estoppel Outside the Nondisclosure Context*

Judicial estoppel can be relevant in bankruptcy proceedings unrelated to the nondisclosure of assets or claims. In *Newman v. Johnson (In re Johnson)*, a chapter 7 consumer debtor participated in a religious wedding ceremony with the plaintiff, but did not obtain a marriage license.<sup>312</sup> Decades later, a state court granted the parties a divorce, pursuant to which the debtor-defendant was required to turn large amounts of cash and property over to the plaintiff.<sup>313</sup> When the plaintiff moved to declare this debt nondischargeable as a nonsupport debt pursuant to a separation agreement<sup>314</sup> or a domestic support obligation,<sup>315</sup> the debtor-defendant argued that the debt should be deemed dischargeable because he and the plaintiff were never legally married.<sup>316</sup> The court held that because the debtor-defendant “took the position of being legally married and thus created a ‘spouse’ relationship in the divorce pleadings, he [wa]s judicially estopped from changing that position” in the dischargeability proceeding.<sup>317</sup> Thus, the debtor-defendant could not argue that the plaintiff was not his

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310. *Schneider v. Unum Life Ins. Co. of Am.*, No. CV 05-1402-PK, 2008 WL 109065, at \*5-6 (D. Or. Jan. 8, 2008). *See generally* CODE § 522 (2012) (setting forth rules for exemptions in bankruptcy). *But see* *Martin v. U.S. Bank*, No. 4:04CV01527AGF, 2005 WL 3107722, at \*4 (E.D. Mo. Nov. 18, 2005) (noting that the Code “requires the scheduling of all assets and claims, even exempt property” (emphasis added) (citing *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1271 (8th Cir. 1984), *abrogated on other grounds by Patterson v. Shumate*, 504 U.S. 753 (1992))).

311. *See In re Watts*, No. 09-35864, 2012 WL 3400820, at \*4-8 (Bankr. S.D. Tex. Aug. 9, 2012).

312. 473 B.R. 447, 451 (Bankr. D. Utah 2012).

313. *Id.*

314. *See* CODE § 523(a)(15) (2012).

315. *See id.* § 523(a)(5).

316. *Johnson*, 473 B.R. at 453.

317. *Id.* at 457.

former spouse, and the court therefore deemed the debt nondischargeable.<sup>318</sup>

As discussed previously in the nondisclosure context, courts often find that the judicial acceptance element of judicial estoppel is not met when the initial inconsistent position was in the nature of a settlement or stipulation.<sup>319</sup> The same holds true outside the nondisclosure context. In *In re Waters*, the IRS filed a motion to convert the debtor's chapter 13 case to one under chapter 11.<sup>320</sup> The debtor, the IRS, and the state taxing authority then agreed to a stipulation that provided that the case be converted to chapter 11, among other things.<sup>321</sup> Later, the debtor alleged that the IRS filed false proofs of claim against him.<sup>322</sup> Thus, argued the debtor, he was "entitled to be treated . . . as if he still were in chapter 13"<sup>323</sup> under the theory of judicial estoppel, because the IRS's initial motion to convert the case to chapter 11 was predicated upon the allegedly false proofs of claim.<sup>324</sup> In dicta, the court stated that the debtor could not satisfy the judicial acceptance element of judicial estoppel, because "the court [accepted the stipulation] pursuant to the agreement of the parties and in no sense adopted the subject proofs of claim."<sup>325</sup> Thus, practitioners should not rely on judicial estoppel when the estoppel would be predicated upon assertions made in a stipulation not officially accepted by the court.

Judicial estoppel has been analyzed in other contexts as well. For instance, where a servicing agent misidentifies the mortgage holder it represents in a state court foreclosure action, at least one court has held that the servicing agent is not judicially estopped from asserting that the deed of trust had been assigned to a different lender on whose behalf the agent filed a proof of a secured claim in the debtor's bankruptcy.<sup>326</sup>

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318. *Id.* at 458. The court reached similar conclusions on the grounds of the *Rooker-Feldman* doctrine, issue preclusion, and equitable estoppel. *Id.* at 454-57.

319. *See supra* Part I.B.7.

320. No. 99-31833, 2008 WL 384571, at \*1 (Bankr. D. Conn. Feb. 8, 2008), *adhered to on denial of reconsideration* in 2008 WL 4829844 (Bankr. D. Conn. Oct. 24, 2008).

321. *Id.* at \*5.

322. *Id.* at \*4.

323. *Id.* at \*10.

324. *Id.* at \*10-11. The debtor also asserted the affirmative defenses of equitable estoppel and fraud on the court. *Id.*

325. *Id.* at \*11.

326. *See* *Litton Loan Servicing v. Eads (In re Eads)*, 417 B.R. 728, 737-39 (Bankr. E.D. Tex. 2009).

a) *Judicial Estoppel, Eligibility, and the Credit Counseling Requirement*

A particularly interesting judicial estoppel issue unrelated to nondisclosure of assets relates to the credit counseling requirements for consumer debtors added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).<sup>327</sup> “The counseling requirement applies to individuals in all chapters.”<sup>328</sup> Section 109(h)(1) of the Code currently reads:

Subject to [exceptions not relevant here], . . . an individual *may not be a debtor under this title* unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in [Code] section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.<sup>329</sup>

The “may not be a debtor under this title” language appears to create a mandatory bar to eligibility for consumer debtors who fail to comply with the credit counseling requirement.<sup>330</sup> What happens, then, when a debtor asserts she is ineligible to be a debtor based on her own noncompliance with the credit counseling requirement?

*In re Fiorillo* illustrates the issue nicely.<sup>331</sup> “Facing imminent foreclosure,” the debtor in *Fiorillo* “filed for Chapter 11 bankruptcy” in an attempt to “forestall the foreclosure through the automatic stay provisions of the [Code].”<sup>332</sup> The debtor at no point completed the credit counseling requirement, although he initially submitted a document under the penalty

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327. CODE § 109(h) (2012).

328. *In re Timmerman*, 379 B.R. 838, 844 (Bankr. N.D. Iowa 2007).

329. CODE § 109(h)(1) (emphasis added).

330. *See, e.g., In re Fiorillo*, 455 B.R. 297, 304-07 (D. Mass. 2011).

For more in-depth analysis of Code § 109 and the various approaches as to whether and when dismissal is appropriate on ineligibility grounds, see *Simon v. Amir (In re Amir)*, 436 B.R. 1, 20-22 (B.A.P. 6th Cir. 2010); *Mendez v. Salven (In re Mendez)*, 367 B.R. 109 (B.A.P. 9th Cir. 2007); *In re Crawford*, 420 B.R. 833, 836-41 (Bankr. D.N.M. 2009); *In re Manalad*, 360 B.R. 288, 301-08 (Bankr. C.D. Cal. 2007); *In re Dillard*, No. 06-31028-RFH, 2006 WL 3658485, at \*1-5 (Bankr. M.D. Ga. Dec. 11, 2006).

331. *Fiorillo*, 455 B.R. at 298-310.

332. *Id.* at 298-99.

of perjury certifying that he had.<sup>333</sup> The court then converted his case to a chapter 7 liquidation due to the debtor's failure to (1) file required documents with the court and (2) attend the meeting of the creditors as required by Code § 341.<sup>334</sup> Displeased with the prospect of facing liquidation, the debtor moved to dismiss the case.<sup>335</sup> Because a chapter 7 debtor has no right to a voluntary dismissal, the court denied the motion.<sup>336</sup> The debtor moved again to dismiss the case, this time "on the ground that he was ineligible for relief under the [Code] because he had not taken the required credit-counseling course prior to filing for bankruptcy."<sup>337</sup>

The United States Bankruptcy Court for the District of Massachusetts denied the second motion to dismiss, and the district court affirmed.<sup>338</sup> Noting that a debtor is not permitted to participate in her bankruptcy case only to the extent that the participation benefits her,<sup>339</sup> the court held the debtor was judicially estopped from asserting his ineligibility for bankruptcy.<sup>340</sup> The court explained that the debtor's

initial representations that he complied with [Code] § 109(h) before filing . . . and his purported desire to cure his noncompliance . . . caused the Bankruptcy Court, his creditors, and the Trustee to proceed with the bankruptcy proceedings in reliance upon his contention that he was an eligible debtor. Permitting [the debtor] to assert now that he is ineligible would prejudice the creditors. Accordingly, it was not an abuse of discretion for the Bankruptcy Court to deny his motion on the grounds of estoppel.<sup>341</sup>

The court further held that the debtor could not be permitted to receive the benefits of the automatic stay without "adher[ing] to the less attractive

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333. *Id.* at 299-301. This is admittedly a bit of an oversimplification for the sake of clarity; for the tortured and tortuous full history of Mr. Fiorillo's noncompliance with the credit counseling requirement, see *id.*

334. *Id.* at 299-300.

335. *Id.* at 300.

336. *Id.*

337. *Id.*

338. *Id.* at 304.

339. *Id.* at 308 (quoting *Willis v. Rice (In re Willis)*, 345 B.R. 647, 653-54 (B.A.P. 8th Cir. 2006)); see also *id.* at 311.

340. *Id.* at 310-11.

341. *Id.* at 311.

obligations of a debtor.”<sup>342</sup> Other courts agree with the *Fiorillo* court’s conclusions.<sup>343</sup>

### C. Best Practices for Practitioners

As the foregoing amply illustrates, counsel for current and former debtors must be aware of the consequences and nuances of judicial estoppel, and inform their clients accordingly.<sup>344</sup> Practitioners must inform their clients not only of their duty to disclose, but also that a clandestine and calculated failure to disclose will ultimately not produce financial rewards.

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342. *Id.* at 310. Compare *Perez v. Wells Fargo Bank, N.A.*, No. C-11-02279 JCS, 2011 WL 3809808, at \*12 (N.D. Cal. Aug. 29, 2011), discussed *supra* notes 267-270 and accompanying text, in which the court held that judicial estoppel could not be predicated on the mere fact that a nondisclosing debtor had benefited from the automatic stay because the stay would have protected the debtor regardless of what she disclosed in her bankruptcy schedules. *Perez* and *Fiorillo* are not inconsistent because *Fiorillo* implicates issues of eligibility, not the sufficiency and completeness of a debtor’s schedules. Whereas a debtor will receive the benefit of the stay regardless of what she discloses in her schedules, a debtor that is completely ineligible for bankruptcy should not receive the benefit of the automatic stay because eligibility is a threshold the debtor must pass before qualifying for the benefits of bankruptcy at all. See *In re Parker*, 351 B.R. 790, 798-99 (Bankr. N.D. Ga. 2006). Even though a majority of courts have held that Code § 109(h) is nonjurisdictional and therefore that noncompliance with § 109(h) does not warrant automatic dismissal, see *Fiorillo*, 455 B.R. at 304-07 (listing cases), eligibility is still a threshold issue in the way that disclosure of assets is not, and thus *Perez* and *Fiorillo* are easily reconcilable.

343. See *In re Lilliefors*, 379 B.R. 608, 610-12 (Bankr. E.D. Va. 2007); *Parker*, 351 B.R. at 798-99; see also *United States Trustee v. Winters (In re Winters)*, Bankr. No. 07-60786, Adversary No. 07-6053, 2008 WL 202774, at \*5 n.4 (Bankr. N.D. Ohio Jan. 22, 2008); cf. *In re Timmerman*, 379 B.R. 838, 847 (Bankr. N.D. Iowa 2007) (involving a farm bankruptcy, rather than a consumer bankruptcy).

A similar issue arises when a debtor seeks to dismiss her bankruptcy case on the grounds that she “failed to turn over [his or] her tax returns to the trustee timely as required by section 521(e)(2)(A) of the Code.” *In re Fileccia*, No. 06-05111, 2007 WL 1695387, at \*3 (Bankr. M.D. Tenn. June 6, 2007). Code § 521(e)(2)(B) provides that “[i]f the debtor fails to comply” with the tax return requirement, “the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.” CODE § 521(e)(2)(B) (2012) (emphasis added). Courts here have reached similar results: a debtor should not be permitted to abuse the bankruptcy system by dismissing a bankruptcy case gone sour for her own failure to comply with the Code. *Fileccia*, 2007 WL 1695387, at \*3-6. Though *Fileccia* framed its opinion as a statutory interpretation ruling rather than one of judicial estoppel, *id.* at \*4, it did rely on judicial estoppel case law in reaching its decision, see *id.* at \*5 (citations omitted), and its reasoning echoes that of the aforementioned credit counseling judicial estoppel opinions, see *id.* at \*3-6.

344. See Andrew D. Mendez, *Every Counsel’s Checklist: Handling a Case Involving a Plaintiff Who Has Filed Bankruptcy*, 59 LA. B.J. 404, 405 (2012).

Although it is impossible to tell how often nondisclosures go undetected, it appears that debtors get caught hiding valuable claims all the time.<sup>345</sup> Furthermore, the client should be aware that the intentional failure to disclose an asset is bankruptcy fraud, which the court can punish “by revoking the debtor[‘s] discharge[] and referring [her] to the United States Attorney for potential criminal prosecution.”<sup>346</sup> Also remember that other documents and other occasions, such as the meeting of the creditors pursuant to Code § 341, may require honest and forthright disclosure as well.<sup>347</sup>

Given the presumption of advertence in many circuits, the client must also understand that even accidental failures to disclose may result in judicial estoppel. The client must understand that even claims lacking the traditional trappings of a lawsuit do indeed count for the purposes of judicial estoppel.<sup>348</sup> This would include, for example, a claim filed with the EEOC (or its state equivalent) before receiving a right to sue letter,<sup>349</sup> or a

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345. See *In re FV Steel & Wire Co.*, 349 B.R. 181, 186 (Bankr. E.D. Wis. 2006) (“[D]ebtors are frequently estopped from asserting a claim . . . when they did not list that claim in their bankruptcy schedules . . .” (citations omitted)); see also *Beiner & Chapman*, *supra* note 1, at 14 (“In case after case, bankruptcy debtors have lost employment discrimination claims because they failed to disclose a pending claim, or an accrued but unfiled claim, on their schedule of bankruptcy assets.”). For additional support, see virtually every case cited in the preceding footnotes.

346. *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 413 (7th Cir. 2006).

347. See, e.g., *Kane v. Kane*, Civ. Action No. 08-5633 (FLW), 2009 WL 3208653, at \*6 (D.N.J. Sept. 30, 2009).

348. “[T]he bankruptcy estate includes claims being litigated by the debtor as well as administrative claims.” *Caviness v. England*, CIV S-04-2388 GEB DAD PS, 2007 WL 1302522, at \*11 (May 3, 2007) (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 785 (9th Cir. 2001)), *report and recommendation adopted by* 2007 WL 1577707 (E.D. Cal. May 31, 2007).

349. In one case, the court wrote:

The basis of Plaintiff’s contention in this regard is that she had no “claims” when she filled out schedules “A” and “B” because she had not yet filed the complaint in the instant case and because she had not yet obtained the right to sue letter as to individual defendant McCollough. . . . [T]he court concludes Plaintiff . . . had a duty to disclose . . . any potential claims she may have had against Defendants, including . . . the claims against McCollough, where the right to sue letter had not yet been issued but where the claim that was later asserted had already accrued and the facts upon which that claim would be based were known.

*Rose v. Beverly Health & Rehab. Servs., Inc.*, 356 B.R. 18, 24, 25 (E.D. Cal. 2006); *accord Castillo v. Coca-Cola Bottling Co. of E. Great Lakes*, Civ. Action No. 06-183, 2006 WL 1410045, at \*1 (May 22, 2006), *reconsideration granted by* 2006 WL 1789039 (E.D. Pa.

claim for which a complaint has not yet been filed in court.<sup>350</sup> Even a claim about which the client is “uncertain[] as to the legal basis for recourse” may count.<sup>351</sup> Moreover, the debtor should know that if she realizes after filing

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June 23, 2006); *Caviness*, 2007 WL 1302522, at \*8 (judicially estopping a plaintiff for failing to disclose his EEO complaints, even though plaintiff claimed “they were never investigated” and “no result ever came about”); *see also* *Lewis v. Weyerhaeuser Co.*, 141 F. App’x 420, 422-23 (6th Cir. 2005).

*But see FV*, 349 B.R. at 187. The court in *FV* ultimately found judicial estoppel unwarranted in such circumstances:

[A]t the time [the debtor] filed her bankruptcy, she had not yet received any indication from the EEOC that it was going to treat her claim favorably. In fact, [the debtor] did not receive her Determination Letter from the EEOC until over a year after she obtained her discharge. While not excusing the omission from the bankruptcy schedules—which require a debtor to list all claims, even those that are contingent and unliquidated—given the procedural posture of the claim at the time of the petition, [the debtor] must have considered a recovery extremely remote and unlikely. . . . [The debtor’s] failure to reopen her own bankruptcy to schedule the claim simply does not smack of the same ulterior motivation apparent in [cases where the court found judicial estoppel appropriate].

*Id.*

A jurisdiction that has squarely adopted the presumption of advertence, however, would almost certainly apply judicial estoppel in such circumstances, and even the *FV* court conceded that “the omission from the [debtor’s] bankruptcy schedules” was “not excus[able].” *Id.* In short, debtors would be well-advised to schedule all claims, even those that do not resemble a traditional lawsuit because of their administrative law overlay.

350. In *Rose*, the court wrote:

[A] “pending” claim . . . includes claims that have accrued as of the time of the bankruptcy filing regardless of whether they have been set forth in a complaint. . . . [T]he term “claim” incorporates any potential cause of action that has accrued and whose facts are sufficiently well known to the Plaintiff to indicate the existence of a potential asset.

*Rose*, 356 B.R. at 25-26 (citations omitted).

Some, but not all, courts hold that the duty to disclose even extends to claims that the debtor considers to be “only pipe dreams at the time of the filing of the bankruptcy schedules.” *Simoneau v. Nike, Inc.*, No. 04-CV-1733-BR, 2006 WL 977302, at \*3 (D. Or. Apr. 6, 2006). *But see* *Schneider v. Unum Life Ins. Co. of Am.*, No. CV 05-1402-PK, 2008 WL 109065, at \*4, \*6 (D. Or. Jan. 8, 2008) (refusing to apply judicial estoppel where the debtor was led to believe that she had merely a “fairly slim chance” of succeeding on the nondisclosed claim, and where the debtor “was led to believe that her claim had effectively ended”); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 323 (3d Cir. 2003) (“[W]e do not require debtors to list hypothetical claims that are so tenuous as to be fanciful . . .”).

351. *Smith v. Rosenthal Collins Grp., LLC*, No. 03-2360 M1/AN, 2005 WL 2210208, at \*4 (W.D. Tenn. Sept. 10, 2005).

Plaintiff’s uncertainty as to the legal basis for recourse against RCG at the time

that she neglected to include a claim in her schedules, she must amend her schedules as promptly as possible.<sup>352</sup> Whenever feasible, the debtor should amend the schedules before bringing suit, rather than after.

Conversely, attorneys opposing current and former debtors should be aware of judicial estoppel as a tool and use it as aggressively as is warranted, although a practitioner should only plead judicial estoppel where the record truly supports it.<sup>353</sup> The foregoing analysis demonstrates that, notwithstanding circuit splits and doctrinal confusion, judicial estoppel has, on the whole, developed into a markedly pro-creditor, pro-defendant doctrine; thus, creditors and defendants should utilize judicial estoppel accordingly.

Those attorneys who would otherwise be entitled to use judicial estoppel to dismiss a case against their client must be vigilant, for “some courts view a defendant’s failure to plead judicial estoppel as a waiver of the affirmative defense,”<sup>354</sup> and some courts have refused to apply judicial estoppel because, *inter alia*, the defendant failed to raise the defense in a timely

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his bankruptcy petition was filed does not make his failure to disclose any *potential* claims “inadvertent” for the purposes of judicial estoppel. A 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 the debtor has a “known” cause of action that must be disclosed. The record indicates that Plaintiff was well aware of the factual basis for a “possible” cause of action against RCG at the time he filed his petition. Thus Plaintiff’s failure to disclose his potential claims cannot be considered “inadvertent” . . . .

*Id.* (quoting *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 208 (5th Cir. 1999)).

352. *Beiner & Chapman, supra* note 1, at 19 (“Even though Walker amended the schedule prior to discharge of his bankruptcy claim, the court, in essence, concluded that he had waited too long to do so.” (citing *Walker v. Delta Air Lines, Inc.*, No. Civ.A. 100CV0558-TWT, 2002 WL 32136202, at \*4 (N.D. Ga. Aug. 1, 2002))).

353. *See* RULE 9011(b)-(c); FED. R. CIV. P. 11(b)-(c).

354. *Brown, supra* note 12, at 201 (citing *United States for Use of Am. Bank v. C.I.T. Constr. Inc. of Tex.*, 944 F.2d 253, 258 (5th Cir. 1991)). Some courts hold that if a litigant fails to plead the affirmative defense of judicial estoppel in its responsive pleading, the omission constitutes a waiver of the affirmative defense unless the opposing party was not prejudiced by the omission, such as when the opposing party has received unequivocal notice of the litigant’s intent to plead judicial estoppel. *See Kinnee v. Shack, Inc.*, Civ. No. 07-1463-AC, 2008 WL 4899204, at \*2-3 (D. Or. Nov. 12, 2008) (citations omitted). *But see Sharp v. Oakwood United Hosps.*, 458 F. Supp. 2d 463, 467-68 (E.D. Mich. 2006) (permitting defendants to amend answer to include affirmative defense of judicial estoppel where defendants “could not have sought to amend earlier” and where plaintiff made no showing of prejudice).

manner.<sup>355</sup> A defendant seeking summary judgment on judicial estoppel grounds against a nondisclosing debtor-plaintiff should also make sure to introduce all of the debtor-plaintiff's bankruptcy schedules into evidence, lest the summary judgment motion be denied.<sup>356</sup>

Nonbankruptcy plaintiffs' attorneys should also inquire (and then independently investigate) whether their client has recently gone through or is currently in bankruptcy.<sup>357</sup> If yes, the practitioner should scour the client's bankruptcy schedules to make sure that the claim for which the practitioner is currently representing the client is listed and adequately disclosed. If it is not, the practitioner should advise the client to promptly amend the schedules (reopening the case if it is closed), lest the lawsuit the attorney brings on the client's behalf be dismissed on judicial estoppel grounds. A plaintiffs' attorney should likewise tell the client to inform her if the client files bankruptcy in the future, so that the attorney can ensure that the client lists the pending claim on her schedules.

If a practitioner discovers that the client has failed to disclose a cause of action in a prior or pending bankruptcy, and if the client refuses or fails to promptly reopen the bankruptcy to disclose that claim, the practitioner should report that nondisclosure to the trustee of the debtor's bankruptcy estate. This is true whether the estate is currently open or closed. In several of the leading judicial estoppel cases, the court learned of the debtor's nondisclosure in bankruptcy because either the debtor's bankruptcy attorney or the attorney representing that debtor in his subsequent tort suit reported it to the trustee, who then moved to reopen the estate.<sup>358</sup> The reason to report is not that reporting will preclude the application of judicial estoppel against the client—it probably won't.<sup>359</sup> The true reason stems

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355. *See* Valdez v. JDR LLC, No. CV 04-1620-PHX-JAT, 2006 WL 2038456, at \*1-2 (D. Ariz. July 20, 2006).

356. *See* Phillips v. Flying J Inc., 375 S.W.3d 367, 369-70 (Tex. Ct. App. 2012).

357. *See* Mendez, *supra* note 344, at 405 (“The risk of faded memories (not to mention dissembling) suggest plaintiff and defense counsel would be wise to perform a PACER search as an independent means of determining whether a plaintiff has filed bankruptcy.”).

358. *See, e.g.,* Reed v. City of Arlington, 650 F.3d 571, 573 (5th Cir. 2011); Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1154 (10th Cir. 2007); Biesek v. Soo Line R.R. Co., 440 F.3d 410, 412 (7th Cir. 2006); Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1270 (11th Cir. 2004).

359. *See* Reed, 650 F.3d at 573; Eastman, 493 F.3d at 1154; Biesek, 440 F.3d at 412. *But see* Eubanks v. CBSK Fin. Grp., Inc., 385 F.3d 894, 897 (6th Cir. 2004) (finding debtors not judicially estopped because they “made numerous attempts through their counsel to advise the court and the Trustee of their claim”). The *Eubanks* court also noted that “various courts in other jurisdictions have held that a trustee's knowledge of a claim precludes the

from self-interest and an attorney's professional responsibilities. At least one court has arguably implied that an attorney's failure to report a client's prior nondisclosure immediately after discovering it may make the attorney an accessory to the debtor's fraud.<sup>360</sup> Reporting will also help ensure that the attorney will ultimately be paid her legal fees.<sup>361</sup> Practitioners would therefore be well advised to be vigilant, prompt, and forthcoming.

## II. Equitable Estoppel

### A. Definition

Equitable estoppel, also occasionally known as "estoppel by conduct" or "estoppel *in pais*,"<sup>362</sup> is a defensive doctrine that prevents a party from unfairly taking advantage of an adverse party by inducing that adverse party, through false language or conduct, to act in a certain way to that adverse party's injury.<sup>363</sup> Equitable estoppel "is a defense and not an independent cause of action" that would "furnish a basis for damages claims."<sup>364</sup> Accordingly, some courts hold that "[i]n order for a court to

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application of judicial estoppel since the plaintiff was obviously not trying to defraud the court if they placed the trustee on notice." 385 F.3d at 898 n.1 (citing *Period Homes, Ltd. v. Wallick*, 469 S.E.2d 502 (Ga. 2002)); *see also* *Sports Page, Inc. v. First Union Mgmt., Inc.*, 438 N.W.2d 428 (Minn. Ct. App. 1989).

360. *See Biesek*, 440 F.3d at 412 ("The fraud was [the debtor's] alone. To her credit, [the debtor's] bankruptcy lawyer[,] . . . who had not known about the [debtor's] FELA claim until June 2003, promptly notified the Chapter 7 Trustee about the problem in [the debtor's] disclosures." (emphasis added)). To be sure, this reading of *Biesek*—that an attorney could be subject to discipline for discovering but not reporting her client's bankruptcy fraud—is not inevitable, but an attorney is always well-advised to take her ethical responsibilities as seriously as possible.

361. *See Reed*, 650 F.3d at 576.

362. BLACK'S LAW DICTIONARY, *supra* note 8, at 630; *Wetzel v. Regions Bank*, 649 F.3d 831, 836 (8th Cir. 2011).

363. BLACK'S LAW DICTIONARY, *supra* note 8, at 630.

364. *Nachar v. PNC Bank, Nat'l Ass'n*, 901 F. Supp. 2d 1012, 1021 (N.D. Ohio 2012) (citations omitted); *accord* *Shatteen v. JPMorgan Chase Bank, N.A.*, Civ. Action No. 4:10cv107, 2012 WL 2524277, at \*5 (E.D. Tex. May 17, 2012) ("Plaintiff asserts that she is entitled to recover damages through the common law doctrine of equitable estoppel. However, because equitable estoppel is generally defensive in character, the Court will refer to this cause of action as Plaintiff's claim for promissory estoppel."). *But see* *Glazer v. Abercrombie & Kent, Inc.*, No. 07 C 2284, 2008 WL 4372032, at \*3 n.2 (N.D. Ill. Sept. 23, 2008) ("District courts in Illinois have split on whether . . . equitable estoppel can be plead as [an] affirmative claim[] under Illinois law." (citations omitted)).

Note that a party seeking a declaratory judgment may be able to utilize an estoppel defense in a posture that could fairly be characterized as aggressive rather than defensive.

consider equitable estoppel, a party must affirmatively plead such a claim to give the opposing party an opportunity to conduct discovery and respond.”<sup>365</sup> “[T]he party asserting such a defense . . . bears the burden of proof.”<sup>366</sup>

Equitable estoppel is frequently conflated with other similar doctrines, including, but not limited to, collateral estoppel,<sup>367</sup> promissory estoppel,<sup>368</sup> equitable tolling,<sup>369</sup> laches,<sup>370</sup> and ratification.<sup>371</sup> Moreover, while courts, commentators, and litigants have frequently treated equitable estoppel and

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*See Nicdao v. Chase Home Fin.*, 839 F. Supp. 2d 1051, 1073-74 (D. Alaska 2012) (citing 28 U.S.C. § 2201(a)).

365. *In re Boates*, No. Civ.A. 05-4353, 2006 WL 166569, at \*3 (E.D. Pa. Jan. 23, 2006).

366. *Hall v. Hopkins (In re Jacobs)*, Bankr. No. 04-42387, Adversary No. 05-8078, 2006 WL 4451566, at \*5 (Bankr. D. Idaho Feb. 10, 2006) (citing *Dennett v. Kuenzli*, 936 P.2d 219, 224 (Idaho Ct. App. 1997)).

367. *See, e.g., Stewart v. JPMorgan Chase Bank, N.A. (In re Stewart)*, 473 B.R. 612, 625 n.11 (Bankr. W.D. Pa. 2012) (“It is not entirely clear what theory of estoppel the Debtors are asserting. While the *Complaint* recites the elements of equitable estoppel, the Debtors’ conclude their estoppel discussion by referring to the preclusive doctrine of ‘collateral estoppel.’”).

368. *See, e.g., Shatteen*, 2012 WL 2524277, at \*5 (“Plaintiff asserts that she is entitled to recover damages through the common law doctrine of equitable estoppel. However, because equitable estoppel is generally defensive in character, the Court will refer to this cause of action as Plaintiff’s claim for promissory estoppel.”).

369. *See, e.g., Cerbone v. Int’l Ladies’ Garment Workers’ Union*, 768 F.2d 45, 49-50 (2d Cir. 1985) (“Unlike equitable *tolling*, which is invoked in cases where the plaintiff is ignorant of his cause of action because of the defendant’s fraudulent concealment, equitable *estoppel* is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant’s conduct caused him to delay in bringing his lawsuit.” (emphasis added)); *Bender v. Mann*, Nos. AZ-10-1121-PaJuBa, AZ-10-1122-PaJuBa, 2010 WL 6467681 at \*9 (B.A.P. 9th Cir. Nov. 15, 2010) (explaining how equitable estoppel is often confused with equitable tolling); *Proctor v. Metro. Money Store Corp.*, 645 F. Supp. 2d 464, 485 (D. Md. 2009) (“The argument by Chaudhry and Farahpour misses the mark as it concerns equitable *estoppel* more so than equitable *tolling*.”).

370. *See, e.g., United States v. Gill*, No. 8:06-CV-996-T-MAP, 2007 WL 2310780, at \*3 (M.D. Fla. Aug. 9, 2007) (explaining that defendant’s argument actually implicated laches, not equitable estoppel).

371. *See, e.g., Hancock Bank v. Bates (In re Bates)*, Bankr. No. 09-51279-NPO, Adversary No. 09-05092-NPO, 2010 WL 2203634, at \*10 (Bankr. S.D. Miss. May 27, 2010) (“Hancock Bank blends its discussion of ratification with the principle of equitable estoppel. Equitable estoppel, however, differs from ratification in that equitable estoppel results from the inducement to another to act to his prejudice, whereas ratification arises out of confirmation after conduct.”); *see also* 2A N.Y. JUR.2D AGENCY § 182 (2010) (distinguishing ratification from estoppel).

judicial estoppel as equivalent, interchangeable doctrines,<sup>372</sup> the two doctrines are technically

distinct. . . . [E]quitable estoppel . . . focuses on the relationship between the parties and applies where one of the parties detrimentally has relied upon the position taken by the other party in an earlier proceeding. In those circumstances, the party that induced reliance is estopped from subsequently arguing a contrary position.<sup>373</sup>

The distinction is important because the two doctrines have different purposes and requirements. For instance, unlike judicial estoppel,<sup>374</sup> the court may not raise equitable estoppel *sua sponte*.<sup>375</sup> Whereas judicial estoppel is designed to protect the integrity of the judiciary, equitable estoppel protects the parties.<sup>376</sup> Unlike judicial estoppel, a party seeking equitable estoppel must therefore show that she has detrimentally relied on the conduct of the party to be estopped.<sup>377</sup> Similarly, equitable estoppel is distinct from promissory estoppel.<sup>378</sup> “[U]nder a theory of equitable estoppel, there must be reliance on a misrepresentation of *past or present*

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372. See *Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1343 (11th Cir. 2006); *In re Alan DeAtley Litig.*, No. CV-06-0278-JLQ, 2008 WL 4153675, at \*15 (E.D. Wash. Aug. 29, 2008); *Brown v. Branch*, 758 N.E.2d 48, 52 (Ind. 2001); see also *Chase Manhattan Bank, USA, N.A. v. Deuel (In re Deuel)*, 482 B.R. 323, 330-31 (Bankr. S.D. Cal. 2012) (vacillating between equitable estoppel and judicial estoppel analysis without noting the distinctions between them); *Rose v. Beverly Health & Rehab. Servs., Inc.*, 356 B.R. 18, 23, 26 (E.D. Cal. 2006); see also *Romania v. Mattera (In re Mattera)*, Bankr. No. 05-39171, Adversary No. 07-01216, 2010 WL 148425, at \*4-5 (Bankr. D.N.J. Jan. 12, 2010) (same).

373. *Texaco, Inc. v. Duhé*, 274 F.3d 911, 923 n.16 (5th Cir. 2001) (citing *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598-99 (6th Cir. 1982)).

374. See *supra* note 12 and accompanying text.

375. *In re Boates*, No. Civ.A. 05-4353, 2006 WL 166569, at \*3 (E.D. Pa. Jan. 23, 2006) (citing FED. R. CIV. P. 8(c) (2005); *ADC Telecomms., Inc. v. Siecor Corp.*, 954 F. Supp. 820, 825 (D. Del. 1997)).

376. *OSRecovery, Inc. v. One Groupe Int’l, Inc.*, 462 F.3d 87, 93 n.3 (2d Cir. 2006) (citing *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1037 (2d Cir. 1993)).

377. *E.g.*, *Wetzel v. Regions Bank*, 649 F.3d 831, 836-37 (8th Cir. 2011). A movant seeking equitable estoppel generally cannot rely on the detrimental reliance of others with whom the movant is not in privity to establish her own *prima facie* case for estoppel. See *Hopkins v. Idaho State Univ. Credit Union (In re Herter)*, 456 B.R. 455, 469 (Bankr. D. Idaho 2011).

378. Promissory estoppel is “[t]he principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to her detriment.” BLACK’S LAW DICTIONARY, *supra* note 8, at 631.

*facts*, while a theory of promissory estoppel permits reliance on a misrepresentation of *future intent*.<sup>379</sup> Clearly, practitioners must study the differences between these doctrines and only plead those that actually apply, and courts must carefully scrutinize whether a defendant or counterclaimant has adequately characterized the defenses it has pled.

Returning to equitable estoppel's requirements, although a mere miscommunication between parties generally does not trigger equitable estoppel, most courts hold that "[t]here need not be actual intent to defraud or mislead;" rather, "the estopped party need only have intended or expected that another would act based upon his representation."<sup>380</sup> There are many formulations of the elements of equitable estoppel, but the following four elements are most common:

- (1) the party to be estopped must know the facts;
- (2) the party to be estopped must either intend that its conduct will be acted upon or act in a manner that the party asserting estoppel has a right to believe it so intended;
- (3) the party asserting estoppel must be ignorant of the true facts; and
- (4) the party asserting estoppel must rely on the conduct to its injury.<sup>381</sup>

Notably, some courts hold that a party may be equitably estopped not only on the basis of affirmative conduct and actions, but also only the basis of silence and inaction.<sup>382</sup> However, "there must exist an opportunity and a duty to speak and knowledge that the other party is relying on that silence

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379. *Boylston Dev. Grp., Inc. v. 22 Boylston St. Corp.*, 591 N.E.2d 157, 163 n.17 (Mass. 1992) (emphasis added).

380. *In re Toriello*, No. 08-18063(DHS), 2010 WL 3943737, at \*3 (D.N.J. Oct. 5, 2010) (citing *In re Collier*, 307 B.R. 20, 28 (D. Mass. 2004)).

381. Klein et al., *supra* note 1, at 864. In some jurisdictions, the list of elements for equitable estoppel articulated by the courts is nonexhaustive. *See, e.g.*, *O'Donnell v. Vencor Inc.*, 466 F.3d 1104, 1109, 1111 (9th Cir. 2006) (quoting *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000)).

382. *See, e.g.*, *Metal Finds. Acquisition, LLC v. Reinert (In re Reinert)*, Bankr. No. 11-22840-JAD, Adversary No. 11-2656-JAD, 2012 WL 5177973, at \*7 (Bankr. W.D. Pa. Oct. 18, 2012); *Hancock Bank v. Bates (In re Bates)*, Bankr. No. 09-51279-NPO, Adversary No. 09-05092-NPO, 2010 WL 2203634, at \*10 (Bankr. S.D. Miss. May 27, 2010); *In re Scotto*, No. 809-75956-reg, 2010 WL 1688743, at \*11 (Bankr. E.D.N.Y. Apr. 26, 2010); *In re Hawkins*, 377 B.R. 761, 770 (Bankr. S.D. Fla. 2007) (citing *First Union Commercial Corp. v. Nelson, Mullins, Riley, & Scarborough*, 81 F.3d 1310, 1317 (4th Cir. 1996)).

to his detriment.”<sup>383</sup> For example, a recipient’s mere nonresponse to a letter, unaccompanied by knowledge that the sender is detrimentally relying on the recipient’s silence, does not amount to the recipient’s acceptance of the letter’s contents for equitable estoppel purposes.<sup>384</sup>

As in the judicial estoppel context, courts appear split regarding the applicable standard of review and whether the application of equitable estoppel is entrusted to the court’s discretion.<sup>385</sup> “[B]ecause equitable estoppel is based in a court’s equitable powers, the doctrine of unclean hands” may preclude a court from awarding equitable estoppel to a party who has engaged in misconduct; “one who seeks equity must not himself be guilty of inequitable conduct.”<sup>386</sup>

### B. Recent Developments

Unlike judicial estoppel, there have been comparatively few recent equitable estoppel developments of interest in the area of consumer bankruptcy. Many recent cases stand for unremarkable propositions. For example, a party should be estopped when it knowingly and intentionally makes false representations in affidavits,<sup>387</sup> or when it fails to list known

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383. *Timberland Bancshares, Inc. v. Garrison (In re Garrison)*, 462 B.R. 666, 683 (Bankr. W.D. Ark. 2011) (citations omitted); *accord Willis v. Rice (In re Willis)*, 345 B.R. 647, 652 (B.A.P. 8th Cir. 2006).

384. *E.g., Drake v. Mass. Dep’t of Rev. (In re Drake)*, 434 B.R. 11, 22 (Bankr. D. Mass. 2010).

385. *Compare Wetzel v. Regions Bank*, 649 F.3d 831, 834 (8th Cir. 2011) (applying de novo standard of review to lower court’s decision not to apply equitable estoppel), and *O’Rourke v. United States*, 587 F.3d 537, 540 (2d Cir. 2009) (same), and *Rossi v. Westenhoefer (In re Rossi)*, No. 11-8048, 2012 WL 913732, at \*2 (B.A.P. 6th Cir. Mar. 20, 2012) (stating that equitable estoppel is a mixed question of law and fact to be reviewed de novo), with *O’Donnell*, 466 F.3d at 1109, 1111 (reviewing lower court’s decision not to apply equitable estoppel for abuse of discretion). Even courts within the *same* circuit split on this question. See the discussion of this issue and the cases cited in *Forester v. Chertoff*, 500 F.3d 920, 929 n.11 (9th Cir. 2007).

386. *In re Davenport*, No. 08-41213, 2011 WL 6098068, at \*6 (Bankr. D. Kan. Dec. 7, 2011) (quoting *Cox v. Countrywide Home Loans (In re Cox)*, 408 B.R. 407, 417 (Bankr. D. Kan. 2009)); *accord Tenn. Commerce Bank v. Hutchins*, 409 B.R. 680, 685 (D. Vt. 2009); *Sharpe v. Wells Fargo Home Mortg. (In re Sharpe)*, 391 B.R. 117, 166 (Bankr. N.D. Ala. 2008).

387. *See, e.g., Erickson v. Wells Fargo Nat’l Ass’n (In re Erickson)*, Bankr. No. 09-11933-CAG, Adversary No. 09-01135-CAG, 2011 WL 1599657, at \*4-6 (Bankr. W.D. Tex. Apr. 27, 2011), *aff’d in relevant part*, 2012 WL 4434740, at \*7-8 (W.D. Tex. 2012); *see also Nash v. Gentile*, Nos. 6:08-CV-006(LEK), 6:08-CV-007(LEK), 2008 WL 3211276 (N.D.N.Y. Aug. 6, 2008) (finding sanctions appropriate for special counsel who sought equitable estoppel without a reasonable basis for doing so, where opponents engaged in no

creditors on its bankruptcy schedules and thereby deprives those creditors of sufficient notice.<sup>388</sup> Also unlike judicial estoppel, consumer bankruptcy equitable estoppel cases do not split nicely into conceptually distinct doctrinal issues, each of which would deserve their own subsection in an article such as this. The best this article can do is divide the cases on the basis of whether or not the court ultimately applied equitable estoppel, and then further subdivide the cases on the basis of the identity of the party to be estopped.

Moreover, as will be evident below, many recent attempts to utilize or expand equitable estoppel in consumer bankruptcy cases have failed; courts rarely find that equitable estoppel is warranted in the consumer bankruptcy context. This is most likely because “[t]he availability of relief” under equitable estoppel and its doctrinal relatives “is extremely limited.”<sup>389</sup> This section nonetheless briefly discusses several recent developments and advises debtors’ and creditors’ attorneys alike to be aware of the consequences of equitable estoppel and seek ways to exploit the doctrine to further their clients’ goals.

### *1. Equitable Estoppel Found Warranted*

#### *a) As Against Debtors*

In *In re Widner*,<sup>390</sup> the court equitably estopped a chapter 7 consumer debtor from objecting to the untimeliness of a creditor’s dischargeability complaint, because the debtor unconditionally agreed to the entry of a nondischargeability judgment against her prior to the deadline.<sup>391</sup> The court reached this holding even though (1) a telephone message left by an unidentified individual from debtor’s attorney’s office manifested the debtor’s agreement;<sup>392</sup> (2) the parties engaged in subsequent discussions regarding whether the judgment would be paid in installments and the amount of those installments, thereby indicating that the initial discussions

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wrongful acts, and where the sole reason for expiration of the statute of limitations was party’s own negligence and failure to exercise due diligence).

388. See, e.g., *Tidwell v. Smith (In re Smith)*, 379 B.R. 315, 328-29 (Bankr. N.D. Ill. 2007).

389. *In re Hutchins*, 400 B.R. 403, 413 (Bankr. D. Vt. 2009).

390. *Eastman Credit Union v. Widner (In re Widner)*, Bankr. No. 09-52844, Adversary No. 10-5003, 2010 WL 1427300 (Bankr. E.D. Tenn. Apr. 7, 2010). We note that, as an unpublished decision, the precedential effect of *Widner* is limited.

391. *Id.* at \*3.

392. *Id.* at \*1.

were incomplete,<sup>393</sup> and (3) the parties reached no explicit agreement regarding the accrual of interest.<sup>394</sup> The upshot of *Widner* is that in some jurisdictions, even seemingly unresolved discussions between attorneys can equitably estop their clients from asserting otherwise available affirmative defenses. Practitioners are therefore advised to exercise caution.

A chapter 7 debtor generally “lacks standing to appeal orders potentially affecting the size of her bankruptcy estate,”<sup>395</sup> but an exception exists where the debtor can show an ownership interest in the asset at issue.<sup>396</sup> However, when that debtor has pledged the asset at issue, such as a claim against another debtor’s bankruptcy estate, to support her plan, then the debtor is equitably estopped from asserting that she personally owns the claim and has standing to pursue it.<sup>397</sup> The debtor will also be equitably estopped from treating her apparent pledge of the entire asset to the plan as only pledging part of the asset.<sup>398</sup>

Multiple courts have held that a debtor may be equitably estopped from moving to dismiss an allegedly forged or unauthorized bankruptcy petition when she waits too long after learning about the alleged forgery before taking action.<sup>399</sup> Dismissal is generally appropriate where the debtor did not

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393. *Id.* at \*1, \*3.

394. *Id.* at \*3 (“The fact that there was no express agreement as to the accrual of interest does not preclude the existence of a settlement because interest automatically accrues on a judgment by operation of law. See 28 U.S.C. § 1961. In other words, by agreeing to the entry of a judgment against her, the Debtor implicitly agreed that the judgment would accrue interest.”).

395. *Spirtos v. Ray (In re Spirtos)*, BAP Nos. CC-04-1621-MoBK, CC-05-1118-MoBK, Bankr. No. LA 87-10752-AA, Adversary No. AD 02-02726-AA, 2006 WL 6811021, at \*7 (B.A.P. 9th Cir. May 19, 2006) (citations omitted). Note, however, that as an unpublished opinion the precedential value of *Spirtos* is limited. *Id.* at \*1.

396. *Id.* at \*8.

397. *Id.*

398. *Id.* The court applied judicial estoppel in this case as well. *Id.*

399. See, e.g., *Willis v. Rice (In re Willis)*, 345 B.R. 647, 651-54 (B.A.P. 8th Cir. 2006); *In re Scotto*, No. 809-75956-reg, 2010 WL 1688743, at \*12-14 (Bankr. E.D.N.Y. Apr. 26, 2010). Both of these cases alternatively held that the debtor ratified the allegedly defective petition. For a case reaching similar results on the grounds of ratification rather than estoppel, see *Simon v. Amir (In re Amir)*, 436 B.R. 1, 17-20 (B.A.P. 6th Cir. 2010).

*Scotto* also presents another important takeaway for practitioners, albeit one that should go without saying: do not file bad faith bankruptcies for your clients that you have no intention of pursuing to completion for the sole purpose of stalling litigation. See *Scotto*, 2010 WL 1688743, at \*5. Likewise, an attorney who files a bankruptcy petition without the debtor’s signature may be subject to sanctions pursuant to Rule 9011. *Willis*, 345 B.R. at 651 n.10 (citing *Briggs v. Labarge (In re Phillips)*, 433 F.3d 1068, 1071-72 (8th Cir. 2006)).

sign the petition.<sup>400</sup> However, if the debtor delays challenging the petition and thereby enjoys the benefits of bankruptcy (such as the automatic stay) without suffering from the detriments, then the debtor will be equitably estopped from asserting deficiencies in her petition and schedules as a ground for dismissal.<sup>401</sup>

Although debtors are most often estopped for nondisclosures on their bankruptcy schedules under the rubric of *judicial* estoppel, they may also be *equitably* estopped for their failures to disclose if the elements of equitable estoppel are satisfied.<sup>402</sup>

*b) As Against Trustees*

At least one court has held that a chapter 7 trustee may be bound to an arbitration clause in a contract “to the same extent” that the debtor is bound under equitable estoppel.<sup>403</sup>

In one case, a court equitably estopped a chapter 7 trustee from moving to dismiss a consumer debtor’s case for failure to file payment advices with the bankruptcy clerk pursuant to Code § 521.<sup>404</sup> The debtor physically handed the advices to the trustee to examine at the first meeting of the creditors.<sup>405</sup> The trustee returned the advices to the debtor without informing him that giving the advices to the trustee was no substitute for filing them with the clerk.<sup>406</sup> The court ruled that

[b]y closing the first meeting and returning the payment advices without comment, the trustee provided adequate justification for debtor’s counsel to believe that no further issue existed with regard to the payment advices. For these reasons, the trustee is appropriately estopped from now moving for dismissal of this case due to a failure to complete the timely filing of those same documents.<sup>407</sup>

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400. *E.g., Willis*, 345 B.R. at 651.

401. *See id.*

402. *See, e.g., Metal Foundry Acquisition, LLC v. Reinert (In re Reinert)*, Bankr. No. 11-22840-JAD, Adversary No. 11-2656-JAD, 2012 WL 5177973, at \*1-9 (Bankr. W.D. Pa. Oct. 18, 2012).

403. *Stalzer v. BDO Seidman LLP (In re Watson)*, Nos. 02-96223, 1:05-cv-1117-WSD, 2006 WL 1566968, at \*4 n.3 (N.D.Ga. Mar. 28, 2006).

404. *In re Gilbert*, 403 B.R. 297, 300 (Bankr. W.D.N.Y. 2009).

405. *Id.* at 298.

406. *Id.*

407. *Id.* at 299.

Thus, trustees should carefully consider whether their actions (or non-actions) could later give rise to equitable estoppel.

*c) Against Creditors*

In *Wallach v. Countrywide Home Loans, Inc. (In re Sheppard)*,<sup>408</sup> the chapter 7 trustee of a consumer debtor's estate brought a "strong-arm" proceeding<sup>409</sup> under Code § 544 in order to avoid a mortgage based on the lender's error in recording a copy that the debtor had not signed.<sup>410</sup> The case had previously been closed, but after learning about a potential defect in the lender's mortgage, the trustee successfully moved to reopen the case.<sup>411</sup> The lender argued that Code § 546(a) barred the trustee's avoidance action, which section "essentially provides that a trustee may not commence an avoidance action under [Code] section 544 after . . . the time that the case is closed," *inter alia*.<sup>412</sup> Whereas ordinarily "this prior closing of the case [would] have precluded any avoidance action,"<sup>413</sup> in this case the lender

had previously moved for relief from the automatic stay of [Code] § 362. That motion made no reference to the recording defect or to the fact that [the lender's] pre-petition complaint had sought both to foreclose and to correct the error. As an exhibit to its motion, [the lender] attached a copy not of the unsigned mortgage of record, but of an unrecorded mortgage with the debtor's full signature. By reason of this selective presentation, [the lender] effectively camouflaged a serious title problem. If the motion had alerted the trustee to that problem, then presumably the trustee would not have allowed the case to close.<sup>414</sup>

As a result, the court concluded that "principles of equitable estoppel" would preclude the lender "from asserting the bar of the earlier closing of this case."<sup>415</sup> *Sheppard* necessarily stands for the proposition that, in

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408. 471 B.R. 45 (Bankr. W.D.N.Y. 2012).

409. For an explanation of what a strong-arm proceeding entails, see Al Teel, Comment, *Why Are Chapter 13 Debtors Still "Standing" in Their Battle for Trustee's Avoidance Powers?: A Call to Resolve the Current Circuit Split*, 43 CUMB. L. REV. 311, 323-24 (2013).

410. *Wallach*, 471 B.R. at 47-48.

411. *Id.* at 47.

412. *Id.* at 48.

413. *Id.*

414. *Id.*

415. *Id.*

appropriate circumstances, the judicially created principles of equitable estoppel can trump the congressionally enacted sections of the Code.<sup>416</sup>

Where a lender sends a letter to a debtor that falsely suggests that the lender holds the debtor's loan, such that the debtors are thereby prevented from "learn[ing] of the [true holder's] identity until it [is] too late to rescind," the lender may be equitably estopped "from denying that it was a holder (i.e., a creditor)" of the loan under the Truth in Lending Act.<sup>417</sup> Courts have applied equitable estoppel against creditors in other ways. For instance, where a creditor permissibly repossesses a consumer debtor's vehicle without seeking relief from the automatic stay due to a statutory exception to the stay, but the creditor has previously misinformed the debtor that it would seek relief from the stay before repossessing the property, the creditor may be equitably estopped.<sup>418</sup> The creditor may be deemed liable for the loss of the debtor's personal property located within the repossessed vehicle that the debtor would have removed had he known the vehicle would be repossessed without legal process.<sup>419</sup>

A creditor has been equitably estopped from denying a debtor's ownership interest in property when it "s[a]t on its rights and collect[ed] payments from the [d]ebtor" rather than her ex-husband and "elected to remain silent when it had the right to initiate a foreclosure proceeding."<sup>420</sup> Likewise, a creditor may be equitably estopped from challenging its

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416. *Cf.* *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367-76 (2007) (reading bad faith exceptions into the Code).

417. *See Meyer v. Argent Mortg. Co. (In re Meyer)*, 379 B.R. 529, 551-54 (Bankr. E.D. Pa. 2007).

418. *Heflin v. Santander Consumer USA, Inc. (In re Heflin)*, 464 B.R. 545, 555-56 (Bankr. D. Conn. 2011).

419. *Id.* at 556.

420. *In re Nunnery*, No. 11-80267, 2011 WL 4712083, at \*3 (Bankr. M.D.N.C. Aug. 17, 2011).

The [d]ebtor made the monthly payments to [the creditor] and maintained the property for seven years after [debtor's ex-husband] ceased residing in the manufactured home. . . . [The creditor] knew of the situation. . . . The [d]ebtor continued to make the monthly payments to [the creditor] in reliance that she would be permitted to continue residing in the manufactured home with her two minor children. Despite knowing that [the applicable contract] prevented [debtor's ex-husband] from transferring any interest in the manufactured home [to the debtor or anyone else] without [the creditor's] consent, [the creditor] was content to sit on its rights. . . . Consequently, . . . the [d]ebtor is the equitable owner of the manufactured home and [the creditor] holds a claim against the [d]ebtor's estate.

*Id.*

classification as unsecured when it fails to take any action whatsoever in the bankruptcy proceeding until after the debtor has received a discharge, despite having notice and actual knowledge of the debtor's bankruptcy.<sup>421</sup> The upshot is that creditors must be vigilant and promptly bring whatever challenges they have *during* the debtor's bankruptcy proceeding, not afterwards.

2. *Equitable Estoppel Found Unwarranted*<sup>422</sup>

a) *Debtors' Estoppel Claims Failed Because No Reasonable Reliance Found*

In *Thornton v. Western & Southern Financial Group Beneflex Plan*, an employee alleged that his employer represented that he would receive long-term disability benefits under the terms of his disability insurance plan, when in reality the plan's unambiguous terms clearly provided otherwise.<sup>423</sup> The employee claimed that his employer "intended for him to rely on these representations, and he did so to his detriment, ultimately resulting in his declaration of bankruptcy."<sup>424</sup> The court held that, the employee's bankruptcy filing notwithstanding, equitable estoppel did not prevent the employer "from denying [the employee's] long-term disability benefits based on the pre-existing condition exclusion contained in the Plan."<sup>425</sup> Because "[p]rinciples of estoppel . . . cannot be applied to vary the terms of unambiguous plan documents," the employee's "[r]eliance on statements suggesting the contrary was not reasonable or justifiable."<sup>426</sup>

Where a creditor files an inflated proof of claim with respect to a lease in a debtor's bankruptcy, that inflated filing "does not equate to altering the

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421. *In re Hawkins*, 377 B.R. 761, 765, 770-71 (Bankr. S.D. Fla. 2007).

422. For additional cases in which courts found equitable estoppel unwarranted, see, for example, *Tenn. Commerce Bank v. Hutchins*, 409 B.R. 680, 685 (D. Vt. 2009); *Hopkins v. Idaho State Univ. Credit Union (In re Herter)*, 456 B.R. 455, 469-71 (Bankr. D. Idaho 2011); *Shuman v. Allan (In re Allan)*, 449 B.R. 628, 638 (Bankr. S.D. Ga. 2009); *In re Shethi*, 389 B.R. 588, 606-07 (Bankr. N.D. Ill. 2008) (holding debtors not equitably estopped from amending exemption schedule); *In re Foth*, No. 06-10696, 2007 WL 4563434, at \*7 (Bankr. D. Kan. Dec. 21, 2007); *Hall v. Hopkins (In re Jacobs)*, Bankr. No. 04-42387, Adversary No. 05-8078, 2006 WL 4451566, at \*5-6 (Bankr. D. Idaho Feb. 10, 2006) (finding plaintiff did not relinquish or waive security interest in car and proceeds).

423. 797 F. Supp. 2d 796, 805-06 (W.D. Ky. 2011).

424. *Id.* at 806.

425. *Id.* at 805.

426. *Id.* (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 404 (6th Cir. 1998)).

terms of the Lease”<sup>427</sup> under equitable estoppel principles because the debtors “could not have ‘reasonably relied’ upon [the creditor’s] proof of claim because [the debtors] knew at all times what the terms of their Lease were.”<sup>428</sup> In such circumstances, the debtors “may not rely upon an equitable estoppel argument to prevent [the creditor] from amending its proof of claim.”<sup>429</sup>

*b) Estoppel Against the Government May Require a Heightened Standard*

Several courts have recently reaffirmed that in order to equitably estop the government in a consumer bankruptcy case, such as when the IRS files a tax deficiency claim, the party seeking to estop the government must satisfy a heightened standard and show “some misrepresentation” or “affirmative misconduct”<sup>430</sup> that rises above the level of mere negligence.<sup>431</sup> For example, a court found equitable estoppel against the government unwarranted where the debtor

argue[d] only that the government-issued schedule for his Chapter 11 payments led him to believe that by abiding by the schedule *all* of his tax liabilities would be discharged. The schedule itself, however, d[id] not suggest this conclusion, and the facts show[ed] that the government did not neglect its efforts to collect the amounts not covered by the bankruptcy case or mislead Defendant into believing it would do so.<sup>432</sup>

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427. Chase Manhattan Auto Fin. Corp. v. Presco (*In re Presco*), Bankr. No. 08-20390JAD, 2009 WL 8556808, at \*3 (Bankr. W.D. Pa. Mar. 16, 2009).

428. *Id.* at \*4.

429. *Id.*

430. *E.g.*, *In re Rodriguez*, 387 B.R. 76, 92 (Bankr. E.D.N.Y. 2008) (citations omitted).

431. O’Rourke v. United States, 587 F.3d 537, 542 (2d Cir. 2009) (quoting Rojas-Reyes v. INS, 235 F.3d 115, 126 (2d Cir. 2000)); accord *United States v. Campbell*, No. 5:09CV00469(ERW), 2010 WL 3996600, at \*9 (C.D. Cal. Sept. 3, 2010); *United States v. Gill*, No. 8:06-CV-996-T-MAP, 2007 WL 2310780, at \*2 (M.D. Fla. Aug. 9, 2007); *Drake v. Mass. Dep’t of Rev. (In re Drake)*, 434 B.R. 11, 22 (Bankr. D. Mass. 2010). *But see In re Breland*, No. 09-11139-11-MAM, 2011 WL 6739514, at \*4 (Bankr. S.D. Ala. Dec. 20, 2011) (holding the IRS was equitably estopped without a showing or analysis of affirmative misconduct).

432. *Gill*, 2007 WL 2310780, at \*3. Indeed, the court in *Gill* suggested that the facts would not even permit the defendant-debtor to satisfy even “the lower, traditional equitable estoppel elements” applied to ordinary, nongovernmental litigants. *Id.* The court further noted that the defendant-debtor’s argument was more appropriately deemed a laches argument than an equitable estoppel argument. *Id.*

Similarly, “[d]elay by the government in furnishing a taxpayer[-debtor] the information needed to file a refund claim generally does not rise to the level of affirmative misconduct” necessary to justify a chapter 7 trustee’s claim of equitable estoppel when objecting to a proof of claim filed by the IRS; “nor does it justify the equitable tolling of the statute of limitations.”<sup>433</sup>

*c) Issues Regarding Trustees*

At least one court has held, however, that no such heightened standard applies to a chapter 7 trustee, as a chapter 7 trustee is “an independent fiduciary, and not . . . an instrumentality of any governmental unit.”<sup>434</sup> Not all courts agree; some have suggested that “compelling circumstances” must be shown before a chapter 7 trustee may be equitably estopped.<sup>435</sup>

A bankruptcy appellate panel has also held that an arguably lackadaisical chapter 7 trustee would not be equitably estopped from claiming ownership of a chapter 7 consumer debtor’s state court cause of action, even though the trustee “was required to expeditiously liquidate or abandon property of the estate,” and “could have been more diligent in his investigation” and closing of the bankruptcy case, because there was no suggestion that the trustee “ke[pt] the case open for an improper purpose.”<sup>436</sup>

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433. *Rodriguez*, 387 B.R. at 92-93 (citations omitted). The court further held that the trustee could not demonstrate detrimental reliance. *Id.* at 93.

434. *In re Gilbert*, 403 B.R. 297, 299 (Bankr. W.D.N.Y. 2009). The court went on to explain that “even if the case trustee were deemed to fulfill some governmental function, his actions in the present instance do not represent the fulfillment of any statutory duty.” *Id.*

435. One court wrote the following:

In addition to the legal justifications for not estopping Trustee from performing his duties as a chapter 7 case trustee in this case, there are strong policy reasons against doing so. A “prime bankruptcy policy” is to achieve equality of distribution among creditors of a debtor. The chapter 7 trustee system helps sustain that policy by preventing a race to obtain and liquidate assets by individual creditors, and by providing representation to creditors who might not otherwise be able to afford to participate in the distribution process. Allowing an individual creditor, or a subset of creditors, to prevent a trustee from fulfilling his statutory duties to the bankruptcy estate based upon his personal conduct would frustrate one of the [Code’s] primary tools to ensure the protection of *all* creditors’ rights, and should not be supported by the Court absent compelling circumstances.

*Hopkins v. Idaho State Univ. Credit Union (In re Herter)*, 456 B.R. 455, 471 (Bankr. D. Idaho 2011) (citations omitted).

436. *Slates v. Reger (In re Slates)*, BAP No. EC-12-1168-KiDJu, Bankr. No. 10-22970-CMK, 2012 WL 5359489, at \*9-10 (B.A.P. 9th Cir. Oct. 31, 2012).

At least one court has held that equitable estoppel is an inappropriate tool for shifting liability for a chapter 7 trustee's attorney fees to a lender when that lender includes its own request for attorney fees in its complaint in an adversary proceeding.<sup>437</sup>

In *In re Davenport*, chapter 13 debtors discussed their initial proposal to abandon certain real property with the chapter 13 trustee at the initial meeting of creditors.<sup>438</sup>

Because he did not consider himself a "liquidating trustee," however, the Trustee informed them that he would not accept the transfer of the property, and liquidate it, for the benefit of creditors. The Trustee did, however, inform the Debtors that because the plan payments proposed by them . . . were sufficient to satisfy the best interest of the creditors test without the sale of this property, there was no need to liquidate [the debtors'] interest in the land. Debtors agreed to amend their plan to remove the "abandonment" language, and that plan was confirmed in December 2008 without objection.<sup>439</sup>

Subsequent to confirmation, the debtors sold the real property for a substantial windfall<sup>440</sup> without seeking court approval or informing the

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437. Chase Manhattan Bank, USA, N.A. v. Deuel (*In re Deuel*), 482 B.R. 323, 329-30 (Bankr. S.D. Cal. 2012). The court noted:

The Trustee argues that the estate is entitled to recover attorneys' fees based on principles of estoppel. He argues first that Chase unequivocally demanded attorneys' fees in its complaint and in the bankruptcy court's order and judgment. He, thereafter, argues generally and generically that estoppel applies. The Court determines that these arguments fail. . . .

Estoppel theory states: "If one merely alleges a right to recover attorneys' fees one is estopped from contending that he or she could not recover them if the other party prevails and claims attorneys' fees."

The Court determines that the estoppel theory is an inappropriate vehicle for shifting liability for attorneys' fees in any event and particularly so given the equivocal nature of the attorneys' fees "demand" and "award" in this case. Instead, attorneys' fees, if awarded, must be otherwise recoverable by contract, statute, or at law.

*Id.*

438. No. 08-41213, 2011 WL 6098068, at \*1 (Bankr. D. Kan. Dec. 7, 2011).

439. *Id.*

440. The court noted:

[I]n 2010, Mrs. Davenport and her siblings were contacted by the Kansas Department of Transportation ("KDOT") because KDOT intended to acquire the land for a highway project. In a letter dated November 2010, KDOT offered Mrs. Davenport and her siblings \$776,895 for the land—more than 15 times the

court or the trustee, and went on a spending spree.<sup>441</sup> The trustee moved to compel the debtors to turn over the proceeds from the property sale.<sup>442</sup> The debtors argued that the trustee was equitably estopped from doing so<sup>443</sup> “as a result of the Trustee’s decision not to require [the real property to] be sold prior to plan confirmation.”<sup>444</sup> The debtors considered the trustee to have abandoned the asset<sup>445</sup> and thought the money was theirs to fritter away as they wished.<sup>446</sup> The court apoplectically disagreed.<sup>447</sup> For one, the trustee “did not abandon the property”—indeed, he “informed the [debtors] that they could not abandon the property to him to liquidate.”<sup>448</sup> Thus, there was “nothing improper about the information provided by the Trustee to the [debtors].”<sup>449</sup> Moreover, the debtors were barred from asserting equitable estoppel by the aforementioned doctrine of unclean hands.<sup>450</sup> Though the

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previously appraised value of the land.

*Id.*

441. *Id.* at \*1-2. Specifically, the debtors took a vacation in Hawaii, purchased a newer vehicle, fixed up their home, built an expensive garden shed, bought new furniture and high-end appliances, and even used some of the proceeds to make their Chapter 13 plan payments and cover their monthly living expenses—begging the question what they did with their ordinary monthly income of at least \$2,225.

*Id.* at \*7.

442. *Id.* at \*1.

443. *Id.* at \*6.

444. *Id.* at \*2.

445. *Id.* at \*6.

446. *Id.* at \*2.

447. *Id.* at \*6-7. The court raged:

[The d]ebtors . . . are like the children who have been caught eating the prohibited cookies from the family cookie jar. Although at the point they were caught they had eaten 90% of the cookies, they wish to eat the few that remain even though that will deprive the rest of the family of their share. This I will not, and cannot, allow.

*Id.* at \*7.

448. *Id.* at \*6.

449. *Id.*

450. The court found the facts of the case egregious:

I find the [debtors’] decision to spend these estate assets, especially after the Trustee filed his motion for turnover, simply inexcusable. . . .

[A]fter deducting taxes, the [debtors] received almost \$114,000 from the land sale. That is equivalent to two and one-half year’s income for these Debtors. They could have paid 100% of their claims . . . and still emerged from under this Chapter 13 proceeding completely debt free (including their home and two or three cars), and still had \$24,000 (or over six months of net income) remaining. . . .

facts of *Davenport* are undoubtedly extreme, practitioners and trustees can hopefully apply its teachings to less extreme fact situations, and debtors' attorneys can use *Davenport* as a cautionary tale for advising their clients how *not* to act.

*d) Special Issues with Creditors*

The potential to apply equitable estoppel arises when a lender, by its representations, promises, or actions, induces a would-be debtor not to file bankruptcy.<sup>451</sup> However, at least one court has indicated<sup>452</sup> that when that would-be debtor would not have filed bankruptcy even in the absence of the lender's actions and representations because, due to her lack of sophistication and legal knowledge, she did not believe she was eligible for bankruptcy, the lender may not be equitably estopped.<sup>453</sup> The would-be debtor could not possibly prove reliance on the lender's actions and representations.<sup>454</sup>

The flipside of this scenario occurs when a lender argues that it agreed to "continue[]" to advance monies for taxes that the Debtor failed to pay notwithstanding the entry of a foreclosure judgment" in reliance on the "Debtor's promise to file a Chapter 13 plan that would provide for [the lender's] presumably arrear claim and make current post-petition mortgage

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But that was not how the [debtors] elected to proceed. . . .

In approximately eleven months, the [debtors] managed to spend almost \$100,000 from the sale of the land, plus at least \$24,475 from their ordinary earnings . . . . The only effort they made to pay any of this windfall to their creditors was to make their required monthly Chapter 13 plan payments . . . .

To make matters worse, the [debtors] did not inform the Court or the Trustee of the sale of this land or seek the required Court approval. This deprived the Trustee and creditors of the ability to capture more of the funds for the benefit of creditors.

The [debtors] are, in no way, entitled to the Court's equity under these facts.

*Id.* at \*6-7.

451. See *Mitchell v. Wells Fargo Bank, N.A. (In re Mitchell)*, 476 B.R. 33, 45 (Bankr. D. Mass. 2012).

452. We use the word "indicated" rather than "ruled" because *Mitchell* involved a non-core proceeding in which a party did not consent to the bankruptcy court issuing a final order. As a result, the court's decision was "submitted to the district court as proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c)(1) and [Rule] 9033." *Id.* at 37. At the time of this writing, there is no indication whether the district court has accepted or rejected the bankruptcy court's findings and conclusions.

453. *Id.* at 45.

454. *Id.*

payments.”<sup>455</sup> Where the lender “provide[s] no evidence that it had been induced into making the advances by Debtor’s conduct,”<sup>456</sup> it cannot make a claim for those escrow advances in the debtor’s bankruptcy on the grounds of equitable estoppel.<sup>457</sup>

At least one court has recently reaffirmed that, under equitable estoppel principles, “a creditor does not waive the right to act on a future default by accepting payment of a past default.”<sup>458</sup>

### III. Conclusion

As the foregoing demonstrates, with few exceptions, the doctrine of estoppel is in a state of flux. There is plenty of wiggle room for creative practitioners to develop these doctrines in innovative ways that serve their

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455. *In re Miles*, 400 B.R. 441, 445 (Bankr. E.D. Pa. 2008).

456. *Id.*

457. *Id.* at 443-46. The court explained:

[The lender] points to the undisputed fact that Debtor has filed three Chapter 13 cases since the judgment was entered which provided for a cure of arrears and resumption of post-petition payments. Moreover, it entered into the Filing Stipulation agreeing to the new case upon the Debtor’s promise to file a Chapter 13 plan that would provide for its presumably arrears claim and make current post-petition mortgage payments. [The lender] argues that it relied on these commitments and continued to advance monies for taxes that the Debtor failed to pay notwithstanding the entry of a foreclosure judgment. Notably [the lender] provided no evidence that it had been induced into making the advances by Debtor’s conduct. An equally plausible explanation for its decision to pay real estate taxes and insurance premiums was a desire to protect its collateral. Moreover, the Debtor’s election to propose a plan that would retire the debt instead of reinstate the mortgage was permissible under the [Code] and the Filing Stipulation. While that document stated that Debtor was required to file a plan that would provide for [the lender’s] anticipated proof of claim in the amount of \$48,000, it expressly allowed Debtor the right to review the claim when it was filed and object as appropriate. The Filing Stipulation did not require Debtor to pay the escrow component of its claim if she chose not to reinstate the Mortgage nor require Debtor to file an arrears plan. Moreover, there is no evidence that [the lender] ever considered, let alone discussed with Debtor, the reimbursement of post-judgment advances in the event she filed a full payment plan. In short, I have no way of knowing what [the lender] would have done had it been aware that the Mortgage would not be reinstated through an arrears plan.

*Id.* at 445.

458. *Sharpe v. Wells Fargo Home Mortg. (In re Sharpe)*, 391 B.R. 117, 165 (Bankr. N.D. Ala. 2008) (applying Alabama law).

clients, be they debtors or creditors, plaintiffs or defendants, or trustees.<sup>459</sup> Hopefully this article can assist that development in ways that are sensible, coherent, and consistent. In the following volume, we will engage in a similar analysis of preclusion doctrines in consumer bankruptcy cases.

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459. That said, of course, we caution against the abusive use of preclusive doctrines. One should only plead them if they are supportable. *See* RULE 9011(b)-(c); FED. R. CIV. P. 11(b)-(c). Estoppel and preclusion should not become stock, kneejerk arguments that are employed every time an opposing party is haled into court against its will in the way that *Stern v. Marshall* objections are often reflexively raised in bankruptcy courts nowadays. *See, e.g., In re Ambac Fin. Grp., Inc.*, 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011).