

# Bankruptcy

by Hon. James D. Walker, Jr.\*  
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## I. INTRODUCTION

No one topic dominated bankruptcy cases arising in the Eleventh Circuit in 2004, but several developments took center stage. First, judicial estoppel re-emerged as a tool used to prevent a windfall to the debtor when the trustee is the real party in interest.<sup>1</sup> Second, any benefit accruing to debtors after last year's Supreme Court decision<sup>2</sup> on state sovereign immunity may have been effectively eliminated by a recent circuit court decision.<sup>3</sup> Third, student loan creditors endeavored to eviscerate the last remnants of the undue hardship discharge by invoking the availability of the income contingent repayment plan.<sup>4</sup> This Article addresses these and other recent developments in bankruptcy law. Where applicable, the Article also points out changes resulting from the recent enactment of bankruptcy reform.

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1. See *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1271-72 (11th Cir. 2004); *In re Upshur*, 317 B.R. 446, 454 (Bankr. N.D. Ga. 2004); *In re Huggins*, 305 B.R. 63, 67 (Bankr. N.D. Ala. 2003).

2. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

3. *Ga. Higher Educ. Assistance Corp. v. Crow*, 394 F.3d 918 (11th Cir. 2004).

4. See *McLaney v. Ky. Higher Educ. Assistance Auth.*, 314 B.R. 228 (Bankr. M.D. Ala. 2004); *Educ. Credit Mgt. Corp. v. Boykin*, 313 B.R. 516 (M.D. Ga. 2004); *Nanton-Marie v. United States Dep't of Educ.*, 303 B.R. 228 (Bankr. S.D. Fla. 2003).

## II. PROCEDURE

A. *Judicial Estoppel*

In *Parker v. Wendy's International, Inc.*<sup>5</sup> the court of appeals advanced the seemingly straightforward rule that inconsistent positions asserted by a debtor in two different proceedings cannot be the basis of a judicial estoppel defense against the Chapter 7 trustee.<sup>6</sup> However, judicial estoppel may be effective against the trustee when the nonbankruptcy recovery exceeds the total amount of claims, costs, and fees in the Chapter 7 case.<sup>7</sup> In *Parker* the court of appeals acknowledged this “unlikely scenario” and stated that “perhaps judicial estoppel could be invoked by the defendant to limit any recovery to only that amount and prevent an undeserved windfall from devolving on the non-disclosing debtor.”<sup>8</sup>

In two cases<sup>9</sup> in which the debtor or trustee sought to reopen the bankruptcy to assert a previously undisclosed cause of action, the courts faced the issue of whether the trustee's recovery should be limited.<sup>10</sup> In *In re Huggins*,<sup>11</sup> the bankruptcy court reopened the case but limited the trustee's authority to recover to no more than “the amount of the proofs of claim filed in this case, reasonable attorney fees and reasonable expenses . . . .”<sup>12</sup> In contrast, the court in *In re Upshur*<sup>13</sup> declined to make any findings relating to the judicial estoppel defense. Instead, the court limited its decision to the issue of reopening the bankruptcy case.<sup>14</sup> All questions relating to judicial estoppel—including, presumably, any limitation on the amount of recovery—were for the nonbankruptcy court to decide.<sup>15</sup>

As these cases demonstrate, the circuit court's “unlikely scenario” is not so unlikely. The cases also show some disagreement among

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5. 365 F.3d 1268 (11th Cir. 2004).

6. *Id.* at 1271-72. For an overview of judicial estoppel in the bankruptcy context, see Hon. James D. Walker, Jr. & Amber Nickell, *Bankruptcy*, 55 MERCER L. REV. 1101, 1104-08 (2004).

7. *See Parker*, 365 F.3d at 1273 n.4.

8. *Id.*

9. *In re Upshur*, 317 B.R. 446 (Bankr. N.D. Ga. 2004); *In re Huggins*, 305 B.R. 63 (Bankr. N.D. Ala. 2003).

10. *Id.*

11. 305 B.R. 63 (Bankr. N.D. Ala. 2003).

12. *Id.* at 67.

13. 317 B.R. 446 (Bankr. N.D. Ga. 2004).

14. *Id.* at 454.

15. *Id.* at 454 n.5.

bankruptcy judges about the role of the bankruptcy court in the judicial estoppel analysis.

### B. *Sovereign Immunity*

Last year, in *Tennessee Student Assistance Corp. v. Hood*,<sup>16</sup> the Supreme Court held that sovereign immunity cannot be raised as a defense to the discharge of student loans because such a proceeding is not a suit within the meaning of the Eleventh Amendment.<sup>17</sup> Instead, the bankruptcy court's power to discharge such a debt derives from its *in rem* jurisdiction over property of the estate.<sup>18</sup> As it turns out, the decision in *Hood* may represent an empty victory for debtors. According to the court of appeals, while a bankruptcy court may discharge an obligation owed to the state, a bankruptcy court may not be able to enforce that discharge against the state.<sup>19</sup>

In *Georgia Higher Education Assistance Corp. v. Crow (In re Crow)*,<sup>20</sup> debtors filed an adversary proceeding to determine if their student loans were dischargeable. The complaint included a request for sanctions for the state's violation of the automatic stay. The issue was whether state sovereign immunity under the Eleventh Amendment precluded such sanctions.<sup>21</sup> The court said, "[b]ecause count two seeks affirmative relief from the state through a coercive judicial process, the bankruptcy court's jurisdiction over it is premised on the persona of the state, not on the res of the debtor's property."<sup>22</sup> Thus, the state could raise sovereign immunity as a defense. However, the defense is only valid if Congress's attempt to abrogate sovereign immunity pursuant to § 106(a) of the Bankruptcy Code<sup>23</sup> was ineffective.<sup>24</sup> The court, following the majority of circuits, concluded that Congress has no authority to abrogate state sovereign immunity in bankruptcy proceedings pursuant to either Article I<sup>25</sup> or the Fourteenth Amendment.<sup>26</sup> Consequently, the court ruled that the debtors' request for sanctions based on a stay violation must be dismissed.<sup>27</sup>

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16. 124 S. Ct. 1905 (2004).

17. *Id.* at 1906; U.S. CONST. amend. XI.

18. *Hood*, 124 S. Ct. at 1906.

19. *Id.* at 1911 n.4.

20. 394 F.3d 918 (11th Cir. 2004).

21. *Id.* at 921.

22. *Id.* (citations omitted).

23. 11 U.S.C. § 106(a) (2000).

24. *Crow*, 394 F.3d at 921.

25. U.S. CONST. art. I.

26. *Crow*, 394 F.3d at 921-24; U.S. CONST. amend. XIV.

27. *Crow*, 394 F.3d at 924.

































