Judicial Estoppel and the Eleventh Circuit Consumer Bankruptcy Debtor

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Judicial estoppel is an equitable doctrine intended to prevent a litigant from making a mockery of the judicial system by asserting inconsistent positions in different legal proceedings.[1] The peculiarities of bankruptcy, however, are not always conducive to the easy application of judicial estoppel, particularly when it harms the debtor's creditors. Since the Eleventh Circuit Court of Appeals decided its first bankruptcy-related judicial estoppel case in 2002,[2] the court has not fully addressed some important complexities raised by bankruptcy.

Part I of this Article explains how relevant bankruptcy law can complicate the application of judicial estoppel. Parts II and III examine the body of law regarding judicial estoppel raised as a defense that is presently emerging from federal and state courts within the Eleventh Circuit. Part IV looks at the impact of judicial estoppel in the bankruptcy courts. Part V suggests a new focus for judicial estoppel analysis when the plaintiff is a bankruptcy debtor.

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1. Hon. William Houston Brown et al., *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197, 200-02 (2001).

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

I. THE PECULIARITIES OF BANKRUPTCY LAW

When a debtor files for bankruptcy, he is required to list all assets on his bankruptcy schedules.[3] All his nonexempt assets, including causes of action, become property of the bankruptcy estate.[4] So long as causes of action remain property of the estate, only the trustee may pursue them.[5] Property of the estate will revest in the debtor if it is abandoned by the trustee.[6] In Chapter 13,[7] post-petition property necessary to the completion of the plan becomes property of the estate.[8] In addition, in Chapter 13, unless the plan provides otherwise, property of the estate that is not necessary to the completion of the plan revests in the debtor upon plan confirmation.[9] Property that has not been administered or revested in the debtor, including causes of action not listed on the schedules, remains property of the estate even after the case has been closed.[10]

While a case is open, the debtor can freely amend his schedules.[11] If the case has closed, the debtor or the trustee must ask the bankruptcy court to reopen the case in order to amend the schedules to add a cause of action.[12] A court may reopen a bankruptcy case "to administer assets, to accord relief to the debtor, or for other cause."[13] The decision to reopen a case is within the court's discretion.[14] When deciding whether to reopen a case for the purpose of allowing debtors to add a cause of action, most courts refuse to consider the debtor's motive for omitting the asset.[15] Instead, courts focus on three considerations: "1)

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3. 11 U.S.C. § 521(1) (2000); FED. R. BANKR. P. 1007(b)(1).

4. 11 U.S.C. § 541(a) (2000).

5. 11 U.S.C. § 323 (2000); Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004).

6. 11 U.S.C. § 554 (2000).

7. 11 U.S.C. § 1301 (2000).

8. 11 U.S.C. § 1306(a) (2000); Telfair v. First Union Mortgage Corp., 216 F.3d 1333, 1340 (11th Cir. 2000).

9. *Telfair*, 216 F.3d at 1340. In the Northern District of Georgia, for example, the locally approved plan provides for no revesting until discharge or dismissal.

10. 11 U.S.C. § 554(d) (2000).

11. FED. R. BANKR. P. 1009(a).

12. *See id.*

13. 11 U.S.C. § 350(b) (2000).

14. *In re* Lewis, 273 B.R. 739, 743 (Bankr. N.D. Ga. 2001).

15. *See, e.g.*, *In re* Upshur, 317 B.R. 446, 454 (Bankr. N.D. Ga. 2004); *In re* Tarrer, 273 B.R. 724, 734 (Bankr. N.D. Ga. 2002); *In re* Strickland, 285 B.R. 537, 539 (Bankr. S.D. Ga. 2001). Nevertheless, the court in *In re Rochester* understood the Eleventh Circuit cases to "suggest that a bankruptcy court, in order to achieve the policy goal of encouraging full disclosure in the bankruptcy process, should not reopen a bankruptcy case for the purpose

the benefit to the debtor; 2) the prejudice or detriment to the defendant in the pending litigation; and 3) the benefit to the debtor's creditors."[16]

II. JUDICIAL ESTOPPEL IN THE FEDERAL COURTS

A. *New Hampshire v. Maine*

In *New Hampshire v. Maine*,[17] a nonbankruptcy case, the United States Supreme Court described judicial estoppel as an equitable doctrine to be applied at a court's discretion "'to protect the integrity of the judicial process.'"[18] Judicial estoppel protects the integrity of the judicial process by preventing a party from pursuing contradictory positions in different proceedings.[19] Although the doctrine does not lend itself to a hard and fast rule, the Court set forth three factors relevant to judicial estoppel inquiries:

> (1) a party's later position must be "clearly inconsistent" with its earlier position [; (2) the party] 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)] the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[20]

The Court noted that other factors also may be relevant depending on the circumstances.[21]

B. *The Eleventh Circuit Court of Appeals*

1. Eleventh Circuit Court of Appeals Decisions Regarding Judicial Estoppel. The Eleventh Circuit Court of Appeals has decided four bankruptcy-related judicial estoppel cases.[22] Each case reached the court on appeal from the application of judicial estoppel in a

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of administering an undisclosed cause of action *if it is clear that the debtor intentionally failed to disclose the asset*." 308 B.R. 596, 604 (Bankr. N.D. Ga. 2004) (emphasis added).

16. *Tarrer*, 273 B.R. at 732.

17. 532 U.S. 742 (2001).

18. *Id.* at 749 (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)).

19. *Id.*

20. *Id.* at 750-51 (quoting *Edwards*, 690 F.2d at 599).

21. *Id.* at 751.

22. After this Article was written, the court decided a fifth case, *Muse v. Accord Human Resources, Inc.*, No. 04-16491, 2005 WL 891015 (11th Cir. Apr. 15, 2005). *Muse* does not change the analytical framework discussed in this Article. *See infra* note 106.

nonbankruptcy proceeding. Before turning to the rationale in these cases, a brief review of their facts is instructive.

In the first case, *Burnes v. Pemco Aeroplex, Inc.*,[23] the debtor filed a Chapter 13 petition and listed no causes of action in his schedules. Six months later, he initiated an employment discrimination claim but did not amend his schedules. Thereafter, the debtor converted his case to Chapter 7[24] and, again, failed to amend his schedules. The debtor received a discharge, and the employment discrimination defendant was granted summary judgment on the ground of judicial estoppel.[25] The circuit court affirmed the application of judicial estoppel to debtor's request for monetary relief but reversed the application of judicial estoppel to the request for injunctive relief.[26]

In the second case, *De Leon v. Comcar Industries*,[27] the debtor, prior to filing a Chapter 13 petition, initiated employment discrimination proceedings by seeking a right-to-sue letter. He received the right-to-sue letter post-petition but prior to confirmation. The plan was confirmed, but it is unclear what happened next.[28] According to the circuit court, the debtor "filed an amended petition to reopen the bankruptcy estate."[29] Nevertheless, the bankruptcy court docket indicated that the debtor filed an amended schedule B on April 9, 2002.[30] In any event, the employment discrimination defendant sought and received summary judgment in the district court based on judicial estoppel.[31] The circuit court affirmed.[32]

In the third case, *Barger v. Cartersville*,[33] the debtor initiated an employment discrimination action, seeking monetary and injunctive relief, prior to filing a Chapter 7 petition. The discrimination claim was not listed on her schedules. The debtor, however, told her bankruptcy attorney about the action and told the bankruptcy trustee about her claim for an injunction. The debtor did not mention her bankruptcy case despite the fact that she was asked about other legal proceedings during the discovery phase of the employment discrimination suit. The debtor received a discharge, and her bankruptcy case was closed. After

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23. 291 F.3d 1282 (11th Cir. 2002).
24. 11 U.S.C. § 701 (2000).
25. *Burnes*, 291 F.3d at 1284.
26. *Id.* at 1289.
27. 321 F.3d 1289 (11th Cir. 2003).
28. *Id.* at 1290-91.
29. *Id.* at 1291.
30. Docket Report, No. 8:00-bk-17273-PMG (Bankr. M.D. Fla.).
31. *De Leon*, 321 F.3d at 1290, 1292.
32. *Id.* at 1292.
33. 348 F.3d 1289 (11th Cir. 2003).

learning of the bankruptcy, defendants in the discrimination suit sought summary judgment. The debtor was granted permission to reopen her bankruptcy case in order to add her discrimination claim. The district court granted summary judgment to defendant on the ground of judicial estoppel. Shortly thereafter, the debtor obtained a written opinion from the bankruptcy court stating that the omission of her claim was due to her attorney's inadvertence. Nevertheless, the district court refused to reconsider its grant of summary judgment.[34] The circuit court affirmed the application of judicial estoppel to the claim for monetary damages but reversed on the claim for injunctive relief.[35]

In the fourth and most recent case, *Parker v. Wendy's International, Inc.*,[36] the debtor filed an employment discrimination claim two years before filing a Chapter 7 petition. She did not list the pending action on her bankruptcy schedules. The bankruptcy court granted a discharge and closed the bankruptcy case. The debtor's attorney in the discrimination case later informed the Chapter 7 trustee about the discrimination claim. The trustee sought to intervene in the employment discrimination case and reopen the bankruptcy case. Both requests were granted. Subsequently, the district court granted defendant's motion to dismiss based on judicial estoppel.[37] The circuit court reversed.[38]

Parker is significant for two reasons. First, of the four mentioned cases, *Parker* is the only case where the defendant lost on the judicial estoppel issue with respect to a claim for monetary relief. Additionally, it is the only case where some action was taken to amend the bankruptcy schedules before an assertion of judicial estoppel.

2. The Eleventh Circuit Test for Judicial Estoppel Cases. The Eleventh Circuit Court of Appeals adopted a test for analyzing judicial estoppel cases that uses punishment of the nondisclosing debtor as the mechanism for protecting the integrity of the judicial system. The court has consistently applied a two-prong test in all bankruptcy-related judicial estoppel cases. First, "'the allegedly inconsistent positions [must have been] made under oath in a prior proceeding.'"[39] Second, the "'inconsistencies must . . . have been calculated to make a mockery of the judicial system.'"[40] The court decided that this test was consistent

34. *Id.* at 1291-92.
35. *Id.* at 1297.
36. 365 F.3d 1268 (11th Cir. 2004).
37. *Id.* at 1269-71.
38. *Id.* at 1273.
39. *Burnes*, 291 F.3d at 1285 (quoting Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1308 (11th Cir. 2001)).
40. *Id.*

with the factors set forth by the Supreme Court in *New Hampshire* and "provide[s] courts with sufficient flexibility in determining the applicability of the doctrine of judicial estoppel based on the facts of a particular case."[41] Because the purpose of judicial estoppel is to "protect[] the integrity of the judicial system" rather than the parties, neither privity nor detrimental reliance is a component of the analysis.[42]

a. Prong One—The Debtor made the inconsistent statement under oath. Prong one, requiring that the statements be made under oath, has been the subject of virtually no discussion by the circuit court. Instead, by signing his bankruptcy petition, the debtor is presumed to have asserted an inconsistent position under oath.[43] In *Walker v. Delta Air Lines, Inc.*,[44] the district court concluded that the Eleventh Circuit test requires no inquiry into whether the bankruptcy court adopted the debtor's position.[45] Nevertheless, when the trustee is the real party in interest, the signed petition is not charged against the trustee, at least so long as the recovery does not exceed the amount of the claims in the bankruptcy case, plus fees and costs.[46]

The issue of the real party in interest, when the debtor is a Chapter 7 debtor, has created some tension among Eleventh Circuit panels. In *Burnes* the debtor pursued the discrimination claim, and the issue of whether he was the real party in interest was never raised.[47] In *Barger* the court noted that the Chapter 7 trustee is the real party in interest but did not discuss whether that fact affected judicial estoppel analysis.[48]

Parker was the first case where the court analyzed the impact of the trustee's role.[49] The court concluded that while "the trustee does not

41. *Id.* at 1285-86.

42. *Id.* at 1286.

43. *Id.* ("There is no debate that Billups's financial disclosure forms were submitted under oath to the bankruptcy court; therefore, the issue becomes one of intent." *Id.* at 1286.); *Barger*, 348 F.3d at 1294 ("There is no debate that Barger submitted her Statement of Financial Affairs under oath to the bankruptcy court. Therefore, the issue here is intent." *Id.* at 1294.). *See also De Leon*, 321 F.3d at 1292 (making no mention of prong one); *Parker*, 365 F.3d at 1271-73 (stating the trustee conceded that the debtor "took inconsistent positions in bankruptcy court and district court[,]" but the trustee "made no false or inconsistent statement under oath in a prior proceeding and is not tainted or burdened by the debtor's misconduct." *Id.* at 1271-73.).

44. No. 100CV0558-TWT, 2002 WL 32136202 (N.D. Ga. Aug. 1, 2002).

45. *Id.* at *5.

46. *Parker*, 365 F.3d at 1272, 1273 n.4.

47. *Burnes*, 291 F.3d at 1286.

48. *Barger*, 348 F.3d at 1292-93.

49. *Parker*, 365 F.3d at 1269.

have any more rights than the debtor . . . any *post-petition* conduct by Parker, including failure to disclose an asset, does not relate to the merits of the discrimination claim."[50] In reaching its conclusion, the court stated that "it is questionable as to whether judicial estoppel was correctly applied in *Burnes*. The more appropriate defense in *Burnes* was, instead, that the debtor lacked standing."[51] The court made no mention of whether *Barger*, in which the trustee was substituted as the real party in interest and was successfully thwarted by judicial estoppel, was correctly decided. Notably, no one judge has heard more than one of the four Eleventh Circuit cases discussed in this Article, and none of the cases were decided *en banc*.

b. Prong Two—The debtor made the statement with the intent to make a mockery of the judicial system. Prong two of the Eleventh Circuit test for judicial estoppel in bankruptcy-related cases evaluates the debtor's intent to make a mockery of the judicial system, which the court defines as "a purposeful contradiction—not simple error or inadvertence."[52] The requisite intent can be inferred if the debtor (1) knew about the undisclosed claims and (2) had a motive to conceal them.[53] Because "the need for complete and honest disclosure exists in all types of bankruptcies," the court makes no distinction between Chapter 7 and Chapter 13 cases on the question of intent.[54]

As with the assertion of an inconsistent position, the debtor's knowledge of the cause of action is virtually assumed. The court has found knowledge when the debtor had initiated an undisclosed cause of action prior to filing for bankruptcy[55] and when the debtor initiated a cause of action after filing for bankruptcy but did not amend his schedules.[56] Waiting until judicial estoppel is raised in the nonbankruptcy proceeding before attempting to amend schedules is also evidence of intent.[57] Blaming the omission on an attorney, moreover, will not

50. 365 F.3d at 1272 n.3.

51. *Id.* at 1272.

52. *Barger*, 348 F.3d at 1294.

53. *Burnes*, 291 F.3d at 1287 (citing *In re* Coastal Plains, Inc., 179 F.3d 197, 210 (5th Cir. 1999)).

54. *De Leon*, 321 F.3d at 1291.

55. *Barger*, 348 F.3d at 1294-95.

56. *De Leon*, 321 F.3d at 1291-92; *Burnes*, 291 F.3d at 1287-88.

57. *Compare Barger*, 348 F.3d at 1297; *De Leon*, 321 F.3d at 1291-92; *and Burnes*, 291 F.3d at 1288, *with* Baldwin v. Citigroup, Inc. *(In re* Baldwin), 307 B.R. 251, 269 (M.D. Ala. 2004) (judicial estoppel did not apply when "the debtor was not aware of his claim [when he filed his bankruptcy petition] and upon becoming aware, he promptly amended his schedule." *Id.* at 269.).