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

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

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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.).

save a debtor.[58] The proper remedy in such circumstances is a malpractice action.[59] Furthermore, any time a debtor will benefit financially from the nondisclosure, the debtor has a motive to conceal the cause of action.[60] The mere existence of a claim for damages creates motive because, by omitting the claim, the debtor can keep any proceeds from the cause of action.[61]

III. APPLICATION OF JUDICIAL ESTOPPEL BY THE STATE COURTS

A. Alabama

In 2003 the Alabama Supreme Court, in *Vincent v. First Alabama Bank*,[62] adopted a new test for judicial estoppel.[63] Prior to *Vincent*, the court used a six-part test that required both privity between the parties and detrimental reliance by the defendant on the previous inconsistent position.[64] In *Vincent* the debtor placed large amounts of cash in a safety deposit box. The bank granted his wife unauthorized access to the box, and she removed the money. The debtor sued the bank for negligence. The debtor, however, had not listed the money as an asset in his bankruptcy case, and the bank asserted judicial estoppel as a defense to the negligence action.[65]

Under the applicable version of judicial estoppel, the bank had to prove privity and detrimental reliance.[66] After noting some "depart[ure] from rigid adherence to the requirements" of privity and detrimental reliance in its previous cases, the court expressly changed its position.[67] The court believed that such rigid requirements defeated judicial estoppel's purpose of protecting the court rather than the

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58. *Barger*, 348 F.3d at 1295.

59. *Id.*

60. The Eleventh Circuit has not applied judicial estoppel when the omitted claims were for nonmonetary relief. *Barger*, 348 F.3d at 1297; *Burnes*, 291 F.3d at 1289.

61. *Barger*, 348 F.3d at 1296; *De Leon*, 321 F.3d at 1292; *Burnes*, 291 F.3d at 1288.

62. 883 So. 2d 1236 (Ala. 2003).

63. *Id.* at 1244-45.

64. Jinright v. Paulk, 758 So. 2d 553, 555 (Ala. 2000) (quoting 28 AM. JUR. 2D *Estoppel and Waiver* § 70 (1966)). The six factors are:

> (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; and (6) it must appear unjust to one party to permit the other to change.

Id.

65. *Vincent*, 883 So. 2d at 1238-39.

66. *Id.* at 1242.

67. *Id.* at 1243.

litigants.[68] In *Vincent* the judicial estoppel defense would have been ineffective if the old rule applied.[69] The court determined that "such a result in this case is simply offensive—Vincent would be permitted to have it both ways, successfully denying ownership of an asset in the earlier proceedings and seeking its recovery in this proceeding."[70] Consequently, the court adopted the test set forth in *New Hampshire v. Maine*[71] and overruled any prior cases that were inconsistent with the new test.[72] The Alabama courts have yet to fully develop the new test.[73]

B. Florida

Unlike Alabama courts, Florida courts still apply the older version of judicial estoppel that requires both privity and detrimental reliance.[74] Under such strict requirements, judicial estoppel can be hard to prove in a bankruptcy context, as demonstrated by the *Vincent* case, and, thus, less likely to be raised as a defense. This may explain why judicial estoppel has been raised in only a handful of Florida cases.

As the court in *Ramsey v. Jonassen*[75] noted, "[j]udicial estoppel is not a principle that has been fully developed in Florida law."[76] In *Ramsey* a Chapter 11 debtor filed a legal malpractice claim against her attorney. The attorney successfully raised the defense of judicial estoppel because the debtor had omitted the claim from her bankruptcy petition.[77] The

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68. *Id.* at 1243-44.
69. *Id.* at 1245.
70. *Id.*
71. 532 U.S. 742 (2001).
72. *Vincent*, 883 So. 2d at 1245.
73. Since *Vincent*, one case, *Crider v. Misty Acres*, 893 So. 2d 1165 (Ala. Ct. App. 2004), has invoked judicial estoppel. In *Crider* the debtors disclosed and claimed an exemption for their state law cause of action, valuing it at $2,500. Defendants raised judicial estoppel to try to limit the debtors to a recovery of $2,500. *Id.* at 1167, 1172. The court rejected that argument, stating:

> There is no evidence indicating that the Criders attempted to mislead the bankruptcy court when they notified the court of the contingent claim and placed a value on that claim or that seeking damages over $2,500 would result in a miscarriage of justice where the bankruptcy trustee knew of the nature of the lawsuit and the lawsuit was exempted from the bankruptcy estate without objection from any interested party.

Id. at 1172.
74. Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001) (quoting 21 C.J. 1228).
75. 737 So. 2d 1114 (Fla. Dist. Ct. App. 1999).
76. *Id.* at 1115.
77. *Id.*

court of appeals reversed due to lack of reliance.[78] "Since Appellee . . . was not a creditor in the bankruptcy action, and . . . did not vote in favor of the reorganization in reliance on the absence of any possible 'set off,' he cannot claim to have relied on Appellant's failure to disclose the malpractice claim in her bankruptcy action."[79] Thus, judicial estoppel was inapplicable.[80]

C. *Georgia*

The Georgia Supreme Court has "striven to apply the 'federal' doctrine of judicial estoppel, in an effort 'to afford the judgment of the bankruptcy court the same effect here as would result in the court where that judgment was rendered.'"[81] In *Wolfork v. Tackett*,[82] a case that faced heavy criticism in bankruptcy circles,[83] the Georgia Supreme Court applied judicial estoppel to the post-petition tort claim of a Chapter 13 debtor.[84] The court stated that the "failure to reveal assets, including unliquidated tort claims, operates as a denial that such assets exist, deprives the bankruptcy court of the full information it needs to evaluate and rule upon a bankruptcy petition, and deprives creditors of resources that may satisfy unpaid obligations."[85]

Georgia courts have since retreated, somewhat, from the harsh result in *Wolfork*,[86] focusing much of their analysis on events in the bankruptcy court. For example, in *Chicon v. Carter*,[87] which also involved the undisclosed post-petition tort claim of the debtors, the court refused to apply judicial estoppel.[88] In *Chicon* the debtors completed a Chapter 13 plan that paid one hundred percent of their claims, and the bankruptcy court granted the debtors a discharge. Thereafter, the debtors filed

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78. *Id.* at 1116.

79. *Id.*

80. *Id. See also* Vining v. Segal, 773 So. 2d 1243, 1243 (Fla. Dist. Ct. App. 2000) ("The failure to disclose an asset in a bankruptcy action does not justify the application of judicial estoppel in a subsequent action absent a showing of detrimental reliance." *Id.* at 1243.).

81. IBF Participating Income Fund v. Dillard-Winecoff, LLC, 275 Ga. 765, 766, 573 S.E.2d 58, 59 (2002) (quoting Southmark Corp. v. Trotter, Smith & Jacobs, 212 Ga. App. 454, 455, 442 S.E.2d 265 (Ga. App. 1994)).

82. 273 Ga. 328, 540 S.E.2d 611 (2001).

83. Brown, *supra* note 1, at 206.

84. *Wolfork*, 273 Ga. at 328, 540 S.E.2d at 612.

85. *Id.*

86. In *Period Homes, Ltd. v. Wallick*, 275 Ga. 486, 569 S.E.2d 502 (2002), the court expressly repudiated *Wolfork* to the extent that a Chapter 7 or 11 debtor is required to amend its bankruptcy petition to add assets acquired post-petition. *Id.* at 487-88, 569 S.E.2d at 503-04.

87. 258 Ga. App. 164, 573 S.E.2d 413 (2002).

88. *Id.* at 164, 573 S.E.2d at 414.

a tort claim in state court, and defendant raised judicial estoppel as a defense. The debtors immediately sought to reopen the bankruptcy case to amend their schedules. The bankruptcy court denied the request to reopen on the ground that the tort cause of action was not property of the bankruptcy estate, so disclosure was not necessary. Consequently, the bankruptcy court stated that judicial estoppel should not apply to bar the tort claim.[89] Deferring to the judgment of the bankruptcy court, the Georgia Court of Appeals stated that "'it stands to reason that the Georgia court in which the tort claim is asserted should honor the bankruptcy court's actions. To hold otherwise would produce overly harsh and inequitable results.'"[90]

In other cases where the debtor has shown that amendment of his schedules was not necessary or when the debtor successfully amended his schedules to add the omitted causes of action, the courts have declined to apply judicial estoppel.[91] Similarly, the courts have held judicial estoppel inapplicable when the debtors have "effectively eliminated any inconsistency" that arose from their omission of a cause of action from their bankruptcy petition by voluntarily dismissing the bankruptcy case.[92]

IV. BANKRUPTCY COURT CASES

In *Burnes v. Pemco Aeroplex, Inc.*,[93] the debtor argued that he should be allowed to reopen his bankruptcy case and add the omitted claim to his schedules.[94] The circuit court responded, saying,

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89. *Id.* at 164-65, 573 S.E.2d at 414.

90. *Id.* at 166, 573 S.E.2d at 415 (quoting Jowers v. Arthur, 245 Ga. App. 68, 70-71, 537 S.E.2d 200 (2000)).

91. *Compare* Period Homes, Ltd. v. Wallick, 275 Ga. App. 486, 488-89, 569 S.E.2d 502, 504 (2002) (holding that the debtor had neither misled the bankruptcy court nor gained any benefit from the omission); *and* Rowan v. George H. Green Oil, Inc., 257 Ga. App. 774, 775-76, 572 S.E.2d 338, 339-40 (2002) (declining to apply judicial estoppel when debtor amended her bankruptcy schedules after defendant raised judicial estoppel), *with* Cochran v. Emory Univ., 251 Ga. App. 737, 739, 555 S.E.2d 96, 99 (2001) (allowing discretion in applying judicial estoppel when debtor waited until after summary judgment had been granted to amend her schedules).

92. Weiser v. Wert, 251 Ga. App. 566, 568, 554 S.E.2d 762, 764-65 (2001); *see also IBF Participating Income Fund*, 275 Ga. at 767, 573 S.E.2d at 60 (refusing to apply judicial estoppel when a Chapter 11 case was dismissed for cause because the dismissal "return[ed] the debtor and creditors to the status quo ante," thus eliminating any benefit to the debtor arising from the omission).

93. 291 F.3d 1282 (11th Cir. 2002).

94. *Id.* at 1288.

> The success of our bankruptcy laws requires a debtor's full and honest disclosure. Allowing [the debtor] to back-up, re-open [sic] the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of debtors' assets.[95]

The circuit court openly disapproves of debtors amending their schedules only after judicial estoppel has been raised as a defense in the nonbankruptcy case. Even a bankruptcy court ruling that the omission was inadvertent does not help the debtor.[96] This approach is markedly different from the Georgia approach, which allows amendment of bankruptcy schedules to defeat a judicial estoppel defense, even if the amendment occurs after the defense is raised, so long as the debtor does not dawdle in seeking amendment.[97] Based on these decisions, many debtors (or trustees) attempt to influence the judicial estoppel decision in nonbankruptcy court proceedings by amending the bankruptcy schedules to add the previously omitted cause of action. In some instances, the bankruptcy court must reopen the case. Even though the issue of judicial estoppel is not formally before the bankruptcy court, the court's ruling could be determinative in the nonbankruptcy court.

Bankruptcy courts are well aware of the possible repercussions of their decisions. In some cases, that knowledge may play a role in the bankruptcy court's decision. Some courts have gone as far as to prejudge the judicial estoppel issue.[98] Others refuse to consider its impact at all.[99]

Of course, *Parker v. Wendy's International, Inc.*[100] changed the landscape for Chapter 7 cases. Now, the trustee will be able to pursue the nonbankruptcy claim free from judicial estoppel concerns, at least in the federal courts. Yet, even *Parker* has caused some disagreement among the bankruptcy courts. Courts are divided concerning whether a bankruptcy court can and should define the scope of a judicial estoppel defense by limiting the amount of damages the trustee can recover,

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95. *Id.*

96. Barger v. Cartersville, 348 F.3d 1289, 1292 (11th Cir. 2003).

97. *See supra* Part III.C.

98. *In re* Rochester, 308 B.R. 596, 605 (Bankr. N.D. Ga. 2004); *In re* Huggins, 305 B.R. 63, 66 (Bankr. N.D. Ala. 2003).

99. *In re* Upshur, 317 B.R. 446, 454 (Bankr. N.D. Ga. 2004).

100. 365 F.3d at 1268 (11th Cir. 2004).

which prevents the debtor from receiving a windfall if the damages exceed the value of the claims in the bankruptcy case.[101]

While Chapter 7 inquiries may have been simplified by *Parker*, the bankruptcy courts must still address motions by Chapter 13 debtors to amend schedules. Chapter 13 cases are not closed until the plan is completed and the discharge is entered.[102] Thus, the debtor can add an omitted claim without first petitioning the bankruptcy court.[103] Furthermore, causes of action that arise post-confirmation are not always property of the estate pursuant to *Telfair v. First Union Mortgage Corp.*[104] and, thus, need not be listed at all.[105] When the cause of action is not property of the estate, the bankruptcy courts make a point of stating that judicial estoppel should not apply.[106]

V. A NEW APPROACH

Judicial estoppel, in the context of bankruptcy law, can have a significant impact on parties other than the debtor and the defendant. 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.

Perhaps the easiest way to address this problem is by requiring a more searching inquiry. Instead of treating the filing of the petition as a previous inconsistent statement, courts should focus on whether the party "succeeded in persuading a court to accept that party's earlier position . . . ."[107] In other words, did the bankruptcy court issue any orders, or did the trustee act in reliance on the omitted cause of action?

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101. *Upshur*, 317 B.R. at 453-54 (acknowledging the possibility of a limitation but leaving such a determination to the district court); *In re* Williams, 310 B.R. 442, 444 (Bankr. N.D. Ala. 2004) (limiting the trustee's recovery to the value of unsecured claims, fees, and expenses).

102. *See* 11 U.S.C. § 350(a) (2000); FED. R. BANKR. P. 1009(a).

103. *Id.*

104. 216 F.3d 1333 (11th Cir. 2000).

105. *In re* Carter, 258 B.R. 526, 527-28 (Bankr. S.D. Ga. 2001); *In re* Ross, 278 B.R. 269, 275 (Bankr. M.D. Ga. 2001).

106. *Carter*, 258 B.R. at 528; *Ross*, 278 B.R. at 275. This principle was recently reaffirmed by the circuit court in *Muse v. Accord Human Resources, Inc.*, No. 04-16491, 2005 WL 891015 (11th Cir. Apr. 15, 2006). The court in *Muse* held that judicial estoppel did not apply to a Chapter 13 debtor's claim for overtime wages because it arose post-confirmation and was not necessary to completion of the plan. *Id.* at *2. *Muse* does not otherwise affect the circuit court's judicial estoppel analysis.

107. *New Hampshire*, 532 U.S. at 750-51.

Additionally, by 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.

Yet, in bankruptcy-related cases, a meaningful inquiry is particularly important. As the court in *In re Lewis*[108] explained: "The remedy for failing to disclose a pre-petition asset should not be one which punishes creditors; to this Court, such a result is absurd and undermines the purpose of the bankruptcy system."[109] In effect, the application of judicial estoppel to a bankruptcy debtor can cause the very result the doctrine is intended to prevent—it impairs the integrity of the judicial system.

Some allowance for the fact that, unlike other types of courts, a bankruptcy court is in the position to protect its own integrity when a debtor has omitted a cause of action also would be desireable in the judicial estoppel analysis. Thus, a bankruptcy court does not need to rely on a second court to do so through the application of judicial estoppel. "Bankruptcy courts . . . are empowered to do something about a debtor's failure to list assets. Bankruptcy courts may deny a Chapter 7 or 11 debtor's discharge for concealing property or making a false oath or account and may revoke a debtor's discharge that was obtained through fraud."[110]

For this reason, no judicial estoppel is necessary in the limited circumstances when a debtor seeks to assert a cause of action he omitted from his bankruptcy schedules. Whether or not it intended to do so, the circuit court effectively implemented such a rule in *Parker* when it decided that judicial estoppel does not apply to a bankruptcy trustee.[111]

The most significant impact of *Parker* is that it eviscerates prong two of the Eleventh Circuit analysis by eliminating the motive—financial benefit—to conceal a cause of action. When the trustee is pursuing the claim, any financial gain realized will accrue to the benefit of the debtor's creditors; not to the benefit of the debtor.[112] The court

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108. 273 B.R. 739 (Bankr. N.D. Ga. 2001).

109. *Id.* at 748.

110. Robert B. Chapman, *Bankruptcy*, 53 MERCER L. REV. 1199, 1211 (2002). The bankruptcy court's ability to revoke a discharge is subject to a statute of limitations. 11 U.S.C. § 727(d)-(e) (2000).

111. *Parker*, 365 F.3d at 1273.

112. If the trustee abandons the claim and the debtor pursues it in his own name, he will still be subject to the defense of judicial estoppel.

virtually ensured this result by suggesting a limited application of judicial estoppel to prevent the debtor from receiving any amounts awarded in excess of the bankruptcy claims.[113]

It now remains to be seen how the law on this issue will develop and whether the state courts will follow the lead of the Eleventh Circuit. In particular, it will be interesting to see whether the Eleventh Circuit will attempt to resolve the conflict between *Parker* and earlier cases like *Barger v. Cartersville*[114] and *Burnes v. Pemco Aeroplex, Inc.*[115]

113. *Parker*, 365 F.3d at 1273.
114. 348 F.3d 1289 (11th Cir. 2003).
115. 291 F.3d 1282 (11th Cir. 2002).

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