[Doctrine of Judicial Estoppel May Bar Debtors' Continued Pursuit of Legal Claims Not Disclosed in Bankruptcy]

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The Bankruptcy Code mandates certain disclosure obligations upon bankruptcy debtors as part of the price they pay for receiving the benefit of a bankruptcy discharge. Included in these disclosure obligations which must be listed on the debtor's schedule of assets is any pending or potential litigation of the debtor. Once a debtor initiates bankruptcy proceedings, the debtor's assets, including legal claims, become the property of the bankruptcy estate rather than the debtor's personal property.

Debtors who fail to "schedule" pending or potential litigation as an asset in bankruptcy may be judicially estopped from subsequently pursuing the cause of action in separate litigation. A debtor's failure to list an asset (here, a cause of action) is equated with an assertion that the asset does not exist. To prevent parties from taking conflicting positions in litigation in order to suit their interests, the doctrine of judicial estoppel may preclude debtors from taking an "inconsistent" position that a valid legal claim exists, after stating under oath, in bankruptcy, that no such claim existed.

The elements of judicial estoppel vary slightly by jurisdiction. Ohio and Kentucky have fashioned their standards from those originally announced by the Sixth Circuit.

Kentucky courts apply a broad standard calling for the application of judicial estoppel to "prevent[ ] a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." Relying on the Sixth Circuit's 1988 opinion in *Reynolds v. Commissioner,* the Kentucky Court of Appeals applied this standard to a trademark infringement and unfair competition lawsuit in *Colston Investment Co. v. Home Supply Co.*

Ohio courts apply a three part test originally announced by the Sixth Circuit in *Griffith v. Wal-Mart Stores* and adopted in 2007 by the Ohio Supreme Court in *Greer-Burger v. Temesi*. In Ohio, judicial estoppel applies where an individual (1) asserted a contrary position; (2) under oath in a prior proceeding; and where (3) the prior position was accepted by the court. In *Greer-Burger*, the court applied the doctrine of judicial estoppel to a plaintiff-employee who failed to list her pending retaliation claim on her schedule of assets in bankruptcy, but had her debts, including attorney fees, discharged in bankruptcy. The court held that "because her attorney fees were discharged in bankruptcy, and because she took an inconsistent factual position in not listing her pending retaliation claim, she [was] equitably and judicially estopped from recovering attorney fees for that claim."

Several courts, including the Sixth Circuit, have recognized an "inadvertence" exception to the doctrine of judicial estoppel. This exception can protect debtors who failed to disclose a claim in two circumstances: (1) where the debtor lacked knowledge of the factual basis of the undisclosed claim; or (2) where the debtor has no motive for concealing the claim.

With the “lack of knowledge” exception, debtors will likely avoid preclusion from pursuing an undisclosed claim if the cause of action had not yet accrued. As for the “no motive” exception, generally speaking, debtors have a motive for concealing legal claims in their bankruptcy proceedings: to pay less to their creditors than what is owed in full and to subsequently obtain recovery in litigation free of any encumbrance by creditors. If disclosed, the legal claim becomes property of the bankruptcy estate and any resulting value is allocated to creditors to satisfy debts.

Judicial estoppel is intended to preserve the integrity of the judicial process. Because the successfulness and fairness of the bankruptcy process is contingent upon a debtor’s complete and honest disclosure, courts invoke judicial estoppel to ensure that a debtor does not receive the benefit of a bankruptcy discharge and subsequently obtain a windfall by personal recovery from an undisclosed asset.