

Dismissing Bankruptcy-Debtor Plaintiffs' Cases on Judicial Estoppel Grounds

By William H. Burgess

Several times each week, courts must decide whether to dismiss lawsuits outright because the plaintiff previously declared bankruptcy but did not disclose the lawsuit in bankruptcy filings. If a plaintiff argues that the nondisclosure was "inadvertent or mistaken," her chances of avoiding dismissal depend on which jurisdiction she is in. The federal courts of appeals are split 3-3, and the remaining six have not taken a definitive position yet. This increasingly widespread application of judicial estoppel can be a case-dispositive weapon for defendants and often catches plaintiffs by surprise. This article describes the defense, the developing circuit split, and the need for eventual Supreme Court review.

Suppose that an employee is fired in 2010. The employee declares bankruptcy and receives a discharge from the bankruptcy court in 2011. She sues her employer in district court in 2012 for discrimination based on the firing. If she did not disclose her discrimination lawsuit to the bankruptcy court in 2011, the district court where her lawsuit is pending may dismiss the lawsuit on judicial estoppel grounds. The idea is that by not disclosing the lawsuit to the bankruptcy court, the plaintiff successfully took the position that no such lawsuit existed. And the district court need not allow her to take the opposite position by continuing to prosecute the lawsuit.

The Supreme Court has said that "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake."¹ Many cases involving lawsuits that were not disclosed in bankruptcy turn on how the court responds to a plaintiff's argument that the nondisclosure was inadvertent or mistaken. Some plaintiffs argue that they did not know that they needed to disclose potential lawsuits that had not been filed or pending lawsuits for which they had received no money. Some plaintiffs try to fix the nondisclosure by reopening their bankruptcies. The courts of appeals are split 3-3 on how to respond.

In the Fifth, Tenth, and Eleventh Circuits, such arguments are legally irrelevant. Those courts presume that the plaintiff's nondisclosure was a deliberate falsehood unless the plaintiff can show either (1) that she lacked knowledge of the facts relevant to the undisclosed lawsuit or (2) that—even though all bankruptcy debtors have a motive to conceal assets—the particular plaintiff somehow lacked that motive. In the Sixth, Seventh and Ninth Circuits, plaintiffs who attempt to fix and explain their nondisclosures are sometimes permitted to continue with their lawsuits, depending on their good faith and the quality of their evidence and attempts to fix the nondisclosures. The Third Circuit has cases pointing in different directions, and the remaining five courts of appeals appear not to have addressed the question directly.

This differential treatment is critical. Regardless of whether the civil claims concern contracts, trademark infringement, discrimination, assault and battery, or wrongful death, judicial estoppel may extinguish the claims entirely because of the plaintiff's mistakes in bankruptcy court. More than a million people file nonbusiness bankruptcies each year.² The same problems that contribute to bankruptcy in the first place (such as firing and demotion at work, physical injuries, and medical expenses) also frequently lead to litigation.



People who file for personal bankruptcy are by definition insolvent and rarely able to afford to pay sophisticated counsel to spend extensive time preparing their filings. Mistakes on bankruptcy forms are inevitable, and a considerable number of mistakes will have consequences in later litigation. This issue—whether to judicially estop a plaintiff from continuing to prosecute a lawsuit that was not disclosed in bankruptcy—appears to arise several times each week in the federal and state courts.³ A growing number of commentators are taking notice.⁴ Several publications advise defense attorneys to check a plaintiff's bankruptcy filings to set up a potential motion to dismiss, and advise plaintiff and bankruptcy attorneys to try to avoid the problem in the first place.⁵ Plaintiffs and defendants ignore the issue at their peril.

Judicial Estoppel Generally

Judicial estoppel is an equitable doctrine that allows courts to prevent a litigant from taking two inconsistent positions and prevailing on both.⁶ The general idea is that courts have inherent power to protect the integrity of their proceedings and do not have to allow litigants to manipulate them. Three examples illustrate the point. Courts do not have to tolerate it when heirs avoid

California estate tax in one case by arguing that the decedent was a New Yorker and in a later case try to take advantage of other California law by arguing that the decedent was a Californian.⁷ Or, once an Americans with Disabilities Act plaintiff successfully challenges one defendant's failure to provide wheelchair access, courts do not have to let her to argue later that a wheelchair is unacceptable and she really requires a Segway.⁸ Or, after New Hampshire successfully contends that its border with Maine is in the middle of the Piscataqua River, it can be prevented from arguing later that the boundary is the Maine shore.⁹

The final example is the Supreme Court's 2001 case, *New Hampshire v. Maine*,¹⁰ which provided a restatement of three factors that "typically inform the decision whether to apply the doctrine in a particular case." First, a party's position must be clearly inconsistent with the earlier position. Second, the party must have successfully persuaded a court to accept the earlier position so that if the party prevailed on the later position, either the first or second court might appear to have been misled. Third, courts should consider whether the party asserting inconsistent positions would gain an unfair advantage if courts permit the inconsistent positions. The Court added that those factors were not "inflexible prerequisites,"

that judicial estoppel “is an equitable doctrine invoked by a court at its discretion,” and that “it may be appropriate to resist application of judicial estoppel when a party’s prior position was based on inadvertence or mistake.”¹¹ In practice, consistent with the equitable nature of judicial estoppel, and the Supreme Court’s statements about “inflexible prerequisites” and “inadvertence or mistake,” a plaintiff’s good or bad faith in advancing different positions is often dispositive of the question whether to apply judicial estoppel,¹² but not always.¹³

Judicial Estoppel Applied to Nondisclosing Bankrupt Plaintiffs

The logic of applying judicial estoppel to lawsuits left off of bankruptcy disclosures turns on the disclosure obligations. Debtors must fully disclose their finances on a “statement of financial affairs.”¹⁴ That includes not just houses, cars, and bank accounts but also pending or even potential lawsuits.¹⁵ And debtors must certify the disclosures’ accuracy.¹⁶ When a bankruptcy debtor files a disclosure, courts reason that the debtor takes the position that no pending or potential lawsuits exist other than those disclosed. When the bankruptcy court issues a discharge, it accepts that position. Thus, when the debtor later attempts to prosecute a lawsuit that was omitted from the bankruptcy disclosures, she is taking the opposite position in a trial court that the lawsuit *does* exist. As explained above, the trial court need not accept that new, inconsistent position.¹⁷ Most courts agree on the foregoing principles. As the Seventh Circuit put it, “[p]lenty of authority supports the ... conclusion that a debtor in bankruptcy who receives a discharge (and thus a personal financial benefit) by representing that he has no valuable choses in action cannot turn around after the bankruptcy ends and recover on a supposedly nonexistent claim.”¹⁸

When confronted with a motion to dismiss on judicial estoppel grounds, plaintiffs frequently assert that their failure to disclose the lawsuit to the bankruptcy court was inadvertent. Some say that they did not know that they were required to disclose pending lawsuits for which they had received no money or potential lawsuits that had not been filed. Some add that they submitted their bankruptcy forms pro se or that their bankruptcy attorney failed to advise them properly. Some further argue that the defendant in their district court suit is not a creditor in the bankruptcy court, not harmed by the nondisclosure, and would receive a windfall if the lawsuit is dismissed. Finally, some attempt to avoid dismissal by reopening their bankruptcy cases and filing amended disclosures. Courts in different circuits respond differently to these arguments.

The Fifth, Tenth, and Eleventh Circuits’ Nearly Irrebuttable Presumption of Bad Faith

The Fifth, Tenth, and Eleventh circuits take a dim view of inadvertence arguments. In those circuits, a debtor’s failure to disclose a lawsuit to the bankruptcy court is presumed to be deliberate and is *only* regarded as inadvertent or mistaken when “the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.”¹⁹ Put differently, those courts will *presume* bad faith or “deliberate manipulation,” when a debtor has “knowledge of the claims and a motive to conceal them.”²⁰

Some describe this approach as an objective test, as the plaintiff’s subjective intent is irrelevant.²¹ The first prong is narrow and operates like a statute of limitations—a debtor only “lacks knowledge of

the undisclosed claims” when she lacks knowledge of the underlying *facts*, as opposed to lacking knowledge that those facts may support a lawsuit.²² The second prong—that the debtor “has no motive for ... concealment”—underscores the strictness of the test, as it is almost never met. A motive to conceal assets is considered inherent in the bankruptcy process,²³ and nearly always exists except where the debtor has relinquished the claim and the trustee prosecutes it for the benefit of the bankruptcy estate and creditors.²⁴ If the plaintiff argues that she did not know she needed to disclose her lawsuit to the bankruptcy court, that is irrelevant.²⁵ If she alleges miscommunication or bad advice from her bankruptcy attorney, that is also irrelevant. Litigants are bound by the actions and omissions of their attorneys, and their remedy may be a malpractice suit if those actions and omissions are sufficiently egregious.²⁶ Thus, in those circuits, judicial estoppel applies nearly automatically in most instances where bankruptcy debtors failed to disclose lawsuits and obtained discharges in bankruptcy.

The origin of that rule is the Fifth Circuit’s 1999 *In re Coastal Plains* decision,²⁷ which the Tenth and Eleventh circuits later adopted.²⁸ The Tenth Circuit’s *Eastman* decision illustrates the rule in action. A railroad worker (Gardner) was injured at work, retained a personal injury attorney, and sued the railroad under federal law in 2003. In 2004, he retained a bankruptcy attorney, filed for bankruptcy, and received a discharge, without disclosing his personal injury lawsuit. In 2005, Gardner’s personal injury attorney learned of the bankruptcy and informed the bankruptcy trustee. The bankruptcy court reopened the case and granted Gardner a new discharge. Back in the district court, however, the court granted the railroad’s motion for summary judgment on judicial estoppel grounds. On appeal and in the district court, Gardner asserted that his disclosure had been inadvertent and ultimately harmless. Gardner argued that he told his bankruptcy attorney about his personal injury lawsuit and relied on the bankruptcy attorney to file the correct papers. And he noted his disclosure was harmless because his bankruptcy was reopened and his creditors were made whole.²⁹

The Tenth Circuit found Gardner’s inadvertence arguments legally irrelevant, and affirmed the dismissal. “Unfortunately for Gardner,” the Court remarked, “our sister circuits, for what seem to us sound reasons, have not been overly receptive to debtors’ attempts to recover on claims about which they ‘inadvertently or mistakenly’ forgot to inform the bankruptcy court.” Gardner was bound by the omissions of his bankruptcy attorney, even if neither he nor the attorney intended to deceive the bankruptcy court. And “[t]hat Gardner’s bankruptcy was reopened and his creditors were made whole once his omission became known [was] inconsequential.”³⁰

The Fifth, Tenth, and Eleventh circuits apply their narrow definition of inadvertence consistently. Some judges in those circuits have criticized that approach,³¹ and at least one from another circuit has defended that approach against contrary arguments.³² The Fifth, Tenth, and Eleventh circuits base their rule on two related principles: the absolute importance of full disclosure by debtors in bankruptcy and the value of deterring fraud or incomplete disclosures.

First, the American bankruptcy process gives debtors a fresh start and extinguishes their debts in some measure at the expense of innocent creditors.³³ The integrity of the bankruptcy process therefore critically depends on full disclosures so that a process for giving honest debtors a fresh start does not enable fraud. Strictly

limiting the definition of inadvertence thus protects the integrity of the bankruptcy process by reinforcing the Bankruptcy Code's disclosure obligations.³⁴

Second, relatedly, strict application of judicial estoppel deters fraud and deficient disclosures in the future.³⁵ For more than 100 years, courts have recognized that the bankruptcy process may offer incentives to dishonest debtors to hide assets and exploit them later.³⁶ As the First Circuit put it: "Conceal your claims, get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively."³⁷ The Fifth, Tenth, and Eleventh circuits consistently cite that specter of fraud as a reason for taking a narrow view of inadvertence.³⁸ Thus, even where a plaintiff's actions tend to show that its nondisclosure was inadvertent or mistaken, those circuits have applied judicial estoppel to deter others. In *Eastman*, for example, the Tenth Circuit rejected Gardner's arguments for considering that he had reopened his bankruptcy and made his creditors whole. To excuse Gardner on that basis, the court held, would provide incentives to others to hide assets and only come clean when caught. "This so-called remedy," the court stated, "would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtor's assets."³⁹

The Sixth, Seventh, and Ninth Circuits' Rebuttable Presumption of Bad Faith and Broad Consideration of Evidence of Good Faith

The Sixth, Seventh, and Ninth circuits accept the Fifth, Tenth, and Eleventh circuits' proposition that courts may presume bad faith or deliberate manipulation when a debtor has knowledge of the claims and a motive to conceal them.⁴⁰ In those circuits, however, the presumption is not irrebuttable, and courts consider a range of explanations from plaintiffs to rebut or avoid the presumption.

The Seventh and Ninth circuits have stated clearly that the presumption of deceit does not apply where the plaintiff reopens the bankruptcy to disclose the lawsuit to the creditors.⁴¹ If a plaintiff has reopened the bankruptcy, the inadvertence inquiry is "not limited to the plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset," but also includes "more broadly, the plaintiff's subjective intent when filling out and signing the bankruptcy schedules."⁴² In other words, those courts ask whether the plaintiff was actually trying to deceive the bankruptcy court instead of presuming deception from incomplete disclosures.

Ah Quin v. County of Kauai illustrates the Ninth Circuit's approach. There, the plaintiff was pursuing a district court employment-discrimination case that she did not disclose in bankruptcy. Her attorney in the discrimination case discovered the disclosure problem and alerted the defendant and the plaintiff's bankruptcy attorney. The plaintiff then reopened her bankruptcy, and submitted declarations from herself and her attorneys explaining that the earlier nondisclosure was a mistake and not in bad faith.⁴³ The district court dismissed on judicial estoppel grounds, relying primarily on the Tenth Circuit's *Eastman* decision.⁴⁴ The Ninth Circuit reversed and explicitly split with the Fifth, Tenth, and Eleventh circuits for four reasons. First, once a bankruptcy debtor reopens the bankruptcy and makes a full disclosure, the *New Hampshire* factors—inconsistent positions, judicial acceptance of the first position, and unfair advantage—are in some sense cured or no longer met. Second, the general

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deterrence justification that the Fifth, Tenth, and Eleventh circuits invoke is an awkward fit for the equitable doctrine of judicial estoppel—which is concerned more with the immediate case before the court than with incentives for future litigants. Third, the bankruptcy court, trustees, and creditors already have numerous tools at their disposal to discourage deception and to punish it severely when it is found. Finally, application of judicial estoppel in this manner can have perverse results: An asset (the lawsuit) is destroyed with no benefit to the bankruptcy creditors. The only winner is the defendant—an allegedly bad actor who is excused from any consequences "for the entirely unrelated reason that Plaintiff happened to file for bankruptcy and, possibly due to inadvertence, happened to omit the claim from her initial schedules." The *Ah Quin* court therefore remanded to the district court to make a factual finding on inadvertence, which the lower court had previously inferred on reasoning borrowed from the Tenth Circuit.⁴⁵

The Seventh Circuit's case law is to similar effect. The Ninth Circuit's *Ah Quin* decision relied on two Seventh Circuit decisions.⁴⁶ And a later Seventh Circuit decision reversed a district court's application of judicial estoppel where the plaintiff made efforts to correct her initial nondisclosure.⁴⁷ That case, *Spaine*, applied *Ah Quin*'s holding that a "presumption of deceit does not arise if [the] debtor corrects omissions from bankruptcy schedules in [a] manner that permits bankruptcy court to assess case 'with the full and correct information.'"⁴⁸

The Sixth Circuit's law appears to be aligned with the Seventh and Ninth circuits, though it has also cited the opposing view favorably. The Sixth Circuit stated in 2002 that it "adopt[ed]" the analysis of the Fifth Circuit's *Coastal Plains* decision.⁴⁹ Subsequent cases, however, have distinguished *Coastal Plains* and taken a much broader view of inadvertence.⁵⁰ The Sixth Circuit does not limit its analysis of inadvertence to asking whether the plaintiff had knowledge of the omitted claims and a motivation to conceal them. Rather, like the Seventh and Ninth circuits, the Sixth Circuit considers a broader range of evidence of good or bad faith, including the plaintiff's subjective intent, and efforts to correct initial nondisclosures.⁵¹

Other Circuits

The six remaining regional circuits have not taken a definitive position.⁵² The Third Circuit's case law points in different directions. That court accepts the reasoning of the Fifth, Tenth, and Eleventh circuits 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.”⁵² Yet, in another case that it has repeatedly cited and not overruled, the Third Circuit explicitly rejected the argument that “intent may be inferred for purposes of judicial estoppel solely from nondisclosure notwithstanding the affirmative disclosure requirement of the Bankruptcy Code” and stated its “unwilling[ness] to treat careless or inadvertent nondisclosures as equivalent to deliberate manipulation when administering the ‘strong medicine’ of judicial estoppel.”⁵³

The First, Second, Fourth, Eighth, and D.C. circuits have quoted decisions of other circuits in dicta but have not directly addressed how to treat claims of inadvertence in this context. The First Circuit has explicitly reserved the question.⁵⁴ The Second Circuit seems not to have reached it at all.⁵⁵ The Fourth Circuit has stated frequently, outside of the bankruptcy context, that a party’s good or bad faith in advancing inconsistent positions “is the determinative factor” in deciding whether to apply judicial estoppel. Its most relevant case on nondisclosures in bankruptcy does not involve inadvertence arguments but rather a situation where the plaintiff did disclose a potential, not-yet-filed claim in bankruptcy and simply failed to submit an immediate update when the lawsuit actually began.⁵⁶ The Eighth Circuit’s most relevant case similarly did not discuss inadvertence, as there was no actual discharge in the bankruptcy proceedings.⁵⁷ And in the D.C. Circuit’s most relevant case, the court rejected an inadvertence argument where evidence refuted any claim of inadvertence of any kind and thus obviated any need to decide whether to adopt a broad or narrow definition of inadvertence.⁵⁸

Evaluating Competing Approaches

The 3-3 split in the federal courts of appeals has only recently crystallized. While judicial estoppel has been traced to the mid-19th century,⁵⁹ it was not widely recognized until recently. The D.C. Circuit said in 1980 that “judicial estoppel has not been followed by anything remotely approaching a majority of jurisdictions,”⁶⁰ and the Tenth Circuit rejected judicial estoppel as recently as 2003.⁶¹ The Supreme Court’s 2001 *New Hampshire v. Maine* case is the Court’s first comprehensive discussion of judicial estoppel. *New Hampshire* offered a restatement of judicial estoppel and applied it to a boundary dispute between New Hampshire and Maine.⁶² Since then, every circuit has embraced the concept. Once *New Hampshire* placed judicial estoppel into a framework, different circuits could thereafter evaluate the Fifth Circuit’s *Coastal Plains* rule in the context of that framework and adopt it, reject it, or modify it.

While courts on each side of the 3-3 split sometimes cite each other’s opinions favorably, it seems clear that there is, in fact, a split. District courts and commentators have acknowledged the developing split of authority.⁶³ And the Ninth Circuit’s *Ah Quin* decision explicitly splits with the Fifth, Tenth, and Eleventh circuits’ treatment of inadvertence and places primary importance on factors—such as a plaintiff’s subjective intent and reopening of her bankruptcy—that those circuits regard as legally irrelevant.⁶⁴ And it seems clear that the *Eastman* and *Ah Quin* cases described above would have been resolved differently had the jurisdictions been reversed. The current split highlights tensions between law and equity and between the objectives of deterring future bad behavior versus reaching a fair result in an individual case.

The Fifth, Tenth, and Eleventh circuits favor general deterrence and clear rules. Those courts place primary importance

on full disclosure in bankruptcy and of avoiding fraud. The best defense of that rule against contrary arguments is probably Judge Jay Bybee’s dissent in *Ah Quin*. As that dissent puts it, “when a lie is punished and future lies are deterred—especially in the context of a system so dependent on full and accurate disclosure—equity will usually have been done. ‘Come what may, anything is better than lies or deception.’”⁶⁵ It is better, in the view of those courts, to dismiss potentially meritorious claims that may have been omitted from bankruptcy disclosures because of negligence or ignorance than to risk involving the court in fraud or to risk creating a common-law escape hatch from the Bankruptcy Code’s disclosure requirements. That means categorically rejecting certain types of excuses for nondisclosure and putting the public on notice that nondisclosure in bankruptcy will have consequences. It is often said that ignorance of the law is no excuse, and plaintiffs’ assertions of ignorance of their disclosure obligations in bankruptcy are irrelevant in those circuits.⁶⁶ Thus, even though the creditors in an individual case may lose the potential value of the dismissed lawsuit, all creditors are better served in the long term by the ex ante deterrence of incomplete bankruptcy disclosures. And they are better served in the short term by the exception those circuits recognize for when the bankruptcy trustee prosecutes a lawsuit for the benefit of creditors. If the strict rule in those circuits seems inconsistent with the equitable nature of judicial estoppel, defenders of the rule respond that “courts of equity must be governed by rules and precedents no less than courts of law.”⁶⁷

The Sixth, Seventh, and Ninth circuits place greater emphasis on the equitable nature of judicial estoppel and the fact that dismissing a lawsuit can only harm the plaintiff’s creditors and benefit an alleged bad actor (the defendant). In distinguishing the equitable doctrine of laches from statutes of limitations, the Supreme Court has said that “[e]quity eschews mechanical rules; it depends on flexibility.”⁶⁸ Courts of appeals applying judicial estoppel have consistently noted that the doctrine is meant to prevent deliberate manipulation of courts, not to function as a trap for the unwary or a strict rule.⁶⁹ Thus, where a plaintiff has claimed that nondisclosure in bankruptcy was inadvertent, those courts will generally look deeper into the facts of the individual case to evaluate the plaintiff’s arguments rather than applying a strict rule that makes most such arguments categorically unavailing. At least one court has found that the bankruptcy disclosure forms do not necessarily alert laypersons clearly to the need to disclose lawsuits,⁷⁰ and courts have held in other contexts that “willfulness” or “knowing” misconduct cannot be proved by relying on the common law presumption that every person knows the law.⁷¹ In response to the argument that full disclosure in bankruptcy is important, the Ninth Circuit notes—as other courts and commentators have—that bankruptcy courts and trustees already have numerous tools at their disposal to punish actual fraud, including involuntary reopening, sanctions, revocation of discharge, and referral for criminal prosecution.⁷²

Finally, the rule in the Sixth, Seventh, and Ninth circuits avoids the harsh result of rewarding alleged bad actors at the possible expense of innocent creditors. Dismissing a case outright on judicial estoppel grounds has potentially harsh consequences for a plaintiff who has alleged that she is the victim of some kind of wrong for which the law supplies a remedy—e.g., discrimination, fraud,

assault, breach of contract, or constitutional violations. Courts that dismiss those cases to avoid being involved in potential bankruptcy fraud by the plaintiff do so at the risk of ratifying the alleged bad conduct of the defendant in the case before them.⁷³ And by extinguishing a lawsuit, the court destroys an asset that could be used to benefit the plaintiff's innocent creditors.⁷⁴

Future Developments in Other Circuits and Supreme Court Review

It remains to be seen how the law will continue to develop, but it seems clear that the courts of appeals and district courts in First, Second, Third, Fourth, Eighth, and D.C. circuits will increasingly be asked to address claims of inadvertence.

Those courts should not make the mistake of looking at one side of the split in isolation. Nor should those courts view the competing approaches as the only possibilities. For one thing, it is questionable whether courts should adopt even a rebuttable presumption that a nondisclosure in bankruptcy is deliberate. In *eBay Inc. v. MercExchange LLC*, the Supreme Court criticized the Federal Circuit for taking a general equitable doctrine (injunctions) and adopting a special rule for patent cases of presuming irreparable harm when the plaintiff prevails at trial and then seeks an injunction.⁷⁵ *eBay* ruled that the decision whether to grant an injunction “must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases.” The presumption that courts draw from a bankruptcy debtor's nondisclosure resembles the subject-matter-specific presumption that the Supreme Court unanimously rejected in *eBay* as improperly displacing “traditional principles of equity.”⁷⁶

For another thing, when a district court is convinced that a plaintiff should suffer some consequence for pursuing a lawsuit that was not disclosed in bankruptcy, the court may wish to consider alternatives to outright dismissal. Most courts hold that it is generally inappropriate to use a court's inherent powers to dismiss a case without considering less severe alternatives.⁷⁷ Courts have broad discretion under their inherent powers to tailor sanctions. Alternatives such as capping damages, permitting plaintiffs to pursue injunctive relief but not damages, or requiring plaintiffs to return to the bankruptcy court at the conclusion of the case to disclose any judgment to their creditors, or staying the case to permit reopening of the bankruptcy, might address the competing concerns better than a binary decision whether to dismiss a case or not.

It also remains to be seen how and whether the Supreme Court will intervene. In favor of review are (1) the existence of a developing split of authority with reasoned opinions on both sides, (2) the more-than-weekly basis on which this application of judicial estoppel arises in federal and state courts, and (3) the important, case-dispositive consequences of this issue for a broad range of civil claims. Against immediate review are that the split of authority has only recently developed and that further percolation—particularly in the First, Second, Third, Fourth, Eighth, and D.C. circuits—might aid the Supreme Court's review later on. Further, the courts of appeals have varied in their approaches to judicial estoppel for decades, and the Supreme Court has never previously thought that this variance warranted review to establish a uniform rule (*New Hampshire* was an original jurisdiction case.). In the meantime, district courts and courts of appeals should be aware that the case law is in flux and differs across jurisdictions. And plaintiffs, defen-

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dants, and their attorneys should be aware that the issue exists. Otherwise, defendants may unwittingly forfeit a case-dispositive defense, and plaintiffs may learn about the issue for the first time when served with a motion to dismiss. ☉



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Endnotes

¹*New Hampshire v. Maine*, 532 U.S. 742, 751, 753 (2001).

²1,038,720 “non-business” bankruptcies were filed in 2013 www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf.

³A search on Westlaw's “allcases” database for “JUDICIAL ESTOPPEL /P BANKRUPT” yields 280 results for 2013, 263 for 2012, 216 for 2012, and 185 for 2010. The search appears to generate few, if any, false positives.

⁴*See, e.g.*, K.M. Lewis & Paul M. Lopez, *Recent Developments in Estoppel and Preclusion Doctrines in Consumer Bankruptcy Cases; Volume I of II: Estoppel*, 66 OKLA. L. REV. 459 (2014); 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); 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 (2001).

⁵*See, e.g.*, Kyle M. Heisner, *Invoking Judicial Estoppel to Secure Dismissal*, THE LEGAL INTELLIGENCER (Nov. 25, 2014); Roman T. Galas & John P. Mueller, *Using Bankruptcy to (Es)top a Plaintiff in His Tracks*, DRITODAY (Oct. 13, 2011), [available at dritoday.org/feature.aspx?id=178](http://available.at.dritoday.org/feature.aspx?id=178); Benjamin A. Hardy, *The Bankrupt's Employment Claim—List It or Lose It*, 18 LABOR LAWYER 193 (Fall 2002).

⁶*New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

⁷*Milton H. Greene Archives v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012).

⁸*Baughman v. Disney World Co.*, 685 F.3d 1131, 1133-34 (9th Cir. 2012).

⁹*New Hampshire v. Maine*, 532 U.S. 742 (2001).

¹⁰532 U.S. 742.

¹¹*Id.* at 749-53.

¹²*See, e.g.*, *Johnson v. Or. Dep't of Human Resources*, 141 F.3d 1361, 1369 (9th Cir. 1998); *Zinkand v. Brown*, 478 F.3d 634, 638

(4th Cir. 2007).

¹³*Milton H. Greene*, 692 F.3d at 995 (“[C]hicanery or knowing misrepresentation by the party to be estopped is a factor to be considered in the judicial estoppel analysis and not an ‘inflexible prerequisite’ to its application.”).

¹⁴See generally 11 U.S.C. § 521; Admin. Office of the Courts, Bankruptcy Cases, at www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/BankruptcyCases.aspx

¹⁵See, e.g., *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 784 (9th Cir. 2001); *In re Coastal Plains, Inc.*, 179 F.3d 197, 207-08 (5th Cir. 1999).

¹⁶Bankruptcy Form B7 at 11, available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Official_2010/B_007_0410.pdf

¹⁷See, e.g., *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 412 (7th Cir. 2006); *Ah Quin v. County of Kauai*, 733 F.3d 267, 271 (9th Cir. 2013).

¹⁸*Biesek*, 440 F.3d at 412.

¹⁹*Eastman v. Union Pac. Ry. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007); *Barger v. City of Cartersville*, 348 F.3d 1289, 1295 (11th Cir. 2003); *Coastal Plains*, 179 F.3d at 210.

²⁰*Eastman*, 493 F.3d at 1157.

²¹See, e.g., Nat’l Consumer Bankruptcy Rights Ctr., Inadvertence as Subjective/Objective Question in Judicial Estoppel Analysis (July 21, 2014), at www.ncbr.org/as-subjectiveobjective-question-in-judicial-estoppel-analysis/.

²²*Coastal Plains*, 179 F.3d at 208.

²³*Eastman*, 493 F.3d at 1159 (positing an “ever-present motive to conceal legal claims and reap the financial rewards”) (citing cases); *Beiner & Chapman*, supra note 4, at 12 (“An analysis under *Coastal Plains* inevitably leads to the conclusion that all debtors have a motive for concealment.”).

²⁴*Reed v. City of Arlington*, 650 F.3d 571, 573 (5th Cir. 2011) (en banc); *Parker v. Wendy’s Int’l Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004).

²⁵See, e.g., *Coastal Plains*, 179 F.3d at 207 (scope of disclosure duty “goes without saying”); *Kamont v. West*, 83 F. App’x 1, 2 (5th Cir. 2003) (“A lack of awareness of the statutory disclosure duty is simply not relevant to the question of judicial estoppel.”).

²⁶*Eastman*, 493 F.3d at 1157; *Queen v. TA Operating LLC*, 734 F.3d 1081, 1094 (10th Cir. 2013).

²⁷*Coastal Plains*, 179 F.3d at 197; *Beiner & Chapman*, supra note 4, at 12 (*Coastal Plains* is “very influential in this area.”).

²⁸*Eastman*, 493 F.3d at 1157 (10th Cir. 2007); *Barger*, 348 F.3d at 1295.

²⁹*Eastman*, 493 F.3d at 1153-57, 1160.

³⁰*Id.* at 1157, 1160.

³¹*Barger v. City of Cartersville*, 348 F.3d 1289, 1297-98 (11th Cir. 2003) (Barkett, J., dissenting); *Jethroe v. Omnova Solutions Inc.*, 412 F.3d 598, 601 n.4 (5th Cir. 2005) (acknowledging “persuasive authority” contrary to the Fifth Circuit’s *Coastal Plains* decision).

³²*Ah Quin v. County of Kauai*, 733 F.3d 267, 281-86, 292-93 (9th Cir. 2013) (Bybee, J., dissenting).

³³See *Williams v. U.S. Fid. & Guaranty Co.*, 236 U.S. 549, 554-55 (1915); *Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1107 (2007) (citing *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991)).

³⁴See, e.g., *Eastman*, 493 F.3d at 1159 (“The doctrine of judicial estoppel serves to offset such motive, inducing debtors to be completely truthful in their bankruptcy disclosures.”); *Coastal Plains*, 179 F.3d at 207-08.

³⁵*Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc); *Ah Quin*, 733 F.3d at 293 (Bybee, J., dissenting).

³⁶See *First Nat’l Bank of Jacksboro v. Lasater*, 196 U.S. 115, 119 (1905); *Marrama*, 127 S. Ct. at 1107.

³⁷*Payless Wholesale Distrib. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993).

³⁸*Eastman*, 493 F.3d at 1157-58 (citing *Payless*).

³⁹*Id.* at 1160 (quoting *Burnes*, 291 F.3d at 1288).

⁴⁰*Ah Quin*, 733 F.3d at 273; *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002); *Spaine v. Community Contacts Inc.*, 756 F.3d 542, 544 (7th Cir. 2014).

⁴¹*Ah Quin*, 733 F.3d at 273 (original emphasis); see also *Spaine*, 756 F.3d at 547 (citing *Ah Quin*); *Eubanks v. CBSK Fin. Grp. Inc.*, 385 F.3d 894, 897-99 (6th Cir. 2004).

⁴²*Id.* at 276-77.

⁴³*Id.* at 270.

⁴⁴433 B.R. 320, 324-25 (D. Haw. 2010).

⁴⁵*Ah Quin*, 733 F.3d at 274-76; see also *Dzakula v. McHugh*, 746 F.3d 399, 400-02 (9th Cir. 2014) (clarifying and distinguishing *Ah Quin*).

⁴⁶*Id.* at 274 (citing *Biesek*, 440 F.3d 310; *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006)).

⁴⁷*Spaine*, 756 F.3d at 547-48.

⁴⁸*Id.* at 547 (quoting *Ah Quin*, 733 F.3d at 272-73).

⁴⁹*Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002) (“Although this court is not bound by *Coastal Plains Inc.*, these two requirements for a finding of an inadvertent omission seem reasonable and appropriate. ... We therefore adopt them in our analysis of the present case.”).

⁵⁰*Eubanks*, 385 F.3d at 897-99.

⁵¹See *Javery v. Lucent Techs Inc.*, 741 F.3d 686, 698 (6th Cir. 2014); *Stephenson v. Malloy*, 700 F.3d 265, 272-73 (6th Cir. 2012).

⁵²The Federal Circuit applies regional circuit law to questions of judicial estoppel that arise in appeals from district courts. See *Wang Labs. Inc. v. Applied Computer Sci.*, 958 F.2d 355, 358. (Fed. Cir. 1992).

⁵³*Krystal Cadillac-Oldsmobile GMC Truck Inc. v. General Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003); *id.* at 323 (citing *Coastal Plains* with approval).

⁵⁴*Ryan Operations, G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 364, 365 (3d Cir. 1996).

⁵⁵*Guay v. Burack*, 677 F.3d 10, 20 (1st Cir. 2012) (“This case does not present facts that require consideration of that exception, and we leave that question open.”).

⁵⁶*Whitehurst v. 230 Fifth Inc.*, 998 F. Supp. 2d 233, 259 (SDNY 2014) (“The Second Circuit has not yet told us whether good faith mistakes to include a specific asset in an earlier bankruptcy proceeding should invoke estoppel. ...”).

⁵⁷*Whitten v. Fred’s Inc.*, 601 F.3d 231, 241, 242 (4th Cir. 2010) (quoting *Zinkand*, 478 F.3d at 638 (4th Cir. 2007)), overruled in part on other grounds, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

⁵⁸*Stallings v. Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006).

⁵⁹*Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 800 (D.C. Cir. 2010).

⁶⁰See *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857).

⁶¹*Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980).

⁶¹See, e.g., *NISH v. Rumsfeld*, 348 F.3d 1263, 1272 (10th Cir. 2003).

⁶²*New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (“[W]e have not had occasion to discuss the doctrine elaborately . . .”).

⁶³*Robinson v. District of Columbia*, 10 F. Supp. 3d 181, 186 n.3 (D.D.C. 2014) (acknowledging split); *Spain v. Community Contacts*, 2013 WL 4782158, at 5 n.2 (N.D. Ill. Sept. 6, 2013) (same); *Jethroe*, 412 F.3d at 601 n.4; *Current Circuit Splits*, 10 SETON HALL CIRCUIT REVIEW 145, 151-52 (2013) (same); Nat’l Consumer Bankruptcy Center, Ninth and Tenth Circuits Differ on Judicial Estoppel Considerations (Sept. 9, 2013), at www.ncbrc.org/blog/2013/09/09/ninth-and-tenth-circuits-differ-on-judicial-estoppel-considerations/ (similar); B. Shapiro, Las Vegas Bankruptcy Blog, The 9th Circuit vs. the 10th Circuit — Judicial Estoppel (Aug. 26, 2013), at brianshapiro.blogspot.com/2013/08/the-9th-circuit-vs-10th-circuit.html (similar).

⁶⁴*Ah Quin*, 733 F.3d at 277.

⁶⁵*Ah Quin*, 733 F.3d at 294 (Bybee, J., dissenting) (quoting 2 *Anna Karenina* 76 (N.H. Dole trans., 1899) (1877)).

⁶⁶*Coastal Plains*, 179 F.3d at 207; *Kamont v. West*, 83 F. App’x 1, 2 (5th Cir. 2003).

⁶⁷*Ah Quin*, 733 F.3d at 283 n.3 (Bybee, J., dissenting) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

⁶⁸*Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).

⁶⁹See, e.g., *Perry v. Blum*, 629 F.3d 1, 13 (1st Cir. 2010); *Johnson*, 141 F.3d at 1369.

⁷⁰*Fairchild v. Touchtunes Music Corp.*, No. 1-C-9699, 2002 WL 31833768, at *3 (N.D. Ill. Dec. 12, 2002).

⁷¹*Cheek v. United States*, 498 U.S. 192, 199-200 (1991); *United States v. Isaacs*, 539 F.2d 686 (9th Cir. 1976).

⁷²*Ah Quin*, 733 F.3d at 275; see also *Oneida Motor Freight Inc. v. United Jersey Bank*, 848 F.2d 414, 423 (3d Cir. 1988) (Stapleton, J., dissenting); *In re Griner*, 240 B.R. 432, 439 (Bankr. S.D. Ala. 1999); *Beiner & Chapman*, supra note 4, at 57.

⁷³*Ah Quin*, 733 F.3d at 275.

⁷⁴*Id.*; see also *Cannon-Stokes*, 453 F.3d at 448; *Oneida*, 848 F.2d at 422 (Stapleton, J., dissenting).

⁷⁵547 U.S. 388, 393-94 (2006).

⁷⁶See also *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 157 (2010); *Flexible Lifeline Sys. Inc. v. Precision Lift Inc.*, 654 F.3d 989, 995-96 (9th Cir. 2011).

⁷⁷See *Ready Transp. Inc. v. AAR Mfg. Inc.*, 627 F.d 402, 404-05 (9th Cir. 2010) (collecting cases).

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With the stakes so high, candidates, parties, and outside spenders will continue to push the boundaries. Conversely, reformers and partisans stand at the ready to file a complaint at the slightest hint of impropriety. Indeed, some groups exist for little else. After the CNN report ran, ADLF, run by veteran Democrat operative Brad Woodhouse, almost immediately filed its FEC complaint. A glance at the group’s website reveals little except a menu of FEC and other complaints against Republicans. This should give both sides pause before pushing the coordination limits too far. ☉



Paul H. Jossey is an election lawyer in Alexandria, Virginia. This is not intended to be legal advice. © 2015 Paul H. Jossey. All rights reserved.

Endnotes

¹Chris Moody, *How the GOP Used Twitter To Stretch Election Laws*, updated Nov. 17, 2014, available at www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/.

²Available at americandemocracy.org/app/uploads/ADLF_Before-The-Federal-Election-Commission-11.24.14.pdf.

³Campaign Manager Pleads Guilty to Coordinated Campaign Contributions and False Statements, Department of Justice Press Release, Feb. 12, 2015, available at www.justice.gov/opa/pr/campaign-manager-pleads-guilty-coordinated-campaign-contributions-and-false-statements.

⁴See the FEC brochure on Coordinated Communications and Independent Expenditures, available at www.fec.gov/pages/

[brochures/indexp.shtml](#).

⁵11 CFR 109.21(d).

⁶Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

⁷See www.nrscc.org/blog/how-democrats-subvert-campaign-finance-laws.

⁸See www.moresoftmoneyhardlaw.com/2014/11/coordination-controversy-twittersverse/.

⁹*In the Matter of American Crossroads*, (MUR 6357), Statement of Reasons, Chair Caroline C. Hunter and commissioners Donald F. McGahn and Matthew S. Peterson, Feb. 22, 2012, available at eqs.fec.gov/eqsdocsMUR/12044312281.pdf.

¹⁰*In the Matter of American Crossroads*, (MUR 6357), Statement of Reasons of Vice Chair Ellen L. Weintraub and commissioners Cynthia L. Bauerly and Steven T. Walther, Feb. 27, 2012, available at eqs.fec.gov/eqsdocsMUR/12044312290.pdf.

¹¹Daniel P. Tokaji and Renata E. B. Strause, *The New Soft Money, Outside Spending in Congressional Elections*, (2014) available at moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf.

¹²See Rachel Marcus and John Dunbar, *Rules Against Coordination Between Super PACs, Candidates Tough To Enforce*, Jan. 13, 2012, available at www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce.