THE QUARTERLY JOURNAL

CHATTANOOGA CHAPTER OF THE FEDERAL BAR ASSOCIATION

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A Tale of Two Debtors

By Lane Crowder
Law Clerk to United States Bankruptcy Court Judge Shelley D. Rucker

The world of bankruptcy can be a puzzling and mysterious place to a layperson, and even to the average non-bankruptcy attorney. However, if the non-bankruptcy attorney begins to understand a few core policies behind the Bankruptcy Code, the world of bankruptcy might become a bit less opaque, and might even begin to make logical sense. This article will attempt to elucidate one of the mysterious wrinkles of bankruptcy law that may have dramatic effects on non-bankruptcy litigation – the concept of judicial estoppel and its application in non-bankruptcy litigation to statements made on bankruptcy petitions and schedules. By exploring two different rulings of the Sixth Circuit, one can see how the concept of judicial estoppel works to protect two of the core policies behind the Bankruptcy Code – protecting the honest, but unfortunate debtor and preserving as many assets as possible for the benefit of creditors.

The Bankruptcy Code requires a debtor to disclose all of his or her assets and liabilities. *See* 11 U.S.C. § 521(a)(1)(B). As the United States Supreme Court put it in *Marrama v. Citizens Bank of Massachusetts*, "[t]he principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991)). One of the key words behind this explanation of the Bankruptcy Code is, of course, "honest." Another way of thinking about honesty in the bankruptcy context is to relate it to the concept of "full disclosure." The Bankruptcy Code was not established to protect dishonest debtors who attempt to hide assets or debtors who like to play fast and loose with the facts pertaining to their financial condition. In *In re Hamo* the Bankruptcy Appellate Panel for the Sixth Circuit quoted a bankruptcy court regarding the purpose of Section 727(a)(4)(A), a provision that denies a discharge to a debtor who fraudulently and knowingly makes a false oath or account:

> The very purpose of . . . 11 U.S.C. § 727(a)(4)(A), is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. . . . Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.
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> . . . .
>
> A discharge is a privilege and not a right and therefore the strict requirement of accuracy is a small quid pro quo. The successful functioning of the bankruptcy code hinges upon the bankrupt's veracity and his willingness to make a full disclosure.

233 B.R. 718, 725-726 (B.A.P. 6th Cir. 1999) (quoting *Hillis v. Martin, Martin v. Martin (In re Martin)*, 124 B.R. 542, 545, 547-48 (Bankr. N.D. Ind. 1991)). Thus, the Bankruptcy Code frowns upon those debtors who fail to provide complete disclosure of their financial affairs to their creditors, the trustee, and the court.

This basic purpose of the Bankruptcy Code, to protect honest but unfortunate debtors, helps to explain the seemingly anomalous situation in which a debtor can lose her right to pursue a civil litigation action due to the failure to disclose the possibility of such a claim on a bankruptcy petition or schedule. The Sixth Circuit's analysis of judicial estoppel in this context has been evolving in recent years, and the key may turn on whether a debtor's failure to disclose a claim or lawsuit was "inadvertent" or represented "bad faith." This focus on the motivation of the debtor returns back to the fundamental policy of protecting honest debtors who do not engage in "gamesmanship."

In the first tale of a debtor, *White v. Wyndham Vacation Ownership, Inc.* the Sixth Circuit confronted the question of whether the doctrine of judicial estoppel precluded an employment discrimination plaintiff from pursuing a sexual harassment claim against her employer in federal district court due to her failure to list the claim on her bankruptcy schedules. 617 F.3d 472 (6th Cir. 2010). The majority concluded that it did. However, a strong dissenting opinion argued that the application of judicial estoppel to preclude the sexual harassment claim merely prevented the debtor's creditors from receiving any additional funds and aided the employer alleged of sexual harassment.

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In *White* the EEOC had issued the debtor plaintiff a notice of a right to sue on her harassment claim one month before she filed a Chapter 13 bankruptcy petition in U.S. Bankruptcy Court for the Eastern District of Tennessee. 617 F.3d at 474. The Court explained that the concept of judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id.* at 476 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808 (2001)). The doctrine is intended to prevent abuse of judicial process through "'cynical gamesmanship.'" *Id.* (quoting *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002)).

The court then revisited its test for the application of judicial estoppel in the bankruptcy context: (1) the debtor "assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) [the debtor's] omission did not result from mistake or inadvertence." 617 F.3d at 478. In reviewing whether mistake or inadvertence existed, the court considered whether the debtor lacked knowledge of the facts behind the undisclosed claims, whether she had a motive for concealment, and whether the evidence as a whole indicated a lack of bad faith. *Id.* The Court affirmed the district court's award of summary judgment to the employer based on the doctrine of judicial estoppel. It found that the debtor's failure to list her sexual harassment claim in her bankruptcy schedules, which she signed under penalty of perjury and which disclosed a separate legal claim, indicated an intentional omission. The majority found that the timing of the disclosure of the debtor's sexual harassment claim, only *after* the defendant employer had filed a motion to dismiss, was significant. *Id.* at 480.

The debtor pointed out that her bankruptcy attorney filed an affidavit prior to the employer's motion to dismiss. The attorney's affidavit indicated that he and the debtor discussed her sexual harassment claim. *Id.* The debtor also pointed to the application to employ counsel to represent her in her sexual harassment claim, filed prior to the motion to dismiss, as evidence of her inadvertent omission of the sexual harassment claim. *Id.* The majority concluded that the application did not "adequately inform" the court, the trustee or the creditors of the debtor's claim. *Id.* at 481. The court determined that the timing of the disclosure on the amended schedules indicated "gamesmanship," and found that the debtor had a strong financial incentive to conceal the claim. *Id.* at 481, 483.

The dissenting opinion called the majority's approach a failure "to appreciate the absurdity of the result of its erroneous application of judicial estoppel." *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 484 (6th Cir. 2010) (Clay, J., dissenting). The dissenting opinion noted the anomalous result that the employer who allegedly employed an individual who harassed the debtor on numerous occasions escaped from paying any damages whatsoever, when the employer could have paid damages that could have benefited the debtor's creditors. It criticized the majority for applying judicial estoppel in "too rigid" a fashion and for failing to draw all reasonable inferences, including explanations relating to the timing of the debtor's disclosure, in favor of the debtor on summary judgment. *Id.* at 486. The dissent chided the majority, and stated that it "simply never comes to terms with the fact that the real victim of such unorthodox and aggressive use of judicial estoppel is not the debtor but the bankruptcy estate, and by extension the debtor's creditors." *Id.* at 488-489.

A little over two years later we come to the tale of the second debtor. A different Sixth Circuit panel reached a different conclusion regarding the application of judicial estoppel based on bankruptcy filings in *Stephenson v. Malloy*, 700 F.3d 265 (6th Cir. 2012). In that case the district court granted summary judgment to the defendant, relying on *White*. The Sixth Circuit reversed, holding that the debtor's failure to disclose his negligence lawsuit on his bankruptcy schedules was inadvertent. *Id.* at 275. The debtor in *Stephenson* had a claim against the defendant based on a traffic accident. The debtor listed on his bankruptcy schedules a lawsuit against an insurance company based on the accident, but failed to list the claim against the defendant. *Id.* at 267. However, the debtor provided substantial proof that he had informed the trustee of his lawsuit against the defendant from the very beginning of his bankruptcy case. *Id*. at 269-270. Such proof included correspondence between the debtor's attorney and the bankruptcy trustee regarding retaining the attorney to represent the debtor or the trustee in the negligence action. The district court granted summary judgment to the defendant based on *White*, but also granted the debtor's motion to substitute the bankruptcy trustee as the real party in interest. *Id*. at 270. The Sixth Circuit reversed the district court, finding that the trustee was not judicially estopped from pursuing the debtor's claims because the trustee did not omit any claim in the bankruptcy schedules. 700 F.3d at 272. The Court further determined that "the strength and nature" of the evidence demonstrating that the debtor did not attempt to conceal his negligence action from the trustee distinguished the case from the situation in *White*. The Court found that the debtor's attorney "communicated freely" about the lawsuit with the trustee "from nearly the inception of the bankruptcy proceeding, repeatedly seeking the trustee's guidance as to how the litigation should be handled." *Id*. at 275. The Court held the omission of the negligence claim was "inadvertent" and was "not barred by judicial estoppel."

A review of these two decisions emphasizes how important the concept of full disclosure and honesty is to the Bankruptcy Code. Courts will examine the motivation of debtors after reviewing the facts as a whole and will not hesitate to penalize the dishonest debtor or one guilty of "gamesmanship." So, if you find yourself working with parties who have filed for bankruptcy, it is important to know whether your clients have disclosed the claim that they are retaining you to pursue. Otherwise, you may find yourself on the losing end of a dispositive motion in non-bankruptcy related litigation.

Annual Meeting

January 15, 2013

The Chattanooga Chapter celebrated the close of a year marked with success and ushered in a new year of promise.

The Chapter featured University of South Carolina Esteemed Emeritus Professor Dan T. Carter (pictured at top), whose talk focused on voting rights in the United States. Our special guests included Howard High School student participants in the Talented Tenth Leadership Program and their FBA chapter mentors, including U.S. Magistrate Judge Susan K. Lee (bottom left). Talented Tenth Program Director Exavious Farley (top right) offered remarks about the program and its partnership with the Chattanooga Chapter. Incoming President Katharine Gardner awarded John Medearis the Outstanding Service Award for his longstanding commitment to serving the Chapter (both bottom right).

Rule of the Day

By Katharine M. Gardner

The statements and opinions expressed in the following article are solely those of Katharine M. Gardner.

Last December, the United States Attorney's Office for the Eastern District of Tennessee sponsored an ethics seminar in Knoxville. United States District Judge Ronnie Greer was the featured speaker, and he offered some pearls of wisdom concerning practice in federal court. His list was derived from actual experiences on the bench. (The offending lawyers surely were *not* FBA members!) While none us would fail to follow such basic rules of practice, it never hurts to be reminded. Here are some of the rules offered by Judge Greer:

Do Nots:

1. Do not misrepresent facts to opposing counsel or the Court.
2. Do not express exasperation with an argument or a ruling.
3. Do not continue to argue after a ruling.
4. Do not react emotionally to a ruling.
5. Do not use sarcasm when arguing to the Court.
6. Do not use unseemly gestures or expressions such as rolling eyes, huffing and puffing, or shrugging shoulders.
7. Do not be evasive or refuse to answer a direct question by the Court.
8. Do not direct your argument to opposing counsel.
9. Do not try to argue over the Court or opposing counsel.
10. Do not let yourself be provoked by the bad behavior of opposing counsel.

And Some Do's:

1. Do disclose law on point even if it is against your position.
2. Do act professionally at all times.
3. Do be intellectually honest. Concede if a case does not support your position; it will bolster your credibility with the Court and leave you to advocate effectively for another day.

We are fortunate because the practice of law in federal court in Chattanooga, Tennessee is generally a place filled with civility, courtesy, and high ethical standards. Lets all do our part to maintain that favorable atmosphere.

The Clerk's Corner

——Tips From Inside the Chambers——

If you ask for an extension of the discovery deadline, do not assume that it will per se entitle you to an extension of the dispositive motion deadline. It will not. Extending the dispositive motion deadline affects the Court's work schedule by shortening the amount of time there is to work on a dispositive motion. In contrast, extending the discovery deadline affects only the lawyers' work schedules. If you request an extension of the dispositive motion deadline, you should proffer a compelling reason why it is necessary—running behind in discovery is not sufficient.

Please inform the Court when a case has settled. That enables the Court to remove the trial date and other important deadlines from the calendar, which frees up that space for other matters. The Court should be the first to know after the parties have reached an agreement!

Before you file a motion to compel, you must try to resolve the motion without Court intervention. It is in the Rules, and you must certify as to your attempts in your motion. In general, try and resolve EVERY discovery issue prior to enlisting the Court.

A stipulation of dismissal is a stipulation. It does not need a Court order, just attorney signatures, in order to close a case. Do not include a signature block for the Judge and do not expect an order.

Proposed orders are always welcome for routine motions, particularly when there is no opposition from the other side or when it stems from a joint motion.

By William H. Payne IV

LABOR PAYNE

Adversary Proceeding?

I had a law school professor who bemoaned the trend towards alternative dispute resolution as a means to avoid litigation, and proclaimed that sometimes zealous representation of your client involves "loading up your canon with all of your best ammunition and aiming it at the other side."

Though I might not put things in precisely those terms, I think the point was that advocacy is a sacred aspect of the profession and the 'alternative' to advocacy might be something stagnant.

I rediscovered advocacy in one of its purest forms recently while volunteering as a juror/judge for the local mock trial competition. I used to be a high school teacher, and having been subjected to a great many student presentations, I was curious about what a 'mock trial' might look like. Frankly, I was not expecting much. In my experience, even the most gifted students tend to turn into automatons when forced to speak in public, or worse still, their attempts at easy bonhomie are cloying.

However, I was blown away by the high quality of the student performances and not simply because of my low expectations. The students I observed dug into the rules of evidence in real time, frantically reshuffling their rhetoric to advance the positions of their imaginary clients, about whose plights they obviously cared.

Somehow, by engaging with trial practice, these teenagers were performing what educators refer to as 'synthesis,' which is the highest rung on the cognitive ladder. They took reams of memorized information, re-ordered it rapidly, and based on the outcome, articulated new and creative ideas to achieve a goal (even at the risk of embarrassing themselves!). In the classroom, even the best classrooms, this happens rarely.

This experience gave a litigator/educator pause for two reasons: one topical, one more philosophical. First, as you may have noticed, the news-media-internet-blogosphere has made a lot of noise recently about how law school is too impractical, too long, too cerebral, and too oversubscribed. This noise falls in step with the larger noise that liberal arts education in general bears the same faults and has become an outmoded means for preparing young people for today's workforce.

The antidote, they say, is to teach law students more hands-on practical application skills in a shorter amount of time so they can get straight to work to repay their loans. Likewise, undergraduates are to put aside the study of arts and culture in favor of technical, vocational training.

I dissent. I believe this approach is the death knell for the 'synthesis' aspect of learning that calls for on-the-spot invention. I think people should learn to think before they learn how to act. The students I observed at mock trial could not distinguish a motion for remittitur from a writ of certiorari, but they were still engaged in the best of what lawyers do: tying their brains in knots to get a result for another person, even when the cause is hopeless.

Learning how to perform a task or apply a technique is like memorizing a dirty joke for a family reunion. At best, your little effort will earn you five minutes of attention. Or, it could fall completely flat. This is the danger of vocational training. When I see teenagers jumping up out their seats to debate each other, it seems ridiculous to assume they should go to school to learn a finite set of skills for a job that's already moving towards obsolescence. Chances are, if they stay excited about ideas rather than just techniques, they will do a job, even our jobs, in a way we have not thought of yet.

This brings me to the more philosophical revelation of 'mock trial.' Knowledge of a subject all by itself is worthless without the momentum of dispute. Anyone who's ever had a discovery battle knows that evidence gains its admissibility from its tendency to support relevant facts, and facts become relevant to the degree that they are central to the dispute at hand. Why shouldn't this analysis apply to every bit of sought-after knowledge? Or, more simply, why shouldn't learning be directed by the purposefulness of the biggest ideas rather the ill-defined commodity of 'valuable' knowledge?

I'm not arguing that we need more motivational dogma or ideological loyalty in legal education, although both those things may be necessary precursors to rigorous thought. It just occurs to me that in our rush to put emphasis on the acquisition of education, we have accidentally equated it with the acquisition of a static thing like a plasma-screen television. In real time, it's the ability to *play* that makes you a smart lawyer, an educated person, an advocate. So, perhaps, education is an adversary proceeding where you take on as much as you can handle about the human race – culture, psychology, history, politics - and you don't learn until you fail miserably with your thesis and pick up the pieces to try again.

As an epilogue, I think mediations and arbitration can embody a great deal of tenacious advocacy and adversary zeal. However, the success of those types of legal encounters depends a lot upon whether the attorneys are prepared to understand that facts and law meet up with each other in the fast lane along with culture, psychology, history and politics, and you can't walk into it hoping to put the rubber stamp of the law on another manila folder. You have to come to play.

MESSAGE FROM THE CHAPTER PRESIDENT
By Katharine M. Gardner

Katharine Gardner with FBA President-Elect Honorable Gustavo A. Gelpi, Jr., United States District Judge for the District of Puerto Rico, at the FBA Mid-Year Meeting

A few weeks after I began my tenure as president of the Chattanooga Chapter of the FBA, the federal government, following several false starts, toppled off the fiscal cliff in anti-climactic fashion. Sequestration kicked in and 5% or $350 million of the federal judiciary's total budget of about $7 billion was cut. Recently, I was discussing the effect of sequestration on the federal courts with a friend who has a Harvard MBA and a Ph.D. in economics. I was astounded when my friend suggested the district courts could save money by considering only a certain number or type of cases per year. If my Ivy-league educated friend thought federal district courts have this discretion, then what does the general public think, I wondered. As we lawyers know, a district court is *required* under the Constitution to address every case filed if the court has subject matter jurisdiction – and case filings are going up, not down.

> ***"It is our job, as individuals and as one collective body, to educate the general public about the constitutional role played by the federal judiciary and to educate our elected representatives about its legitimate financial needs."***

While, in isolation, $7 billion seems like a lot of money, it is about *two tenths of one percent of the entire federal government's budget.* This figure is particularly mind-boggling when one considers that under the Constitution, the federal judiciary is the separate and co-equal "Third Branch" of our three-branch form of federal government. It helps to gain some perspective by thinking about what else you could do with $7 billion. Here are some ideas:

1. Buy Twitter.[1]
2. Run for President 7 times (if you're a masochist) - Romney and Obama spent one billion dollars each on the last Presidential campaign.[2]
3. Buy one nuclear submarine.[3]
4. Buy all the chocolate consumed in the world in one year.[4]
5. Buy one armor clad, Zumwalt class destroyer.[5]

I don't mean to trivialize this subject with my attempt at humor; it is serious. Many believe the consequences of underfunding the federal judiciary will be dire. For example, David F. Lewis, a former U.S. District Court Judge in California from 1990 to 2007 and the current Dean of Duke University Law School, opines that an underfunded judiciary will attract mediocre judicial talent resulting in a mediocre judiciary.[6] Real pay for judges has declined dramatically in recent years. Since 1992, the pay of most federal workers has increased by 91%, but judicial pay has increased 39% while inflation has increased by 36%.[7] Recently, Judge Julia Gibbons of the Sixth Circuit Court of Appeals testified before congressional appropriators that a 5% cut in the federal judiciary's budget would result in a loss of 2,000 employees nationwide because the judiciary, unlike some federal agencies, has no discretionary programs which it can drop. She further stated the judiciary is already at low staff levels because it has not filled vacant positions in anticipation of sequestration.

There are 16,000 lawyers in the FBA nationwide, and our membership has never been so critical to the overall health of the federal judiciary. It is our job, as individuals and as one collective body, to educate the general public about the constitutional role played by the federal judiciary and to educate our elected representatives about its legitimate financial needs. To this end, the national FBA's Governmental Relations Committee, backed by the weight of all 16,000 of us, has been meeting with our congressional representatives and senators to advocate for the necessary funding of the federal judiciary. Americans should know that the hard-working federal judiciary, which protects our personal rights, resolves our disputes peacefully when we cannot resolve them ourselves, and safe-guards the rule of law essential for a free and civilized society, is a lean, economically efficient branch of their federal government.

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[1] http://www.forbes.com/sites/thestreet/2012/04/16/pinterest-is-a-7-7-billion-company/ (April 16, 2012)
[2] http://www.washingtonpost.com/blogs/the-fix/wp/2012/12/07/both-romney-and-obama-ran-1-billion-campaigns/(December 7, 2012)
[3] http://www.bloomberg.com/news/2010-05-25/nuclear-submarine (May 25, 2010)
[4] http://www.wolc.org/tuesdayTrivia/index.html (April 4, 2013)
[5] http://www.dailymail.co.uk/sciencetech/article-2128986/The-7-billion-dollar-warship-built-maintain-American-naval-supremacy-China-21st-Century.html (April 12, 2012)
[6] http://www.sacbee.com/2013/04/03/5311802/cuts-will-make-federal-judiciary.html
[7] http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx
[8] http://www.sacbee.com/2013/04/03/5311802/cuts-will-make-federal-judiciary.html

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FBA CAPITOL HILL DAY *Washington, D.C.* *See www.fedbar.org*	**APRIL 25**
FEDERAL PRACTICE CLE/NEW ADMISSION CEREMONY	**MAY 22**
MEMBERS ONLY BROWN BAG LUNCH WITH THE JUDGE	**MEMBERS WILL RECEIVE AN EMAIL ABOUT THIS EVENT**

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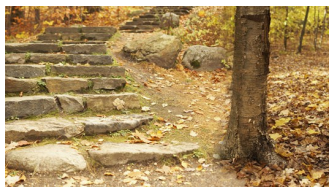
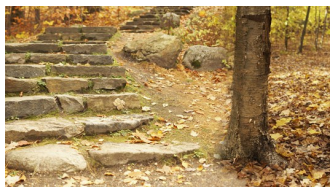
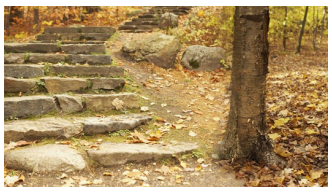
MILESTONE MEMBERS

The Chattanooga Chapter congratulates the following members who have reached milestones of continuous membership in the FBA:

5 Years:	Bryan C. Frye
10 Years:	D. Scott Bennett
15 Years:	Bradford G. Harvey, Travis R. McDonough, C. Maury Nicely
20+ Years:	Hon. H.T. Milburn, Hon. R. Allan Edgar, Hon. Harry S. Mattice, Jr., Hon. Douglas G. White, Harold A. Schwartz, Jr.

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