BANKRUPTCY BRIEFS

Newsletter of the Bankruptcy Section of the Federal Bar Association

Marc Taubenfeld, Editor *Summer 2013*

LETTER FROM THE CHAIR

Welcome to our newest edition of *Bankruptcy Briefs*, the official annual newsletter of the Bankruptcy Section. I think you'll agree with me that our editor, board member Marc Taubenfeld, and the contributing authors have all done a fine job. Please join me in offering your congratulations and positive feedback.

It has been my privilege to serve as the Chair of our Section since last October, when Bankruptcy Judge Alan Trust (E.D.N.Y.) handed over the reins. I write today to provide some updates on Section activities, to introduce our slate of recommended new Section officers for the coming year, and to thank all of you for the opportunity to serve.

First, did you know that the Bankruptcy Section is one of the oldest organizations of lawyers and judges devoted to bankruptcy? We celebrate our *30th* anniversary this year! Our organization (currently the third-largest Section within the FBA) is national in scope, and growing. Our more than 1,000 members include many of the nation's leading bankruptcy lawyers, bankruptcy judges, government lawyers, general counsel and law professors. We have members from almost every State, the District of Columbia, and Puerto Rico.

Our Section has continued its emphasis on professional education and development. We often sponsor CLE events, and team up with FBA Chapters as well as outside bar organizations. Some of these are noted on the Bankruptcy Section's website, http://fedbar.org/Sections/Bankruptcy-Law-Section.aspx. And several of our board members will present a bankruptcy seminar at this year's annual FBA meeting in September, as in years past. If you have a suggestion for a Section-sponsored CLE event, please let us know.

Our Section has also continued its focus on scholarship. In addition to this newsletter, our members provided outstanding substantive bankruptcy law articles and profiles of bankruptcy judges for the February 2013 edition of *The Federal Lawyer*, the official magazine of the Federal Bar Association, which we have posted on our Section web page. In addition, I am proud of our ongoing "Circuit Writer" project, which has been adeptly managed by Kathy Harrell-Latham. The summaries of recent decisions prepared by volunteer members are emailed to all members and posted on our web page. Writing these summaries also provides an opportunity to get involved in our Section.

Next, a short note regarding our Section's leadership. Several new members joined our Section's Executive Committee this year:

- United States Bankruptcy Judge Craig Gargotta (San Antonio, Texas)
- Assistant U.S. Trustee Lisa Lambert (Dallas, Texas)
- Justin Alberto (Wilmington, Delaware)
- Christopher Sullivan (San Francisco, California)
- Mark Desgrosseilliers (Wilmington, Delaware)
- Meena Untawale (Newark, New Jersey)

We are delighted to have them join in leading our Section, and appreciate their hard work.

Finally, the annual meeting of the Section will be held in conjunction with the FBA's Annual Meeting and Convention in San Juan, Puerto Rico. The Section meeting will begin at 6:00 p.m. on Friday, September 27, 2013 at the Caribe Hilton Hotel in San Juan. In anticipation of our annual Section meeting, the Executive Committee nominates the following members to serve as officers for the upcoming year:

Nominee	Nominated Position	Prior Position
Kathleen Harrell-Latham	Chair	Chair-elect Board member
Mark Desgrosseilliers	Chair-elect	Treasurer, Board member
Meena Untawale	Treasurer	Secretary, Board member
Lisa Lambert	Secretary	Board member

Voting will be conducted at the Section meeting. See our website for more details, and join me in wishing the best of luck to next year's officers.

In closing, I hope you enjoy this edition of *Bankruptcy Briefs*, and I thank you for the opportunity to serve. As always, we look forward to hearing from you. This is your Section, and we welcome your suggestions and involvement.

Regards,
Rob

BANKRUPTCY LAW SECTION OFFICERS

CHAIR
ROB WEBER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1 RODNEY SQ
WILMINGTON, DE 19801
(302) 651-3144
robert.weber@skadden.com

CHAIR-ELECT
KATHY HARRELL-LATHAM
LARKIN HOFFMAN ET AL
7900 XERXES AVE S
1500 WELLS FARGO PLAZA
BLOOMINGTON, MN 55431
(952) 896-1544
klatham@lhdl.com

SECRETARY
MEENA UNTAWALE
MCCARTER & ENGLISH, LLP
FOUR GATEWAY CENTER
100 MULBERRY STREET
NEWARK, NEW JERSEY 07102
(973) 849-4299
muntawale@mccarter.com

TREASURER
MARK L. DESGROSSEILLIERS
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
222 DELAWARE AVENUE, SUITE 1501
WILMINGTON, DE 19801
(302) 252-4359
mdesgrosseilliers@wcsr.com

IMMEDIATE PAST CHAIR
HON. ALAN TRUST
U.S. BANKRUPTCY COURT
290 FEDERAL PLAZA, 9TH FL
CENTRAL ISLIP, NY 11722
(631) 712-5682
alan_trust@nyeb.uscourts.gov

BOARD MEMBERS

ANGELA ABREU
FORMAN HOLT ELIADES & YOUNGMAN LLC
80 ROUTE 4 EAST, SUITE 290
PARAMUS, NJ 07652
201-845-1000 X. 347
aabreu@formanlaw.com

JUSTIN R. ALBERTO
BAYARD PA
222 DELAWARE AVE, STE 900
WILMINGTON, DE 19801
(302) 429-4226
jalberto@bayardlaw.com

JUDGE CRAIG A. GARGOTTA
HIPOLITO F. GARCIA FEDERAL BUILDING AND UNITED STATES COURTHOUSE
615 E. HOUSTON ST., RM. 505
SAN ANTONIO, TEXAS 78205
(210) 472-5181
judge_craig_gargotta@txwb.uscourts.gov

HON. HARLIN HALE
US BANKRUPTCY JUDGE
US BANKRUPTCY COURT
FEDERAL BUILDING RM 1254
1100 COMMERCE ST
DALLAS, TX 75242
(214) 753-2016
judge_harlin_hale@txnb.uscourts.gov

LISA LAMBERT
UNITED STATES TRUSTEE
1100 COMMERCE, RM 976
DALLAS, TX 75242
(214) 767-8967
Lisa.L.Lambert@usdoj.gov

TRISTAN MANTHEY
HELLER DRAPER PATRICK & HORN LLC
650 POYDRAS ST STE 2500
NEW ORLEANS, LA 70130
(504)568-1888
tmanthey@hellerdraper.com

RON MAROKO
OFFICE OF THE UNITED STATES TRUSTEE
725 S FIGUEROA ST # 2600
LOS ANGELES, CA 90017-5524
(213)894-4520
ron.maroko@usdoj.gov

STEVE A. PEIRCE
FULBRIGHT & JAWORSKI L.L.P.
300 CONVENT STREET, SUITE 2200
SAN ANTONIO, TEXAS 78205-3792
(210) 270-7179
speirce@fulbright.com

CHRISTOPHER D. SULLIVAN
GREENFIELD SULLIVAN DRAA & HARRINGTON LLP
150 CALIFORNIA STREET, STE 2200
SAN FRANCISCO, CA 94111
(415) 283-1776
csullivan@greenfieldsullivan.com

MARC TAUBENFELD
MCGUIRE CRADDOCK & STROTHER PC
2501 N HARWOOD ST, STE 1800
DALLAS, TX 75201
(214) 954-6809
mtaubenfeld@mcslaw.com

CLE PROGRAMMING AND OUTREACH COMMITTEE

CHAIR
TRISTAN MANTHEY

COMMITTEE MEMBERS
KATHY HARRELL-LATHAM

THE SUPREME COURT TO DECIDE *LAW*

OVERVIEW

The Supreme Court will consider the case of *In re Law*, where the Ninth Circuit affirmed the Bankruptcy Appellate Panel's orders imposing a surcharge against a debtor's homestead exemption. The surcharge was intended to compensate the Debtor's estate for monetary costs imposed by debtor's misconduct and preserve creditor's access to property of the estate. 435 Fed.Appx. 697, 698 (9th Cir. 2011).

FACTS

Stephen Law ("Debtor") filed for relief under Chapter 7 of the Bankruptcy Code. *Law v. Siegel*, 401 B.R. 447, 449 (Bankr. C.D. Cal. 2009). Alfred H. Siegel ("Trustee") was appointed as Chapter 7 trustee. *Id.* at 448. Debtor claimed a $75,000 homestead exemption for his primary residence in Hacienda Heights, California ("Property"), which was the sole asset of the estate. *Id.* at 449. According to the Debtor's schedules, the Property was valued at $363,348, subject to the two liens held by Washington Mutual Bank and "Lin's Mortgage & Associates." *Id.*

Trustee filed a motion to surcharge Debtor's homestead exemption, and moved to sell the Property, stating that the Debtor "engaged in fraudulent conduct, exhibited bad faith by pursuing frivolous litigation, and failed to comply with the bankruptcy court's orders." *Law v. Siegel*, 2009 WL 7751415 at *1 (9th Cir. BAP 2009). Trustee asserted that the second mortgage lien on the Property, held by creditor Lili Lin, was fictitious and an effort by the Debtor to deprive the estate of equity. *Id.* at *3. Based on Debtor's submission of the fictitious promissory note, and as a result of the large increase in attorney's fees from such action, the Bankruptcy Court assessed a surcharge against debtor's exempt assets in favor of the estate for debtor's fraudulent actions under the broad authority given to bankruptcy courts in section 105(a). *Id.* at *1. Under section 105(a), "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, *taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process*." 11 U.S.C. §105(a).

On appeal, the first surcharge motion was reversed by the Bankruptcy Appellate Panel (BAP) and the reversal was affirmed by the Ninth Circuit. *Law v. Siegel*, 308 Fed.Appx. 161, 161 (9th Cir. 2009). The Ninth Circuit held the Bankruptcy Court used the surcharge to shift the litigation expenses to the Debtor as punishment. *Id.* at 162. However, the "decision left open the possibility of a future order . . . [that included] an adequate explanation why any surcharge . . . incurred by the estate should be reimbursed from the debtor's exemptions." 401 B.R. 447 at 449.

The Bankruptcy Court, when presented with Trustee's renewed motion to surcharge debtor's homestead exemption, found the surcharge was appropriate to compensate for Debtor's misconduct – the consequences of which "fall most heavily on Debtor's creditors, including Trustee and his attorneys." 401 B.R. at 455. The Bankruptcy Court relied on the 9th Circuit's decision in *Latman v. Burdette*, which held that a surcharge may be used to "prevent fraud, caused by misconduct," but not as punishment to the debtor. 366 F.3d 774 (9th Cir. 2004). *See also Onubah v. Zamora*, 375 B.R. 549 (9th Cir. BAP 2007). Thus, because Debtor "attempted to perpetrate a fiction and fraud" through the fictitious second lien in favor of Lili Lin, the Bankruptcy Court imposed an equitable surcharge to debtor's homestead exemption. 2009 WL 7751415 at *4. The BAP affirmed the Bankruptcy Court's decision. *Id.* at 10. Of importance, however, Judge Markell noted the absence of a following of *Latman*, and the addition of federal legislation governing fraudulently asserted exemptions, but ultimately agreed *Latman* was still binding

UPCOMING EVENTS

September 12, 2013
The New United States Trustee Fee Guidelines: A Discussion With Roberta DeAngelis, United States Trustee for Region 3
3:30 p.m. - 5:30 p.m.
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street, 16th Floor, Wilmington, Delaware
Co-sponsored by the Delaware Chapter and the Bankruptcy Section

September 26-28, 2013
FBA Annual Meeting and Convention in San Juan, Puerto Rico

September 27, 2013
(A) 9:00 a.m. – 10:00 a.m.:
Bankruptcy Section presents Top Ten Bankruptcy Cases of the Past Year at the FBA Annual Meeting
Panelists:
- Hon. Craig Gargotta, U.S. Bankruptcy Judge, Western District of Texas
- Hon. Barry Russell, Chief Judge Emeritus, U.S. Bankruptcy Judge, Central District of California
- Hon. Brian K. Tester, U.S. Bankruptcy Judge, District of Puerto Rico
- Hon. Alan S. Trust, U.S. Bankruptcy Judge, Eastern District of New York

(B) 4:30 p.m. - 6:00 p.m.
at Palmeras Room, Caribe Hilton Hotel
(i) Bankruptcy Section Annual Meeting to Elect New Officers, at the FBA Annual Meeting
(ii) Reception for Local Bankruptcy Judges and Practitioners, at the FBA Annual Meeting

November 19, 2013
Dallas Chapter and the Bankruptcy Section Co-Sponsor 1/2 day Bankruptcy Seminar – Dallas, Texas

December 13, 2013
Los Angeles Chapter and the Bankruptcy Section Co-Sponsor: Tenth Annual Bankruptcy Ethics Symposium – Los Angeles, California

March 29, 2014
FBA Midyear Meeting in Arlington, Virginia

September 4-6, 2014
FBA Annual Meeting and Convention – Providence, Rhode Island

authority. *Id.*

The 9th Circuit affirmed the BAP's decision "granting the trustee's surcharge motion because the surcharge was calculated to compensate the estate for the actual monetary costs imposed by the debtor's misconduct," and comports with the protection of the bankruptcy process. *Law v. Siegel*, 453 Fed.Appx. 697 (9th Cir. 2011).

POSSIBLE IMPACT

A decision by the Supreme Court affirming the Ninth Circuit's decision in *In re Law* could expand the authority of the bankruptcy court under section 105(a). This decision will have a large impact in Bankruptcy Courts nation-wide, but may not encompass other circuit opinions, specifically where the surcharge was imposed under section 105 to "substitute for non-exempt property that [a debtor] had concealed or dissipated," and not as a form of compensation for additional costs and expenditures of the estate caused by the debtor's actions. Brief for the United States as Amicus Curiae at 17. *See also Malley v. Agin*, 693 F.3d 28 (1st Cir. 2012); *Latman*, 366 F.3d 774 (9th Cir. 2004).

Moreover, Courts are divided on the spectrum of authority granted to Bankruptcy Courts under section 105. The Supreme Court's reasoning in *Marrama v. Citizens Bank* suggests that section 105 gives overarching discretion to Bankruptcy Courts to "prevent abuse of process." 549 U.S. 365, 375 (2007). Thus, application of *Marrama*'s broad holding might result in a judgment in favor of Trustee's surcharge motion against the debtor.

The Supreme Court could look to Bankruptcy Code §4003(b)(2), which may provide a remedy to the present situation and not require reliance on the broad umbrella of section 105 of the Bankruptcy Code. See *Scrivner v. Mashburn*, 535 F.3d 1258, 1265 (10th Cir. 2008), cert. denied, 556 U.S. 1126 (2009). Bankruptcy Code §4003(b)(2) provides: "The trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption." Fed. R. Bankr. P. 4003.

Regardless of the Court's approach, because the High Court is likely to opine on the Bankruptcy Court's power and authority, *In re Law* is an important case to watch. ■

Author:
Meredith Laurey Levine
Paul M. Hebert Law Center, May 2014
Extern to the Honorable Harlin "Cooter" Hale,
U.S. Bankruptcy Judge, N.D. Texas (mlevin5@lsu.edu)

Supreme Court Grants Cert in *Bellingham Insurance* in an Attempt to Further Clarify Issues Left Unsettled by *Stern v. Marshall*

INTRODUCTION

On December 4, 2012, the Ninth Circuit issued its decision in the case of *In re Bellingham Insurance Agency, Inc.*, where it attempted to resolve several matters left unsettled by *Stern v. Marshall*. Namely, the court addressed two issues: (1) whether bankruptcy courts possess the authority to hear and enter proposed findings of fact for de novo review to a district court in "core" proceedings; and (2) whether a bankruptcy court may enter final judgments in matters normally reserved for Article III courts based on a litigant's consent and whether such consent may be implied by a litigant's conduct. The Ninth Circuit answered these questions in the affirmative, and the Supreme Court granted certiorari on June 24. Given that these issues arise often in bankruptcy litigation, the outcome of this case should be on every practitioner's radar.

BACKGROUND

Nicholas Paleveda and his wife, Marjorie Ewing owned—among other businesses—Aegis Retirement Income Services, Inc. (ARIS) and Bellingham Insurance Agency, Inc. (BIA). When BIA became insolvent and ceased operations, Paleveda used its funds to incorporate Executive Benefits Insurance Agency, Inc. (EBIA). Subsequently, roughly $373,000 of commission income was deposited into a joint account held by EBIA and ARIS.

BIA then filed for Chapter 7 Bankruptcy, and the Trustee field a complaint against EBIA and ARIS alleging that the transfer of commissions constituted a fraudulent transfer. The Bankruptcy Court for the Western District of Washington held that the transfers were fraudulent conveyances and entered a judgment in the amount of the deposits. The district court affirmed, and EBIA appealed to the Ninth Circuit where, for the first time, it raised the issue of the bankruptcy judge's authority to enter a final judgment on the fraudulent conveyance claims.

BANKRUPTCY COURT'S ABILITY TO ENTER FINAL JUDGMENTS ON FRAUDULENT TRANSFERS

The Ninth Circuit first noted the distinction between "core" and "non-core" proceedings. In a core proceeding, the court explained, bankruptcy judges traditionally had the authority to "hear and determine the controversy" and to enter a final judgment subject to appellate review, while in non-core proceedings, a bankruptcy judge only possessed the ability to "submit proposed findings of fact and conclusions of law to the district court." *In re Bellingham Ins. Agency*, 702 F.3d 553, 558 (9th Cir. 2012); 28 U.S.C. § 157(b)(1).

After *Stern*, however, the circuit court noted, this was no longer the case. Instead, the court explained that, although fraudulent conveyance claims are listed as core proceedings, a bankruptcy judge no longer has the authority enter a final judgment in such actions when the defendant is not a creditor to the estate. *Id*. On the other hand, the Sixth Circuit has determined that bankruptcy courts may enter a final order on a fraudulent conveyance claim. But in that case, the defendant filed a proof of claim to the debtor's estate. *In re Global Technovations, Inc.*, 694 F.3d 705, 722 (6th Cir. 2012).

The *Bellingham* court recognized three exceptions to the rule mandating that an Article III judge enter final judgments. The relevant exception in *Bellingham* was the "public rights" exception, which allows for a non-Article III judge to enter a final judgment when the case involves public rather than private rights.

However, the circuit court held that fraudulent conveyance claims do not fit within the public rights exception and thus could not be decided by a non-Article III judge. *Bellingham*, 702

F.3d at 561. The court followed closely the reasoning of the Supreme Court in *Granfinanciera, S.A. v. Nordberg*, which held that fraudulent conveyance claims "are quintessentially suits at common law that more nearly resemble state-law contract claims." *Bellingham*, 702 F.3d at 562 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989)).

REPORTS AND RECOMMENDATIONS TO THE DISTRICT COURT

Though the court in *Bellingham* decided that bankruptcy judges do not have the authority to enter final judgments on fraudulent conveyance claims, it recognized that its decision created a "gap" in this area of the law. That is, section 157(b)(2)(H) lists fraudulent conveyance actions as core proceedings, and under federal law, bankruptcy judges are authorized to "hear and determine all . . . core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). The Ninth Circuit reconciled these statutes with its decision that bankruptcy judges cannot enter final judgments on fraudulent conveyance proceedings by holding that bankruptcy judges have "the power to hear fraudulent conveyance cases and to submit reports and recommendations to the district courts." *Bellingham*, 702 F.3d at 565. The ability to hear those cases, the court said, authorized bankruptcy judges "to issue proposed findings of fact and conclusions of law," to the district court subject to de novo review. *Id.* at 565-66.

WAIVER AND CONSENT

Next, the court sought to decide whether a litigant could consent to a bankruptcy judge's authority to enter a final judgment in a fraudulent conveyance action. The Ninth Circuit held that a litigant could in fact waive its right to have its case decided by an Article III court, and noted that this right is "well established." *Bellingham*, 702 F.3d at 566. This viewpoint is counter to that of the Sixth Circuit where that court has concluded that, because this issue implicates the structure of the judicial system, a litigant cannot waive its objection to the bankruptcy court's ability to enter a final judgment. *See In re Waldman*, 698 F.3d 910, 918 (6th Cir. 2012). In *Waldman*, the Sixth Circuit reasoned through whether a litigant, in consenting to the bankruptcy court's jurisdiction, waives a "personal right" or a "non-waivable structural principle." *Id.* Because that court understood the right to an Article III tribunal to be a structural principle, it held that it "was not Waldman's to waive." *Id.* These divergent holdings likely led to the grant of the writ of certiorari by the Supreme Court.

Coming to a different conclusion, the Ninth Circuit cited Supreme Court precedent and 28 U.S.C. § 157(c)(2), which states that bankruptcy courts possess the authority to enter final judgments in non-core proceedings "with the consent of all the parties to the proceeding." *Id.* at 567. Because a litigant has the statutory authority to consent to a case being decided by a bankruptcy judge in a non-core proceeding, the Ninth Circuit understood the statute to permit "the same judge to decide a core proceeding," where it would otherwise bar a non-Article III court from entering a final order. *Id.*

The Ninth Circuit's analysis did not end there, however. Turning to the facts in Bellingham, the court took on the issue of whether the EBIA actually consented to the bankruptcy court's jurisdiction. The court first noted that it previously held that implied consent could be inferred from a litigant's actions when it did not object to a bankruptcy court's jurisdiction. *See In re Daniels-Head & Assoc.*, 819 F.2d 914, 919 (9th Cir. 1987). In *Bellingham*, the court pointed out that EBIA actually petitioned the district court to stay its consideration of the motion until the bankruptcy court ruled on the Trustee's motion for summary judgment. In fact, EBIA first objected to the bankruptcy court's jurisdiction after briefs were submitted for its appeal to the Ninth Circuit. This conduct, the court said, shows that EBIA "impliedly consented to the bankruptcy court's jurisdiction." *Bellingham*, 702 F.3d at 568.

CONCLUSION

The Ninth Circuit in *Bellingham* sought to clarify questions pertaining to a bankruptcy court's authority that remained in the wake of *Stern v. Marshall*. By holding that a bankruptcy judge may submit proposed findings of fact and conclusions of law to a district court in core proceedings and that bankruptcy courts may have authority to hear matters normally reserved for Article III courts on the basis of a litigant's implied consent, the court allowed bankruptcy courts to hold onto some of their traditional powers. It remains to be seen, however, whether the Supreme Court will agree with the Ninth Circuit that a litigant may consent to the bankruptcy court's determination or if it will take the side of the Sixth Circuit that Article III is a non-waivable principle. This decision will undoubtedly paint a clearer picture of a bankruptcy court's authority, which should greatly affect the practice of bankruptcy litigation across the country. ■

Author:
Ryan P. Graney
SMU Dedman School of Law – May 2014
Judicial Intern to the Honorable Harlin D. Hale
(rgraney@smu.edu).

ESTOP. HAMMER TIME. THE RISK OF NON-DISCLOSURE IN CONSUMER BANKRUPTCY CASES

In recent years, judges have been dropping the hammer (or, more accurately, the gavel) with increasing aggressiveness on former consumer bankruptcy debtors who fail to list causes of action as assets on their bankruptcy schedules. Because a potential damage award constitutes a possible source of money that could be used to satisfy creditors, the debtor must disclose all claims he or she may have against all defendants. Under the doctrine of judicial estoppel, the failure to disclose a claim to the bankruptcy court is tantamount to a declaration that the claim does not exist. Thus, a debtor that fails to disclose a cause of action in his or her bankruptcy may be barred from later bringing that claim in a subsequent lawsuit. As a result, judicial estoppel is relevant not only to consumer debtor's attorneys, but also to plaintiff's and defendant's attorneys who practice outside the bankruptcy realm.

The problem is that practitioners are often unfamiliar with the elements of judicial estoppel and how they differ from other estoppel doctrines. Moreover, practitioners often underestimate the importance of judicial estoppel to their everyday practice. In this article, the authors will examine judicial estoppel and discuss ways to avoid having the hammer dropped on your clients. The authors will also compare judicial estoppel to a related but distinct doctrine, equitable estoppel, to ensure that practitioners facing an impending battle over judicial estoppel do not lose the war by confusing it with a similarly-titled doctrine.

JUDICIAL ESTOPPEL

At its core, judicial estoppel is a "judicially-created doctrine"[1] that "prevents a party from contradicting previous declarations made during the same or an earlier proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court."[2] This doctrine may be raised by counsel or *sua sponte* where appropriate.

While there is no uniform set of judicial estoppel elements, the Supreme Court has established the following framework to help determine the doctrine's applicability:

1. A party has taken a position in a legal proceeding that is "clearly inconsistent" with a position that party has taken previously in either the same or a separate legal proceeding;
2. That party "has 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. That party "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[3]

An additional element many courts consider is whether the inconsistent statement was made advertently.[4]

The judicial estoppel doctrine becomes particularly relevant in the consumer bankruptcy context when it comes to the

disclosure requirements required under the Bankruptcy Code. As stated above, a debtor that fails to disclose a potential cause of action may be estopped from later pursuing that cause of action.[5]

The danger of being estopped by the court from bringing an undisclosed cause of action has grown particularly acute in recent years. Courts have become increasingly willing to deem a debtor's nondisclosure advertent, and therefore sufficient to trigger judicial estoppel, where the debtor has knowledge of the asset and a motivation to not disclose it. [6] Moreover, courts have stated that "the motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court. Motivation in this context is self-evident because of the potential financial benefit resulting from the nondisclosure."[7]

This imposes an important duty on the consumer bankruptcy practitioner to make sure the client is aware of his or her ongoing duty to the bankruptcy court to disclose any pending or potential causes of action and the possible consequences for failing to do so.

EQUITABLE ESTOPPEL

Although judicial estoppel and equitable estoppel are often mistakenly treated as interchangeable, the two doctrines have two different purposes and different requirements. "[U]nlike judicial estoppel, which is designed to protect the integrity of the judicial process, equitable estoppel ensures the fairness between the parties."[8]

The four typical elements of equitable estoppel are:

1. the party to be estopped must know the facts;
2. the party to be estopped must either intend that its conduct will be acted upon or act in a manner that the party asserting estoppel has a right to believe it so intended;
3. the party asserting estoppel must be ignorant of the true facts; and
4. the party asserting estoppel must rely on the conduct to its injury.[9]

Thus, equitable estoppel is intended to prevent a party that induced reliance from subsequently arguing a contrary position.

Practitioners must recognize the differences between judicial estoppel and equitable estoppel, lest he or she raise irrelevant arguments in his or her client's defense. Failing to accurately plead these doctrines could mislead the court and result in a number of unfortunate consequences.

The foregoing analysis is merely a brief introduction to an increasingly complex topic. For a full discussion of recent developments in estoppel doctrines in consumer bankruptcy cases, please see our forthcoming article, *Recent Developments in Estoppel and Preclusion Doctrines in Consumer Bankruptcy Cases, Volume I of II: Estoppel*, which will be published in the Oklahoma Law Review. ■

Authors:

Kevin M. Lewis
Law Clerk to the Honorable D. Michael Lynn United States Bankruptcy Court for the Northern District of Texas.
Harvard Law School, J.D., 2012; Illinois Wesleyan University, B.A., 2009.

Paul M. Lopez
Law Clerk to the Honorable D. Michael Lynn United States Bankruptcy Court for the Northern District of Texas.
Texas Wesleyan University School of Law, J.D., 2010; Texas State University, B.A., 2007.

Footnotes:

[9] *E.g.*, Price v. Kuchaes, 950 N.E.2d 1218, 1227 (Ind. Ct. App. 2011) (quoting Morgan County Hosp. v. Upham, 884 N.E.2d 275, 280 (Ind. Ct. App. 2008)).

[2] BLACK'S LAW DICTIONARY (9th ed. 2009).

[3] New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (citations omitted).

[4] *See, e.g.*, Love v. Tyson Foods, Inc., 677 F.3d 258, 266 (5th Cir. 2012); Galin v. United States, No. 08-CV-2508, 2008 WL 5378387, at *11 (E.D.N.Y. Dec. 23, 2008).

[5] A debtor that fails to disclose may also face other negative consequences, including (1) sanctions, (2) conversion to a chapter 7 liquidation, (3) denial of discharge, or even (4) criminal prosecution.

[6] *See, e.g.*, Love, 677 F.3d at 258; Eastman v. Union Pacific R.R. Co., 493 F.3d 1151 (10th Cir. 2007).

[7] Love, 677 F.3d at 262 (quoting Thompson v. Sanderson Farms, Inc., No. 3:04CV837-WHB-JCS, 2006 U.S. Dist. LEXIS 48409, at *12-13 (S.D. Miss. May 31, 2006) (citation omitted)).

[8] OSRecovery, Inc. v. One Groupe Int'l, 462 F.3d 87, 93 n.3 (2d Cir. 2006) (citing Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir. 1993)).

[9] *See* Honorable Christopher Klein *et al, Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 AM. BANKR. L.J. 839, 864 (2005).