

## Bankruptcy Circuit Update

Featuring cases from November 2017

### *Special Announcement*

#### *Group Section Conference Call to Discuss Significant Cases*

This month our writers Circuit Writers and Section Leaders will be convening our fourth section-wide conference call on **Friday, January 26, 2018** months of the summaries. Volunteers will be summarizing significant or interesting cases. The presenters will be open for questions and lead discussion of key points. We hope you will join us for this call. The call-in information is: **dial in 866-690-2070 – code 787-594-2077**. If any section-members, whether or not you are a Circuit Writer, would like to volunteer to discuss a significant case or recent bankruptcy development, please e-mail us at [csullivan@diamondmccarthy.com](mailto:csullivan@diamondmccarthy.com).

### Second Circuit Summaries

#### *Bais Din of Mechon L’Hoyroa v. Congregation Birchos Yosef*

**(In re Congregation Birchos Yosef)**

**699 Fed.Appx. 91 (2d Cir., November 1, 2017)**

The Second Circuit affirmed the judgment of the district court dismissing the appeal of Bais Din of Mechon L’Hoyroa (the “Bais Din”) from a bankruptcy court order enforcing automatic stay.

The bankruptcy court found that certain defendants in adversary proceedings brought by Congregation Birchos Yosef had violated the automatic stay by initiating proceedings in the Bais Din, a rabbinical court, after the automatic stay went into effect, and it held those defendants in contempt. The bankruptcy court further ordered that decrees issued by the Bais Din in furtherance of those rabbinical proceedings were void and of no force or effect. The Bais Din, which was not a party in the adversary proceeding, appealed to the district court, arguing that the order violated the Free Exercise Clause of the U.S. Constitution and the Religious Freedom Restoration Act. The district court dismissed the appeal for lack of jurisdiction, finding that the Bais Din did not have standing to appeal the bankruptcy court’s order, and the Bais Din appealed the dismissal.

The Second Circuit noted that the general rule is that only a person who is “directly and adversely affected pecuniarily” by a bankruptcy court order has standing to appeal from the ruling. Without such limitation, bankruptcy litigation would become bogged down in numerous appeals brought by the many parties who are indirectly affected by every bankruptcy court order.

Here, the Second Circuit agreed with the district court’s conclusion that the Bais Din failed to demonstrate that it suffered a pecuniary harm. In fact, the Bais Din did not even allege a pecuniary harm before the district court, claiming instead that the automatic stay inhibited the free exercise of religion by “preventing the Bais Din from issuing notices to or against”

individuals who violate Jewish law's prohibition on initiating proceedings in secular courts without prior permission from a rabbinical court. The Second Circuit noted that whatever the merits of that claim, it did not reflect a pecuniary injury, and that the more appropriate recourse was for the Bais Din to file a civil action.

***Am. Federated Title Corp. v. GFI Mgmt. Servs., Inc.***  
**2017 WL 5499156, --- Fed.Appx. ---- (2d Cir., November 16, 2017)**

The Second Circuit affirmed the judgment of the district court holding that (1) management fee payments made by the A&M Companies (as defined below) to GFI Management Services, Inc. ("GFIM") were not constructively fraudulent conveyances, and (2) the corporate veils of the A&M Companies' and GFI Acquisition, LLC ("GFIA") should not be pierced so as to permit American Federated Title Corporation ("AFTC") to recover against Allen I. Gross and Edith Gross (the "Grosses") and GFIM on the bankruptcy court judgments at issue in this case.

In 2007, AFTC negotiated a Purchase and Sale Agreement ("PSA") with GFIA, an entity owned by the Grosses, pursuant to which AFTC would sell real property in Florida to GFIA. Since 2007-08, the parties were involved in protracted litigation arising from the PSA and the bankruptcies of three other companies controlled by the Grosses (the "A&M Companies"). AFTC sued GFIM and the Grosses to recover on judgments totaling \$7.5 million entered against GFIA and the A&M Companies in the bankruptcy court. The district court rendered a mixed verdict in this case, finding for AFTC on some of its claims and against it on others. The court later denied AFTC's motion for reconsideration of that verdict, and AFTC appealed.

The Management Fee Payments:

The Second Circuit first addressed the district court's conclusion that the management fee payments to GFIM should not have been deemed constructively fraudulent conveyances. On appeal, AFTC argued: (1) that the district court should have applied an "irrebuttable presumption that the management fee payments lacked good faith," and (2) that the district court did not properly consider the good faith element of fair consideration in its analysis.

The Second Circuit found neither of these argument persuasive. The Second Circuit began its analysis by noting that sections 273 and 273-a of New York's Debtor and Creditor Law provide that, to be deemed fraudulent, payments for a conveyance must have been made "without a fair consideration," in addition to the transferor failing to meet certain requirements related to its financial health. New York law deems "fair consideration" to have been given in two circumstances: (i) when in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or (ii) when such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

The Second Circuit noted that the thrust of AFTC's "fair consideration" argument was that the Second Circuit should not adhere to its decision in *HBE Leasing Corp. v. Frank*, 48 F.3d 623 (2d Cir. 1995). In *HBE Leasing*, the Second Circuit distinguished "preferential payments of

pre-existing obligations . . . to a debtor corporation’s shareholders, officers, or directors” from transfers made in exchange for “contemporaneous advance[s] of funds.” *Id.* at 634-35. In that case, the Second Circuit observed that the latter category of payments could not be found to be fraudulent because “a present advance of commensurate value does not ordinarily prejudice other creditors” and thus does not trigger an irrebuttable presumption of an absence of good faith. *Id.* at 635.

On appeal, AFTC argued that *HBE Leasing* is no longer good law because state court appellate decisions have contradicted the good faith limitation derived from that case. In support, AFTC cited three New York appellate division cases (from two different departments), as well as a mix of district court and bankruptcy court decisions, some of which predated the Second Circuit’s decision in *HBE Leasing*. However, the Second Circuit noted that the cited appellate division cases presented factual scenarios materially different from the case at hand. Furthermore, the Second Circuit cited to many post-*HBE Leasing* decisions of several state and federal courts that echoed the distinction that the Second Circuit drew in *HBE Leasing*.

Accordingly, the Second Circuit reasoned that the management fee payments in this case compensated GFIM for work that enabled the AFTC-owned properties to retain their rental and sale values and therefore found no reason to fault the district court for following *HBE Leasing* and declining to apply an irrebuttable presumption that the payments for contemporaneous value lacked fair consideration. The Second Circuit also noted that though the district court did not initially explicitly evaluate the good faith element of fair consideration, it did so in its ruling on AFTC’s motion for reconsideration, at which time it observed that AFTC adduced no evidence that the transfers were made in bad faith.

#### Piercing the Corporate Veil:

The Second Circuit then turned to the district court’s decision not to pierce the corporate veil, thereby preventing AFTC from reaching the Grosses’ and GFIM’s assets to satisfy the bankruptcy court judgments. Under New York law, in order to pierce the corporate veil, one must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked, and (2) such domination was used to commit a fraud or wrong against the plaintiff which resulted in injury.

AFTC first argued that the district court applied an incorrect legal standard to AFTC’s veil-piercing demand, in that the court required proof of an “intentionally unjust” act. The Second Circuit, however, agreed with the district court’s emphasis on intentionality, as absent such an emphasis, a controlling party could be held liable for any corporate transaction, regardless of intent. Here, the district court’s emphasis on the evidence (or lack thereof) of any wrongful intent reflected an effort to distinguish wrongs that, while perhaps giving rise to a claim for contract damages, fell short of supporting the extraordinary remedy of piercing the corporate veil. In other words, analysis of the defendants’ intent here offered one method of assessing whether the corporate form was sufficiently abused to permit veil piercing.

AFTC also objected to the district court’s resolution of several factual questions underlying its decision against piercing. In doing so, the Second Circuit noted that AFTC was improperly attempting to recast disagreements with many of the district court’s factual findings as errors of law. The Second Circuit also held that the district court properly rejected AFTC’s

argument that veil piercing was warranted because GFIA pursued plainly meritless litigation as an undercapitalized “dummy” entity, because both the Second Circuit and the district court found that litigation was pursued for legitimate reasons. Accordingly, the Second Circuit found no error in the legal standard applied by the district court to AFTC’s veil-piercing claim or in the district court’s evaluation of the evidence that AFTC presented to support that claim.

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### **Fifth Circuit Summary**

***Law Offices of Michael R. Nevarez v. Monge,***  
**700 Fed. App’x 354 (5th Cir. 2017).**

Joe and Rosana Monge (the “Monges”) hired attorney Michael R. Nevarez to pursue various qui tam actions; however, before the case was complete, the Monges declared bankruptcy. Nevarez sued the Monges for unpaid legal bills, and the Monges countersued in bankruptcy court alleging, among other things, that Nevarez continued pursuing the qui tam actions without their knowledge or consent (the “Qui Tam Claim”), in violation of the automatic stay.

Nevarez argued the Monges’ claims were subject to arbitration under their retainer agreement and sought a stay pending arbitration. The bankruptcy court agreed, with the exception of the Monges’ Qui Tam Claim. Accordingly, the bankruptcy court entered three orders to that effect, one of which denied Nevarez’s motion to stay. Nevarez appealed all three orders to the district court (the “Interlocutory Order Appeal”) but, before it could rule, the bankruptcy court issued a final judgment on all issues between the Monges and Nevarez. Nevarez also appealed this final judgment to the district court (the “Final Judgment Appeal”).

The district court consolidated the two lawsuits, dismissed the Interlocutory Order Appeal, and rendered final judgment in that action. The court stated it intended to consider the interlocutory order issues in the Final Judgment Appeal. Nevarez, however, appealed the dismissal of the Interlocutory Order Appeal to the Fifth Circuit.

The Monges moved to dismiss the appeal pending before the Fifth Circuit, arguing the district court had not yet had the opportunity to rule on the merits of the issues. Nevarez countered that the bankruptcy court’s denial of his motion to stay, while interlocutory, was appealable under section 16 of the Federal Arbitration Act. Further, he contended dismissal of the Interlocutory Order Appeal was improper because the district court had entered final judgment after consolidating the two cases.

The Fifth Circuit explained dismissal was consistent with the statutory scheme of district court review of bankruptcy decisions except in narrow and statutorily specified circumstances, none of which existed here. Because the district court had not yet had the opportunity to consider the merits of the issues in the consolidated case, dismissal was warranted.

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*This summary is for general information purposes only and is not intended to be and should not be taken as Kirkland legal advice.*

### Ninth Circuit Summary

***In re Milby,***  
**875 F.3d 1229 (9th Cir. Nov. 21, 2017).**

This case deals with the application of the doctrine of equitable tolling, which is read into every federal statute of limitations. Charlene Milby filed for chapter 7 bankruptcy on September 22, 2011. Under 11 U.S.C. §546(a)(1), the bankruptcy estate had two years, or until September 22, 2013, to file any avoidance actions. With just a few days left before the statute of limitations was set to run, one of the debtor's largest creditors (the "Templetons") informed the bankruptcy trustee of allegedly fraudulent transfers. The trustee, believing she had insufficient information on those transfers, chose not to act. Instead she filed another complaint to avoid different transfers. Approximately one year later, the bankruptcy court approved a settlement agreement pertaining to the trustee's complaint. The Templetons then approached the trustee about challenging the transfers they had previously brought to her attention. The court subsequently approved the Templeton's appointment to pursue claims on behalf of the estate. The next day, on September 24, 2014, the Templetons filed a complaint seeking to avoid the transfers on actual and constructive fraudulent counts. The defendants moved for summary judgment, arguing that the counts were barred by the two year limitations period on avoidance actions. The Templetons conceded that the limitations period would normally have expired on September 22, 2013—nearly a year before the action was filed—but argued that equitable tolling applied given Milby's misconduct in failing to disclose the subject transfers or to cooperate with the bankruptcy trustee.

In the Ninth Circuit, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. The bankruptcy court found that the second element was satisfied but not the first and thus granted summary judgment in favor of the defendants. The court recognized that extraordinary circumstances prevented the trustee from discovering the subject transfers because the debtor had lied on her schedules, lied at the meeting of creditors and failed to cooperate with the trustee. However, the court concluded that equitable tolling did not apply because the estate had the opportunity to assert claims based on the subject transfers before the limitations period expired but did not do so. Although the bankruptcy court

found the trustee “was diligent in her administration of the estate” up to the time she discovered the subject transfers, it nevertheless declined to apply equitable tolling because no “exceptional circumstances existed *after* discovery of the Subject Transfers” to prevent timely filing. The BAP, in turn, reversed on the ground that “[a] court should not look at the trustee’s post-discovery diligence when considering whether equitable tolling should be applied.”

The Ninth Circuit affirmed the BAP’s decision and concluded that equitable tolling should be applied. However, the Ninth Circuit stated that neither the bankruptcy court nor the BAP applied the law on equitable tolling correctly. The Ninth Circuit explained that the bankruptcy court’s approach was too narrow and it erred insofar as it held that equitable tolling is inappropriate any time a litigant has the opportunity to file before a limitations period would normally expire but does not do so. On the other hand, the Ninth Circuit explained that the BAP’s approach was too broad and it erred in holding that post-discovery diligence is never relevant to whether equitable tolling applies. The Ninth Circuit held that a court must look at overall diligence, but give greater weight to diligence before discovery. Specifically, quoting *Gibbs v. Legrand*, 767 F.3d 879, 892 (9th Cir. 2014), the Ninth Circuit stated “[d]iligence *after* an extraordinary circumstance is lifted may be illuminating as to overall diligence, but is not alone determinative.” It is “one factor in a broader diligence assessment.” That said, we give diligence *before* the extraordinary circumstance ends more weight than diligence afterward. Applying *Gibbs* to the present case, the Ninth Circuit held that the estate satisfied the diligence element. The bankruptcy court found that the trustee was diligent during the time the subject transfers were concealed, and it is “diligence *during* the existence of an extraordinary circumstance [that] is the key consideration.” Less than a week remained on the statute of limitations when the estate discovered the subject transfers in September 2013, and it would have been unreasonable to require the estate to file in that time. Equitable tolling therefore applied and the estate gets the benefit of the stop-clock rule. The court explained that the stop clock rule governs the computation of time remaining on a statute of limitations when equitable tolling applies. Citing to *Socop – Gonzales v. I.N.S.*, 272 F.3d 1176 (9th Cir. 2001), the Ninth Circuit explained that under the stop-clock rule, “the event that ‘tolls’ the statute simply *stops the clock* until the occurrence of a later event that permits the statute to resume running.” The Ninth Circuit then held that the Templetons timely filed the action

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## Tenth Circuit Summary

***Elliot v. Ward, et al. (In re Sandridge Energy, Inc.),***  
**No. 16-6014, 2017 WL 5507653 (10<sup>th</sup> Cir. Nov. 17, 2017)**

The Tenth Circuit dismissed, on mootness grounds, a former shareholder’s appeal of an order approving settlement of a shareholder derivative suit, denial of a motion to approve related discovery and for attorney’s fees. After the district court’s rulings, the corporate debtor filed a

chapter 11 case and confirmed a plan which, among other things, cancelled the company's stock, released the shareholder derivative claims, with the right to pursue that litigation vested solely in the reorganized debtor. In conjunction with confirmation, the reorganized debtor moved to dismiss the former shareholder's appeal of the district court's rulings on mootness grounds. Specifically, the reorganized debtor argued that given the cancellation of stock, neither the former shareholder nor anyone else had standing to prosecute shareholder derivative litigation that had vested in the reorganized debtor, those derivative litigation claims had been released, and the only entity that could pursue such claims was the reorganized debtor. The former shareholder acknowledged that he could no longer continue prosecuting his shareholder derivative litigation claims given the continuous-owner requirement, but that requirement did not apply to his objection to the settlement of those claims and, in all events, that requirement did not apply to his claim for attorneys' fees for actions in related state court litigation he claimed improved the settlement. The Tenth Circuit held that, with the exception for the claim for attorney's fees, the former shareholders' claims had been rendered moot by confirmation of the debtor's chapter 11 plan, accepting the arguments advanced by the reorganized debtor. The Tenth Circuit explained that the appeal was moot as to all non-attorneys' fees claims because, if the former shareholder were to succeed in having approval of the settlement quashed, the district court would have to dismiss the derivative suit because none of the shareholder-plaintiffs, whose stock had been cancelled, had standing to prosecute it meaning that the relief requested, a settlement more favorable to the corporate debtor. Was impossible to grant. This also mooted out the former shareholder's request for additional discovery and objection to approval of the settlement agreement. However, the former shareholder's claims for attorneys' fees was not rendered moot because it was a backwards-looking claim that did not require continuous shareholder status.

***Slovak Republic v. Loveridge (In re Eurogas, Inc.),***  
**No. UT-16-033, 2017 WL 5591459 (BAP 10<sup>th</sup> Cir. Nov. 21, 2017)**

The Tenth Circuit dismissed an appeal by the Slovak Republic of an order approving a settlement for lack of appellate standing. The Slovak Republic became a creditor of the estate by purchasing two claims. The Slovak Republic objected to the chapter 7 trustee's settlement, which contemplated payment of cash, a waiver of the largest unsecured claim and an interest in mining rights purportedly revoked by the Slovak Republic, in part that the settlement was effectively a section sale instead a settlement compromise not made in good faith. The bankruptcy court overruled the objection, concluding that the settlement agreement would increase creditors' dividend by 15-20% and the Slovak Republic objected because rejection would benefit them in a related international arbitration proceeding regarding the mining rights issue. The bankruptcy court declined to review the settlement agreement under Section 363 because that analysis would not benefit the estate's creditors. Applying the traditional 9019 factors the bankruptcy court approved the settlement agreement. On appeal, the BAP granted a motion to dismiss the appeal for lack of standing, finding that the Slovak Republic was not an "aggrieved person" because, as an unsecured creditor, it stood to gain a larger distribution from the estate if the settlement agreement was approved. The Slovak Republic's argument that, if its offer to the trustee were accepted, the same increased distribution would result, but the BAP found that contention was contingent on the bankruptcy court sustaining an objection to the claim that was being withdrawn, which might or might not occur. The BAP also found that the Slovak Republic offered no explanation how approval of the settlement agreement diminished its property, increased its burdens or impaired its rights, and its objection was merely to better its position in

the related arbitration. Alternatively, the BAP found that the bankruptcy court did not abuse its discretion in approving the settlement agreement.

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## 11th Circuit

*ABI's discussion of the panel decision from October 2017*

***Slater v. U.S. Steel Corp.,***

**12-15548, 871 F.3d 1174 (11th Cir. Sept. 18, 2017)**

At the urging of one of the judges on the original panel, the Eleventh Circuit sat en banc and reversed two of its prior decisions by holding that a court must consider all the facts and circumstances before invoking the doctrine of judicial estoppel. To prevent a defendant from reaping an “unjustified windfall,” the intentional failure to list a claim belonging to a bankrupt no longer results in the automatic application of judicial estoppel.

Even after the Sept. 18 opinion by Circuit Judge Jill Pryor, the Eleventh Circuit still has not gone as far as the Fifth Circuit when the New Orleans-based court sat en banc and functionally held in *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011), that a defendant in a lawsuit cannot assert judicial estoppel to inflict harm on a bankruptcy trustee and innocent creditors based on a debtor’s shortcomings.

The Facts: A woman initiated an employment discrimination suit two years before filing a chapter 7 petition. The employer learned about the bankruptcy and filed a motion to dismiss based on judicial estoppel, because the debtor had not scheduled the lawsuit among her assets. The debtor modified her schedules to list the claim, and the chapter 7 trustee retained the debtor’s litigation counsel as special counsel to pursue the suit on behalf of the estate. The debtor then converted her case to chapter 13 and confirmed a plan, but the chapter 13 case was dismissed when the debtor failed to make plan payments.

Invoking judicial estoppel, the district court dismissed the discrimination suit. Recognizing that it was bound by Eleventh Circuit precedent, the appeals court’s three-judge panel upheld dismissal in February 2016 in an unsigned, 32-page per curiam opinion.

One of the three judges on the panel, Circuit Judge Gerald B. Tjoflat, wrote a special concurrence that reads like a dissent. He urged the appeals court to rehear the case en banc and overrule two Eleventh Circuit precedents that he believed were “wrongly decided.” Anyone confronted with an issue involving judicial estoppel should study Judge Tjoflat’s 78-page concurrence from last year, because it reads like a treatise discussing everything there is to know on the subject.

The appeals court granted rehearing en banc, heard argument in February and reversed its own precedents in Judge Pryor's 33-page opinion.

### **'Mockery' No Longer Automatic.**

Judge Pryor began by reaffirming the circuit's general rule that judicial estoppel applies when a litigant takes inconsistent positions and intends "to make a mockery of the judicial system." Her opinion focused on the mockery element because the debtor unquestionably took inconsistent positions by originally omitting the suit from her schedules.

Under the circuit's Barger and Burnes decisions from 2003 and 2002, respectively, Judge Pryor said that the mockery element was conclusively established by a debtor's nondisclosure, "even if the plaintiff corrected his bankruptcy disclosures after the omission was called to his attention and the bankruptcy court allowed the correction without penalty."

Judge Pryor devoted her opinion to explaining why the court was reversing Barger and Burnes and holding that the court instead "should consider all the facts and circumstances," including the "plaintiff's level of sophistication, his explanation for the omission, whether he subsequently corrected the disclosure, and any action taken by the bankruptcy court concerning the nondisclosure." She said that "voluntariness alone does not necessarily establish a calculated attempt to undermine the judicial process."

In refusing to impose judicial estoppel reflexively, Judge Pryor seemed largely motivated to avoid giving "an unjustified windfall" to "an otherwise liable civil defendant," in the process harming "innocent creditors." She recognized that pro se debtors may not understand how the requirement for disclosing contingent and unliquidated claims also means claims that the debtor holds, not just claims against the debtor.

Judge Pryor explained why courts should not automatically apply judicial estoppel even in chapter 13 cases. Because the debtor must satisfy the best interests test to confirm a plan, creditors in chapter 13 would be harmed just like in chapter 7 if a claim by the debtor is treated as worthless.

### **Is a Cert Petition Next?**

Judge Pryor said there is a split of circuits even after abandoning Burnes and Barger. Like her court now holds, the Sixth, Seventh and Ninth Circuits previously ruled that the "mockery" element requires showing more than an intention not to disclose.

The Fifth and Tenth Circuits, she said, take the opposite view by endorsing "the inference that a plaintiff who omitted a claim necessarily intended to manipulate the judicial system." Judge Pryor may have overstated the circuit split.

The en banc opinion in Reed, written for the Fifth Circuit by Circuit Judge Carolyn King, laid down a "general rule that, absent unusual circumstances, an innocent trustee can pursue for the benefit of creditors a judgment or cause of action that the debtor fails to disclose." She also said that judicial estoppel must be applied "flexibly" to achieve "substantial justice," a principle

that Judge Tjoflat advocated in his concurrence in the Eleventh Circuit's original decision last year.

In substance, the applicability of judicial estoppel is now virtually irrelevant in the Fifth Circuit when a trustee is prosecuting a previously undisclosed claim for the benefit of creditors. The Fifth Circuit also endorsed the idea of precluding a culpable debtor from benefitting from successful prosecution by directing any recovery exclusively toward creditors.

Therefore, the Fifth Circuit's pre-Reed automatic invocation of judicial estoppel may no longer be good law in that circuit. Even if it is, the principle has little relevance after Reed, which permits recoveries on undisclosed claims to benefit innocent creditors.

Consequently, the Tenth Circuit may be the only circuit functionally at odds with four other circuits. As such, there may not be a fully developed, entrenched split warranting a grant of certiorari. For lack of a final order, a certiorari petition also would be premature at this juncture because the circuit remanded for more than ministerial duties.

### **The Amicus in the Eleventh**

Supporting the debtor, J. Erik Heath of San Francisco submitted an amicus brief in the Eleventh Circuit on behalf of the National Association of Consumer Bankruptcy Attorneys. In addition to explaining how Eleventh Circuit precedent had gone beyond the purpose of judicial estoppel, he recommended adopting the approach in Reed by granting a trustee standing to pursue a claim not available to a debtor in view of judicial estoppel.

Unfortunately, Judge Pryor did not cite Reed or consider how that case might inform the relief available on remand. Although the Eleventh Circuit "may not have explicitly gone the route of Reed," Heath told ABI in an email that he believes it's "part of the result." He also praised the appeals court for overruling Barger and thereby allowing "trustees to escape judicial estoppel."

Remand to the Panel

### **When a circuit court reverses, it ordinarily remands to the trial court. But *not* here.**

Judge Pryor remanded the case to the original three-judge panel "to consider whether the district court abused its discretion in applying judicial estoppel and to resolve any other remaining issues." [Emphasis added.]

The mandate to consider other issues should allow the three judges to opine on a result like Reed, where creditors can benefit but the debtor cannot.

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