2016 WL 690859
United States Bankruptcy
Appellate Panel of the First Circuit.

MJS Las Croabas Properties, Inc., a/
k/a Ocean Club at Seven Seas, Debtor.
Castellanos Group Law Firm, L.L.C., Appellant,
v.
Federal Deposit Insurance Corporation, as Receiver
for Westernbank Puerto Rico, and Wilfredo
Segarra Miranda, Chapter 7 Trustee, Appellees.

BAP NO. PR 15–036
|
Bankruptcy Case No. 12–05710–ESL
|
February 17, 2016

Synopsis

Background: After motion for relief from stay was precipitously withdrawn by homeowners' association hours before scheduled hearing thereon, Chapter 7 trustee and the Federal Deposit Insurance Corporation (FDIC) filed motion for award of sanctions. United States Bankruptcy Court for the District of Puerto Rico, Enrique S. Lamoutte, J., 530 B.R. 25, granted motion in part and denied it in part, and appeal was taken.

Holdings: The Bankruptcy Appellate Panel, Cary, J., held that:

[1] bankruptcy court could rely on "unreasonable and vexatious multiplication" theory to award sanctions, not only against firm attorney, but against law firm itself;

[2] bankruptcy court did not abuse its discretion in awarding sanctions on "unreasonable and vexatious multiplication" theory against attorney and attorney's firm based on attorney's conduct in steadfastly refusing to communicate with opposing counsel and filing last-minute, improperly-noticed request to withdraw motion; and

[3] bankruptcy court did not abuse its discretion in quantifying, at $2,667.50 and $11,603.10, the attorney fees awarded to trustee and opposing party, respectively, for attorney's unreasonable and vexatious multiplication of proceedings.

Affirmed.

Appeal from the United States Bankruptcy Court for the District of Puerto Rico, (Hon. Enrique S. Lamoutte, U.S. Bankruptcy Judge)

Attorneys and Law Firms

Alfredo A. Castellanos Bayouth, Esq., on brief for Appellant.

Jeffrey A. Sandell, Esq., Manuel Fernández–Bared, Esq., and Brian M. Dick–Biascoechea, Esq., on brief for Appellee, Federal Deposit Insurance Corporation, as Receiver for Westernbank Puerto Rico. [1]

Before Feeney, Deasy, and Cary, United States Bankruptcy Appellate Panel Judges.

Opinion

Cary, U.S. Bankruptcy Appellate Panel Judge.

***1** Castellanos Group Law Firm, L.L.C. (the "Castellanos Firm") appeals from the following bankruptcy court orders: (1) the March 13, 2015 order imposing sanctions against the firm (the "March 2015 Order"); [2] and (2) the May 27, 2015 order quantifying the amount of the sanctions (the "May 2015 Order") (collectively, "the Orders"). For the reasons discussed below, we **AFFIRM** the Orders.

BACKGROUND

MJS Las Croabas Properties, Inc. (the "Debtor") [3] filed a voluntary chapter 11 petition on July 19, 2012. Thereafter, Quiñones–Rodriguez filed duplicate notices of appearance in the main case and an adversary proceeding on behalf of a creditor, indicating she was a lawyer "from the law firm of Castellanos & Gierbolini." [4] On September 12, 2013, the bankruptcy court converted the case to chapter 7; several days later, the Trustee was appointed.

On August 14, 2014, Quiñones–Rodriguez filed a motion for relief from stay pursuant to § 362 [5] (the "Relief Motion") on behalf of a different creditor, the Homeowners Association of the Development (the "HOA"), [6] seeking authorization "to present a complaint before the Department of Consumer Affairs against the [D]ebtor for [ ] construction defects" relating to the Development. Her signature on the Relief Motion indicated that Quiñones–Rodriguez was a lawyer with the Castellanos Firm. On August 15, 2014, the bankruptcy court issued a summons, scheduling the Relief Motion for a hearing at 9:00 A.M. on September 9, 2014 (the "September 2014 Hearing").

***2** Thereafter, on August 19, 20, and 21, 2014, Manuel Fernández–Bared ("Fernández–Bared"), a lawyer from the firm of Toro, Colón, Mullet, Rivera & Sifre, P.S.C. ("Toro Colón") serving as local counsel for the FDIC, telephoned Quiñones–Rodriguez to resolve the FDIC's concerns regarding the Relief Motion prior to the September 2014 Hearing. [7] In each instance, the person who answered the phone informed Fernández–Bared that Quiñones–Rodriguez was unavailable; each time, Fernández–Bared left a message, asking Quiñones–Rodriguez to return his call. His phone calls went unreturned and unacknowledged. In addition, the Trustee and Trigild telephoned Quiñones–Rodriguez several times, without success.

Unable to reach Quiñones–Rodriguez by email or telephone, the FDIC filed a motion for extension of time on August 27, 2014, seeking seven additional days to communicate with the HOA and/or to respond to the Relief Motion. On August 28, 2014, Trigild also filed a motion for extension of time, similarly requesting a seven-day extension in order to make a final effort to speak with the HOA's counsel or, if necessary, to file a response to the Relief Motion. The following day, the Trustee likewise filed a motion, seeking nine additional days to file an opposition to the Relief Motion. In the absence of any objection or response from the HOA, the bankruptcy court granted the three motions, directing the FDIC and Trigild to respond to the Relief Motion by September 4, 2014, and the Trustee to respond by September 8, 2014.

On August 29, 2014, the FDIC, through another of its local attorneys, Brian M. Dick–Biascoechea ("Dick–Biascoechea"), attempted to communicate with Quiñones–Rodriguez via telephone, in yet another effort to discuss the Relief Motion prior to the September 2014 Hearing. Quiñones–Rodriguez was "unavailable" to take the call. Dick–Biascoechea immediately followed up the call with an email to Quiñones–Rodriquez, stating:

> My name is Brian Dick[–]Biascoechea, I represent the FDIC as receiver for Westernbank in the bankruptcy case of MJS Las Croabas, developer of [the Development]. I would like to speak with you as soon as possible concerning your client's request for relief from stay. I called your office today but was not able to reach you. Brother counsel Manuel Fernández[-]Bared has also tried contacting you on several occasions since you filed the motion for stay relief, to no avail.
>
> Undeniably, all parties, as well as the Court, will benefit from a discussion of your client's objectives and your understanding of the law in this matter. It is in all our interests to dissipate any disagreements regarding your request before the FDIC, Trigild and the Trustee contest your motion next week. Per our motion for extension of time filed on August 27, 2014, the Court is already aware that we are trying to contact you for these purposes.
>
> Let us know what time you can speak, or, simply give me a call using the contact information below.

Dick–Biascoechea did not receive any form of response to his email.

Subsequently, on September 3, 2014, Trigild's attorney emailed Quiñones–Rodriguez, stating:

> ***3** We are writing on behalf of Trigild, Inc. We have tried to reach you at your office several times, however we have not received any response. Trigild has some concerns with the HOA's Motion for Relief from Automatic Stay that we would like to discuss without having to object to the HOA's motion. Trigild has until tomorrow to file its opposition to HOA's motion, therefore we hope to receive a response from you before then.

That email produced no response.

Unable to resolve its concerns regarding the Relief Motion by telephone, the FDIC filed a twelve-page opposition to the Relief Motion (the "FDIC's Opposition") by the September 4, 2014 deadline, five days before the September 2014 Hearing. [8] It argued:

> Over the past three weeks, the FDIC–R has repeatedly called and e-mailed the HOA's counsel in a genuine,

> honest, and good faith effort to resolve various defects inflicting [sic] the HOA's Motion for Relief. The HOA's counsel, however, has refused to respond to a single message or otherwise speak with undersigned counsel. Accordingly, in order to protect its interests, which arise, in part, from its timely-filed proofs of claim totaling more than $54 million, the FDIC–R has no choice but to file this objection and point out that the Motion for Relief is improper, fatally flawed for numerous independent reasons, and must be denied.

(footnote omitted). Trigild immediately joined the FDIC's Opposition, stating, in relevant part:

> Trigild has tried to contact HOA's counsel several times, has left several messages, additionally we sent an email to HOA's counsel informing her that we wanted to discuss some of Trigild's concerns. However we haven't received any response.

Several days passed, and the HOA's counsel continued to ignore the communications from the FDIC, the Trustee, and Trigild. However, on September 8, 2014, at 4:51 P.M., while Sandell was traveling by plane from Dallas, Texas to San Juan, Puerto Rico to attend the September 2014 Hearing, Quiñones–Rodriguez unexpectedly filed a terse motion to withdraw the Relief Motion and "vacate" [sic] the hearing (the "Withdrawal Motion"), offering no explanation for this change of course.

Accordingly, at 6:52 A.M. on the morning of the September 2014 Hearing, the FDIC filed a response to the Withdrawal Motion (the "FDIC's Response to the Withdrawal Motion"), wherein it: (1) requested the entry of an order pursuant to the bankruptcy court's inherent authority, directing both the HOA and the [Castellanos Firm] to pay the FDIC's expenses and costs incurred in connection with the filing of the FDIC's Opposition and travelling to the hearing (the "FDIC's Sanctions Request"); (2) urged the court to proceed with the hearing; and (3) requested five additional days to prepare a bill of costs, itemizing the expenses and costs it incurred as a result of "the misconduct of [the] HOA and [the Castellanos Firm]." The FDIC maintained that Sandell "had no choice but to prepare and file [an] extensive response ... and fly from Dallas, Texas to San Juan, Puerto Rico" to attend the September 2014 Hearing because the [Castellanos Firm] "categorically refused to respond to any communications concerning the [Relief Motion]."

At the hearing which ensued shortly thereafter, the HOA, the Trustee, and the FDIC appeared by counsel.[9] At the outset of the hearing, the court acknowledged the withdrawal of the Relief Motion, observed that there would have been grounds to deny the motion, and ruled that the FDIC's request to proceed with the hearing was moot. Then, in support of the FDIC's Sanctions Request, Sandell argued that the HOA refused to respond to "dozens of voice messages" and "several e-mails" from Trigild and the FDIC. On behalf of the HOA, Quiñones–Rodriguez countered: "[W]e are in the process of moving our offices, so our communications are interrupted right now. All the files are packed, ... we have an answering service, but we don't have an office per se, so that might account for our lack of communication."

***4** The court explicitly granted both the Castellanos Firm and Quiñones–Rodriguez additional time to respond to the FDIC's Sanctions Request and indicated it was inclined to view the allegations of the FDIC and Trigild favorably:

> So when you answer the motion by the FDIC and if there are any allegations to be made by counsel or by the persons involved in this matter, that they be under sworn statements under penalty of perjury, in opposition to the motion.
>
> Depending on what the response is, I may or may not schedule a hearing and I will determine if the matter should be decided on the pleadings. But definitely, prima facie, after I read the—I can advance to you that after I read the oppositions both by the FDIC and Trigild, as a matter of law, I thought that they proceeded.
>
> Second, if that—if failure to answer calls prompted the respondents to incur expenses, they should be compensated.
>
> I am advancing that that's how I see it, but I will not make any final determination until I hear your written response, because as a matter of due process, I think you should be given time to respond to the allegations which, in my opinion, are serious allegations.

On September 19, 2014, the Trustee filed a motion, "joining" the FDIC's Response to the Withdrawal Motion (the

"Trustee's Sanctions Request") and representing that he had attempted to contact Quiñones–Rodriguez on at least three occasions, to no avail. The Trustee further asserted that the conduct of both the HOA and its counsel demonstrated "bad faith" and "unnecessarily increased administrative expenses of the estate." Maintaining that Rule 11, [10] § 1927, [11] and the court's inherent power permitted the court "to correct and to discipline conduct by counsel and parties," the Trustee sought: (1) the imposition of sanctions against the HOA and its counsel, jointly and severally; (2) a determination that the withdrawal of the Relief Motion was "with prejudice"; and (3) a five-day period (from the entry of the order) to submit evidence in support of his fee application.

On October 2, 2014, absent objection, the bankruptcy court entered two orders–one granting the FDIC's Sanctions Request, and the other granting the Trustee's Sanctions Request (collectively, the "October 2014 Sanctions Orders"). The same day, the HOA immediately filed an emergency motion to vacate the October 2014 Sanctions Orders, on the grounds that they were entered prematurely. [12] Later on October 2, 2014, the HOA filed an amended motion to vacate (the "Amended Motion to Vacate"), [13] reiterating the allegations of the original motion, and adding several attachments, including its Motion in Opposition to Request for Sanctions (the "HOA's Opposition to Sanctions") and unsworn statements of Quiñones–Rodriguez, Alfredo Castellanos Bayouth ("Castellanos"), and Elga Albino Acosta ("Albino Acosta"). The Amended Motion to Vacate was filed on behalf of the HOA by Quiñones–Rodriguez, whose signature line indicated that she was a lawyer with the "Castellanos & Gierbolini Law Firm."

***5** In the HOA's Opposition to Sanctions, it argued: (1) law firms are not responsible for the signatures of their attorneys; (2) the imposition of sanctions under § 1927 requires a finding of bad faith and vexatious conduct; (3) counsel for the FDIC could have appeared telephonically to avoid travel costs; (4) neither the FDIC nor the Trustee "exhausted" their remedies by sending a letter to opposing counsel, "explaining what they consider[ed] frivolous"; and (5) "defending or prosecuting a lawsuit" was a "valid exercise of its First Amendment rights." Accordingly, the HOA asked the court to vacate the October 2014 Sanctions Orders.

In her unsworn statement, Quiñones–Rodriguez indicated, inter alia, that: (1) she was an "independent contractor" and counsel for the HOA; (2) she had rendered professional legal services on behalf of "Alfred Castellanos, [d/b/a] Castellanos & Castellanos Law Firm, Castellanos & Gierbolini Law Firm and ... now Castellanos Group Law Firm, L.L.C.," for nearly four years; (3) the Relief Motion was filed "after careful consideration ... and after multiple communications with the HOA"; (4) beyond the request for a certain expert's report, she knew of only one other communication from the moving parties relating to the Relief Motion; (5) she was unaware that the FDIC's attorney was traveling from Dallas for the September 2014 Hearing when she filed the Withdrawal Motion; (6) the HOA instructed her to file the Withdrawal Motion; and (7) she was surprised to learn that the September 2014 Hearing was going forward.

In his unsworn statement, Castellanos represented: (1) he was the "owner and founding member" of the Castellanos Firm; (2) he was not the attorney of record for the HOA; (3) he "never received any communication from any of the attorneys that represent the FDIC or the Trustee regarding this case"; (4) it was not his "practice to be unavailable to communicate with opposing counsel"; (5) sanctions, if any, should be imposed upon the FDIC and the Trustee for making "heinous accusations"; (6) the court should warn the FDIC against submitting "future filings ... intended to deprive parties and litigants of their First Amendment rights"; and (7) the court should strike the FDIC's Response to the Withdrawal Motion from the docket.

Albino Acosta asserted in her unsworn statement that: (1) she had been the administrative assistant for "Alfredo Castellanos, [d/b/a] Castellanos & Castellanos Law Firm, Castellanos & Gierbolini Law Firm and ... now Castellanos Group Law Firm, L.L.C." for nearly four years; (2) she was responsible for answering "most if not all" of the firm's incoming phone calls and "channeling ... all written notifications"; (3) as of October 2, 2014, she had not received any phone call, email, letter, or fax from any of the attorneys for the FDIC or from the office of the Trustee; and (4) the allegations contained in the FDIC's Response to the Withdrawal Motion and the Trustee's Sanctions Request were untrue. [14]

The HOA simultaneously filed a Motion Requesting Leave to File Documents, explaining that it filed the HOA's Opposition to Sanctions as an exhibit to the Amended Motion to Vacate because the "CM/ECF system did not allow [it] to file the opposition separately." Accordingly, the HOA requested leave to "file the Opposition to Motion for Sanctions separately with the accompanying exhibits."

***6** On October 7, 2014, the court granted the HOA's request to file an opposition to the pending sanctions requests, but instructed it to comply with P.R. LBR 9013–1(c). [15] Accordingly, on October 8, 2014, Quiñones–Rodriguez re-filed the HOA's Opposition to Sanctions as a separate document, this time indicating that she was from the "Castellanos Group Law Firm."

On October 10, 2014, Quiñones–Rodriguez filed on behalf of the HOA a motion for clarification relating to the October 7, 2014 order, again indicating her affiliation with the "Castellanos Group Law Firm." She argued:

> It is the HOA's understanding by what is stated in the Generic Order issued on October 7, 2014 that our Amended Motion to Vacate Order was implicitly granted by allowing the filing of the opposition to motion for sanctions.
>
> [ ] However, and out of an abundance of caution, HOA respectfully requests from this Honorable Court to clarify the Order issued under ECF No. 507 [(Order Granting Leave to File Documents)] or in the alternative, to issue a separate Order regarding our petition to Vacate Orders issued under ECF Nos. 500 and 501.

On October 16, 2014, the bankruptcy court entered an order vacating the October 2014 Sanctions Orders (the "Order Vacating Sanctions"), ruling as follows:

> Contrary to HOA's assertion, permitting it to file an opposition does not in the least equate to vacating an order. Therefore, the *Motion to [C]larify* (Docket No. 512) on that premise is hereby denied. Notwithstanding, because the October 2, 2014 orders (Docket Nos. 500 and 501) were entered prematurely, the court hereby grants the *[Amended]Motion to Vacate* (Docket No. 503). Therefore, the orders entered on October 2, 2014 are hereby vacated and set aside.
>
> Furthermore because the *Opposition to Request for Sanctions* (Docket No. 508) does not contain the objection language required in [P.R.] LBR 9013–1(c) as cautioned by the court, the FDIC and the Trustee are hereby granted 21 days to file replies to HOA's opposition to the requests for sanctions.

On October 28, 2014, the Trustee responded to the HOA's Opposition to Sanctions, arguing that: (1) the Relief Motion failed to set forth sufficient grounds to determine whether cause existed to lift or modify the automatic stay; (2) the HOA's counsel "neglected to adequately explain how she complied with the requirements of [Bankruptcy Rule] 9011" before filing the Relief Motion; (3) the HOA's claim against the Debtor, if any, was time-barred; and (4) the HOA's counsel "failed to provide any evidence that she made a *pre-filing* reasonable inquiry to determine whether [the] HOA had a colorable claim and that 'cause' existed to lift the stay." Additionally, the Trustee challenged the statement of Albino Acosta, highlighting that she was responsible for answering "*most*, if not all," of the Castellanos Firm's calls. Moreover, the Trustee attempted to discredit Albino Acosta's statement that she had not received any phone calls from the office of the Trustee:

> That denial serves no purpose since, as stated in open court at the September 9th hearing, the various calls to Atty. Anabelle Rodriguez were made from the office of the undersigned as counsel for Trustee, not from the office of the Trustee himself.

***7** Accordingly, the Trustee requested that: (1) the withdrawal of the Relief Motion be deemed to be with prejudice; (2) costs and attorneys' fees be imposed upon the HOA and its counsel, jointly and severally; and (3) the court grant a five-day period for the submission of evidence regarding his fees.

On October 30, 2014, Quiñones–Rodriguez filed a motion for reconsideration (the "Reconsideration Motion") of the Order Vacating Sanctions on behalf of the HOA, challenging as excessive the 21–day period which the court afforded to the FDIC and the Trustee for responding to the HOA's Opposition to Sanctions. Accordingly, she asked the court to strike as untimely any response to the HOA's Opposition to Sanctions which might be filed by the Trustee or the FDIC. The FDIC filed an objection to the Reconsideration Motion.

Thereafter, on November 6, 2014, the FDIC filed a response to the HOA's Opposition to Sanctions (the "FDIC's Reply to HOA's Opposition"), chronicling all of the unanswered calls and emails which the FDIC had directed to Quiñones–Rodriguez, as well as to Castellanos. This time, the FDIC specified that the doctrine of inherent powers, Bankruptcy Rule 9011, and/or § 1927, authorized the imposition of sanctions against both the HOA and its counsel.

The FDIC addressed each of the alleged sources of the court's sanctioning power in turn. As grounds for the imposition of sanctions under the court's inherent authority, the FDIC reiterated that: (1) the Relief Motion lacked support; (2) the HOA failed to respond to the FDIC's efforts to reach an out-of-court resolution of the Relief Motion; (3) the HOA failed to notify the FDIC that it planned to file the Withdrawal Motion; and (4) the HOA's counsel behaved in a manner inconsistent with the responsibilities of an officer of the court.

The FDIC next presented its argument under Bankruptcy Rule 9011, stating that the "standard for deciding whether sanctionable conduct has occurred [under the Rule] is objective: did the attorney make a reasonable inquiry into the facts and law before signing and presenting the offending document?" Answering this question in the negative, it maintained:

> A quick look at the docket would have revealed to the HOA that the FDIC–R has a lien over all of the debtor's assets, covering their entire value. Even if the HOA had established "cause" to lift the stay ..., the HOA would have accomplished nothing. All of the proceeds from the property would satisfy secured creditors first. The [Relief Motion] was not only meritless, but pointless.

The FDIC further contended that under Rule 11(c), law firms may be jointly responsible for violations committed by its partners, associates, and employees, absent "exceptional circumstances."

The FDIC then asserted that the HOA violated § 1927 by "filing ... a motion that had no legal justification whatsoever, and then steadfastly refus[ing] to discuss a resolution of the motion with anyone." Additionally, the FDIC rejected the HOA's First Amendment argument, asserting that the Constitution does not authorize the HOA "to do as it pleases without regard to the cost to other parties."

Without a further hearing, the bankruptcy court entered the March 2015 Order, which it memorialized in a 23–page memorandum. *See In re MJS Croabas Props., Inc.,* 530 B.R. 25 (Bankr.D.P.R.2015). As a preliminary matter, the court denied the Reconsideration Motion, explaining that "due process" supported the 21–day response time it afforded the FDIC and the Trustee. *Id.* at 35. The court went on to examine the challenged conduct through the lens of each alleged source of its sanction authority, beginning with a Bankruptcy Rule 9011 analysis. *Id.* at 36. It ruled:

> ***8** Ms. Anabelle Quiñones[-]Rodr[i]guez's failure to respond to the emails sent to her by the FDIC and Trigild caused "unnecessary delay" and "needless increase in the cost of litigation" in contravention of Fed. R. Bankr. P. 9011(b)(1). The court further finds that her assertion that "there was no apparent need to call counsel from [sic] the parties to communicate to them [her] filing" hours away from the September 9, 2014 hearing, in spite of the emails sent by the FDIC and Trigild to that effect constitutes lack of "reasonable professionalism" and courtesy. *In re Terrón Hernández,* 513 B.R. [172,] 179 [(Bankr.D.P.R.2014)], quoting *In re D.C. Sullivan Co.,* 843 F.2d 596, 598–599 (1st Cir.1988). Such actions, in the totality of circumstances, were unduly "costly, burdensome [to the FDIC and to Trigild] and unnecessary." *Zagano v. For[d]ham University,* 720 F.Supp. [266,] 268 [(S.D.N.Y.1989)]. In addition, her unapologetic attitude at the September 9, 2014 hearing and her subsequent motions and briefs shows intransigence, which is inconsistent with the requirements that pleadings not be presented "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" and that claims be "warranted by existing law." Fed. R. Bankr. P. 9011.

Id. at 39 (footnote omitted).

Noting that Congress amended Bankruptcy Rule 9011 in 1997 to make law firms jointly responsible for violations committed by the firm's partners, associates, and employees, the court sanctioned the Castellanos Firm and Quiñones–Rodriguez, jointly and severally [16] The court reasoned that the Castellanos Firm failed to allege or demonstrate any extraordinary circumstances which would insulate it from liability under Bankruptcy Rule 9011(c)(1)(A).

The court then proceeded with its § 1927 analysis, noting that the statute's purpose is "to deter unnecessary delays in litigation." *Id.* at 40 (citations omitted). It also observed that behavior is deemed "vexatious" and, therefore, sanctionable under that statute, "when it is harassing or annoying, regardless of whether it is intended to be so." *Id.* at 41 (citation omitted) (internal quotations omitted). This standard, the court further explained, "necessarily demands that the conduct sanctioned be more severe than mere negligence, inadvertence, or incompetence." *Id.* (citations omitted) (internal quotations omitted). Accordingly, citing

ABA Model Rule of Professional Conduct 3.2, applicable through P.R. L. Civ. R. 83E(a) and P.R. LBR 1001–1(b), the court noted that attorneys are required "to take all efforts to expedite litigation," *id.* at 41 n. 12:

> Not responding to emails from opposing counsel[ ] that expressly requested an opportunity to resolve a controversy scheduled for a hearing and then, without a courtesy call to them, deliberately withdrawing the motion that creates the controversy only hours away from the hearing, is an unacceptable "disregard for the orderly process of justice", especially from an officer of the court. The court finds that the September 9, 2014 hearing, along with its inherent costs and attorneys' fees, could have easily been avoided had Ms. Quiñones[-]Rodr [i]guez answered the emails and/or phone calls to opposing counsel[ ], who attempted in good faith to avoid the hearing. Therefore, the court finds Ms. Quiñones[-]Rodr[i]guez's conduct sanctionable under 28 U.S.C. § 1927.

Id. at 41 (footnotes omitted) (internal citation omitted). In addition, it sided with those courts which "have held that [§] 1927 sanctions may be ordered as to the 'firm as a whole' for the conduct of individual lawyers, especially when the court also sanctions under its inherent powers." *Id.* at 42 (citations omitted) (internal quotations omitted).

The court then examined the propriety of sanctions under the doctrine of inherent power, noting the Supreme Court's guidance that the "inherent power to sanction is broad," *id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)), and "reaches any abuse of the judicial process." *Id.* (citing *Chambers*, 501 U.S. at 44, 111 S.Ct. 2123). "Hence, [a] court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* (citation omitted) (internal quotations omitted). Pursuant to this standard, the court found that Quiñones–Rodriguez's "actions and omissions ... constitute[d] dilatory litigation, all of which is sanctionable under th[e] court's inherent power." *Id.*

***9** In view of the foregoing, the court ruled that Quiñones–Rodriguez and the Castellanos Firm were liable, "jointly and severally under Fed. R. Bankr.P. 9011, 28 U.S.C. § 1927, and the court's inherent power, to pay the excess costs, expenses and fees in favor of the FDIC and the Trustee, which is the 'mildest' form of sanctions." *Id.* at 43 (citation omitted). After carefully articulating the standards for determining the amount of sanctions, the court directed the FDIC and the Trustee to submit itemized descriptions of their fees, excess costs and expenses, within twenty days. *Id.* The court granted both Quiñones–Rodriguez and the Castellanos Firm 14 days thereafter to file a response. [17] *Id.*

In compliance with the court's directive, on March 27, 2015, the Trustee filed a motion, requesting sanctions in the amount of $2,667.50, which represented 9.70 hours of work billed at the rate of $275.00 per hour. In support of the request, the Trustee submitted copies of time records, specifying the date, the amount of time expended, and nature of the work performed.

On the same date, the FDIC also filed a motion, seeking court approval of its request for $11,603.10 in fees and costs ($5,804.10 for work performed by Toro Colón and $5,799.00 for work performed and costs incurred by Sandell), all of which it claimed were incurred in connection with the Relief Motion. This sum represented a voluntary reduction of the total of $17,407.20 in fees which the FDIC actually incurred. According to the FDIC, in order "to facilitate the Court's determination of reasonableness," it discounted Toro Colón's fees by 50%. In further support of its request, the FDIC submitted as Exhibit A, Sandell's Declaration, in which he affirmed the accuracy of the FDIC's fees and expenses; as Exhibit B, redacted invoices of Toro Colón; and as Exhibit C, the curriculum vitae for the Toro Colón attorneys.

On April 16, 2015, after obtaining a seven-day extension of time, the Castellanos Firm filed its Motion in Compliance with Order and in Oppos[ ]ition to Docket Entry 542–543 (the "Motion in Compliance"), finally confronting the threat of impending sanctions against the firm. Opposing the imposition of sanctions, the Castellanos Firm argued: (1) law firms are not responsible for the signature of their attorneys; (2) § 1927 does not authorize the imposition of sanctions against law firms; (3) individuals who telephone a law firm regarding a pending legal dispute "should be required to call the managing partner of the law firm or the head of the litigation division"; (4) there was no evidence that the Relief Motion was filed to harass or for any other improper purpose, or that its allegations were "utterly implausible"; (5) there was no reason to believe that the September 2014 hearing would require opposing counsel to fly from Texas; (6) Rule 11 sanctions are to be granted "sparingly"; (7) the FDIC and the Trustee failed to comply with Bankruptcy Rule 9011(c)(1)(A)'s procedural requirements; (8) the conduct complained of did not justify § 1927 sanctions; and (9) the Eighth Amendment limits "the steps a government may take against an individual, whether it be ... imposing monetary sanctions or using cruel and unusual punishments." Based on the foregoing, the Castellanos Firm asked the court to impose a nominal $1.00 sanction and to make a finding regarding the "specific conduct that affected the proceedings," or, alternatively, to vacate the March 2015 Order as clearly erroneous. The Motion in Compliance was devoid of any specific challenge to the bill of costs submitted by either the FDIC or the Trustee.

***10** On April 17, 2015, the court entered an order, granting the FDIC and the Trustee 14 days to respond to the Motion in Compliance. Thereafter, the FDIC filed a motion seeking an order deeming the respective bills of costs submitted by the FDIC and the Trustee unopposed. In support, the FDIC argued the only issue before the court was "simply the amount of the sanction, not whether a sanction should be imposed"; therefore, the FDIC asserted, the bills of costs should be approved and the Motion in Compliance should be stricken as non-responsive.

In addition, the FDIC filed a response to the Motion in Compliance ("Objection to the Castellanos Firm's Motion in Compliance"), in which it repeated numerous of its earlier arguments, and added: (1) Bankruptcy Rule 9011's "safe harbor" provisions were inapplicable, as the sanctioned behavior in this case was not the sort that could be "withdrawn" as contemplated by Bankruptcy Rule 9011; and (2) even if the court concluded that the FDIC had failed to comply with Bankruptcy Rule 9011's safe harbor provisions, § 1927 and the court's inherent powers amply supported a decision to sanction Quiñones–Rodriguez and the Castellanos Firm. The Trustee filed a motion, in which he indicated that he was joining the FDIC's Objection to the Castellanos Firm's Motion in Compliance; like the FDIC, the Trustee complained that the Motion in Compliance merely amounted to a late request for reconsideration rather than an objection to his itemized fee request.

In its May 22, 2015 consolidated reply to both the Trustee and the FDIC ("the Consolidated Reply"), the Castellanos Firm argued that: (1) they had failed to comply with Bankruptcy Rule 9011's mandatory procedural requirements; (2) the court erred by imposing sanctions on the firm without a finding that the firm had acted in bad faith; and (3) Bankruptcy Rule 9011 sanctions were inappropriate because the HOA had already voluntarily moved to dismiss the Relief Motion.

Thereafter, the court entered the May 2015 Order, whereby it rejected the arguments presented in the Castellanos Firm's Motion in Compliance and the Consolidated Reply, and quantified the costs and attorneys' fees imposed against Quiñones–Rodriguez and the firm:

> The court agrees with the Chapter 7 Trustee and the FDIC. The Castellanos Law Firm's *Motion in Compliance* (Docket No. 558) and *Consolidated Reply to Docket Entries 580 and 581* (Docket No. 585) restate the same arguments that the HOA brought in its *Opposition to the Sanctions* (Docket No. 508), which the court has already considered, analyzed and adjudicated in the *Opinion and Order*. The motions filed by the Castellanos Law Firm do not respond and/or contest the amounts claimed by the FDIC and the Chapter 7 Trustee and/or their reasonableness. *See* the *Opinion and Order* (Docket No. 534, p. 23, lines 8–11).
>
> The *Opinion and Order* entered on March 13, 2015 (Docket No. 534) adjudicated the merits of the request for sanctions. The only matter pending was to determine the amount of the sanctions. *Id.* The Castellanos Law Firm has not challenged the requests made by the FDIC and the Chapter 7 Trustee. The court has independently reviewed the fees, costs and expenses being claimed and finds the same to be reasonable. Therefore, upon the *Opinion and Order*, Ms. Anabelle Quiñones–Rodr[i]guez and the Castellanos Law Firm are jointly and severally sanctioned in the uncontested amounts of $2,667.50 in favor of the Debtor's bankruptcy estate through the Chapter 7 Trustee, as disclosed in the *Motion in Compliance* (Docket No. 542), and $11,603.10 as disclosed in the *Itemized Description of Fees, Costs and Expenses in Compliance with Court Order* (Docket No. 543), to be disbursed as follows: $5,804.10 in favor of Toro, Colón, Mullet, Rivera & Sifre, P.S.C. and $5,799.00 in favor of the FDIC's in-house counsel, Mr. Jeffrey A. Sandell. Ms. Anabelle Quiñones–Rodr[i]guez and the Castellanos Law Firm are jointly and severally ordered to remit the aforementioned payments within the next 30 days. The Chapter 7 Trustee and the FDIC are hereby ordered to inform the court of such compliance.

***11** *In re MJS Las Croabas Props., Inc.*, No. 12–05710–ESL, slip op. at 3–4 (Bankr.D.P.R. May 27, 2015).

The Castellanos Firm timely appealed the Orders. In its brief, it frames the issues on appeal as whether the bankruptcy court abused its discretion by: (1) imposing Bankruptcy Rule 9011 sanctions against the Castellanos Firm and "bypassing" that rule's procedural requirements; (2) imposing statutory and/or inherent power sanctions against the firm without a finding of bad faith; (3) imposing sanctions on the firm for the actions of Quiñones–Rodriguez, an "independent contractor"; (4) treating the requests for sanctions as "unchallenged"; and (5) imposing an "excessive fine" against the firm in violation of the Eighth Amendment and the First Amendment. On appeal, the Castellanos Firm attempts to distance itself from the challenged misconduct by arguing that the bankruptcy court sanctioned "a third party [l]aw [f]irm," not the Castellanos & Gierbolini Law Firm, and also by asserting that both Quiñones–Rodriguez and Albino Acosta were independent contractors, whose actions could not be attributed to the Castellanos Firm. The firm further argues that § 1927 does not authorize the imposition of sanctions against law firms.

The FDIC and the Trustee counter with arguments which remain unchanged from their assertions in the proceedings below. Additionally, relying largely on Quiñones–Rodriguez's own statement submitted in the proceedings below, the FDIC and the Trustee reject the notion that Quiñones–Rodriguez was unrelated to the Castellanos Firm.

By motion dated June 26, 2015, the Castellanos Firm sought a stay pending appeal from the bankruptcy court. The bankruptcy court denied the motion, concluding that the Castellanos Firm had failed to establish a likelihood of success on the merits of the appeal. The court rejected the Castellanos Firm's argument that it had been denied the opportunity to answer the charge that the firm had violated Bankruptcy Rule 9011. The court also remained unpersuaded that Quiñones–Rodriguez was simply an independent contractor, unaffiliated with the Castellanos Firm.[18]

***12** The Castellanos Firm has not requested a stay pending appeal from the Panel. *See* Fed. R. Bankr. P. 8007(b). Nonetheless, neither Quiñones–Rodriguez nor the Castellanos Firm has complied with the May 2015 Order.

JURISDICTION

[1] [2] [3] A bankruptcy appellate panel is " 'duty-bound' " to determine its jurisdiction before proceeding to the merits, even if not raised by the litigants. *Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.),* 226 B.R. 724, 725 (1st BAP Cir.1998) (quoting *Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.),* 218 B.R. 643, 645 (1st BAP Cir.1998)). A panel may hear appeals from final judgments, orders, and decrees. 28 U.S.C. § 158(a) and (b); *see also In re Bank of New Eng. Corp.,* 218 B.R. at 645 (citation omitted). "A bankruptcy court's order imposing sanctions ... is a final, appealable order where, as here, it resolves all of the issues pertaining to a discrete claim." *In re Hermosilla,* BAP No. MB 11–045, 2011 WL 6034487, at *2 (1st BAP Cir. Nov. 14, 2011) (citations omitted); *see also Schwartz–Tallard v. America's Servicing Co. (In re Schwartz–Tallard),* 473 B.R. 340, 346 (9th BAP Cir.2012) (citation omitted), *aff'd*, 803 F.3d 1095 (9th Cir.2015); *Lafayette v. Collins (In re Withrow),* 405 B.R. 505, 511 (1st BAP Cir.2009) (citations omitted); *White v. Burdick (In re CK Liquidation Corp.),* 321 B.R. 355, 361 (1st BAP Cir.2005) (stating an "order imposing [Bankruptcy] Rule 9011 sanctions is final when the matter out of which it arose becomes final") (citation omitted). Here, the Relief Motion has been withdrawn and the amount of sanctions has been quantified. Accordingly, we have jurisdiction.

STANDARD OF REVIEW

[4] [5] [6] Appellate courts apply the clearly erroneous standard to findings of fact and de novo review to conclusions of law. *In re Hermosilla,* 2011 WL 6034487, at *3 (citing *Lessard v. Wilton–Lyndeborough Coop. Sch. Dist.,* 592 F.3d 267, 269 (1st Cir.2010)). "A bankruptcy court's imposition of a sanction typically embodies a judgment call, and, thus, review is for abuse of discretion." *Charbono v. Sumski (In re Charbono),* 790 F.3d 80, 85 (1st Cir.2015) (citations omitted). "[A]ppellate panels traditionally give district courts considerable leeway in the exercise of the latter's admitted authority to punish ... litigants." *Young v. Gordon,* 330 F.3d 76, 81 (1st Cir.2003) (citation omitted) (affirming district court's order of dismissal for noncompliance with discovery order). "This standard is not appellant-friendly, and a sanctioned litigant bears a weighty burden in attempting to show that an abuse occurred." *Jensen v. Phillips Screw Co.,* 546 F.3d 59, 64 (1st Cir.2008) (citation omitted) (internal quotations omitted). "To shoulder that burden, the sanctioned litigant must establish that the sanctioning court ignored a material factor deserving significant weight, or that its decision rested upon an improper factor, or that it considered all the appropriate factors but made a serious mistake in weighing them." *Id.* (citation omitted) (internal quotations omitted).

DISCUSSION

I. ***The March 2015 Order***

A. The Bankruptcy Court's Power to Sanction, Generally

***13** "The 'American Rule' is that each party bears its own attorney fees and litigation expenses." *New Eng. Surfaces v. E.I. DuPont de Nemours & Co.,* 558 F.Supp.2d 116, 122 (D.Me.2008) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)). "Narrow exceptions to the American Rule exist under the Federal Rules of Civil Procedure, some statutes, and the court's inherent power." *Id.* Pursuant to these exceptions, a court may assess attorneys' fees as a sanction. *See Chambers,* 501 U.S. at 45, 111 S.Ct. 2123. "Sanctions stem, in part, from a need to regulate conduct during litigation." *Goya Foods, Inc. v. Wallack Mgmt. Co.,* 344 F.3d 16, 20 (1st Cir.2003) (citing *Chambers,* 501 U.S. at 53, 111 S.Ct. 2123). "Thus, a sanction may properly have a punitive aspect," *id.* (citation omitted), in addition to its "compensatory effect." *Chambers,* 501 U.S. at 53, 111 S.Ct. 2123 (citation omitted) (internal quotations omitted).

[7] **[8]** **[9]** "The bankruptcy court has the power to sanction ... pursuant to (1) Fed. R. Bankr. P. 9011; (2) its inherent power; and (3) 28 U.S.C. § 1927...." *Sunshine Three Real Estate Corp. v. Housman (In re Sunshine Three Real Estate Corp.),* Adv. No. 09–01330, 2010 WL 1541428, at *2 (Bankr.D.Mass. Apr. 15, 2010) (footnote omitted). The Supreme Court has warned, however, that a court must "exercise caution" when invoking its inherent power and "ordinarily should rely on the Rules...." *Chambers,* 501 U.S. at 50, 111 S.Ct. 2123. It added that if "neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." *Id.*

Here, the bankruptcy court ruled that all three of the above sources of authority supported an award of sanctions. However, one court of appeals has observed that "the analysis in *Chambers* 'leads to the conclusion that if statutory or rules-based sanctions are entirely adequate, they should be invoked, rather than the inherent power.' " *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 278 F.3d 175, 189 (3d Cir.2002) (quoting Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse,* 428 (3d ed.1999)). Because "the preferred method of sanctioning is by rule or statute," we begin with an analysis under § 1927. *Theokary v. Abbatiello (In re Theokary),* 468 B.R. 729, 745 (Bankr.E.D.Pa.2012) (citing *Chambers,* 501 U.S. at 50, 111 S.Ct. 2123; *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 278 F.3d at 189; *Martin v. Brown,* 63 F.3d 1252, 1265 (3d Cir.1995)); *see also In re Charbono,* 790 F.3d at 88 ("The admonition that 'courts [are] to be cautious in using their inherent power to sanction' remains true.") (citing *United States v. Romero–López* 661 F.3d 106, 108 (1st Cir.2011) (citing *Chambers,* 501 U.S. at 44, 111 S.Ct. 2123).

B. Imposition of Sanctions Pursuant to § 1927

1. Section 1927's Requirements

"Unlike Rule 11 and Bankruptcy Rule 9011, which are lengthy and impose specific procedural requirements with which a party seeking sanctions must comply, § 1927 is short and clear...." *In re Schaefer Salt Recovery, Inc.,* 542 F.3d 90, 101 (3d Cir.2008) (citing 28 U.S.C. § 1927). It provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. "Although courts are divided as to whether bankruptcy courts have jurisdiction to award sanctions under 28 U.S.C. § 1927, the United States Court of Appeals for the Third Circuit and courts in this district have ruled that the bankruptcy court has such authority." *In re Sunshine Three Real Estate Corp.,* 2010 WL 1541428, at *3 (citing *In re Schaefer Salt Recovery, Inc.,* 542 F.3d at 105 (concluding the bankruptcy court has authority to sanction under § 1927); *Stone v. Casiello (In re Casiello),* 333 B.R. 571, 575 (Bankr.D.Mass.2005) (same); *In re Lincoln North Assocs., Ltd. P'ship,* 163 B.R. 403 (Bankr.D.Mass.1993) (same)); *see also In re Royal Manor Mgmt., Inc.,* 525 B.R. 338, 365 (6th BAP Cir.2015) (same) (citation omitted).

***14** **[10]** **[11]** **[12]** The "plain language of [§ 1927] restricts its operation to acts that 'multipl[y]' the proceedings." *Jensen,* 546 F.3d at 65 (quoting 28 U.S.C. § 1927). In the First Circuit's view, Congress' use of the verb "multipl[y]" in the text of the statute "clearly contemplates that, to be sanctionable thereunder, conduct must have an effect on an already initiated proceeding." *Id.* Litigation conduct qualifies as "vexatious" within the meaning of § 1927 if it is " 'harassing or annoying, regardless of whether it is intended to be so.' " *Lamboy–Ortiz v. Ortiz–Vélez* 630 F.3d 228, 245 (1st Cir.2010) (citation omitted). The First Circuit has also explained that § 1927 "does not apply to '[g]arden-variety carelessness or even incompetence,' but instead requires that the 'attorney's actions ... evince a studied disregard of the need for an orderly judicial process, or add up to a reckless breach of the lawyer's obligations as an officer of the court.' " *Id.* at 245–46 (citation omitted).

[13] **[14]** **[15]** "The purpose of sanctions under § 1927 is to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *In re Royal Manor Mgmt., Inc.,* 525 B.R. at 365 (citations omitted) (internal quotations omitted). "Unlike Rule 11 sanctions which focus on particular papers, the inquiry under § 1927 is on a course of conduct." *Bowler v. U.S. Immigration and Naturalization Serv.,* 901 F.Supp. 597, 605 (S.D.N.Y.1995) (citation omitted). As the Sixth Circuit aptly explained, "[t]here must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *Rathbun v. Warren City Schs. (In re Ruben),* 825 F.2d 977, 984 (6th Cir.1987).

[16] **[17]** Although some courts of appeals have construed § 1927's language, "unreasonably and vexatiously," to require a finding of subjective bad faith as a predicate to the imposition of sanctions, the First Circuit has not. *Cruz v. Savage,* 896 F.2d 626, 631–32 (1st Cir.1990) (stating "we do not require a finding of subjective bad faith" to justify § 1927 sanctions) (citations omitted). In assessing whether an attorney acted unreasonably and vexatiously, the First Circuit instructs courts to apply an objective standard. *Id.* at 632. "[C]ommon sense suggests that [the trial judge] must be accorded wide latitude in drawing inferences as to when multiplication of the proceedings crosses the line between what is acceptable if tedious and what is unreasonable and vexatious." *Jensen,* 546 F.3d at 67. "Distinguishing between what is a vigorous but reasonable attempt to salvage a case that is going badly and a stubbornly capricious attempt to gain advantage by prolonging matters is not easy." *Id.* "The unique position occupied by a trial judge gives her an intimate familiarity with the ebb and flow of the cases on her docket." *Id.* "Appellate courts recognize, therefore, that they must defer in large measure to a trial judge's first-line authority for case-management decisions." *Id.* (citation omitted) (internal quotations omitted).

2. Whether the § 1927 Standard Applies to Law Firms

[18] Section 1927 applies to "[a]ny attorney or other person admitted to conduct cases in any court of the United States...." 28 U.S.C. § 1927. The statute does not expressly provide for vicarious liability. Ira Leesfield and Mark Sylvester, 2 *Litigating Tort Cases* § 20–19 (2014). Therefore, we are confronted at the outset with a threshold legal issue, namely, whether a federal court may impose liability on law firms, as a whole, as well as individual attorneys within the firm, pursuant to § 1927. The Castellanos Firm argues § 1927 does not authorize the imposition of sanctions against a law firm.

***15** There is a split among the circuits on this issue. The Second, Eleventh, Eighth, Third, and District of Columbia Circuits have imposed § 1927 sanctions on law firms. *See, e.g., Enmon v. Prospect Capital Corp.,* 675 F.3d 138, 147 (2d Cir.2012) (finding "no reason" to refrain from holding a law firm liable under § 1927 and stating "we would upset a relatively long-standing practice among district courts in our Circuit if we were to hold that law firms may not be sanctioned under § 1927 for the acts of certain attorneys") (citations omitted); *Smith v. Grand Bank & Trust of Fla.,* 193 Fed.Appx. 833, 838 (11th Cir.2006) ("[T]his court has implicitly determined that § 1927 applies to law firms."); *Lee v. First Lenders Ins. Servs., Inc.,* 236 F.3d 443 (8th Cir.2001) (affirming district court's sanction against a law firm under § 1927); *LaPrade v. Kidder Peabody & Co.,* 146 F.3d 899, 907 (D.C.Cir.1998) ("[W]e hold that the district court had jurisdiction to impose sanctions [under § 1927] upon [the law firm] and that in so doing it did not abuse its discretion...."); *Baker Indus., Inc. v. Cerberus Ltd.,* 764 F.2d 204, 212 (3d Cir.1985) ("[W]e conclude that the district court properly imposed attorneys' fees and costs against [the] Cravath [firm] under [ ] § 1927."). A number of district courts have likewise relied on § 1927 to sanction law firms. *See, e.g., Gurman v. Metro Hous. & Redevelopment Auth.,* 884 F.Supp.2d 895, 912 (D.Minn.2012) (imposing sanctions against law firm pursuant to § 1927); *Sangui Biotech Int'l, Inc. v. Kappes,* 179 F.Supp.2d 1240, 1246 (D.Colo.2002) (same); *Brignoli v. Balch Hardy & Scheinman, Inc.,* 735 F.Supp. 100, 102 (S.D.N.Y.1990) (same).

As one district court reasoned:

> The latter term, "personally," in particular might be thought to militate against the use of 28 U.S.C. § 1927 to sanction a law firm. However, once it is considered that the sanction provision is targeted exclusively at attorney conduct, as opposed to the actions of an irresponsible client, ... the use of the term takes on a rather distinctive meaning of ensuring that it is the attorney personally (and not the party) who is taxed the costs of satisfying the award the court has imposed to cover the additional costs attributable to the vexatious lawyering conduct
>
> ....
>
> Moreover, the statutory provision's reference to any attorney "or other person admitted to conduct cases" discloses an intended focus of the legislation on the regulating of those entities who "conduct cases," a statutory class or category into which law firms naturally fall. It is not surprising then that although no decision has been unearthed specifically addressing the matter of law firm sanctionability under § 1927, courts implicitly have upheld the practice where appropriate. *See Apex Oil v. Belcher Co. of New York, Inc.,* 855 F.2d 1009, 1020 (2d Cir.1988) (affirming district court's award of § 1927 sanctions against large law firm); *Calloway v. Marvel Entertainment Group,* 854 F.2d 1452 (2d Cir.1988) (reversing, on grounds unrelated to sanctioned entity's status as law partnership, an award of sanctions under § 1927), *rev'd on other grounds sub nom. Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989).
>
> The language of § 1927 ... does not therefore disfavor requiring a law firm that is "conducting cases" in a court in a manner that multiplies the proceedings unreasonably and vexatiously to "satisfy personally" the fees and costs reasonably incurred "because of such conduct." 28 U.S.C. § 1927.

Brignoli, 735 F.Supp. at 101–02.

On the other hand, the Ninth, Seventh, and Sixth Circuits have declined to sanction law firms pursuant to § 1927 for the conduct of the firms' attorneys. *See, e.g., Kaass Law v. Wells Fargo Bank, N.A.,* 799 F.3d 1290, 1295 (9th Cir.2015) (stating if "Congress had intended to permit federal courts to impose sanctions against law firms pursuant to [ ] § 1927, it would have included an express authorization to do so in the statute"); *FM Indus., Inc. v. Citicorp Credit Servs., Inc.,* 614 F.3d 335, 340 (7th Cir.2010) ("Liability under § 1927 is direct, not vicarious.") (citation omitted); *Rentz v. Dynasty Apparel Indus., Inc.,* 556 F.3d 389, 396 n. 6 (6th Cir.2009) (stating § 1927 does not authorize the imposition of sanctions on a law firm) (citation omitted); *Claiborne v. Wisdom,* 414 F.3d 715, 723 (7th Cir.2005) (declining to impose § 1927 liability on a law firm, reasoning that "[i]ndividual lawyers, not firms, are admitted to practice").

***16** Although the First Circuit has not explicitly authorized the imposition of § 1927 sanctions against a law firm, it did so implicitly in *Jensen, supra.* There, the First Circuit reviewed a district court's imposition of sanctions against a law firm under § 1927 without ever stating or intimating that law firms were beyond the statute's reach, and remanded the matter for reasons unrelated to this issue. *See Jensen,* 546 F.3d at 68. In addition to the First Circuit's tacit approval of a court's ability to impose § 1927 against a law firm, we find the reasoning of *Brignoli, supra,* and cases similarly decided, persuasive. We, therefore, conclude that the bankruptcy court did not err when it ruled that § 1927 permits sanctions against law firms.

C. Section 1927 and the March 2015 Order

[19] With respect to § 1927, the bankruptcy court specifically found "Quiñones[-]Rodriguez's actions display[ed] a disregard for the orderly process of justice, not negligence, inadvertence or incompetence." Although the bankruptcy court did not make a specific finding regarding the "multiplication of proceedings," the record firmly establishes that the sanctioned conduct, especially Quiñones–Rodriguez's refusal to respond to numerous telephone calls and emails over the course of several weeks, and her eleventh-hour filing of the Withdrawal Motion without warning, all contributed to the need for the filing of opposition papers and to conduct the September 2014 Hearing, which could have been obviated.

[20] **[21]** This is not to suggest that counsel for a litigant who changes strategy is invariably at risk. Indeed, the First Circuit has acknowledged that "a party can turn on a dime [and] change his mind ... without any fault attaching to his counsel." *Jensen,* 546 F.3d at 66. Moreover, the appropriate inquiry under § 1927 is "on a *course* of conduct." *Bowler,* 901 F.Supp. at 605 (emphasis added). Additionally, § 1927 "is concerned only with limiting the abuse of court processes." *Roadway Exp., Inc. v. Piper,* 447 U.S. 752, 762, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). As the Eleventh Circuit stated, "there must be some causal connection between the conduct and the continuation of proceedings that otherwise would not have occurred." *Smith,* 193 Fed.Appx. at 838 (citation omitted).

In the proceedings below, the bankruptcy court found that it was Quiñones–Rodriguez's cumulative behavior that was sanctionable. *See In re MJS Las Croabas Props., Inc.,* 530 B.R. at 41. Indeed, the record reflects that her steadfast, unjustified refusal over a period of several weeks to respond to repeated written and telephonic communications, all imploring an out-of-court resolution, followed by her last-minute Withdrawal Motion, necessitated an otherwise avoidable hearing and appearances by the Trustee's and HOA's counsel. This course of conduct evinced a "cavalier disregard for both the [c]ourt and h[er] colleagues' time," thus warranting the imposition of sanctions. *Hawkins v. Major Electric & Supply, Inc. (In re Hawkins),* 163 B.R. 422, 423 (Bankr.D.R.I.1994) (sanctioning counsel for similar behavior, albeit, without citing § 1927). The behavior which the bankruptcy court found offensive is precisely the type of behavior targeted by § 1927. *See Lamboy–Ortiz,* 630 F.3d at 245–46 (stating § 1927 applies to actions which "evince a studied disregard of the need for an orderly judicial process, or add up to a reckless breach of the lawyer's obligations as an officer of the court").

[22] In reaching this conclusion, we are mindful that the First Circuit affords the trial judge "wide latitude" in distinguishing between vigorous representation and stubbornly capricious conduct, given his/her familiarity with his/her own docket. *Jensen,* 546 F.3d at 67. Moreover, the pattern of conduct at issue in the instant appeal is clearly distinguishable in character and severity from a single, obstinate, or careless failure to respond to a telephone call or letter. As striking as Quiñones–Rodriguez's refusal to communicate and her precipitous filing of the Withdrawal Motion is the Castellanos Firm's failure to justify the offending conduct when repeatedly warned of the threat of impending sanctions against the firm. The Castellanos Firm remained silent when confronted with the FDIC's Response to the Withdrawal Motion, the Trustee's Sanctions Request, the October 2014 Sanctions Orders, and the FDIC's Reply to HOA's Opposition. Even the court's admonition from the bench at the September 2014 Hearing that it was inclined to grant the pending requests for sanctions, which included a request for sanctions against the Castellanos Firm, did not elicit a response from the firm. Quiñones–Rodriguez's intransigence was equaled only by the Castellanos Firm's indifference. Indeed, the filing of its first notice of appeal (which we dismissed as interlocutory) marked the Castellanos Firm's belated involvement in this fray.

***17** Furthermore, the Castellanos Firm's argument that it had no way of knowing that Sandell was traveling from Texas for the September 2014 Hearing does not excuse the refusal to confer, telephonically or otherwise, regarding the Relief Motion. Quiñones–Rodriguez's only proffered excuse for her silence, namely, that the firm was in the process of moving, similarly fails to justify the lack of communication over an approximate three-week period. Like the bankruptcy court, we also are unpersuaded by the Castellanos Firm's argument that Quiñones–Rodriguez was an independent contractor whose actions could not be attributed to the firm. This claim is belied by her signature on the papers she filed in the proceedings below, which consistently reflected that she was affiliated with the firm. Moreover, the Castellanos Firm failed to provide any support for the characterization of its relationship with Quiñones–Rodriguez as that of an independent contractor and also failed to request an evidentiary hearing on this issue.[19] On this record, we have no difficulty in concluding that the challenged conduct unreasonably and vexatiously multiplied the proceedings. Based on the foregoing, we hold that the bankruptcy court acted well within its discretion when it imposed sanctions on the Castellanos Firm pursuant to § 1927.

As we need affirm the March 2015 Order on only a single ground, our scrutiny of the March 2015 Order ends here. We do not extend our analysis to Bankruptcy Rule 9011, as that rule "applies only to written papers filed with ... the court, and does not govern the conduct of litigation more generally." *Lamboy–Ortiz,* 630 F.3d at 245 (citations omitted). Nor do we reach the question of whether inherent power sanctions were appropriate, having concluded that § 1927 is "up to the task."[20] *See Chambers,* 501 U.S. at 50, 111 S.Ct. 2123 (instructing that reliance on inherent power is "safe[ ]" if "neither the statute nor the Rules are up to the task").

II. *The May 2015 Order: the Amount of Sanctions*

[23] **[24]** On appeal, the Castellanos Firm complains that the amount of the sanctions imposed by the May 2015 Order is "inherently ... excessive" in violation of the Eighth Amendment, whose purpose, according to the firm, is to "limit ... fines directly imposed by and payable to the Federal Government." The Castellanos Firm also argues that the challenged sanctions interfere with the firm's "First Amendment right to petition the Government for the redress of grievances." We reject these arguments for a number of reasons, including: (1) the sanctions imposed against the Castellanos Firm did not constitute a fine payable to the government, but, rather, were payable to the litigants for wasted time and efforts; (2) the sanctions were a properly invoked remedy under § 1927 for the reasons previously stated; (3) the sanctions were compensatory to reimburse the parties' time spent; and (4) the Castellanos Firm had multiple opportunities to air its grievances in the bankruptcy court proceedings and ignored them.

***18** Furthermore, in the proceedings below, the Castellanos Firm neglected to object to a single line item of the fees requested by the FDIC or the Trustee, nor did it challenge the method for determining the amount of sanctions which the court articulated in the March 2015 Order. Moreover, the Castellanos Firm offered no concrete challenge to the reasonableness of the fees claimed, the rate sought, or the time expended. Thus, the Castellanos Firm has failed to demonstrate that the May 2015 Order was an abuse of discretion.

CONCLUSION

Based on the foregoing, the Orders are hereby **AFFIRMED.**

All Citations

--- B.R. ----, 2016 WL 690859, 62 Bankr.Ct.Dec. 66

Footnotes

1 The appellee, Wilfredo Segarra Miranda, Chapter 7 Trustee (the "Trustee"), has joined in the brief of Federal Deposit Insurance Corporation.

2 Although the court imposed sanctions on Anabelle Quiñones–Rodriguez ("Quiñones–Rodriguez") and the Castellanos Firm, jointly and severally, pursuant to the March 2015 Order, Quiñones–Rodriguez did not appeal either of the Orders.

3 The Debtor is a real estate company formed in 2004 for the purpose of purchasing real property and constructing residential units for marketing and resale to third parties in a development located in Fajardo, Puerto Rico, known as "The Ocean Club at Seven Seas" (the "Development"). Pre-petition, Federal Deposit Insurance Corporation, as receiver of Westernbank Puerto Rico (the "FDIC"), filed a complaint against the Debtor and others in the U.S. District Court for the District of Puerto Rico, Case No. 3:12–cv–01187–JAF, seeking a receiver and payment of the outstanding debt of approximately $20,000,000.00 (which was secured in part by the Development and the guarantees of individuals listed in the complaint). The court appointed Trigild, Inc. ("Trigild") to serve as receiver and manage the unsold properties. The bankruptcy court's docket reflects that the bankruptcy court entered orders effectively maintaining the district court receivership even post-conversion. *See TD Bank, N.A. v. LaPointe (In re LaPointe),* 505 B.R. 589, 591 n. 1 (1st BAP Cir.2014) (stating "we may take judicial notice of the bankruptcy court's docket and imaged papers") (citation omitted). On July 31, 2014, judgment entered in the district court case, thereby closing the case, subject to reopening upon the conditions stated in the judgment.

4 The Castellanos & Gierbolini Law Firm subsequently became the Castellanos Group Law Firm, L.L.C.

5 Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, *et seq.* All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure, and all references to "Rule" shall be to the Federal Rules of Civil Procedure. "Section 1927" or "§ 1927" shall refer to 28 U.S.C. § 1927.

6 The HOA is the "administrator" of the Development.

7 Puerto Rico Local Bankruptcy Rule ("P.R.LBR") 4001–1(h) provides: "If the motion for relief from stay is contested, counsel for the parties must confer with respect to the issues raised in the motion, in order to determine whether a consent order may be entered and/or to stipulate to relevant facts." Although the FDIC and the Trustee's communication efforts appear to be an attempt to comply with the local rule, neither the parties nor the bankruptcy court cited the rule in the proceedings below, nor do the parties reference the rule on appeal.

8 The attorney responsible for the filing of the FDIC's Opposition was Jeffrey Sandell ("Sandell"), whose signature line indicated that his office is located in Dallas, Texas.

9 Quiñones–Rodriguez appeared for the HOA; Eldia Díaz Olmo appeared on behalf of the Trustee; Sandell and Fernández–Bared appeared for the FDIC; and Wilnerys Álvarez–Rivera appeared on behalf of Trigild. No appearance was entered on behalf of the Castellanos Firm, even though the FDIC's Response to the Withdrawal Motion contained, inter alia, a request for the imposition of sanctions against the firm.

10 Rule 11 is applicable to bankruptcy proceedings by virtue of Bankruptcy Rule 9011. *See* Fed. R. Bankr. P. 9011. It provides, inter alia, that by signing and filing a document with a court, a party certifies certain matters and can be subject to sanctions should a court determine that the certification has been violated.

11 *See* p. 25, *infra,* for the text of § 1927.

12 The Castellanos Firm did not join in the motion to vacate, nor did it file an independent motion to reconsider or vacate the October 2014 Sanctions Orders, despite the imposition of joint and several liability upon the firm.

13 Again, the Castellanos Firm did not join in the Amended Motion to Vacate.

14 Neither Quiñones–Rodriguez nor Castellanos requested, on behalf of themselves or the Castellanos Firm, an evidentiary hearing to address the assertions that Quiñones–Rodriguez had received only one message, that Albino Acosta had never received any communications from the FDIC or the Trustee, or that Castellanos had never received any communication from any of the attorneys for the FDIC or the Trustee. Accordingly, the Panel will not consider the statements of Quiñones–Rodriguez, Albino Acosta, or Castellanos.

15 P.R. LBR 9013–1(c) provides that "[a]dequate notice must be given to interested parties of the time to respond to every motion, application, or objection to exemption." The rule further provides that the notice language must be "substantially similar" to the language provided therein. P.R. LBR 9013–1(c).

16 The court did not address the conduct of Castellanos, individually; it explicitly ruled, however, that there was no evidence that the HOA, itself, was guilty of misconduct.

17 The Castellanos Firm filed a notice of appeal of the March 2015 Order. This notice of appeal represented the Castellanos Firm's first response to the threat of liability for sanctions. We dismissed that appeal as interlocutory.

18 Citing to its order dated April 8, 2015, the court reasoned:

> The foregoing is in direct contrast with the record of the instant case. For instance, in the *Notice of Appearance* filed by Ms. Anabelle Quiñones–Rodr[i]guez on May 16, 2013, she expressly requested that "an appearance by Anabelle Quiñones–Rodr[i]guez, Esq. **from the law firm of Castellanos & Gierbolini be entered**" ... Moreover, in every subsequent motion electronically she signed and filed, her electronic signature was placed underneath the Castellanos Law Firm's information containing the address, telephone number ... and her email ..., belonging to the Castellanos & Gierbolini Law Firm, which subsequently became the Castellanos Law Firm.... Hence, the court concludes that contrary to the Castellanos Law Firm's allegation, the record in this case shows that Ms. Anabelle Quiñones–Rodr[i]guez was affiliated with the law firm. Furthermore, Mr. Alfredo Castellanos Bayouth "owner and founding member of the Castellanos Law Firm" ... has been notified of all motions and orders entered in the lead bankruptcy case since he filed a *Notice of Appearance and Request to Receive Notices* on October 10, 2012 ... on behalf of [a] creditor.... Therefore, he has received electronic notice of all documents filed and entered in the instant lead bankruptcy case, including the motions filed by Ms. Quiñones–Rodr[i]guez as an affiliated attorney to the Castellanos Law Firm and the motions relevant to the contested matter on sanctions. In addition, Mr. Alfredo Castellanos Bayouth also informed this court that his law firm represents the [HOA], as does Ms. Quiñones–Rodr[i]guez, through the *Informative Motion Notifying Vacations and Moving of the Firm* filed on December 12, 2014....

19 The factors relevant to the determination of whether a worker is an independent contractor or employee include:

> [T]he hiring party's right to control the manner and means by which the product is accomplished ...; the skills required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Alberty–Velez v. Corporacion de P.R. Para La Difusion Publica, 361 F.3d 1, 7 (1st Cir.2004) (citations omitted) (internal quotations omitted). The Castellanos Firm never argued or demonstrated the presence of any of these factors.

20 We note, however, were we to reach this issue, the bankruptcy court's failure to make an explicit finding of bad faith would be problematic. *See In re Charbono,* 790 F.3d at 88 (stating a finding of bad faith is a prerequisite for the imposition of inherent power sanctions); *see also Galanis v. Szulik,* 841 F.Supp.2d 456, 461 (D.Mass.2011) ("Should a court choose to exercise its inherent sanction power, it 'must describe the bad faith conduct with sufficient specificity, accompanied by a detailed explanation' of the reasons justifying the issuance and the amount of the award.") (citation omitted).

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2016 WL 732207
Only the Westlaw citation is currently available.
United States Court of Appeals,
First Circuit.

Steven C. FUSTOLO, Plaintiff, Appellant,
v.
50 THOMAS PATTON DRIVE, LLC; The Patriot Group LLC; Richard Mayer, Defendants, Appellees.

No. 15–1340.
|
Feb. 24, 2016.

Synopsis
Background: Putative debtor sought dismissal of involuntary Chapter 7 petition filed by three petitioning creditors, each of which was a judgment creditor of alleged debtor. Hearing was held, and the parties filed cross-motions for summary judgment. The United States Bankruptcy Court for the District of Massachusetts, Joan N. Feeney, J., 503 B.R. 206, entered order for relief, and putative debtor appealed. The District Court, Rya W. Zobel, J., 2015 WL 4876075, affirmed. Appeal was taken.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

[1] mere fact that claim that was based on Massachusetts state court judgment did not categorically mean that it was free from any "bona fide dispute," and that judgment creditor was therefore eligible to join in filing involuntary petition;

[2] unstayed judgment that appeared on its face to be in error, as holding judgment debtor personally liable on all notes of corporate makers, even notes that he had not guaranteed, did not give rise to debt that was free from any "bona fide dispute";

[3] petitioning creditor could rely on underlying guarantees to support its joinder in petition; and

[4] putative debtor's obligation on his guarantee of notes executed by corporate makers was not subject to any "bona fide dispute," despite fact that notes may have technically violated state usury law.

Affirmed.

Appeal from the United States District Court for the District Of Massachusetts, Rya W. Zobel, U.S. District Judge.

Attorneys and Law Firms

David M. Nickless, with whom Nickless, Phillips and O'Connor, was on brief for appellant.

Michael J. Fencer, with whom Howard P. Blatchford, Jonathan M. Horne, and Jager Smith P.C., were on brief, for appellees 50 Thomas Patton Drive, LLC, and Richard Mayer.

Colleen C. Cook, with whom Michael Paris, Jack I. Siegal, and Nystrom Beckman & Paris LLP, were on brief, for appellee The Patriot Group LLC.

Before TORRUELLA, LYNCH, * and KAYATTA, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

***1** We hold in this case that a claim to payment that 50 Thomas Patton Drive, LLC ("Patton Drive") holds against Steven Fustolo ("Fustolo") "is not contingent as to liability or the subject of a bona fide dispute as to liability or amount" within the meaning of section 303(b)(1) of the Bankruptcy Code. 11 U.S.C. § 303(b)(1). We therefore affirm the decision of the bankruptcy court, which found Patton Drive qualified to join with two other creditors also holding non-contingent, undisputed claims to force Fustolo into an involuntary bankruptcy proceeding.

I.

Patton Drive's claims against Fustolo arise out of four promissory notes issued to Patton Drive by Fustolo's affiliate companies in connection with two real estate transactions. Fustolo personally guaranteed two of the notes (the "Guaranteed Notes"), which together totaled $1.25 million, but did not guarantee the other two notes (the "Unguaranteed Notes"), which together totaled $1.5 million. When the principal debtors defaulted on all four notes, Patton Drive sued the debtor companies and Fustolo, asserting that Fustolo was personally liable on his guarantee. The

Massachusetts state court found Fustolo liable for breach of contract and rejected Fustolo's argument that Patton Drive's technical violation of a state usury statute should reduce the amount of interest owed on the notes. The court entered a final judgment against Fustolo in favor of Patton Drive in the amount of roughly $6.76 million. [1] Fustolo contends that this judgment overstated his liability by approximately $4 million because it erroneously assumed that he had guaranteed all of the notes. In response, Patton Drive demurs, declining to offer any defense of the state court's damages calculation. Fustolo lodged a timely appeal of the state court judgment but did nothing further to prosecute the appeal, which we are told has rested more or less dormant on the state court's appellate docket for at least four years.

Meanwhile, Fustolo, who admittedly has at least twelve creditors, failed to satisfy his financial obligations to at least two of those other creditors, The Patriot Group LLC ("Patriot") and Richard Mayer ("Mayer"). On May 6, 2013, eighteen months after entry of the state court judgment, Patton Drive joined with Patriot and Mayer to file a petition with the United States Bankruptcy Court, seeking to place Fustolo into involuntary Chapter 7 bankruptcy, and to thereby cause Fustolo's debts to be determined and his assets gathered and liquidated in an orderly fashion to satisfy those debts. *See* 11 U.S.C. §§ 303(b)(1), 701 et seq.

The creditors' ability to force Fustolo into bankruptcy rests on 11 U.S.C. § 303(b)(1), which provides that involuntary bankruptcy proceedings may be commenced via petition to the bankruptcy court

> by three or more entities, each of which is ... a holder of a claim against [the debtor] that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount ... if such noncontingent, undisputed claims aggregate at least [$14,425] more than the value of any lien on property of the debtor securing such claims held by the holders of such claims.

***2** 11 U.S.C. § 303(b)(1); *see also id.* § 104(a). Fustolo does not dispute that Patriot and Mayer hold eligible claims against him. Nor does Fustolo dispute that the total amount of those undisputed claims exceeds the value of any related liens on his property by the statutorily requisite amount. However, Fustolo maintains that Patton Drive has not asserted a claim that qualifies it to serve as a petitioning creditor because his pending state court appeal subjects Patton Drive's judgment to "bona fide dispute as to liability or amount." *Id.* § 303(b)(1).

Following an evidentiary hearing in the bankruptcy court on Fustolo's challenge to their qualifications to initiate an involuntary proceeding, the three petitioning creditors moved for summary judgment. Fustolo opposed the motion and filed his own cross-motion for summary judgment. On December 16, 2013, the bankruptcy court granted summary judgment to the petitioning creditors, thus authorizing involuntary bankruptcy proceedings to commence against Fustolo.

In assessing whether Patton Drive's state court judgment constituted a qualifying claim despite Fustolo's appeal, the bankruptcy court employed the approach approved by the Fourth Circuit in *In re Byrd,* 357 F.3d 433 (4th Cir.2004). Under this approach, the court did not accord the state court judgment against Fustolo dispositive force in establishing the absence of a bona fide dispute concerning the right to payment recognized and affirmed in that judgment. Instead, the court began with a presumption that the judgment foreclosed any bona fide dispute, but then proceeded to assess the merits of Fustolo's pending state court appeal to determine whether Fustolo's case "exemplifie[d] the rare circumstance where the amount of the judgment is in bona fide dispute." Upon examination, the court found a bona fide dispute as to the portion of the judgment that awarded damages against Fustolo on the Unguaranteed Notes because, among other things, Patton Drive did not oppose the contention that it had no right to recover against Fustolo on those notes. At the same time, the bankruptcy court separately assessed Patton Drive's right to payment on the portion of the state court judgment that covered Fustolo's breach of contract on the Guaranteed Notes. Finding this portion of the judgment free of bona fide dispute, the bankruptcy court granted summary judgment to Fustolo's creditors and denied Fustolo's cross-motion.

Fustolo then appealed to the district court and found himself jumping from the frying pan into the fire. The district court eschewed the Fourth Circuit's merits-based analysis of the preclusive effect of an appealed state court judgment, opting instead for the approach announced in *In re Drexler,* 56 B.R. 960 (Bankr.S.D.N.Y.1986), and adopted by the only other circuit court to have decided this issue, *see In re Marciano,* 708 F.3d 1123, 1124 (9th Cir.2013). Under the so-called *Drexler* rule, an unstayed state court judgment, whether or not subject to appeal, per se constitutes a claim that is not subject to bona fide dispute. *See Drexler,* 56 B.R. at 967.

Therefore finding that Fustolo's appeal in state court, however meritorious, could not raise a bona fide dispute as to Patton Drive's claim, the district court affirmed the bankruptcy court's order.

***3** **[1]** Fustolo now appeals to this court pursuant to 28 U.S.C. § 158(d)(1), [2] urging us, first, to reject the district court's decision to apply *Drexler's* categorical rule and, second, to reject the bankruptcy court's determination that, even under *Byrd's* more debtor-friendly burden-shifting rule, Patton Drive qualifies as a petitioning creditor because it holds a claim on the Guaranteed Notes that is free of bona fide dispute. For slightly different reasons, we affirm.

II.

A.

[2] In bankruptcy proceedings, summary judgment is appropriate when the movant has shown that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Bankr.P. 7056; Fed.R.Civ.P. 56(a). We review the bankruptcy court's grant of summary judgment de novo. *In re Colarusso,* 382 F.3d 51, 57–58 (1st Cir.2004). In undertaking this review, we afford no deference to the district court's intermediate decision. *In re Healthco Int'l,* Inc., 132 F.3d 104, 107 (1st Cir.1997).

B

[3] We begin with the creditors' argument that we can easily resolve this appeal by adopting the district court's conclusion that the *Drexler* rule applies and that Patton Drive's claim is therefore categorically free from bona fide dispute. If the creditors are correct on this point, we need not—and indeed cannot—look behind the state court judgment to assess its merits. On the facts of this case, however, we cannot hold that the *Drexler* rule applies.

The *Drexler* rule, followed by the Ninth Circuit, *see Marciano,* 708 F.3d at 1124, has much to commend it. It is simple to apply, and it reduces the waste of assets inherent in opening the opportunity for a financially troubled party to argue the merits of issues previously adjudicated in state court. It also arguably accords to a state court judgment the sort of respect and finality reflected in the Full Faith and Credit Act, which requires that federal courts give state court judgments "the same full faith and credit ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. § 1738; *see also Marciano,* 708 F.3d at 1128. [3]

[4] More importantly, the *Drexler* rule fits with Congress's apparent purpose in requiring each claim underlying an involuntary petition to be free of "bona fide dispute." In usual course, bankruptcy serves as a haven for debtors seeking protection from creditors and hoping to make a fresh start. *See In re Fahey,* 779 F.3d 1, 8–9 (1st Cir.2015). But the Bankruptcy Code also serves another, "often conflicting," purpose: to "ensure fair payment to creditors." *In re Energy Res. Co.,* 871 F.2d 223, 230 (1st Cir.1989). Section 303 of the Bankruptcy Code thus allows creditors who satisfy certain conditions to force a debtor into bankruptcy, so that the disposition of the debtor's assets can proceed in a more orderly fashion.

[5] **[6]** The requirement that the petitioning creditors' claims be free of bona fide dispute was added by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98–353, § 426(b), 98 Stat. 333, 369. The Bankruptcy Code does not define the term "bona fide dispute," but courts have more or less settled on finding a bona fide dispute when "there is either a genuine issue of material fact that bears upon the debtor's liability or a meritorious contention as to the application of law to undisputed facts." *In re BDC 56 LLC,* 330 F.3d 111, 117 (2d Cir.2003) (citing cases), *abrogated on other grounds as recognized in In re Zarnel,* 619 F.3d 156, 169 (2d Cir.2010). The self-evident purpose of the "no bona fide dispute" requirement, as courts have repeatedly recognized, is "to prevent creditors from using involuntary bankruptcy 'to coerce a debtor to satisfy a judgment even when substantial questions may remain concerning the liability of the debtor.' " *Byrd,* 357 F.3d at 438 (quoting *In re Prisuta,* 121 B.R. 474, 476 (Bankr.W.D.Pa.1990)); *see also BDC 56 LLC,* 330 F.3d at 117–18; *In re Tikijian,* 76 B.R. 304, 313–14 (Bankr.S.D.N.Y.1987) ("It was stated by the proponent of the [1984] amendment ... that the primary purpose of the addition of the bona fide dispute language was to prevent creditors from using involuntary bankruptcy as a club to coerce a debtor to pay debts as to which the debtor, in good faith, had legitimate defenses."). With that purpose in mind, courts generally try to determine whether, objectively, there is a dispute about a debt that reasonably warrants resolution by a factfinder or, in the case of a dispute of law, a court. *See In re*

Busick, 831 F.2d 745, 750 (7th Cir.1987) ("[T]he bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt."). When such a dispute exists, we do not allow the creditor to coerce the debtor's surrender by credibly threatening to use the claim as a basis for an involuntary petition.

***4** But when the creditor already holds a state court judgment upon which execution is possible, allowing the creditor to join in forcing a bankruptcy proceeding adds little material weight to the creditor's ability to coerce payment of the debt. The absence of a stay also undercuts the debtor's ability to argue that the state courts view the debt as not quite collectable. Consistent with these reasons, the *Drexler* rule applies only to "unstayed" state court judgments-those judgments that actually entitle a creditor to access the debtor's assets. *Drexler,* 56 B.R. at 967 n. 11; *see also, e.g., In re Raymark Indus., Inc.,* 99 B.R. 298, 299–300 (Bankr.E.D.Pa.1989).

Turning to the instant case, a Massachusetts trial court's judgment is effectively stayed by operation of state law for the purposes of execution, even absent a court order, while an appeal is pending. *See* Mass. Gen. Laws ch. 231, § 115; *id.* ch. 235, § 16; Mass. R. Civ. P. 62(a). Thus, Patton Drive could not execute in Massachusetts courts on its judgment. *See, e.g., C.F. Tr., Inc. v. Peterson,* No. 961375H, 1998 WL 1284163, at *2–3 (Mass.Super.Ct. May 21, 1998) (refusing execution on a confessed judgment on a promissory note pending debtors' appeal). [4]

The courts below treated this wrinkle as inconsequential in light of the fact that Massachusetts law does not automatically stay the other legal effects of a judgment pending appeal. In particular, the courts below held that Patton Drive's state court judgment is unstayed because of the availability of postjudgment discovery and attachment under Massachusetts law regardless of a pending appeal. *See A.W. Farrell Assocs., LLP v. Haddon,* No. 07P–596, 2008 WL 4130828, at *3–4 (Mass.App.Ct. Sept.9, 2008) (unpublished opinion) (discovery); *Borne v. Haverhill Golf & Country Club,* 58 Mass.App.Ct. 306, 791 N.E.2d 903, 919 (Mass.App.Ct.2003) (attachment). But these tools would have been available to Patton Drive even prior to the judgment that fixed its rights. *See* Mass. R. Civ. P. 4.1 (prejudgment attachment); *id.* 26, 791 N.E.2d 903 (discovery). And the fact that a trial court's judgment is stayed in some senses under Massachusetts law pending appeal, while remaining unstayed in others, does not by itself tell us whether the judgment is stayed or unstayed for the purposes of the *Drexler* rule.

We are not persuaded that a judgment is unstayed for bankruptcy purposes merely because that judgment continues to have some legal effects despite a creditor's legal inability to execute. The Bankruptcy Code defines a "claim" as, in relevant part, a "right to *payment.*" 11 U.S.C. § 101(5)(A) (emphasis supplied). And in construing the requirement that such a claim be free from bona fide dispute, courts applying the *Drexler* rule have focused not on the abstract existence of a legal right, but rather on the claim-holder's ability to vindicate that right in court. *See, e.g., Marciano,* 708 F.3d at 1127 (no bona fide dispute when "Petitioning Creditors were free under California law *to collect* the amounts owed under the judgments at the time the involuntary petition was filed" (emphasis supplied)); *id.* at 1131 (Ikuta, J., dissenting) ("The majority's reasoning seems to be that ... because an unstayed state court judgment is immediately *enforceable,* there can be no objective basis for dispute as to the 'claim's' liability or amount." (emphasis supplied)); *Drexler,* 56 B.R. at 967 (unstayed state court judgment not subject to bona fide dispute because a contrary holding would "effect a radical alteration of[ ] the long-standing *enforceability* of unstayed final judgments" (emphasis supplied)). Because the ability to execute on a state court judgment provides a crucial link in the rationale that justifies the bright line, automatic nature of the *Drexler* rule, we find that rule inapplicable when, as here, execution on the judgment is stayed, even if only by automatic operation of state law. [5] Patton Drive's state court judgment is therefore not categorically insulated from bona fide dispute.

C.

***5 [7]** Even though a state court judgment does not necessarily establish the absence of bona fide dispute when that judgment is effectively stayed, the judgment must nevertheless play some role in our analysis. The fact that a state court has already considered and adjudicated the merits of a claim, and entered judgment on the claim, weighs heavily in favor of finding the claim beyond bona fide dispute. *See Byrd,* 357 F.3d at 438 (state court judgments were "strong evidence that [the creditor's] claims were valid"). This observation is particularly salient where the judgment is stayed by virtue of the automatic operation of state law and not because a state court has probed the merits of the judgment and found reason to suspect that it may be incorrect.

[8] But despite the weight we would normally attach to a state court judgment, here we have a judgment that appears on its face to be in error because it holds Fustolo personally liable for roughly $4 million on the Unguaranteed Notes and, notably, Patton Drive as the holder of the judgment offers no reason at all to think otherwise. As the bankruptcy court recognized, Patton Drive's de facto concession on this point certainly creates a bona fide dispute as to the amount of Patton Drive's right to payment on the judgment.

As Patton Drive points out, however, the dispute over the judgment concerns only a portion of the judgment. Fustolo makes no real effort to deny that he owes, at least, the principal due under the Guaranteed Notes, which totals $1.25 million. [6] Based on this concession, Patton Drive asks us to rule that any dispute concerning the amount of the liability represented by the judgment can be ignored, because the amount admittedly owed well exceeds the amount necessary to justify Patton Drive's joinder as a petitioning creditor under 11 U.S.C. § 303(b)(1).

[9] In making this argument, the creditors essentially ask us to read an implicit materiality requirement into the statutory language "bona fide dispute as to liability or amount." 11 U.S.C. § 303(b)(1). Prior to 2005, some courts had held —as the bankruptcy court held here—that a claim to a disputed amount could nevertheless form the basis of an involuntary petition if the undisputed portion of the claim could independently qualify the creditor. *See, e.g., In re Focus Media, Inc.,* 378 F.3d 916, 925–27 (9th Cir.2004); *BDC 56 LLC,* 330 F.3d at 120; *IBM Credit Corp. v. Compuhouse Sys., Inc.,* 179 B.R. 474, 479 (W.D.Pa.1995); *In re Willow Lake Partners II,* L.P., 156 B.R. 638, 642–43 (Bankr.W.D.Mo.1993). In 2005, however, Congress amended section 303 to add the language "as to liability or amount." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 1098, § 1234, 119 Stat. 23, 204. Faced with a dearth of clarifying legislative history, courts are more or less evenly split on whether the 2005 amendment was intended to change the prevailing law by establishing that "a dispute as to any portion of a claim, even if some dollar amount would be left undisputed, means there is a bona fide dispute as to the amount of the claim," *In re Vicor Techs., Inc.,* No. 12–39329, 2013 WL 1397460, at *5 (Bankr.S.D.Fla. Apr.5, 2013), or simply to reinforce the then-prevailing interpretation, *see In re DemirCo Holdings, Inc.,* No. 06–70122, 2006 WL 1663237, at *3 (Bankr.C.D.Ill. June 9, 2006) (a dispute as to amount is immaterial unless it "ha[s] the potential to reduce the total of [the petitioning creditors'] claims to an amount below the statutory threshold."). [7]

***6** We decline to read a materiality requirement into section 303. As discussed above, the bona fide dispute provision strikes a balance between the Bankruptcy Code's dual purposes of ensuring the orderly disposition of creditors' claims and protecting debtors from coercive tactics. *See supra* Part II.B. Limiting petitioning creditors to only those claims that are of undisputed value is in line with those aims. Accordingly, and in the absence of persuasive contrary authority or illuminating legislative history, we follow the straightforward reading of section 303, which places no qualifiers on the requirement that any asserted claim be free of "bona fide dispute as to ... amount."

D.

Our conclusions that this judgment upon which execution is stayed under Massachusetts law is not categorically insulated from bona fide dispute, that there exists a bona fide dispute as to the amount that will ultimately be due under the judgment, and that a dispute as to amount need not be material to generate a disqualifying bona fide dispute under 11 U.S.C. § 303(b)(1), bring us to Patton Drive's last, two-part argument: First, Patton Drive contends that we should look beneath the state court judgment to the underlying contract claims that gave rise to the judgment and treat its right to payment on the Guaranteed Notes as its qualifying claim. Second, Patton Drive asks us to find that Fustolo's efforts to contest the interest due on the Guaranteed Notes do not suffice to subject its claim on those notes to bona fide dispute as to amount. We address these arguments in turn.

1.

[10] To consider the claim on the Guaranteed Notes as the claim held by Patton Drive that qualifies it as a petitioner under section 303(b)(1), we first confront Fustolo's contention that Patton Drive's claim on the Guaranteed Notes no longer exists because it merged into and became part of the state court judgment. Hence, in Fustolo's view, our conclusion that the judgment itself is subject to a bona fide dispute ends the relevant inquiry. We do not doubt that a merger of this type can occur. *See* Restatement (Second) of Judgments § 18, cmt. a ("When the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it."). But we also see no reason to view such a merger as operative in all contexts. *Cf. Boynton v. Ball,* 121 U.S. 457, 466, 7 S.Ct. 981, 30 L.Ed. 985 (1887) ("[N]otwithstanding the change in [a debt's] form from that of a simple contract debt ... by merger into a judgment of a court of record, it still remains the same debt[.]"); *In re Richard A. Turner Co.,* 209 B.R. 177, 180 (Bankr.D.Mass.1997) (separating a single, jointly held judgment into its three underlying component claims and so finding that the judgment-holders qualified as petitioning creditors). Here, for instance, Fustolo should not be allowed to argue, on the one hand, that the judgment is not final for purposes of establishing that Patton Drive's claim on the judgment is subject to bona fide dispute, yet argue, on the other hand, that we should treat the judgment as final for purposes of displacing the underlying contract claims. Once we have already, to Fustolo's advantage, looked beneath the surface of the state court judgment in order to identify its vulnerable components, we see no principled reason to then ignore what is, but for the potential operation of merger, an independent claim capable of standing on its own merits.

***7** Alternatively, Fustolo argues that even if Patton Drive could have asserted only its claim under the Guaranteed Notes as its qualifying claim in the petition, it did not do so. Rather, the involuntary bankruptcy petition asserts as Patton Drive's claim the entire state court judgment. This is true. But Fustolo concededly knew from the start that the liability represented by the judgment consisted of two separate components, one of which was the liability under the Guaranteed Notes. Indeed, in Fustolo's initial answer to the involuntary petition, Fustolo contested the state court's calculation of the amount of interest due on the Guaranteed Notes specifically, and Fustolo has continued to raise this argument throughout the litigation. Patton Drive's memorandum in support of summary judgment before the bankruptcy court, in turn, made clear that Patton Drive understood the state court judgment to "encompass [ ] ... separate damages components," one of which was Fustolo's liability on the Guaranteed Notes. Fustolo gives us no reason to think that his strategy would have changed had Patton Drive asserted only its claim under the Guaranteed Notes from the outset.

[11] Certainly, Patton Drive could have sought to formally amend the claim it asserted in its involuntary petition. *See* Fed. R. Bankr.P. 7015; *see also id.* 1018; Fed.R.Civ.P. 15. But given that Patton Drive had no way of knowing how the bankruptcy court would rule on the preclusive effect of the state court judgment or on the issue of merger, and given that Fustolo's liability on the Guaranteed Notes formed an obvious, separately calculated amount within the asserted claim, we cannot fault Patton Drive for failing to do so. Accordingly, we hold that a petitioning creditor may be permitted to rely on an undisputed component claim that underlies a disputed multi-part judgment that the creditor has asserted as its qualifying claim, where the amount of that undisputed claim is clearly severable from the amount of the total judgment and where the debtor both has notice of that reliance and is not prejudiced by that reliance. *See In re Cumberland Farms, Inc.,* 284 F.3d 216, 226 (1st Cir.2002) ("Under the liberal pleading regime prescribed by the Federal Rules of Civil Procedure, non-compliance with ... procedural rules does not always preclude consideration of unpleaded claims....").

2.

[12] [13] [14] Our decision that neither merger of the claim on the Guaranteed Notes into the judgment nor Patton Drive's assertion of the state court judgment in the petition precludes Patton Drive from relying only on the claim under the Guaranteed Notes to qualify it as a petitioning creditor brings us to the second part of Patton Drive's two-part argument: whether the claim under the Guaranteed Notes is indeed free of bona fide dispute. Fustolo argues that the $2.7 million due on the Guaranteed Notes is disputed as to amount, claiming that Patton Drive is not entitled to the Guaranteed Notes' full default interest rate of 35% because Patton Drive failed to timely submit a required "usury notification form" to the state attorney general before levying interest rates in excess of 20%. Mass. Gen. Laws ch. 271, § 49(d); *see also Clean Harbors, Inc. v. John Hancock Life Ins. Co.,* 64 Mass.App.Ct. 347, 833 N.E.2d 611, 625 (Mass.App.Ct.2005) (requiring usury notice to be on file with state attorney general before disbursal of loan proceeds). But under Massachusetts law, "[t]he appropriate remedy" to a violation of the usury statute

> ***8** is arrived at by balancing a number of factors including the importance of the public policy against usury, whether a refusal to enforce the [usurious] term will further that policy, the gravity of the misconduct involved, the materiality of the provision to the rest of the contract,

> and the impact of the remedy on the parties' rights and duties.

Begelfer v. Najarian, 381 Mass. 177, 409 N.E.2d 167, 189 (Mass.1980). "[D]etermining what relief is appropriate, if any," is a matter up to "the [trial] judge's discretion, under equitable principles." Clean Harbors, 833 N.E.2d at 625 (emphasis supplied) (noting that "the de minimis nature of the delay in filing the [statutorily required usury] notices" may be a factor in determining remedy). Given the discretion that state law affords trial courts in this matter, and given the state trial court's cogent explanation for its determination that Patton Drive was entitled to the full default interest rate on the Guaranteed Notes despite its technical violation of the usury statute, Fustolo has failed to overcome our strong presumption that state court findings, even when not categorically binding, are free of bona fide dispute.

Because the amount of Fustolo's liability on the Guaranteed Notes, which formed separately delineated counts of the state court judgment, is not subject to bona fide dispute, and because there is no injustice in considering Patton Drive's claim on the Guaranteed Notes separately from Patton Drive's claim on the judgment within which its underlying contract claims are submerged, we find that Patton Drive qualifies as a petitioning creditor and that the bankruptcy court therefore did not err in allowing Patton Drive to join with Patriot and Mayer to initiate involuntary bankruptcy proceedings against Fustolo.

Conclusion

To summarize: Patton Drive holds a claim against Fustolo for $2.7 million under the Guaranteed Notes. Fustolo conceded that he owes the principal due. His only challenge is to the interest due, and that challenge rests on an entirely unsupported assertion that a state trial court abused its broad equitable discretion in not penalizing a technical timing requirement of state usury law in a commercial transaction. And while Patton Drive's claim would otherwise be merged into a final judgment, in this context—to Fustolo's benefit otherwise—we do not accord the judgment its customary finality and effect. Accordingly, we *affirm* the bankruptcy court's grant of summary judgment to Fustolo's creditors.

All Citations

--- F.3d ----, 2016 WL 732207, 62 Bankr.Ct.Dec. 65

Footnotes

* Judge Lynch heard oral argument in this matter and participated in the semble, but she did not participate in the issuance of the panel's opinion. The remaining two panelists issue this opinion pursuant to 28 U.S.C. § 46(d).

1 The court also found, *inter alia,* that Fustolo and his affiliates had violated a state statute by engaging in unfair and deceptive business practices. *See* Mass. Gen. Laws ch. 93A, §§ 2, 11. The parties dispute whether Fustolo was assigned any independent monetary liability for this violation, but it is undisputed that the judgment held all defendants jointly and severally liable for attorneys' fees and costs as to this and other counts.

2 Although no party addresses whether a bankruptcy court's order for relief in favor of a petitioning creditor in an involuntary suit is the sort of final order over which this court has appellate jurisdiction, we follow our sister circuits in finding no apparent impediment. *See In re HealthTrio, Inc.,* 653 F.3d 1154, 1160 (10th Cir.2011); *In re McGinnis,* 296 F.3d 730, 731 (8th Cir.2002) (per curiam); *In re Mason,* 709 F.2d 1313, 1315–18 (9th Cir.1983); *see also Bullard v. Blue Hills Bank,* ––– U.S. ––––, ––––, 135 S.Ct. 1686, 1695, 191 L.Ed.2d 621 (2015) (suggesting that a bankruptcy court order that "allows the bankruptcy to go forward and alters the legal relationships among the parties" is appealable).

3 The creditors take this observation one step further and argue that 28 U.S.C. § 1738 fully estops Fustolo from arguing the existence of a bona fide dispute as to the state court judgment in light of the fact that, under Massachusetts law, "a trial court judgment is final and has preclusive effect regardless of the fact that it is on appeal." *O'Brien v. Hanover Ins. Co.,* 427 Mass. 194, 692 N.E.2d 39, 44 (Mass.1998). Fustolo, though, does not ask us in this litigation to reject the fact or legal effect of the state court judgment. Rather, he seeks only to establish that the amount of his liability is subject to bona fide dispute. *See Marciano,* 708 F.3d at 1134 (Ikuta, J., dissenting) ("[D]etermining whether a claim based on a state court judgment is subject to a bona fide dispute does not require us to [decide anew] any issue [already] decided in a state court proceeding."). And we have found no Massachusetts precedent suggesting that the existence of a judgment estops a litigant from arguing that the judgment is persuasively contested.

4 The creditors have offered no argument that Massachusetts law provides an equitable exception for appeals that have stagnated as long as Fustolo's has, and so we consider any such argument waived without fully foreclosing the possible existence of a state law exception. *See United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990).

5 We leave open the question of whether the *Drexler* rule would apply in the event of an unstayed state court judgment that has been appealed.

6 Fustolo makes a fleeting intimation in his brief that, under *Begelfer v. Najarian,* 381 Mass. 177, 409 N.E.2d 167 (Mass.1980), Patton Drive's failure to comply with state usury law should relieve him of his debt even on the Guaranteed Notes' unpaid principal, *see id.* at 173–74. But Fustolo supplies this court with no developed reason to entertain such a farfetched argument, and so any effort to claim that Fustolo's liability on the Guaranteed Notes' principal is subject to bona fide dispute is waived for lack of development. *See Zannino,* 895 F.2d at 17.

7 *Compare, e.g., Vicor,* 2013 WL 1397460, at *5; *In re Skyworks Ventures, Inc.,* 431 B.R. 573, 578 n. 1 (Bankr.D.N.J.2010); *In re Rosenberg,* 414 B.R. 826, 845–46 (Bankr.S.D.Fla.2009); *In re Excavation, Etc., LLC,* No. 09–60953, 2009 WL 1871682, at *2 (Bankr.D. Or. June 24, 2009); *In re Metro Cremo & Sons, Inc.,* No. 1:08–bk–01798, 2008 WL 5158288, at *4 n. 8 (M.D.Pa. Sept. 29, 2008); *In re Mountain Dairies, Inc.,* 372 B.R. 623, 634 (Bankr.S.D.N.Y.2007); *In re Reg'l Anesthesia Assocs. PC,* 360 B.R. 466, 469–70 (Bankr.W.D.Pa.2007); *In re Euro–Am. Lodging Corp .,* 357 B.R. 700, 712 n. 8 (Bankr.S.D.N.Y.2007) (no materiality requirement), *with, e.g., In re Stewart,* Nos. 14–03177, 14–03179, 2015 WL 1282971, at *6 (Bankr.S.D.Ala. Mar.18, 2015); *In re EM Equip., LLC,* 504 B.R. 8, 18 (Bankr.D.Conn.2013); *In re Roselli,* No. 1232461, 2013 WL 828304, at *9 (Bankr.W.D.N.C. Mar.6, 2013); *In re Miller,* 489 B.R. 74, 82–83 (Bankr.E.D.Tenn.2013); *In re Mountain Country Partners, LLC,* No. 12–20094, 2012 WL 2394714, at *3 (Bankr.S.D.W.Va. June 25, 2012); *In re Tucker,* No. 5:09–bk–914, 2010 WL 4823917, at *6 (Bankr.N.D.W.Va. Nov.22, 2010); *DemirCo,* 2006 WL 1663237, at *3 (requiring materiality).

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2016 WL 453385
United States Bankruptcy
Appellate Panel of the First Circuit.

In re: Peter J. Porcaro, Debtor.
Michael O'Rorke and Beth
O'Rorke, Plaintiffs-Appellees,
v.
Peter J. Porcaro, Defendant-Appellant.

BAP NO. MW 15-026
|
Bankruptcy Case No. 10-45391-CJP
|
Adversary Proceeding No. 11-04010-CJP
|
February 3, 2016

Synopsis

Background: Judgment creditors filed adversary complaint against Chapter 7 debtor, a home improvement contractor, seeking determination that judgment debt arising from his installation of too-small replacement windows in their home was nondischargeable. On the parties' cross-motions for summary judgment, the United States Bankruptcy Court for the District of Massachusetts, Melvin S. Hoffman, J., granted judgment creditors' motion and denied debtor's motion. Debtor appealed.

Holdings: The Bankruptcy Appellate Panel (BAP), Cary, J., held that:

[1] state-court trial judge's conclusion that debtor's conduct was "as egregious a violation of consumer protection laws as there [could] be" was tantamount to a finding that debtor's actions were "wrongful" and "without just cause or excuse," and hence malicious, within meaning of the discharge exception for debts for willful and malicious injury, and

[2] the "willfulness" element of the discharge exception was actually litigated in the state court.

Affirmed.

See also 2008 WL 4456752, 2009 WL 4573455.

Appeal from the United States Bankruptcy Court for the District of Massachusetts (Hon. Melvin S. Hoffman, U.S. Bankruptcy Judge)

Attorneys and Law Firms

Peter J. Porcaro, pro se, on brief for Defendant-Appellant.

Michael J. Heineman, Esq., and Scott R. Pearl, Esq., on brief for Plaintiffs-Appellees.

Before Deasy, Harwood, and Cary, United States Bankruptcy Appellate Panel Judges.

Opinion

Cary, U.S. Bankruptcy Appellate Panel Judge.

***1** Peter J. Porcaro ("Porcaro"), a home improvement contractor, appeals from a bankruptcy court order granting summary judgment in favor of judgment creditors, Michael O'Rorke and Beth O'Rorke (collectively, the "O'Rorkes"), [1] and a bankruptcy court order denying his motion for summary judgment (collectively, the "Orders"). On appeal, Porcaro contends that entering summary judgment in the § 523(a)(6) proceeding was error because the bankruptcy court incorrectly afforded preclusive effect to the O'Rorkes' pre-bankruptcy, state court judgment. [2] For the reasons discussed below, we **AFFIRM** the Orders.

BACKGROUND

I. Pre–Bankruptcy Events

In August 2004, the O'Rorkes hired Porcaro to install eleven replacement windows in their Westborough, Massachusetts home. The contract they entered into required Porcaro to install screens, locks, and custom-made "Majesty" windows, and to dispose of the old windows. The O'Rorkes were to pay him $19,100.00 in the following installments: an initial deposit of $6,366.00; an additional installment of $10,000.00 upon delivery of the windows; and a final payment of the remaining $2,734.00 balance upon completion.

Porcaro retained Paul Meredith ("Meredith"), an installation subcontractor, to do the work at the O'Rorkes' home. Although the job required a permit, Porcaro did not obtain one. When Meredith arrived to perform the work, he noticed that the new windows were approximately 3/4 of an inch too small for the window openings. When he asked Porcaro about this, Porcaro instructed him to proceed with the window installation. Meredith did as he was told.

When the installation was complete, the O'Rorkes paid Porcaro all but $200.00 of the contract price, which they withheld due to minor screen damage. When Porcaro refused to pay Meredith for the work, Meredith informed the O'Rorkes about the problem with the windows.

A. The Arbitration

Thereafter, the parties submitted to arbitration through the Commonwealth of Massachusetts Contractor Home Improvement Arbitration Program. Additionally, the O'Rorkes made a demand upon Porcaro pursuant to Mass. Gen. Laws ch. 93A ("Ch.93A"). After a hearing conducted on June 7, 2005, the arbitrator found that Porcaro had installed windows that were too small and awarded the O'Rorkes $11,300.00 in damages, which sum included $9,000.00 to cover the estimated cost of new replacement windows and $2,300.00 for "patchwork."

B. State Court Proceedings

Porcaro appealed the arbitrator's decision by filing a complaint with the Commonwealth of Massachusetts Trial Court, District Court Department, Westborough Division, alleging breach of contract, malicious prosecution, conspiracy to breach a contract, and breach of the covenant of good faith and fair dealing. The O'Rorkes counterclaimed for breach of contract and violations of Ch. 93A. In February 2007, the case was transferred to the Marlborough Division.

***2** In March 2007, the trial judge conducted a two-day bench trial. This appeal was not limited to a narrow review of the arbitration award but, rather, was by statute a de novo proceeding, designed to resemble an original trial court action more than an ordinary appeal. See Mass. Gen. Laws ch. 142A, § 4(e). Both parties presented evidence, including expert testimony. Porcaro appeared pro se, and, in addition to calling witnesses, testified on his own behalf. The trial yielded approximately 800 pages of documents and testimony.

Meredith testified, on behalf of the O'Rorkes, that during the installation, he discovered every window that was going to be installed was too small for the window openings. In fact, one of the windows almost fell through the opening. He knew this meant he would be unable to properly install the windows. He testified he informed Porcaro that the windows were not the correct size, that they should not be installed, and that he wanted to re-install the old windows until they could order the right size. He further testified that instead of ordering the correct windows, Porcaro directed him, without the O'Rorkes' knowledge, to install the incorrect windows by filling the gaps with wood, a technique called "blocking." When Meredith told Porcaro that he did not have any wood to fill in the gaps, Porcaro responded, "I'll bring you some." According to Meredith, Porcaro threatened to withhold payment if he mentioned anything about it to the O'Rorkes. Meredith also testified Porcaro took affirmative steps to conceal the improper installation from the O'Rorkes by installing wider casings than had originally been used around the windows.

Robert Jeffrey Stevenson ("Stevenson"), a contractor who had previously worked for Michael O'Rorke's company, provided expert witness testimony for the O'Rorkes, stating he had examined the windows and determined they were too small and installed incorrectly. According to Stevenson, when he took the casings off one of the windows, placed his hand in the center of the window, and pushed with little effort, "the window moved about an inch." He also testified that a newly constructed window would need to be installed because the original window frame had been cut, removed, or otherwise altered. The blocking which was installed at Porcaro's direction would have to be removed, as well as what was left of the original window frames, and the siding would need further repair. Stevenson went on to testify, without objection by Porcaro, that the cost to put the O'Rorkes in as good a position as they would have been had Porcaro installed the windows properly would be $20,000.00. He stated: "I'm going to just shoot from the hip, I would say probably about twenty grand, probably a shade more."

In rebuttal, Porcaro's expert, Peter F. DePesa ("DePesa"), a contractor and former building inspector for the town of Andover, Massachusetts, testified that the windows were installed correctly, and that when he inspected the subject windows he "saw no old filler wood." He further testified that the "job look[ed] good...." In response to an inquiry from the bench, he explained that if the windows were too small, it "[a]bsolutely would be visible." DePesa also opined that in the O'Rorkes' house, the rough openings were off "and that's why they put the filler in." With respect to the permit issue, DePesa explained that it was discretionary with local building inspectors whether to require a building permit for window replacement.

***3** In a written opinion issued on March 26, 2007, and revised on April 12, 2007 (the "State Court Decision"), the trial judge decided in favor of the O'Rorkes, awarding them $20,000.00 in damages as the replacement cost for the eleven windows, which he trebled, in accordance with Ch. 93A, to $60,000.00, plus interest, attorneys' fees, and costs. The trial judge prefaced his findings with the observation that the "[i]nstallation of windows that are too small creates a danger of water and other damage." He went on to state:

> With regard to [Porcaro's] Complaint, I find that the evidence I heard supports many of the arbitrator's findings. I find that [Porcaro] wil[l]fully failed to obtain a necessary building permit and wil[l]fully had windows installed in [the O'Rorkes'] home which he knew to be too small for the openings. I do not find that [the O'Rorkes] breached their contract with [Porcaro] and I do not find that there was any conspiracy between [the O'Rorkes] and Meredith to breach the contract. [The O'Rorkes] had every reason to send [Porcaro] a [Ch. 93A] demand letter; [Porcaro's] Counts for malicious prosecution and breach of the covenant of good faith and fair dealing are frivolous.
>
> Judgment shall enter for [the O'Rorkes] on all Counts of [Porcaro's] Complaint.
>
> With regard to the counterclaims, I find that [Porcaro] breached the contract by having windows installed which did not properly fit. In addition, I find that [Porcaro] violated [Ch.] 93A in two respects. First, the failure to obtain a building permit is a violation of G.L. c. 142A, s.2 and is a per se violation of [Ch. 93A]. Second, the knowing and wil[l]ful violation of the contract by installing windows of an improper size is as egregious a violation of consumer protection laws as there can be. The evidence I heard supports a larger damage award than given by the arbitrator.
>
> Judgment shall enter for [the O'Rorkes] on their Counterclaim for $20,000 which shall be trebled to $60,000 plus applicable interest and costs.
>
> After hearing, I award attorneys' fees and costs in the amount of $20,269.93 as requested in the attorneys' fee application and its supplement.

(footnote omitted).

On April 12, 2007, the Marlborough district court entered judgment against Porcaro in the amount of $84,320.34. Porcaro moved for a new trial and the motion was denied. Thereafter, Porcaro appealed to the Commonwealth of Massachusetts Appellate Division of the District Court Department Northern District (the "Appellate Division"). On September 25, 2008, a three-judge panel of the Appellate Division issued an eleven-page opinion, and a Decision and Order affirming the judgment of the state court and dismissing Porcaro's appeal. *Porcaro v. O'Rourke,* 2008 Mass.App.Div. 218 (2008).

On November 17, 2008, Porcaro filed his third appeal, which resulted in the affirmance of the Decision and Order of the Appellate Division in December 2009.

The Appeals Court ruled:

> Our review of the parties' written submissions and the record on appeal persuades us that [Porcaro's] claims are without merit. Moreover, these claims were satisfactorily addressed in the thoughtful and comprehensive decision of the Appellate Division of the District Court department. No error or other abuse of discretion having been made to appear, we discern no basis on which to disturb the judgment on appeal.

Porcaro v. O'Rorke, 918 N.E.2d 97, 2009 WL 4573455 at *1 (2009).

On December 29, 2009, Porcaro filed an Application for Further Appellate Review to the Supreme Judicial Court, which it denied on January 27, 2010. *Porcaro v. O'Rourke,* 455 Mass. 1109, 920 N.E.2d 878 (2010).

II. Bankruptcy Court Proceedings

***4** In October 2010, Porcaro filed a voluntary petition for chapter 7 relief in the United States Bankruptcy Court for the District of Massachusetts. On his Schedule D–Creditors Holding Secured Claims, Porcaro listed the O'Rorkes as the holders of a $100,000.00 disputed judicial lien on real estate located at 320 Putnam Hill Road, Sutton, Massachusetts.

In January 2011, the O'Rorkes commenced the adversary proceeding which is the subject of this appeal with a single-count complaint, wherein they objected to the discharge of Porcaro's judgment debt pursuant to § 523(a)(6). In the complaint, they alleged, in pertinent part:

> In his decision [the trial judge] found that "[debtor] will[l]fully failed to obtain a necessary building permit and will[l]fully had windows installed in [creditors] home which [debtor] **knew** to be too small for the openings." ...
>
> Further, [the trial judge] specifically found that "the **knowing and will[l]ful** violation of the contract by installing windows of an improper size is as egregious a violation of consumer protection laws as there can be." ...

Porcaro answered the complaint in February 2011, denying that a permit was required. As "affirmative defenses," he alleged, in pertinent part: (a) "nothing in [the] complaint ... warrant[ed] a denial of a discharge"; (b) the State Court Decision "stated nothing about fraud"; (c) there was no finding that the installation of the windows was inadequate, and, in fact, the O'Rorkes "never had to spend one cent to pay anyone to repair or replace any of the windows"; and (d) if the windows were too small, "it was not an intentional act."

In March 2015, Porcaro filed a motion for summary judgment, an accompanying affidavit, and exhibits [3] (the "Summary Judgment Motion"), arguing that his "conduct did not cause an intentional, willful or malicious injury to the plaintiffs within the meaning of § 523(a)(6)...." Relying on *Kawaauhau v. Geiger,* 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), and *Printy v. Dean Witter Reynolds, Inc.,* 110 F.3d 853 (1st Cir.1997), he elaborated:

> The "willful and knowing" standard for purposes of [Ch.] 93A is not the same as the standard for willfulness under § 523(a)(6). Under § 523(a)(6), only "a debtor who intentionally acts in a manner he knows, or is substantially certain, will harm another may be considered to have intended the harm and, therefore, to have acted willfully." ...

Noting that the denial of a discharge is a harsh and drastic penalty, Porcaro requested dismissal of the complaint, plus fees and costs.

***5** The O'Rorkes filed a motion for summary judgment (the "Cross–Motion") on March 7, 2015, arguing that the state court findings were binding on the bankruptcy court based on collateral estoppel principles. In support, they asserted the State Court Decision met the requirements of collateral estoppel established by Massachusetts law, including that:

> 1) there was a valid and final judgment on the merits in the prior adjudication;
>
> 2) the party against whom estoppel is asserted was a party to the prior litigation;
>
> 3) the issue in the prior adjudication is identical to the issue in the current litigation; and,
>
> 4) the issue in the prior litigation was essential to the earlier judgment.

They further argued:

> With respect to this matter, there can be no dispute that there was a valid and final judgment on the merits in the district court and that the party against whom estoppel is asserted (the debtor) was a party to that prior litigation. The debtor's conduct was an essential element in the District Court matter and which led [the trial judge] to treble the award and award the creditors' attorneys' fees and costs. *See* Ex. B.

Citing *Geiger, supra,* the O'Rorkes maintained that the trial judge's findings satisfied the Supreme Court's requirements for "willfulness" under § 523(a)(6), namely that "the actor ... intend the injury, not just the act that leads to the injury." They explained:

> Applying this standard for willfulness, it is clear from [the trial judge's] findings that the debtor knew that his conduct was substantially certain to cause injury to the creditors. The debtor will[l]fully failed to obtain a necessary building permit and will[l]fully had windows installed in [creditors] [sic] home which debtor **knew** to be too small for the openings.[ ] ... The debtor, an experienced contractor himself, was told by an experienced window installer (Meredith), at the time of the installation, that the windows were too small.... The debtor, while also failing to obtain the required building permit, directed Meredith to install

> the windows anyway.... Moreover, the debtor took affirmative steps to conceal the improper installation from the creditors.... Based on the facts found by the District Court, it is easy to objectively discern that the debtor specifically intended to injure the creditors.

The O'Rorkes additionally contended the State Court Decision satisfied the "maliciousness" requirement under § 523(a)(6), insofar as the record established that Porcaro's conduct was "wrongful and without just cause or excuse." Finally, the O'Rorkes claimed Porcaro did not qualify as an "honest but unfortunate debtor," deserving of a discharge.

The O'Rorkes subsequently filed an objection to the Summary Judgment Motion, together with a supporting memorandum of law, and accompanying affidavits and exhibits.[4] The substance of their objection largely mirrored the argument set forth in their Cross–Motion.

On April 9, 2015, Porcaro filed an opposition to the Cross–Motion, objecting to the entry of summary judgment in the O'Rorkes' favor and accusing them of making "inflammatory bad faith statement[s] ... for an improper purpose to harass, intimidate, humiliate and to intentionally prejudice and influence the court's opinion of the debtor...." He continued to maintain that his conduct did not satisfy the requirements for nondischargeability of a debt under § 523(a)(6).

***6** At the April 22, 2015 hearing on the parties' summary judgment motions, the bankruptcy court granted the Cross–Motion and denied the Summary Judgment Motion, ruling from the bench, in pertinent part, as follows:

> [T]he question [ ] is, based on the final decision of the district court to which I am bound ... are there sufficient findings to establish that the conduct of Mr. Porcaro that gives rise to the debt was willful and malicious, or do I need to have a trial here to be able to make those findings?
>
> And after reviewing carefully the decision of [the trial judge] in the district court that was handed down in March of 2007, and the decision of the Appellate Division of the district court—a three-judge panel that came down after [the trial judge's] decision in which the panel affirmed [the trial judge]; that was in April of 2007, so a month later—I believe that there are sufficient findings in the district court's decision to justify my finding—not to justify it, but to mandate under principles of collateral estoppel and comity of courts, the Rooker–Feldman doctrine, to mandate my finding here that the conduct of Mr. Porcaro was willful and malicious, and satisfies the requirements of Section 523(a)(6).
>
> We all know Mr. Porcaro's papers show an outstanding understanding of the legal principles for someone who is not an attorney. We all know that the United States Supreme Court has mandated that the standard for willfulness under 523(a)(6) is the intentional infliction of injury, not ... an intentional act that leads to an injury, but the intentional infliction of an injury, and the cases that interpret the meaning of intentional injury speak in terms of an action that the perpetrator intends to cause injury to another or ... it is clear as an objective fact that the action of the perpetrator will cause such injury.
>
> ...
>
> Here, we have a finding by [the trial judge] that the defendant, Mr. Porcaro, knew before the windows were installed that they were too small. I'm not going to allow Mr. Porcaro to relitigate that fact. It is a fact that was found by the district court and it was affirmed by the Appellate Division and that's what I'm stuck with. Mr. Porcaro was told and he knew before the windows were installed that they were too small, and he told Mr. Meredith to go ahead and put them in anyway.
>
> So he intentionally acted in a way that ... did damage to the [O'Rorkes'] property. That is the fact that was found by the district court. And the district court uses a term: Mr. Porcaro "willfully had windows installed in the defendant's home which he knew to be too small for the openings." So the district court, I think, has found that Mr. Porcaro's conduct satisfies the test of the Supreme Court in the *Geiger* case, which is the basis for 523(a)(6) liability.
>
> In terms of maliciousness, the standard is straightforward. It's that the injury be wrongful and committed without just cause or excuse. And again, I find that [the trial judge's] decision and findings of fact in his decision where he found a knowing and willful violation of the contract by installing windows of an improper size, which he calls an egregious violation of consumer protection laws, satisfies the maliciousness requirement of 523(a)(6).
>
> ***7** ...

> I am bound by ... the final decision of the state court.... Those windows were too small. That's what the court found, and the O'Rorkes were damaged, and you knew about it, and ... those are the findings.
>
> So for all of those reasons, I'm going to grant the O'Rorke[s'] motion for summary judgment, and rule that the indebtedness ... of Mr. Porcaro to the O'Rorkes is nondischargeable under Section 523(a)(6). Having done so, there is no need to ... have further argument on Mr. Porcaro's motion for summary judgment.... Mr. Porcaro's motion for summary judgment is denied.

On April 22, 2015, the bankruptcy court entered the Orders. This appeal ensued. On appeal, the parties essentially reiterate the positions which they asserted in the proceedings below.

JURISDICTION

A bankruptcy appellate panel is "duty-bound" to determine its jurisdiction before proceeding to the merits, even if not raised by the litigants. *See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.),* 226 B.R. 724, 725–26 (1st Cir. BAP 1998) (citation omitted) (internal quotation omitted). A panel may hear appeals from "final judgments, orders and decrees...." 28 U.S.C. § 158(a)(1); *see also Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.),* 218 B.R. 643, 645 (1st Cir. BAP 1998). An order granting summary judgment, where no counts remain, is a final order. *Harrington v. Donahue (In re Donahue),* BAP No. NH 11–026, 2011 WL 6737074, at *8 (1st Cir. BAP Dec. 20, 2011). Accordingly, we have jurisdiction to hear this appeal.

STANDARD OF REVIEW

The Panel applies a de novo standard of review to orders granting summary judgment. *See Backlund v. Stanley–Snow (In re Stanley–Snow),* 405 B.R. 11, 17 (1st Cir. BAP 2009) (citations omitted). In addition, "[t]he applicability of the ... collateral estoppel doctrine presents a question of law requiring de novo review." *Blacksmith Invs., Inc. v. Woodford (In re Woodford),* 418 B.R. 644, 650 (1st Cir. BAP 2009). De novo review means that "the appellate court is not bound by the bankruptcy court's view of the law." *Kagan v. Stubbe (In re El San Juan Hotel Corp.),* 239 B.R. 635, 645 (1st Cir. BAP 1999), *aff'd,* 230 F.3d 1347 (1st Cir.2000).

DISCUSSION

I. Applicable Law

A. The Summary Judgment Standard

The Panel has described the summary judgment standard as follows:

> "In bankruptcy, summary judgment is governed in the first instance by Bankruptcy Rule 7056." *Desmond v. Varrasso (In re Varrasso),* 37 F.3d 760, 762 (1st Cir.1994). "By its express terms, the rule incorporates into bankruptcy practice the standards of Rule 56 of the Federal Rules of Civil Procedure." *Id.; see also* Fed. R. Bankr.P. 7056; Fed.R.Civ.P. 56. "It is apodictic that summary judgment should be bestowed only when no genuine issue of material fact exists and the movant has successfully demonstrated an entitlement to judgment as a matter of law." *In re Varrasso,* 37 F.3d at 763.... The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in the original).

***8** *Weiss v. Wells Fargo Bank, N.A. (In re Kelley),*498 B.R. 392, 397 (1st Cir. BAP 2013) (footnote omitted). Where, as here, there are cross-motions for summary judgment, "we employ the same standard of review, but view each motion separately, drawing all inferences in favor of the nonmoving party." *Fadili v. Deutsche Bank Nat'l Trust Co.,* 772 F.3d 951, 953 (1st Cir.2014) (citation omitted).

B. The Doctrine of Issue Preclusion

[1] **[2]** **[3]** **[4]** "The doctrine of issue preclusion, also referred to as collateral estoppel, bars the relitigation of issues determined in prior court actions." *Gray v. Tacason (In re Tacason),* 537 B.R. 41, 50 (1st Cir. BAP 2015) (footnote omitted) (citations omitted). "[Issue preclusion] principles ... apply in discharge exception proceedings pursuant to § 523(a)." *Grogan v. Garner,* 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). "As a result, where there has been a prior state court judgment, the bankruptcy court's ultimate dischargeability determination will be governed by any factual issues that were actually and necessarily decided by the state court." *B.B. v. Bradley (In re Bradley),* 466 B.R. 582, 586 (1st Cir. BAP 2012) (citation omitted) (internal quotations omitted). "That Congress intended the bankruptcy court to determine the final result—dischargeability or not—does not require the bankruptcy court to redetermine all the underlying facts." *Livingston v. Transnation Title Ins. Co. (In re Livingston),* 372 Fed.Appx. 613, 617 (6th Cir.2010) (citation omitted) (internal quotations omitted).

[5] **[6]** "Under the full faith and credit statute, 28 U.S.C. § 1738, the preclusive effect of a state court judgment in a subsequent nondischargeability proceeding under federal bankruptcy law is governed by the collateral estoppel law of the state from which the judgment is taken." *Stowe v. Bologna (In re Bologna),* 206 B.R. 628, 630–31 (Bankr.D.Mass.1997) (footnote omitted) (citations omitted). Therefore, we employ Massachusetts issue preclusion law.

[7] **[8]** The Supreme Judicial Court has stated that issue preclusion applies when:

> "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication. Additionally[,] the issue decided in the prior adjudication must have been essential to the earlier judgment."

Pisnoy v. Ahmed (In re Sonus Networks, Inc. S'holder Derivative Litig.), 499 F.3d 47, 56–57 (1st Cir.2007) (quoting *Kobrin v. Bd. of Registration in Med.,* 444 Mass. 837, 832 N.E.2d 628, 634 (2005)). "Massachusetts courts also require that appellate review must have been available in the earlier case before issue preclusion will arise." *Id.* at 57 (citing *Sena v. Commonwealth,* 417 Mass. 250, 629 N.E.2d 986, 992 (1994)). "The party asserting the doctrine has the burden of proving that all the requirements have been met." *Trenwick Am. Reinsurance Corp. v. Swasey (In re Swasey),* 488 B.R. 22, 33 (Bankr.D.Mass.2013) (citing *In re Bradley,* 466 B.R. at 586). "To meet this burden, the moving party must have pinpointed the exact issues litigated in the prior action and introduced a record revealing the controlling facts." *In re Bradley,* 466 B.R. at 586 (footnote omitted) (citation omitted).

C. Elements for Nondischargeability Under § 523(a)(6)

***9** **[9]** **[10]** Section 523(a)(6) excepts from discharge any debt for "willful and malicious injury by the debtor to another entity or to the property of another entity[.]" 11 U.S.C. § 523(a)(6). To except a debt from discharge under § 523(a)(6), a creditor must show: (1) the debtor injured him or his property; (2) the debtor's actions were willful; and (3) the debtor's actions were malicious. *Jones v. Svreck (In re Jones),* 300 B.R. 133, 139 (1st Cir. BAP 2003). "The creditor bears the burden of proving his claim under § 523(a)(6) by a preponderance of the evidence, ... but to obtain summary judgment, the record must compel a determination of nondischargeability as a matter of law." *In re Tacason,* 537 B.R. at 49–50 (citations omitted).

1. Meaning of Willful

[11] The Supreme Court has instructed that the word "willful," as used in § 523(a)(6), "modifies the word 'injury,' indicating that nondischargeability under that section therefore requires 'a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.' " *In re Bradley,* 466 B.R. at 587 (quoting *Geiger,* 523 U.S. at 61–62, 118 S.Ct. 974). It further explained that "[i]ntentional torts generally require that the actor intend 'the *consequences* of an act,' not simply 'the act itself.' " *Geiger,* 523 U.S. at 61–62, 118 S.Ct. 974 (citing *Restatement (Second) of Torts* § 8A)).

[12] "In light of the Supreme Court's citation to the *Restatement (Second) of Torts,* courts have concluded that the Supreme Court meant the willfulness element to include actions intentionally done and known by the debtor to be 'substantially certain to cause injury.' " *In re Bradley,* 466 B.R. at 587 (citation omitted) (internal quotations omitted). As one bankruptcy court within this circuit explained:

> The "substantially certain" alternative is a prominent aspect of the *Restatement* section the *[Geiger]* Court embraces. *See Restatement (Second) of Torts, supra,* § 8A. It is an ingredient of the text of § 8A and comment b., as well as the first illustration. Although the Court did not cite comment b., it could be of some significance to future applications of § 523(a)(6). It reads:
>
> > All consequences which the actor desires to bring about are intended, as the word is used in this Restatement.

> Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

McAlister v. Slosberg (In re Slosberg), 225 B.R. 9, 19 (Bankr.D.Me.1998) (quoting *Restatement (Second) of Torts* § 8A cmt. b). "Thus, a debtor who intentionally acts in a manner he knows, or is substantially certain, will harm another may be considered to have intended the harm and, therefore, to have acted willfully within the meaning of § 523(a)(6)." *Id.* (footnote omitted).

2. Meaning of Malice

[13] Prior to *Geiger,* the First Circuit determined that § 523(a)(6)'s element of "malice" requires the creditor to show that the injury was caused " 'without just cause or excuse.' " *In re Bradley,* 466 B.R. at 587 (quoting *Printy,* 110 F.3d at 859). This circuit continues to apply the *Printy* standard post-*Geiger. Id.* (citations omitted); *see also Old Republic Nat'l Title Ins. Co. v. Levasseur (In re Levasseur),* 737 F.3d 814, 818 (1st Cir.2013) (stating that an injury is malicious "if it was wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will") (citation omitted) (internal quotations omitted).

D. Mass. Gen. Laws Ch. 93A

[14] [15] [16] [17] [18] To prevail at summary judgment on a § 523(a)(6) claim by invoking issue preclusion, the O'Rorkes must have demonstrated that in entering judgment under Ch. 93A, the state court necessarily decided each of the elements to establish nondischargeability. To determine this, we must examine the State Court Decision. Chapter 93A makes unlawful " 'unfair or deceptive acts or practices in the conduct of any trade or commerce....' " *Commonwealth v. Hale,* 618 F.2d 143, 146 (1st Cir.1980) (quoting Mass. Gen. Laws ch. 93A, § 2). "Substantive liability under [Ch.] 93A 'requires a showing of conduct that (1) falls within the penumbra of some common-law, statutory, or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous; and (3) causes substantial injury to consumers or other business persons.' " *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.,* 911 F.Supp.2d 1, 99–100 (D.Mass.2012) (citations omitted), *aff'd,* 775 F.3d 109 (1st Cir.2014). Chapter 93A, § 9(3), allows multiple damages of from two to three times actual damages for "a *willful or knowing* violation of ... section two...." Mass. Gen. Laws ch. 93A, § 9(3) (emphasis added). The "willful or knowing" requirement "is directed against callous and intentional violations of the law...." *Heller v. Silverbranch Constr. Corp.,* 376 Mass. 621, 382 N.E.2d 1065, 1070 (1978). The Supreme Judicial Court has said that "a finding of 'wil [l]ful' conduct within the meaning of [Ch.] 93A is satisfied where the defendant has acted recklessly." *Kattar v. Demoulas,* 433 Mass. 1, 739 N.E.2d 246, 259 (2000) (citations omitted). On the other hand, courts equate "knowing" conduct "with intentional acts." *Id.* (citation omitted) (internal quotations omitted). "Ultimately, [Ch.] 93A ties liability for multiple damages to the degree of the defendant's culpability." *Id.* (citation omitted).

II. Analysis

A. The Issue on Appeal

***10 [19]** In order for issue preclusion to compel entry of summary judgment in their favor under § 523(a)(6), it was incumbent on the O'Rorkes to satisfy the requirements set forth in *Pisnoy, supra*. Several of these elements are dispensed with quickly. The parties do not dispute that the state court action involved the same parties as the case at bar, or that the state court entered a valid, final judgment. Indeed, there was a judgment on the merits after actual litigation; the parties in the state court proceeding were the same as in the adversary proceeding. Nor is there any question as to whether appellate review was available to Porcaro in the state court action, as he amply availed himself of the appellate process in the state courts. Thus, the preclusive effect of the State Court Decision depends on the presence of the remaining elements for issue preclusion under Massachusetts law, namely: (1) the issues in the state court litigation were identical to the issues presented in the adversary proceeding; and (2) those issues were essential to the state court judgment. Porcaro never raised the question of whether the issues in the adversary proceeding were "essential" to the state court judgment, either in the proceedings below or on appeal. Accordingly, that issue is waived on appeal. *See Velázquez Rodríguez v. Municipality of San Juan,* 659 F.3d 168, 175 (1st Cir.2011) ("It should go without saying that we deem waived claims not made or claims adverted to in a cursory fashion, unaccompanied by developed argument.") (citations omitted).

Our inquiry is, therefore, limited to whether the issues before the trial judge were identical to those in the adversary proceeding under § 523(a)(6), requiring the establishment of an injury, maliciousness, and willfulness. *See In re Jones,* *supra*. Porcaro argues that a Ch. 93A claim and a § 523(a)(6) claim lack the necessary identity of elements for application of the doctrine of issue preclusion, and, particularly, that the "willfulness" element of § 523(a)(6) is not satisfied here.

[20] **[21]** **[22]** Porcaro does not meaningfully dispute whether the "maliciousness" element of § 523(a)(6) is met. In the proceedings below, he asserted, without elaboration, that the state court judge did not state in his written decision that "the debtor's conduct was malicious." In the reply brief which he filed in this appeal, Porcaro simply reiterates this assertion. Given the inadequacy of Porcaro's treatment of the "maliciousness" requirement, and that the heart of the parties' dispute, as demonstrated by their submissions below and on appeal, is really the "willfulness" issue, we need not dwell on the maliciousness element. *See Velázquez Rodríguez, supra.* In any event, the argument that the trial judge did not make a finding of maliciousness is meritless, as his conclusion that Porcaro's conduct was "as egregious a violation of consumer protection laws as there can be" is tantamount to a finding that Porcaro's actions were "wrongful" and "without just cause or excuse." *See In re Levasseur*, 737 F.3d at 818. Porcaro's claim that the injury element of § 523(a)(6) was not satisfied in the state court is equally unpersuasive. As we previously stated, "the term 'injury' ... is understood to mean a 'violation of another's legal right, for which the law provides a remedy.' " *Tacason*, 537 B.R. at 50 (quoting *First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir.2013)). The trial judge's breach of contract finding easily satisfies this requirement. Thus, our sole focus is whether the willfulness issue in the state court was identical to the willfulness element of § 523(a)(6).

B. Identity, Generally

[23] **[24]** For issue preclusion to apply, "[t]he identity of the issues need not be absolute; rather, it is enough that the issues are in substance identical." *Manganella v. Evanston Ins. Co.*, 700 F.3d 585, 591 (1st Cir.2012) (citing *Montana v. United States*, 440 U.S. 147, 155, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). "Further, the issue need not have been the ultimate issue decided ...; issue preclusion can extend to necessary intermediate findings ..., even where those findings are not explicit...." *Id.* (citations omitted).

C. Are the Elements of Ch. 93A and § 523(a)(6) the Same?

The issue before the trial judge regarding the multiplication of damages was whether Porcaro acted willfully or knowingly. *See Kattar*, 739 N.E.2d at 259 (equating "willfully" with "recklessly" and "knowingly" with "intentional acts"). The issue before the bankruptcy court on summary judgment was whether there existed a genuine issue of fact regarding whether Porcaro intended the consequences of his act, not simply the act itself—i.e., whether there existed a substantial certainty that harm would result from Porcaro's conduct. *See Slosberg, supra*.

***11** **[25]** Porcaro correctly points out that Ch. 93A violations and § 523(a)(6) claims are not synonymous. We are cognizant that "it would be possible for a state court to find a violation of [Ch.] 93A ... for behavior which lacks the characteristics of misconduct necessary to support a ... finding of nondischargeability." *Commonwealth v. Hale*, 618 F.2d at 147. Moreover, we previously agreed with the "majority of courts that ... have concluded that a state court judgment that could have been based on reckless disregard is not the equivalent of the substantial certainty required by § 523(a)(6)." *In re Bradley*, 466 B.R. at 588 (citing cases). Nonetheless, this does not mean that a Ch. 93A judgment may not be given preclusive effect in a § 523(a)(6) nondischargeability proceeding. *See In re Stanley–Snow*, 405 B.R. at 22 (considering preclusive effect of a Ch. 93A judgment in subsequent § 523(a)(2)(A) action).

D. The Effect of the Record: Determining Whether an Issue was Actually Litigated

[26] In determining whether an issue was actually litigated and decided, we are " 'free to go beyond the judgment ... and examine the pleadings and evidence in the prior action.' " *In re Stanley–Snow*, 405 B.R. at 22 (quoting *Nissan v. Weiss (In re Weiss)*, 235 B.R. 349 (Bankr.S.D.N.Y.1999), *aff'd*, 255 B.R. 115 (S.D.N.Y.2000)). Here, we cannot ignore the extensive record. The First Circuit has given us guidance as to the use of the record in similar proceedings. In *Stoehr v. Mohamed*, 244 F.3d 206 (1st Cir.2001), it was confronted with the analogous question of whether a Ch. 93A judgment may be given preclusive effect in a subsequent § 523(a)(2)(A) nondischargeability proceeding. As in the instant case, the *Stoehr* court had an "ample record." *Id.* at 208. The *Stoehr* court concluded that application of issue preclusion was appropriate in light of the record, reasoning as follows:

> [The state court] findings make clear that the issue of fraud was actually litigated in the superior court, was a necessary component of the court's judgment, and was the same as the issue adjudicated in the section 523(a)(2) proceeding....

> [Stoehr] correctly points out that [Ch.] 93A violations and fraud are not synonymous, and that [Ch.] 93A liability may be premised on conduct other than fraud. The superior court's findings, however, make clear that fraud was in fact the basis for [Ch.] 93A liability in this case, and do not suggest any different theory of [Ch.] 93A liability.

Id. at 208–209.

In *Stanley–Snow, supra,* the Panel adopted *Stoehr's* reasoning to give a Ch. 93A judgment preclusive effect in a subsequent § 523(a)(2)(A) proceeding, stating:

> Neither misrepresentation nor fraud are a necessary component of a state court's judgment for [Ch.] 93A violations. Moreover, in a[Ch.] 93A action, it is unnecessary for a plaintiff to establish that the defendant knew his allegedly deceptive representations were false or to prove actual reliance upon the defendant's representations....
>
> Notwithstanding, this does not mean that a[Ch.] 93A judgment may not be given preclusive effect in a § 523(a)(2)(A) nondischargeability proceeding. To the contrary, collateral estoppel is appropriate where, as here, the record so amply supports the state court's conclusions in the State Court Judgment based on the Debtor's fraudulent conduct. *See Stoehr,* 244 F.3d at 208. As the *Stoehr* court noted: "An issue may be actually decided for purposes of collateral estoppel, even if it is not explicitly decided, if it 'constituted, logically or practically, a necessary component of the decision reached in the prior litigation.' "

In re Stanley–Snow, 405 B.R. at 22 (citations omitted).

E. The Contents of the Record in the Instant Appeal

[27] This now brings us to the ultimate question: does the record in this case support the bankruptcy court's nondischargeability conclusion? As part of his charge, the trial judge had to decide whether Porcaro's actions were willful (reckless) or knowing (intentional), such that the multiplication of damages was warranted. The trial judge's unambiguous and factually supported findings set forth in the State Court Decision leave little question that Porcaro's actions were "intentionally done." He twice described Porcaro's actions as willful (in descriptions unrelated to the Ch. 93A claim), and to substantiate the trebling of damages under the Ch. 93A claim, he found that Porcaro's actions were willful and knowing, stating: "[T]he wil[l]ful and knowing violation of the contract by installing windows of an improper size is as egregious a violation of consumer protection laws as there can be." Furthermore, the trial judge found that Meredith, Porcaro's subcontractor, alerted Porcaro that the windows were too small prior to installation and that Porcaro then instructed Meredith to install the windows anyway. The trial judge found that such windows created "a danger of water and other damage" so that their replacement was required. He explained the evidence supported the arbitrator's earlier findings. In addition to the comprehensive State Court Decision, we have the benefit of portions of the transcript of Meredith's testimony (omitted from the record by Porcaro, but supplied by the O'Rorkes), wherein Meredith explained he warned Porcaro about the problem with the windows, and cautioned him that the old ones should be reinstalled pending the order of suitable replacements. Meredith's testimony further establishes that Porcaro took steps to cover up the improper installation and made threats should Meredith inform the O'Rorkes.

***12** **[28]** "An issue may be 'actually' decided even if it is not *explicitly* decided, for it may have constituted, logically, or practically, a necessary component of the decision reached in the prior litigation." *Grella v. Salem Five Cent Sav. Bank,* 42 F.3d 26, 30–31 (1st Cir.2014) (citation omitted). Thus, in *Tacason,* despite the absence of an explicit finding of intent to injure, the Panel held that certain state court rulings made upon the entry of the default judgment satisfied the elements of § 523(a)(6). 537 B.R. at 53–54. Here, although the state court did not expressly find that Porcaro intended to injure the O'Rorkes, the court's findings, combined with the testimony from the state court trial, easily support a conclusion that harm to the O'Rorkes was substantially likely to occur, and that Porcaro "still [went] ahead." *See In re Slosberg,* 225 B.R. at 19 (stating if the actor knows that the consequences are certain, or substantially certain, to result from his act, and "still goes ahead, he is treated by the law as if he had in fact desired to produce the result") (citation omitted) (internal quotations omitted). Indeed, the state court findings make it clear that Porcaro's knowledge was a significant basis for Ch. 93A liability, and do not suggest a different theory of liability.

Moreover, the fulsome nature of the record before us distinguishes the instant case from others where a paltry record prevented the court from applying the doctrine of issue preclusion. *See, e.g., In re Bradley,* 466 B.R. at 589 (refusing to give preclusive effect to a California state court judgment for infliction of emotional distress in a subsequent § 523(a)(6) proceeding, stating the basis for the state court judgment was "opaque," especially given the absence of the state court complaint, transcript, or detailed findings from the record); *In re Swasey,* 488 B.R. at 45 (declining to give preclusive effect to a Ch. 93A judgment in a subsequent § 523(a)(6) proceeding, reasoning that the debtor's intent to injure the plaintiffs remained "[e]lusive," in part, "[b]ecause of the absence of direct and circumstantial evidence"); *Morin v. Longo (In re Longo),* 37 B.R. 900, 902 (Bankr.D.Mass.1984) (refusing to hold that the state court record of prior Ch. 93A proceedings established the elements of a § 523(a)(6) claim, where the "state court record [was] devoid of any allegations or findings which would warrant a conclusion that the state court made a finding that the injury was willful and malicious"). The abundance of the record in the instant appeal, as in *Stoehr, Stanley–Snow,* and *Tacason,* compels a conclusion that the "willfulness" element of § 523(a)(6) was actually litigated in the state court. Accordingly, the bankruptcy court correctly denied the Summary Judgment Motion and granted the Cross–Motion, based on the preclusive effect of the State Court Decision.

CONCLUSION

Based on the foregoing, the Orders are **AFFIRMED**.

All Citations

--- B.R. ----, 2016 WL 453385, 62 Bankr.Ct.Dec. 35

Footnotes

1 In the state court proceedings, discussed infra, "O'Rorke" is occasionally spelled "O'Rourke." We adhere, however, to the spelling which the O'Rorkes used in their bankruptcy court and Panel submissions: "O'Rorke."

2 Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, *et seq.*

3 Porcaro's exhibits included: A) a portion of the transcript of Michael O'Rorke's deposition, wherein he testified, inter alia, that he learned that Porcaro instructed Meredith to install the windows even though Porcaro knew they were too small; B) a copy of the contract for window installation executed by the O'Rorkes and Porcaro; C) a copy of the decision of the arbitrator; D) a portion of the transcript of the state court hearing, featuring testimony by Stevenson; E) an excerpt from the transcript of the state court hearing, featuring a portion of the cross-examination and redirect examination of Stevenson; F) excerpts from the transcript of the state court hearing, featuring portions of the direct examination of DePesa, and the affidavit of DePesa, wherein he averred that the windows were properly installed; G) an excerpt from the transcript of the state court hearing, featuring another portion of the direct examination of DePesa; H) a copy of a quitclaim deed dated April 29, 1999 conveying title to the Property to the O'Rorkes, and a copy of another quitclaim deed dated August 28, 2007, whereby the O'Rorkes conveyed the Property for the sum of $380,000.00; I) a copy of the state court judgment dated April12, 2007; J) the affidavit of Porcaro, wherein he averred, inter alia, that the windows he installed in the O'Rorkes' home had not been replaced and were, in fact, "a big selling point of the home ...."; and K) a list of the foregoing summary judgment exhibits, with brief descriptions.

4 Their exhibits included: A) the decision of the arbitrator; B) the State Court Decision; C) the Decision and Order and the Opinion of the Appellate Division dated September 25, 2008; D) the decision of the Appeals Court, pursuant to Rule 1:28, dated December 8, 2009; E) Notice of Denial of F.A.R Application; F) sworn testimonial of Meredith; and G) trial testimony of Meredith.

2016 WL 521188
United States Court of Appeals,
First Circuit.

In re REDONDO CONSTRUCTION CORPORATION, Debtor
Puerto Rico Highway and Transportation Authority, Plaintiff, Appellant,
v.
Redondo Construction Corporation, Defendant, Appellee.

No. 15–1397.
|
Feb. 10, 2016.

Synopsis
Background: Chapter 11 debtor-contractor brought adversary proceedings against Puerto Rico Highway and Transportation Authority (PRHTA), claiming amounts due for work performed on road construction projects. The Bankruptcy Court, Carlo, J., 411 B.R. 89, entered judgments in debtor's favor. The PRHTA moved to alter or amend judgment, and debtor cross-moved to correct clerical errors in the judgment. The bankruptcy court, 424 B.R. 29, granted motions in part and denied them in part. PRHTA appealed. The district court, affirmed, and PRHTA appealed. The Court of Appeals, 678 F.3d 115, affirmed in part, vacated in part, and remanded. On remand, the Bankruptcy Court, Enrique S. Lamoutte, J., 505 B.R. 388, awarded prejudgment interest to debtor at the rate of six percent. PRHTA appealed. The United States District Court for the District of Puerto Rico, Francisco A. Besosa, J., 523 B.R. 339, affirmed. PRHTA appealed.

Holdings: The Court of Appeals, Torruella, Circuit Judge, held that:

[1] contractor preserved its right to interest as indemnity for default;

[2] award of interest as indemnity for default accrued from time that construction projects were substantially completed; and

[3] federal law exclusively controlled mandatory award of postjudgment interest.

Vacated and remanded.

Appeal from the United States District Court for the District of Puerto Rico, Hon. Francisco A. Besosa, U.S. District Judge.

Attorneys and Law Firms

Héctor Benítez–Arraiza, with whom Quiñones & Arbona, P.S .C., was on brief, for appellant.

Charles A. Cuprill–Hernández, with whom Law Offices Charles A. Cuprill, P.S.C., was on brief, for appellee.

Before TORRUELLA, HAWKINS, * and BARRON, Circuit Judges.

Opinion

TORRUELLA, Circuit Judge.

***1** This case returns to us following our remand in *In re Redondo Construction Corp. (Redondo III),* 678 F.3d 115 (1st Cir.2012). The Puerto Rico Highway and Transportation Authority ("the Authority") appeals the district court's affirmance of the bankruptcy court's award of prejudgment interest to Redondo Construction Corporation ("Redondo") on its contract claims under Article 1061 of the Puerto Rico Civil Code, 31 L.P.R.A. § 3025, accruing through the payment of principal. As explained below, we reject the Authority's contention that Redondo forfeited its claim to prejudgment interest under Article 1061 but agree with its argument that 28 U.S.C. § 1961 exclusively controls awards of postjudgment interest in federal court. We thus find that we must vacate and remand for a calculation of § 1961 interest and, to prevent double recovery, a recalculation of Article 1061 interest.

I.

Because one of the main issues in this appeal is whether Redondo preserved its claim to Article 1061 interest, we focus on the parties' motion practice. We direct readers interested in the factual history of this case to the bankruptcy court's opinion in *Redondo Construction Corp. v. Puerto Rico Highway & Transportation Authority (Redondo I*), 411 B.R. 89 (Bankr.D.P.R.2009).

In the 1990s, Redondo contracted with the Authority to work on three construction projects. [1] Each contract described the projects' design plans, the construction sites' anticipated conditions, and the procedures for implementing variances. In certain situations, Redondo could claim extra compensation for unforeseen additional work. These terms proved important because all three of the construction projects experienced unanticipated problems.

Redondo filed claims against the Authority on all three contracts seeking compensation for additional work performed. Before these claims were resolved, however, Redondo filed for Chapter 11 bankruptcy. Through the Chapter 11 proceedings, Redondo filed three complaints against the Authority for money owed under the construction contracts. In each of these complaints, Redondo stated it was entitled to not only damages, but also prejudgment interest accruing at a rate of 6.5% per annum. Following a bench trial, Redondo filed a memorandum reiterating its request for prejudgment interest at a rate of 6.5% per annum. [2]

The bankruptcy court ruled in Redondo's favor. *Id.* at 89. In addition to awarding Redondo damages, the bankruptcy court, without stating its legal basis for doing so, found that Redondo was entitled to prejudgment interest accruing at 6.5% per annum.

The Authority subsequently filed a timely motion to amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) and Federal Rule of Bankruptcy Procedure 9023. Among other claims, the Authority argued that the bankruptcy court erred in awarding Redondo prejudgment interest. Noting that prejudgment interest is typically a matter of state law, the Authority argued that it had not acted with temerity or obstinacy as required by Puerto Rico Rule of Civil Procedure 44.3(b) in order to impose prejudgment interest. [3]

***2** Redondo filed a response motion defending the bankruptcy court's prejudgment interest award, arguing (1) that the three construction projects "had federal funds participation allowing for the computation of the pre-judgment interest award[ ]" (presumably referring to 41 U.S.C. § 7109(a)(1), which allows parties to recover interest on the principal on contracts in which the federal government is a party) and (2) that Article 1061 allowed for "indemnity" interest under Puerto Rico law.

Although the bankruptcy court ruled in the Authority's favor on some claims, it left the prejudgment interest award intact. *In re Redondo Constr. Corp. (Redondo II),* 424 B.R. 29, 36 (Bankr.D.P.R.2010). The bankruptcy court concluded that the parties contracted to incorporate the rate used for government-party contracts as set by 41 U.S.C. § 7109(a)(1). [4] *Id.* at 33.

Following the bankruptcy court's ruling, the Authority sought review first in the district court, and then in this Court. In *Redondo III,* we found that the record did not show that 41 U.S.C. § 7109(a)(1) applied either independently or by incorporation through contract. 678 F.3d at 125–26. We considered alternative bases under which the bankruptcy court could have awarded prejudgment interest (including Civil Rule 44.3 and Article 1061), but concluded there was no support in the record that the bankruptcy court did so. *Id.* at 126. As a result, we instructed the district court to "vacate the award of prejudgment interest and return the case to the bankruptcy court for a determination of whether prejudgment interest [was] appropriate and, if so, at what rate and for what periods." *Id.*

On remand, Redondo argued it was entitled to prejudgment interest under Article 1061. The bankruptcy court agreed and awarded Redondo Article 1061 interest accruing at a rate of 6% per annum from the date of substantial completion for each construction project, through the date of the Authority's final payment on the principal. *In re Redondo Constr. Corp. (Redondo IV),* 505 B.R. 388, 401 (Bankr.D.P.R.2014).

Following the bankruptcy court's decision, the Authority moved to amend the judgment, arguing that Redondo forfeited its Article 1061 claim and that the bankruptcy court used incorrect start and end dates for the accrual period. After the bankruptcy court denied the Authority's motion, *In re Redondo Constr. Corp. (Redondo V),* 515 B.R. 410, 416 (Bankr.D.P.R.2014), the Authority appealed to the district court. The district court affirmed the bankruptcy court's decision in its entirety. *In re Redondo Constr. Corp. (Redondo VI),* 523 B.R. 339, 346 (D.P.R.2014). This timely appeal followed.

II.

[1] "When state-law claims (such as the contract claims at issue here) are adjudicated by a federal court, prejudgment interest is normally a matter of state law." *Redondo III,* 678

F.3d at 125. Article 1061 of the Puerto Rico Civil Code provides parties to a breach of contract with a right to interest as an indemnity for default. *Rivera v. Crescioni,* 77 D.P.R. 47, 77 P.R.R. 43, 50 (1954). It states in full that

> ***3** [s]hould the obligation consist in the payment of a sum of money, and the debtor should be in default, the indemnity for losses and damages, should there not be a stipulation to the contrary, shall consist in the payment of the interest agreed upon, and should there be no agreement, in that of the legal interest.
>
> Until another rate is fixed by the Government, interest at the rate of six percent (6%) per annum shall be considered as legal.

31 L.P.R.A. § 3025.

[2] In its appeal, the Authority renews its arguments regarding the bankruptcy court's award under Article 1061: that Redondo forfeited its claim, and that even if such an award was warranted, the bankruptcy court used incorrect start and end dates for accrual. "On appeal from a district court decision reviewing a bankruptcy court order, we review the bankruptcy court order directly, disturbing its factual findings only if clearly erroneous, while according *de novo* review to its conclusions of law." *In re Furlong,* 660 F.3d 81, 86 (1st Cir.2011) (quoting *Spenlinhauer v. O'Donnell,* 261 F.3d 113, 117 (1st Cir.2001)). All of the Authority's arguments concern questions of law so our review will be *de novo.* We turn first to the Authority's forfeiture arguments.

III.

[3] The Authority proffers two main arguments for finding that Redondo forfeited its claim to Article 1061 interest. First, the Authority argues that Redondo raised its claim through the wrong procedural vehicle. Second, the Authority argues that even if Redondo's claim was procedurally proper, Redondo failed to adequately develop its claim. Although we agree with the Authority that Article 1061 interest is discretionary (and therefore forfeitable), [5] neither of these claims has merit.

[4] **[5]** The bankruptcy court found Redondo's Article 1061 claim preserved by its response motion in *Redondo II.* The Authority now argues that a Rule 59 response motion is not the proper vehicle through which a party may claim prejudgment interest. [6] Rule 59 motions are typically the proper way for a prevailing party to raise prejudgment interest arguments. *See Oserneck v. Ernst & Whinney,* 489 U.S. 169, 175, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) (holding that a motion for discretionary prejudgment interest "constitute[d] a motion to alter or amend the judgment under Rule 59(e)"); *Redondo III,* 678 F.3d at 122 ("While arguments presented for the first time in a Rule 59(e) motion ordinarily are deemed forfeited, the grant or denial of prejudgment interest is an exception to this general rule." (citation omitted)). Redondo, however, developed its prejudgment interest arguments in its response to the Authority's Rule 59 motion. Of course, that is understandable as the bankruptcy court gave Redondo the exact prejudgment interest relief it requested in its complaints and post-trial memorandum.

[6] We conclude that Redondo preserved its claim by stating in its response motion that Article 1061 could support an award of prejudgment interest as an alternative to 41 U.S.C. § 7109(a)(1). Ruling in the Authority's favor would create a rule requiring prevailing parties to file a Rule 59 motion to amend a favorable judgment in order to preserve their ability to defend their judgment on alternative grounds or assert alternative claims. Such a rule goes against a commonsense understanding of the word amend-Redondo, understandably, would not want the bankruptcy court to amend the favorable judgment. Even if it seemed highly probable that the Authority would challenge the unexplained award of prejudgment interest, Redondo was under no obligation to shore up the bankruptcy court's reasoning until the Authority moved. *See Field v. Mans,* 157 F.3d 35, 41–42 (1st Cir.1998) (refusing to view unchallenged holding by trial court that was unfavorable to prevailing party as law of case on remand because "[i]t would be extremely unrealistic to expect [the prevailing party's] attorney to buttress his client's case by putting forward an alternate theory in support of the lower court's judgment.... We are loath to find that [the prevailing party] waived the [issue] merely by failing to file either a procedurally dubious cross-appeal ... or to brief and argue what, to any attorney, might have seemed an entirely redundant point" (citations omitted)); *cf. Bath Iron Works Corp. v. Coulombe,* 888 F.2d 179, 179–80 (1st Cir.1989) (per curiam) (holding party could not appeal favorable judgment). We are reluctant to find forfeiture based on Redondo's failure to file a "procedurally dubious" Rule 59 motion. *Field,* 157 F.3d at 41.

***4** Additionally, adopting the Authority's position would disadvantage parties who raise a kernel of a prejudgment interest claim prior to judgment vis-à-vis those who wait to file a Rule 59 motion. Our rule permitting prejudgment interest claims in Rule 59 motions is based, in part, on our belief that parties should not be "required to put the cart before the horse and argue about prejudgment interest before the underlying issues of liability and damages have been resolved." *Redondo III,* 678 F.3d at 122. We thus find it excusable that Redondo did not develop every conceivable prejudgment interest claim in its complaint and post-trial memorandum, when the issue of any recovery was still open and commanded its full attention. Redondo should not be held to its merits stage theory when a party who did not apprise the court at all would be allowed to litigate the issue fully in a Rule 59 motion. Finding Redondo's Article 1061 claim procedurally sound, we turn to the Authority's argument that Redondo's response motion did not adequately develop its claim.

[7] **[8]** It is true that "issues adverted to in a perfunctory manner, unaccompanied by argumentation are waived." *Global NAPS, Inc. v. Verizon New England, Inc.,* 706 F.3d 8, 16 (1st Cir.2013) (quoting *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990)). But Redondo's response motion did not mention Article 1061 in a perfunctory manner. In response to the Authority's characterization of Rule 44.3 as the only basis for prejudgment interest under Puerto Rico law, Redondo argued the Authority incorrectly "concentrate[d] itself on Rule 44.3 ... and ignore[d] the provisions of the Civil Code of Puerto Rico as to interest relative indemnity [sic] for nonpayment of money" and quoted Article 1061. We find these statements made it sufficiently clear that Redondo was proposing Article 1061 as an alternative basis for awarding prejudgment interest and therefore reject the Authority's contention that Redondo forfeited its claim to Article 1061 interest. [7]

IV.

[9] We now address the Authority's contention that the bankruptcy court calculated prejudgment interest based on an incorrect time interval. We find no error with the bankruptcy court's start date based on Puerto Rican law. However, because federal law exclusively controls the award of postjudgment interest, we conclude that the bankruptcy court should not have extended the prejudgment interest accrual period past the entry of judgment. As a result, we vacate and remand the bankruptcy court's decision for further proceedings consistent with this opinion.

A. Start of Article 1061 Interest Accrual

Article 1061 does not provide for a specific accrual period. It simply states that creditors have a right of indemnity when "the obligation consist[s] in the payment of a sum of money, and the debtor [is] in default." 31 L.P.R.A. § 3025. The parties agree that under these terms, Article 1061 interest begins accruing when a party defaults. They disagree, however, about when default occurred in this case.

***5** Looking to other provisions of the Puerto Rico Civil Code, Article 1053 defines when parties default under contract law. Normally, a party is in default "from the moment when the creditor demands the fulfilment [sic] of [its] obligation, judicially or extrajudicially." 31 L.P.R.A. § 3017. Pursuant to this provision, the Authority argues that the bankruptcy court should have started calculating the accrual of prejudgment interest from the date Redondo filed its complaints demanding additional compensation.

Article 1053, however, first provides two exceptions to this rule: (1) as otherwise provided by law and (2) "[i]f by reason of its nature and circumstances it may appear that the fixing of the period within which the thing was to be delivered or the service rendered was a determinate cause to constitute the obligation." *Id.* § 3017(1), (2). Further, Article 1053 provides that default for contracts of mutual obligation commences when "one of the persons obligated fulfills his obligation the default begins for the other party." *Id.* § 3017.

[10] The Puerto Rico Supreme Court has held that construction contracts, such as the ones between Redondo and the Authority, are contracts of mutual obligation. *Constructora Bauzá, Inc. v. García López,* 129 D.P.R. 579, 1991 P.R.-Eng. 735, 859 (1991). Thus, Article 1053's general rule that a party is in default only upon the demand of the creditor does not apply. 31 L.P.R.A. § 3017. Rather, Article 1053's terms for contracts of mutual obligations control and the Authority was in default from the time Redondo fulfilled its obligations—in other words, from the dates the construction projects were substantially completed. *Id.* These were the start dates used by the bankruptcy court and thus we find no error. [8]

B. End of Article 1061 Interest Accrual

[11] **[12]** We must, however, vacate and remand the bankruptcy court's calculation of prejudgment interest to the extent it includes accrual past the entry of judgment. Although prejudgment interest is usually governed by state law when the underlying claims are based on state law, postjudgment interest is governed exclusively by federal law under 28 U.S.C. § 1961. *Vázquez–Filippetti v. Cooperativa de Seguros Múltiples de P.R.,* 723 F.3d 24, 28 (1st Cir.2013) ("[T]he plaintiffs tell us that the laws of Puerto Rico require [the defendant] to pay postjudgment interest. Yet it is well established that federal law governs the entitlement to postjudgment interest in any federal civil suit, including a diversity suit such as the instant action."). And under federal law, "[p]ostjudgment interest is mandatory and the prevailing party is entitled to it even if the district court made no provision for its payment." *In re Redondo Const. Corp.,* 700 F.3d 39, 42 (1st Cir.2012). [9]

[13] The bankruptcy court's order in *Redondo IV* clearly accrues Article 1061 interest past the entry of judgment, thus overlapping with § 1961's postjudgment interest period. 505 B.R. at 401. Because § 1961 interest is exclusive and mandatory, we must remand Redondo's case to the bankruptcy court for a calculation of postjudgment interest in accordance with § 1961's terms.

***6 [14]** Redondo argues that it is entitled to interest under both statutes, but "a plaintiff is entitled to only one full recovery, no matter how many different legal grounds may support the verdict." *Freeman v. Package Mach. Co.,* 865 F.2d 1331, 1345 (1st Cir.1988). Redondo's full recovery entitles it to prejudgment interest under Article 1061 and postjudgment interest under § 1961 only. Allowing the Article 1061 interest accrual period to extend into the period already covered by § 1961 would result in Redondo receiving more than its full recovery.

[15] We also reject the bankruptcy and district courts' reasoning in allowing recovery under both statutes. When challenged by the Authority in a motion to amend, the bankruptcy court explained in *Redondo V* that it believed that Redondo could recover under both Article 1061 and § 1961 because Article 1061 interest is "an independent indemnity for damages, by way of penalty, for default in payment." *Redondo V,* 515 B.R. at 414 (quoting *Rivera v. Crescioni,* 77 D.P.R. 47, 55–56 (1954)). The district court echoed this reasoning in its affirmance. *Redondo VI,* 523 B.R. at 345. We, however, find little support for the bankruptcy and district courts' view that Article 1061 acts as a separate "penalty" rather than compensation for delay based on the time value of money, [10] and Redondo never develops its claim beyond a bare assertion. Finding no authority to the contrary, we must direct that the Article 1061 interest award be recalculated to take into account an award of postjudgment interest consistent with § 1961's terms.

V.

Although we find that Redondo is entitled to Article 1061 interest, we must vacate the district court's judgment to allow for an award of postjudgment interest consistent with 28 U.S.C. § 1961 and a reduction of the Article 1061 interest award to the extent their accrual periods overlap. The parties are to bear their own costs.

Vacated and Remanded.

All Citations

--- F.3d ----, 2016 WL 521188, 62 Bankr.Ct.Dec. 43

Footnotes

* Of the Ninth Circuit, sitting by designation.

1 Redondo contracted to build a bridge and access road ("the Patillas project"), to replace a different bridge ("the Dorado–Toa Alta project"), and to improve a highway ("the Mayagüez project").

2 Neither the complaints nor the post-trial memorandum clearly stated under which statute Redondo was claiming prejudgment interest. The complaint regarding the Mayagüez project stated Redondo was entitled to prejudgment interest because federal funds were used in the project. Redondo's post-trial memorandum, however, cited only Puerto Rico Rule of Civil Procedure 44.3 and argued that the Authority acted obstinately by delaying its payment.

3 Rule 44.3(b) states:

> Except when the defendant is the Commonwealth of Puerto Rico, its municipalities, agencies, instrumentalities or officers acting in their official capacity, the court will also impose on the party that has acted rashly the payment of interest at the rate fixed by the Board by virtue of the previous subsection which is in effect at the moment the judgment is pronounced, from the time the cause of action arises in every case of collection of money and from the

time the claim is filed in actions for damages until the date judgment is pronounced, to be computed on the amount of the judgment. The interest rate shall be stated in the judgment.

4 The bankruptcy court cited 41 U.S.C. §§ 601–13, the provisions of the U.S.Code previously containing 41 U.S.C. § 7109(a)(1). *See* Act of January 4, 2011, Pub.L. No. 111–350, 124 Stat. 3677, 3816.

5 Redondo argues that we need not address the Authority's forfeiture arguments because Article 1061 interest automatically attaches upon judgment and as such, cannot be waived or forfeited. All of the cases Redondo cites in support of its claim concern Rule 44.3. *See Municipio de Mayagüez v. Rivera,* 113 D.P.R. 467, 13 P.R. Offic. Trans. 597, 602 (1982) ("[A]ccording to [Rule 44.3(a)'s] provisions, the court must, upon rendering a money judgment, impose the payment of legal interest on the amount of judgment, without exception."); *Fuentes v. Hull Dobbs Co. of P.R.,* 88 D.P.R. 562, 88 P.R.R. 544, 553 (1963) (awarding prejudgment interest on appeal after concluding "that appellee's action in defending itself in this case was manifestly obstinate" even though it "ha[d] not been claimed in the complaint"). The Puerto Rico Supreme Court has unambiguously stated that Rule 44.3 and Article 1061 are different in kind:

> In [the case of Rule 44.3], interest should be considered automatically part of the judgment, by express provision of law. However, [Article 1061] interest is not in the same category. It is not an integral part or inherently inseverable from the principal obligation, but is considered as an independent indemnity for damages, by way of penalty, for default in payment.

Rivera, 77 P.R.R. at 51. Based on this view, the Puerto Rico Supreme Court found that Article 1061 interest "may be waived by the creditor by not appealing to this Court from the failure of the lower court to order its payment." Id. at 51–52. We thus conclude an Article 1061 claim can be forfeited if not raised at the appropriate stage.

6 The Authority makes much of our statement in *Redondo III* that Article 1061 "was [not] cited to the bankruptcy court." 678 F.3d at 126. The Authority argues that we definitively decided that Redondo did not raise Article 1061 until appeal and, under the law of the case doctrine and mandate rule, the bankruptcy court could not look at Redondo's pre-remand motions for discussion of Article 1061. But forfeiture was not a legal issue in *Redondo III:* all we decided in Redondo III was that Article 1061 could not have been the basis of the bankruptcy court's award in *Redondo II. Id.* We do not believe our cursory statement about whether Article 1061 was discussed in the bankruptcy court proceedings was a legal decision that bound the bankruptcy court on remand. *See Naser Jewelers, Inc. v. City of Concord,* 538 F.3d 17, 20 (1st Cir.2008) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (quoting *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983))).

The Authority also views Redondo's focus on 41 U.S.C. § 7109(a)(1) in previous litigation as inconsistent with its Article 1061 claim on remand and therefore barred by judicial estoppel. Judicial estoppel requires us to find (1) "the estopping position and the estopped position [are] directly inconsistent, that is, mutually exclusive" and (2) "the responsible party ... succeeded in persuading a court to accept its prior position." *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.,* 374 F.3d 23, 33 (1st Cir.2004). We neither think Redondo's claims are inconsistent, nor do we think our decision in *Redondo III* adopted the view that Redondo pursued interest exclusively under 41 U.S.C. § 7109(a)(1).

7 Based on its view that Redondo raised Article 1061 for the first time at oral argument, the Authority also argues that Redondo's claim is barred by a fifteen-year statute of limitations. *See* 31 L.P.R.A. § 5294. We reject this argument by finding that Redondo developed its claim to Article 1061 interest in its response motion filed in *Redondo II.* We make no comment on whether § 5294 delineates the appropriate statute of limitations for Article 1061 or whether the statute of limitations would have run during the litigation.

8 The parties stipulated that the dates of substantial completion were: November 1, 1993 for the Mayagüez project; March 18, 1994 for the Patillas project; and September 5, 1995 for the Dorado–Toa Alta project. These dates were adopted by the bankruptcy court. *Redondo IV,* 505 B.R. at 399.

9 This case is not part of the present litigation—although it involves the same parties, we reviewed different contracts, claims, and proceedings.

10 The bankruptcy court's reasoning also appears to be based in part on its view that Article 1061 interest is an inseparable part of the judgment. *See Redondo V,* 515 B.R. at 414 ("Moreover, pre-judgment interest under Article 1061 may be awarded even when they have not been claimed in the complaint. Hence, Article 1061 applies until the obligation is no longer in default." (citation omitted)). We rejected this argument above in footnote 5 of this opinion.

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2016 WL 423800
Only the Westlaw citation is currently available.
United States Court of Appeals,
Second Circuit.

Kenneth P. SILVERMAN, Chapter 7 Trustee of Agape World, Inc., Plaintiff–Appellee,
v.
Karen CULLIN, Defendant–Appellant.

No. 15–1341.
|
Feb. 4, 2016.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Joan M. Azrack, J.).

Attorneys and Law Firms

David J. Mahoney, Silverman Acampora LLP, Jericho, NY, for Plaintiff–Appellee.

Karen Cullin, Medford, NY, pro se.

Present GUIDO CALABRESI, GERARD E. LYNCH and RAYMOND J. LOHIER, JR., Circuit Judges.

SUMMARY ORDER

***1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Appellant Karen Cullin, proceeding pro se, appeals the district court's judgment affirming the bankruptcy court's order awarding $11,744.76 to bankruptcy Trustee Kenneth P. Silverman on a fraudulent conveyance claim against Cullin which sought return of interest payments made to Cullin as part of a Ponzi scheme. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"We review an appeal from a district court's affirmance of a bankruptcy court decision independently, accepting the bankruptcy court's factual findings unless clearly erroneous, and reviewing the bankruptcy court's legal conclusions de novo." *In re Fairfield Sentry Ltd.,* 714 F.3d 127, 132 (2d Cir.2013) (internal quotation marks omitted). Under the clear error standard, we "will reverse the bankruptcy court only if we are 'left with the definite and firm conviction that a mistake has been committed.' " *In re Manville Forest Products Corp.,* 896 F.2d 1384, 1388 (2d Cir.1990), quoting *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948).

Under Section 544(b)(1) of the Bankruptcy Code, the trustee of an estate in bankruptcy "may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. § 544(b)(1). "Applicable law" often means state law. *See In re Palermo,* 739 F.3d 99, 101–02 (2d Cir.2014). Under New York law, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." N.Y. Debt. & Cred Law § 273. "Fair consideration is given for property, or obligation, ... [w]hen 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...." *Id.* § 272.

The district court properly affirmed the bankruptcy court's order awarding 11 $11,744.76 to Silverman. Other courts of appeals have held that payments of "interest" to Ponzi scheme investors should be treated as fraudulent transfers, because "fair consideration" is not present in the context of such schemes. *See Janvey v. Brown,* 767 F.3d 430 (5th Cir.2014); *Donell v. Kowell,* 533 F.3d 762 (9th Cir.2008); *In re Hedged–Invs. Assocs., Inc.,* 84 F .3d 1286 (10th Cir.1996); *Scholes v. Lehmann,* 56 F.3d 750 (7th Cir.1995). While we have not addressed this issue, the prevailing view in the district and bankruptcy courts in this Circuit has agreed with this consensus. *See Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec.LLC,* 531 B.R. 439, 462–64 (Bankr.S.D.N.Y.2015) (collecting cases).

***2** Cullin relies on two outlier cases where guaranteed interest payments at commercially reasonable rate made in satisfaction of an antecedent debt were found to constitute fair consideration. *See In re Carrozzella & Richardson,* 286 B.R. 480, 487–90 (D.Conn.2002); *In re Unified Commercial Capital,* No. 01–MBK–6004L, 2002 WL 32500567 at *8 (W.D.N.Y. June 21, 2002). We need not decide whether those cases were correctly decided. Even if they were, Cullin cannot benefit from their holdings because the interest on her investment was not guaranteed and was in excess of commercially reasonable rates. [1]

We affirm for substantially the reasons stated by the district court in its thorough March 31, 2015 memorandum and order. We have considered all of Cullin's remaining arguments and find them to be without merit.

The judgment of the district court is **AFFIRMED.**

All Citations

--- Fed.Appx. ----, 2016 WL 423800 (Mem)

Footnotes

1 As the district court noted, Cullin failed to establish that the interest payments made to her came within the rule adopted in these cases for the more technical reason that she did not make the relevant contracts part of the record on appeal. *See* Fed. R. Bankr.P. 8009; *Keepers, Inc. v. City of Milford,* 807 F.3d 24, 29 n. 14 (2d Cir.2015). Since Cullin did submit the contracts to the district court as attachments to her reply brief, and since there appears to be no dispute as to their contents, we prefer to address her argument on the merits.

2016 WL 731238
Only the Westlaw citation is currently available.
United States Court of Appeals,
Second Circuit.

In re Richard H. FRIEDBERG, Debtor.
Richard H. Friedberg, Debtor–Appellant,
v.
Melissa Zelen Neier, Chapter 7 Trustee–Appellee.

No. 15–779.
|
Feb. 24, 2016.

Appeal from a judgment of the United States District Court for the District of Connecticut (Covello, J.).

Attorneys and Law Firms

Richard H. Friedberg, pro se, Vero Beach, FL, for Debtor–Appellant.

Melissa Zelen Neier, Esq., Ivey, Barnum & O'Mara LLC, Greenwich, CT, for Appellee.

Present RALPH K. WINTER, PETER W. HALL, and CHRISTOPHER F. DRONEY, Circuit Judges.

SUMMARY ORDER

***1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Debtor–Appellant Richard H. Friedberg, proceeding *pro se*, appeals the judgment of the district court affirming the bankruptcy court's order approving a settlement of all claims against his bankruptcy estate. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We conduct a plenary review when a bankruptcy appeal reaches us after district court review of the bankruptcy court order, assessing the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. *In re N. New England Tel. Operations LLC,* 795 F.3d 343, 346 (2d Cir.2015).

"[T]o have standing to appeal from a bankruptcy court ruling, an appellant must be a person aggrieved—a person directly and adversely affected pecuniarily by the challenged order of the bankruptcy court." In re Barnet, 737 F.3d 238, 242 (2d Cir.2013) (internal quotation omitted). "[A] Chapter 7 debtor is a 'party in interest' and has standing to object to a sale of the assets, or otherwise participate in litigation surrounding the assets of the estate, only if there could be a surplus after all creditors' claims are paid." *In re 60 E. 80th St. Equities, Inc.,* 218 F.3d 109, 115 (2d Cir.2000).

Upon review, we conclude that the bankruptcy court correctly held that Friedberg lacked standing to oppose the approval of the settlement agreement because he had no pecuniary interest directly and adversely affected by the bankruptcy court's order adopting the settlement. The settlement provided for the distribution to Friedberg's creditors of the proceeds from the sale of the estate's real property in Cortland Manor, New York (the "Property"). The Property was sold for $2.3 million. After accounting for administrative expenses, just over $1.9 million remained for distribution to creditors pursuant to the proposed settlement. This amount was far less than the allowed creditor claims against the estate; the priority claim of Marianne Howatson alone was for $2.725 million. The bankruptcy court therefore found that a surplus after payment of the creditors' claims was a mathematical impossibility. This finding was not error, much less clear error. Consequently, Friedberg could not have received a distribution from the estate regardless of the terms of the settlement. His only other interest in the settlement proceedings was an exemption he had claimed, which was provided for in the settlement agreement. Absent an adversely affected pecuniary interest, Friedberg lacked standing to oppose the settlement. *See In re Barnet,* 737 F.3d at 242–43; *In re 60 E. 80th St. Equities, Inc.,* 218 F.3d at 115–16.

Friedberg argues that he has standing based on the surplus that he imagines would have remained had the Property been sold for what he believes was its true value. This argument is without merit. The assertions regarding the Property's "true" value are conclusory and speculative. They are, moreover, irrelevant to this appeal. Friedberg's arguments do not relate to the reasonableness of the bankruptcy court's approval of the settlement, but to the validity of the auction sale that produced the proceeds distributed by the agreement. However, he has already unsuccessfully appealed the bankruptcy court's order authorizing the sale of the Property. The district court dismissed that appeal as barred by 11 U.S.C. § 363(m). "Th[at] section creates a rule of 'statutory mootness,' which bars appellate review of any sale authorized by 11 U.S.C. § 363(b) or (c)," as was the case here, "so long as the sale was made to a good-faith purchaser and was not stayed pending appeal." *In re WestPoint Stevens, Inc.*, 600 F.3d 231, 247 (2d Cir.2010) (internal citations omitted). When § 363(m) is applicable, courts "may neither reverse nor modify the judicially-authorized sale." *Id.* at 248 (emphasis omitted). Here, the sale of the Property was not stayed pending appeal, and, as found by the district court, there is no basis upon which to conclude that the purchaser was not a purchaser in good faith. Consequently, the sale of the Property is immune to Friedberg's challenge, and he cannot rely on its alleged deficiencies to cure his lack of standing.

***2** We have considered all of Friedberg's arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

--- Fed.Appx. ----, 2016 WL 731238 (Mem)

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2016 WL 697793
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NOT PRECEDENTIAL
United States Court of Appeals,
Third Circuit.

In re ROCK AIRPORT OF PITTSBURGH, LLC, Debtor.
Rock Ferrone, Appellant.

No. 15–1094.
|
Submitted Pursuant to Third Circuit LAR 34.1(a) Aug. 20, 2015.
|
Filed Feb. 22, 2016.

Synopsis
Background: Chapter 11 trustee filed amended motion seeking order approving "free and clear" sale of debtor's assets, including a building and the parcel of land on which it sat. Sole shareholder of entity that allegedly owned the property in question, who also was sole owner of debtor, objected. The United States Bankruptcy Court for the Western District of Pennsylvania, Carlota M. B6hm, J., 2014 WL 4495065, determined that the property belonged to debtor and subsequently approved the sale. Objector appealed. The District Court, Arthur J. Schwab, J., 2014 WL 7272259, dismissed appeal. Objector appealed.

Holding: The Court of Appeals held that the district court correctly determined that the appeal had been rendered moot.

Affirmed.

On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. Civil Action No. 2–14–cv–01456), District Judge: Honorable Arthur J. Schwab.

Attorneys and Law Firms

Robert O. Lampl, Esq., Robert O. Lampl & Associates, Pittsburgh, PA, Thomas E. Reilly, Esq., Sewickley, PA, for Debtor–Appellee.

Rock Ferrone, New Kensington, PA, pro se.

Kirk B. Burkley, Esq., Daniel R. Schimizzi, Esq., Bernstein–Burkley, Pittsburgh, PA, for Defendant–Appellee.

Before FUENTES, SHWARTZ and ROTH, Circuit Judges.

OPINION [*]

PER CURIAM.

***1** Rock Ferrone appeals from an order of the United States District Court for the Western District of Pennsylvania ("the District Court") dismissing as moot his appeal of two orders of the United States Bankruptcy Court for the Western District of Pennsylvania ("the Bankruptcy Court"). For the reasons that follow, we will affirm the judgment of the District Court.

Because we write primarily for the parties, who are familiar with the facts, we will not recite them except as necessary to the discussion. This appeal arises out of Chapter 11 Bankruptcy proceedings involving Rock Ferrone, the sole owner of Rock Airport of Pittsburgh, LLC ("Rock Airport" or "the Debtor"). Ferrone is also the sole shareholder of K–Cor, Inc., ("K–Cor") a Pennsylvania company that designs, manufactures, and sells newspaper equipment.

In April 2009, Rock Airport filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court. In April 2013, Natalie Lutz Cardiello ("Cardiello" or "the Trustee") was appointed to serve as Trustee over the Rock Airport bankruptcy estate. Thereafter, Cardiello filed in the Bankruptcy Court a motion seeking an order approving the sale of the Debtor's assets to Alaskan Property Management Company, LLC ("Alaskan"). Listed among those assets was a building and a parcel of land located at 1000 Rockpointe Boulevard, at Rock Airport, in Tarentum, Pennsylvania ("the Rock Built Parcel").

Ferrone objected to Cardiello's motion to approve the sale to Alaskan, arguing that K–Cor was, in fact, the owner of the Rock Port Parcel and that, as a result, the property should not be included in the asset sale. In order to resolve the disputed ownership of the Rock Built Parcel, the Bankruptcy Court held an evidentiary hearing to determine K–Cor's alleged ownership of the property. Following the evidentiary hearing, and after entertaining additional briefing on the issue, the Bankruptcy Court issued a final ruling on September 10, 2014, determining that all of the credible evidence and testimony demonstrated that the Debtor owned the Rock Built Parcel. In so holding, the Bankruptcy Court noted that K–Cor had failed to demonstrate that an agreement to convey the property from Rock Airport to K–Cor had ever existed. Nor had K–Cor produced evidence which might have otherwise suggested its ownership of the property (e.g., that it had insured the property or paid the property taxes).

Shortly thereafter, in a September 16, 2014 order, the Bankruptcy Court approved the sale of the Debtor's assets to Alaskan. The Court noted in its opinion that it had determined that Alaskan was a good faith purchaser, that the process complied with the applicable bankruptcy rules and code provisions, and that the sale was in the interest of the Debtor's estate. Several days later, Ferrone filed in the Bankruptcy Court an emergency motion for a stay pending appeal. After holding a hearing on Ferrone's emergency motion, the Bankruptcy Court denied a stay. On September 30, 2014, the Trustee and Alaskan closed on the sale of the Debtor's assets, which included the Rock Built Parcel.

***2** Ferrone timely appealed to the District Court the Bankruptcy Court's September 10, 2014 order (ruling that the Debtor owned Rock Built Parcel) as well as its September 16, 2014 order (approving the sale of the Debtor's assets to Alaskan).[1] The Trustee argued that the appeal was moot under 11 U.S.C. § 363(m). Upon review, the District Court entered an order dismissing Ferrone's appeal as moot. This appeal followed.[2]

We have jurisdiction over Ferrone's appeal from the District Court's order pursuant to 28 U.S.C. §§ 158(d) and 1291. Our review over the District Court's legal conclusions is plenary, *see In re Heritage Highgate, Inc.,* 679 F.3d 132, 139 (3d Cir.2012), and we review findings of fact for clear error. *See In re Marvel Entm't Grp., Inc.,* 140 F.3d 463, 470 (3d Cir.1998).

Sales in bankruptcy are governed by the provisions of 11 U.S.C. § 363 which, *inter alia,* authorize the trustee, after notice and a hearing, to use, sell, or lease property of a debtor's estate. 11 U .S.C. § 363(b)(1). Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). To promote certainty and finality with respect to such sales, as well as to encourage parties to bid for assets in bankruptcy cases, § 363(m) prohibits the reversal of a sale to a good faith purchaser of bankruptcy estate property, 11 U.S.C. § 363(b)(1), if a party fails to obtain a stay of the sale. *See* 11 U.S.C. § 363(m);[3] *Cinicola v. Scharffenberger,* 248 F.3d 110, 121–22 (3d Cir.2001). In interpreting that provision, we previously determined that the following two conditions must be satisfied before an appeal may be dismissed as moot under § 363(m): (1) the sale was not stayed pending appeal, and (2) reversal or modification of the Bankruptcy Court's authorization would affect the validity of the sale. *See Cinicola,* 248 F.3d at 128; *Krebs Chrysler–Plymouth v. Valley Motors, Inc.,* 141 F.3d 490, 499 (3d Cir.1998).

Having reviewed the record and the arguments on appeal, we conclude that the District Court correctly determined that Ferrone's appeal had been rendered moot under § 363(m). Although he sought a stay pending appeal, Ferrone was unsuccessful in securing one. Additionally, despite his repeated assertion that Alaskan did not purchase the Debtor's assets in good faith, we agree with the District Court that there is no evidence upon which to conclude that Alaskan was not a good-faith purchaser, or that Cardiello and Alaskan acted in bad faith. We further agree that the remedies sought by Ferrone on appeal—that K–Cor be deemed the owner of Rock Built Parcel, and that the sale of Rock Airport's assets to Alaskan be voided—would inevitably undermine the validity of the sale. As a result, the District Court correctly dismissed Ferrone's appeal as moot.[4]

For these reasons, we will affirm the judgment of the District Court. Ferrone's request for oral argument is denied.

All Citations

--- Fed.Appx. ----, 2016 WL 697793

Footnotes

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1 We note that the Bankruptcy Court issued a separate order on September 16, 2014, approving the Trustee's Amended Disclosure Statement as well as her Chapter 11 Plan. However, Ferrone did not appeal that separate order to the District Court.

2 Ferrone did not obtain a stay of the sale from the District Court or this Court either.

3 The statute provides that “[t]he reversal or modification on appeal of an authorization ... of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

4 We also agree, for the reasons identified by the District Court—and assuming without deciding that such a claim was cognizable—that there was no basis upon which to conclude that Ferrone's due process rights had been violated during relevant proceedings before the Bankruptcy Court.

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2016 WL 760201
Only the Westlaw citation is currently available.
United States Court of Appeals,
Third Circuit.

In re Luanne MACRI, Debtor.
Saralyn McQueen, Appellant
v.
Luanne Macri.

No. 15–1982.
|
Submitted Pursuant to Third Circuit LAR 34.1(a) Feb. 22, 2016.
|
Opinion Filed Feb. 25, 2016.

On Appeal from the United States District Court for the District of New Jersey, (D.C. Civil Action No. 2–14–cv–05053), District Judge: Honorable Susan D. Wigenton.

Attorneys and Law Firms

Saralyn McQueen, Newark, NJ, pro se.

Andrew G. Greenberg, Esq., Marlboro, NJ, for Luanne Macri.

Before FUENTES, VANASKIE and SCIRICA, Circuit Judges.

OPINION [*]

PER CURIAM.

***1** Saralyn McQueen, proceeding pro se, appeals from an order of the United States District Court for the District of New Jersey affirming an order entered by the United States Bankruptcy Court for the District of New Jersey. We will affirm as well.

I.

In March 2007, McQueen brought a lawsuit against her neighbor, Luanne Macri, in New Jersey court seeking damages for injuries she had sustained when Macri's two pit bulls attacked and bit her. The parties ultimately settled the matter for $21,886.53. In April 2011, Macri filed a petition for relief under Chapter 7 of the Bankruptcy Code. At that time, she had paid less than half of the settlement award to McQueen.

On June 28, 2011, McQueen commenced an adversary action in the bankruptcy case asking the court to declare Macri's debt to her nondischargeable in accordance with section 523(a)(6) of the Bankruptcy Code, which excepts from discharge any debt incurred "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The Bankruptcy Court conducted a trial to determine whether the settlement award satisfied the criteria of section 523(a)(6), ultimately concluding that it did not. Accordingly, the Bankruptcy Court denied McQueen's request and declared the debt dischargeable. McQueen appealed to the District Court. *See* 28 U.S.C. § 158(a). Following oral argument, [1] the District Court affirmed. McQueen now appeals to this Court.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. §§ 158(d) and 1291. "Our review of the District Court's decision effectively amounts to review of the bankruptcy court's opinion in the first instance." *In re Hechinger Inv. Co. of Del.,* 298 F.3d 219, 224 (3d Cir.2002). We review factual findings of the bankruptcy court for clear error, while legal determinations are subject to plenary review. *In re Fruehauf Trailer Corp.,* 444 F.3d 203, 209–10 (3d Cir.2006). "Factual findings may only be overturned if they are completely devoid of a credible evidentiary basis or bear no rational relationship to the supporting data." *Id.* at 210 (internal alteration and quotation marks omitted). The question of whether a debt correctly falls within section 523(a)(6) is a question of law. *In re Gerhardt,* 348 F.3d 89, 91 (5th Cir.2003).

Section 523 of the Bankruptcy Code excepts from discharge "any debt ... for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). A debtor's actions are willful and malicious under section 523(a)(6) "if they either have a purpose of producing injury or have a substantial certainty of producing injury." *In re Conte,* 33 F.3d 303, 307 (3d Cir.1994). The burden is on the creditor to prove willful and malicious injury by a preponderance of the evidence. *Grogan v. Garner,* 498 U.S. 279, 291 (1991).

Upon review, we agree with the District Court's determination that the Bankruptcy Court did not err in denying McQueen's request to declare the settlement award nondischargeable under section 523(a)(6). McQueen contends that the lower courts erred in determining that she failed to demonstrate that Macri willfully and maliciously ordered her dogs to attack her. According to McQueen, the dogs ran "directly at [her,] like somebody sicced them on [her] ." (Tr. 3/16/15, p. 4.) She also faults Macri for failing to properly contain her dogs, for failing to apologize after the attack, and for having "no compassion or value for human life." (Br.9.) We, like the District Court, sympathize with McQueen for the injuries she sustained. But we agree with both the District Court and Bankruptcy Court that McQueen did not meet her burden of demonstrating, by a preponderance of the evidence, that Macri willfully and maliciously directed her dogs to attack her; without any additional evidence to support her allegations, her belief that Macri "sicced" the dogs on her is mere speculation.

III.

***2** We have considered McQueen's remaining arguments in support of this appeal and conclude that they are meritless.[2] Therefore, we will affirm the judgment of the District Court.

All Citations

--- Fed.Appx. ----, 2016 WL 760201 (Mem)

Footnotes

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1 Macri did not appear at the argument.

2 To the extent that McQueen accuses the District Court and Bankruptcy Court Judges of bias, she provides no support for this contention. We have reviewed the record before us and discern no bias.

811 F.3d 166
United States Court of Appeals,
Fourth Circuit.

IN RE Henry London ANDERSON, Jr., Debtor.
Stubbs & Perdue, P.A., Appellant,
v.
James B. Angell, Chapter 7
Trustee, Trustee–Appellee,
and
United States Of America, Appellee.

No. 15–1316.
|
Argued: Dec. 9, 2015.
|
Decided: Jan. 26, 2016.

Synopsis

Background: After Chapter 11 bankruptcy case converted to Chapter 7 liquidation, Chapter 7 trustee filed a motion in aid of distribution, asking the Bankruptcy Court to provide guidance in making an interim distribution to debtor's creditors. The United States Bankruptcy Court for the Eastern District of North Carolina, Randy D. Doub, J., 2014 WL 590481, granted trustee's motion, concluding debtor's counsel, who had unsecured claim for Chapter 11 administrative expenses, was not entitled to subordination of secured tax claim. Counsel appealed. The United States District Court for the Eastern District of North Carolina, James C. Fox, Senior District Judge, 2015 WL 892363, affirmed. Counsel appealed.

[Holding:] The Court of Appeals, Pamela Harris, Circuit Judge, held that application of amended version of bankruptcy statute did not have impermissible retroactive effect, and thus, under the amended version, counsel was not entitled to subordinate IRS's secured tax claim in favor of its unsecured claim.

Affirmed.

Attorneys and Law Firms

***167 ARGUED:** Trawick Hamilton Stubbs, Jr., Stubbs & Perdue, P.A., New Bern, North Carolina, for Appellant. Paul Andrew Allulis, United States Department of Justice, Washington, D.C.; James B. Angell, Howard, Stallings, From, Hutson, Atkins, Angell & Davis, P.A., Raleigh, North Carolina, for Appellees. **ON BRIEF:** Joseph Z. Frost, Stubbs & Perdue, P.A., Raleigh, North Carolina, for Appellant. Caroline D. Ciraolo, Acting Assistant Attorney General, Thomas J. Clark, Tax Division, United States Department of Justice, Washington, D.C.; Thomas G. Walker, United States Attorney, Office Of The United States Attorney, Raleigh, North Carolina; Nicholas C. Brown, Howard, Stallings, From, Hutson, Atkins, Angell & Davis, P.A., Raleigh, North Carolina, for Appellees.

Before WILKINSON, KEENAN, and HARRIS, Circuit Judges.

Opinion

Affirmed by published opinion. Judge HARRIS wrote the opinion, in which Judge WILKINSON and Judge KEENAN joined.

PAMELA HARRIS, Circuit Judge:

Stubbs & Perdue, P.A. ("Stubbs") represented Henry L. Anderson, Jr. (the "Debtor") in bankruptcy proceedings, and is owed approximately $200,000 in legal fees from that representation. But the Debtor also is subject to nearly $1 million in secured tax claims, and the estate has insufficient funds to pay both Stubbs's fees and ***168** the tax claim. In practical terms, this case is about which of those claims takes priority in a Chapter 7 liquidation under the Bankruptcy Code.

The answer is found in § 724(b)(2) of the Bankruptcy Code, 11 U.S.C. § 724(b)(2). And under the version of § 724(b)(2) in effect when the bankruptcy court rendered its decision, it is clear that the secured tax claim takes priority over Stubbs's claim to fees. Stubbs argues, however, that application of current law to its claim would have an impermissible retroactive effect, and that it can prevail under the prior version of § 724(b)(2) that should govern this case. Like the bankruptcy court and the district court, we disagree, and we therefore affirm the judgment of the district court.

I.

A.

On February 3, 2010, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, which governs reorganizations of debtors' estates. Shortly thereafter, the bankruptcy court approved Stubbs to serve as the Debtor's counsel. In July of 2011, the IRS filed a proof of claim against the estate in the amount of $997,551.80, of which $987,082.88 was secured by the Debtor's property interests.

During the pendency of the Debtor's Chapter 11 case, the bankruptcy court entered five orders approving compensation to Stubbs for legal services, for a total of slightly more than $200,000. The allowance of Stubbs's fees, as the "actual" and "necessary" expenses of preserving the Debtor's estate, gave Stubbs an unsecured claim for "administrative expenses" against the estate. *See* 11 U.S.C. §§ 330(a), 503(b). The Bankruptcy Code establishes a hierarchy of unsecured creditors like Stubbs, and as an administrative expense claimant, Stubbs holds second-priority status under § 507(a)(2) of the Code. *See* 11 U.S.C. § 507(a)(2).

On November 17, 2011, after the Debtor failed to demonstrate that he could effectuate a final plan of reorganization under Chapter 11, the Debtor's bankruptcy case converted to one under Chapter 7, which governs liquidations. The bankruptcy court then appointed James B. Angell (the "Trustee") as the Chapter 7 Trustee.

The Trustee was able to accumulate $702,630.25 for distribution to the estate's creditors. He estimated that total Chapter 7 administrative expenses would amount to $278,921.42, leaving the Debtor's estate with just $423,708.83—far short of what would be required to satisfy the IRS's secured tax claim of nearly $1 million and Stubbs's unsecured Chapter 11 administrative expense claim of roughly $200,000.[1] So unless Stubbs's unsecured claim took priority over the secured claim of the IRS, Stubbs would not collect its fees. Whether Stubbs could "subordinate" the IRS's claim in this manner was governed by 11 U.S.C. § 724(b)(2), and that provision is the focus of this case.

B.

The general rule in bankruptcy is that secured claims are satisfied from the collateral securing those claims prior to any distributions to unsecured claims. *See* 11 U.S.C. §§ 506, 725; *In re Midway Airlines, Inc.*, 383 F.3d 663, 669 (7th Cir.2004). Secured claims, in other words, take priority. Under that general rule, the IRS's claim in this case would be paid ***169** first and nothing would be left for payment on Stubbs's unsecured claim for administrative expenses incurred during the Chapter 11 proceeding.

But in Chapter 7 liquidations, there is a limited exception to this norm. Under § 724(b)(2) of the Bankruptcy Code, certain unsecured creditors may "step into the shoes" of secured tax creditors in Chapter 7 liquidation proceedings, so that when the collateral securing the tax claims is sold, the unsecured creditors are paid first. If Stubbs's claim for Chapter 11 administrative expenses was among the unsecured claims covered by § 724(b)(2), then—and only then—could it recover from the estate.

Because the history of § 724(b)(2) is directly relevant to this case, we cover it in some detail. Until 2005 (and before any of the events at issue here), § 724(b)(2) was relatively uncomplicated, providing all holders of administrative expense claims, like Stubbs, with the right to subordinate secured tax creditors in Chapter 7 liquidations. *See* 11 U.S.C. § 724(b)(2) (2000). But that statutory scheme was criticized on the ground that it created perverse incentives, encouraging Chapter 11 debtors and their representatives to incur administrative expenses even where there was no real hope for a successful reorganization, to the detriment of secured tax creditors when Chapter 7 liquidation ultimately proved necessary. See In re *K.C. Mach. & Tool Co.*, 816 F.2d 238, 248 (6th Cir.1987) (Merritt, J., dissenting).

In 2005, Congress responded with a fix. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109–8, 119 Stat. 23 (the "BAPCPA"), Congress sought to limit the class of administrative expenses covered by § 724(b)(2), excluding claims for the expenses incurred during prior Chapter 11 proceedings. In other words, in order "to provide greater protection for holders of tax liens ... from erosion of their claims' status by expenses incurred under chapter 11 of the Bankruptcy Code," H.R.Rep. No. 109–31(I), at 100 (2005), unsecured Chapter 11 administrative expense claims would no longer take priority over secured tax claims in Chapter 7 liquidations.

Thanks to a drafting error, however, it is not clear that Congress accomplished what it set out to do. The Bankruptcy Code is complicated, and the original version of § 724(b)(2) covered claims for unsecured administrative expenses through cross reference to 11 U.S.C. § 507(a)(1), a provision that gave such claims first priority as among other unsecured claims. *See* 11 U.S.C. § 507(a)(1) (2000). So when Congress amended § 724(b)(2) to exclude Chapter 11 administrative expenses, it did so by clarifying that subordination rights would extend "to any holder of a claim of a kind specified in section 507(a)(1)"—that is, administrative expenses—"*(except that such expenses ... shall be limited to expenses incurred under chapter 7 of this title and shall not include expenses incurred under chapter 11 of this title)*." 11 U.S.C. § 724(b)(2) (2006) (emphasis added). And it would have worked—except that in a separate amendment, the BAPCPA simultaneously altered the § 507 priority scheme for unsecured claims, dropping administrative expense claims from first to second and moving them from § 507(a)(1) to § 507(a)(2). *See* § 212, Pub.L. No. 109–8. The end result was that the exclusion of Chapter 11 expenses inserted into § 724(b)(2), read literally, did not apply to the administrative expenses that were its target, but instead to the new set of claims now enumerated under § 507(a)(1).

That was the state of affairs when the Debtor filed his initial Chapter 11 petition in February of 2010. At the time, none of this was of particular importance, because ***170** § 724(b)(2) applies only in Chapter 7 liquidations and not in Chapter 11 reorganizations. *See* 11 U.S.C. § 103(b). And ten months later, while the Debtor's case remained in Chapter 11, Congress corrected its error with the Bankruptcy Technical Corrections Act of 2010, Pub.L. No. 111–327, 124 Stat. 3557 (the "BTCA"). The BTCA made "technical" changes to the Bankruptcy Code, *see id.*, necessitated by a "number of technical drafting errors" in the BAPCPA. *See* 156 Cong. Rec. H7161 (daily ed. Sept. 28, 2010) (statement of Rep. Scott) ("This bill before us today is simply a technical cleanup of the [BAPCPA]."). In particular, the BTCA coupled the parenthetical excluding Chapter 11 expenses with a cross-reference to *§ 507(a)(2)*, where unsecured claims to administrative expenses are now enumerated, clarifying that Chapter 11 administrative expense claimants do not hold subordination rights under § 724(b)(2). *See* § 2(a)(27), Pub.L. No. 111–327.

Congress enacted the corrected BTCA version of § 724(b)(2) in December 2010. It was not until eleven months later, in November 2011, that the Debtor's bankruptcy case converted from Chapter 11 to Chapter 7, implicating § 724(b)(2) for the first time. Now in a Chapter 7 proceeding, Stubbs could invoke § 724(b)(2)'s exception to the general rule that unsecured claims like its own take a back seat to secured claims like the IRS's—but only if its claim to Chapter 11 administrative expenses was covered by the governing version of § 724(b)(2).

C.

For guidance on this question, the Chapter 7 Trustee filed a Motion in Aid of Distribution before the bankruptcy court. The Trustee, with the support of the United States, took the position that the version of § 724(b)(2) then in effect—the corrected BTCA version—controlled, and that under that provision, there is no question but that Stubbs's unsecured claim to Chapter 11 administrative expenses is excluded. And even under the prior BAPCPA version of § 724(b)(2), the Trustee and the United States argued, it is clear enough that Stubbs is not entitled to subordinate the IRS's secured tax claim.

Stubbs filed an objection. It did not dispute that it had no subordination rights under the current BTCA version of § 724(b)(2). But it argued that regardless of Congress' intent, the plain language of the prior version of § 724(b)(2) did entitle it to subordinate the IRS's secured tax claim. And according to Stubbs, application of the new and corrected version of § 724(b)(2) would have an impermissible retroactive effect, cutting off its right to recover for Chapter 11 administrative expenses incurred before Congress fixed its drafting error.

The bankruptcy court agreed with the Trustee and dismissed Stubbs's objection. *In re Anderson*, No. 10–00809–8–RDD, 2014 WL 590481 (Bankr.E.D.N.C. Feb. 14, 2014). It held, first, that the BTCA version of § 724(b)(2) governs this case, under the normal rule that "a court is to apply the law in effect at the time it renders its decision." *Id.* at *2–3 (quoting *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)). The presumption against retroactivity described in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), the court reasoned, has no bearing here: The BTCA version of § 724(b)(2) already was in effect when the case converted to Chapter 7, so application of current law would have no retroactive effect on Stubbs's right to subordinate tax liens in a Chapter 7 proceeding. 2014 WL 590481, at *3.

***171** In the alternative, the bankruptcy court found that even under the BAPCPA version of § 724(b)(2), Stubbs would hold no right to subordinate the IRS's secured tax claim. Analyzing "the passage of the BTCA, its legislative history, and the legislative history of [the BAPCPA] Section 724(b)(2)," the court thought it "clear that Congress intended to exclude Chapter 11 professional expenses when a case is converted to Chapter 7." *Id.* at *4.

The district court affirmed the decision of the bankruptcy court. *In re Anderson,* No. 7:14–cv–00079–F, 2015 WL 892363 (E.D.N.C. Feb. 26, 2015). Like the bankruptcy court, the district court held that the law in effect at the time of decision—the BTCA version of § 724(b)(2)—governs the case. Because Stubbs had no vested right to subordinate under § 724(b)(2) "until the case was converted to one under Chapter 7, some eleven months after Congress had already passed the BTCA," the court reasoned, application of current law would have no retroactive effect within the meaning of *Landgraf. Id.* at *3. Having found that the BTCA version of § 724(b)(2) applies and precludes Stubbs's claim to subordination, the district court did not decide whether the same result would follow under the BAPCPA version of § 724(b)(2).

This timely appeal followed.

II.

A.

[1] **[2]** This court reviews the judgment of a district court sitting in review of a bankruptcy court de novo. *Jacksonville Airport, Inc. v. Michkeldel, Inc.,* 434 F.3d 729, 731 (4th Cir.2006). We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Id.* Whether § 724(b)(2) empowers Stubbs to subordinate the IRS's secured tax claim is a pure question of law.

B.

[3] **[4]** The Supreme Court has identified two rules for interpreting statutes that, like § 724(b)(2), do not specify their temporal reach. *See Landgraf,* 511 U.S. at 264, 114 S.Ct. 1483. The first is that, as a general rule, "a court is to apply the law in effect at the time it renders its decision." *Id.* (quoting *Bradley,* 416 U.S. at 711, 94 S.Ct. 2006); *see Velasquez–Gabriel v. Crocetti,* 263 F.3d 102, 108 (4th Cir.2001) ("[N]ormally a court is to apply the law in effect at the time it renders its decision." (citation and internal quotation marks omitted)). The second is effectively an exception to the first: Because retroactivity is disfavored, a court should not apply the law currently in effect if it would have a "retroactive effect" on conduct predating the law's enactment, "absent clear congressional intent favoring such a result." *Landgraf,* 511 U.S. at 280, 114 S.Ct. 1483. Combined, these principles dictate that a court apply the law in effect at the time it renders its decision, unless that law would operate retroactively without clear congressional authorization. See *Gordon v. Pete's Auto Serv. of Denbigh, Inc.,* 637 F.3d 454, 458 (4th Cir.2011) (describing *Landgraf* framework for analysis).

The bankruptcy and district courts concluded that this is the ordinary case, in which the law in effect at the time of decision —here, the BTCA version of § 724(b)(2)—applies. Stubbs, on the other hand, argues that this case is the exception, because application of the BTCA version of § 724(b)(2) to its claim for Chapter 11 administrative fees, incurred and approved prior to enactment of the BTCA, would have an impermissible retroactive ***172** effect.[2] We agree with the bankruptcy and district courts, and conclude that Stubbs's claim is governed and foreclosed by the BTCA version of § 724(b)(2).

A rule that courts should apply the law in effect when they render their decisions has the advantage of being clear and easy to administer. And that is especially important in the bankruptcy context. Chapter 7 trustees have a fiduciary duty to make already-complex calculations in an expeditious manner, see *In re Thompson,* 965 F.2d 1136, 1145 (1st Cir.1992), and we have recognized "a public policy interest in reducing the number of ancillary suits that can be brought ... so as to advance the swift and efficient administration of the bankrupt's estate," *In re Richman,* 104 F.3d 654, 656–57 (4th Cir.1997). Requiring Chapter 7 trustees to distinguish between and apply different versions of the Bankruptcy Code, on the other hand, would complicate the process significantly, necessitating an additional level of discovery and analysis. The result would be the potential for substantial delays in administration and increased exposure for bankruptcy trustees, who are subject to personal liability on claims for improper distribution. *Cf. Yadkin Valley Bank & Trust Co. v. McGee,* 819 F.2d 74, 76 (4th Cir.1987) (trustee subject to liability for negligently failing to reduce the assets of the estate to money as expeditiously as possible).

[5] Stubbs argues, however, that it would be unjust to apply the BTCA version of § 724(b)(2) retroactively to disallow payment on its unsecured claim for Chapter 11 fees. See *Landgraf,* 511 U.S. at 265, 114 S.Ct. 1483 (presumption against retroactivity flows from "[e]lementary considerations of fairness"). Prior to the BTCA, Stubbs contends, it was entitled to subordinate the IRS's secured claim under § 724(b)(2); denying it that right as to Chapter 11 administrative expenses approved before the BTCA's passage would have an impermissible "retroactive effect" under *Landgraf.* We disagree.

The problem with Stubbs's argument is its premise: that Stubbs held subordination rights under § 724(b)(2) before the BTCA was enacted in December 2010. Before the BTCA was enacted, § 724(b)(2) had no application to the Debtor's case at all. It afforded Stubbs no entitlement to subordinate the IRS's secured tax claim for the threshold reason that it simply did not apply in the Chapter 11 proceedings that began in this case in early 2010 and did not end until November 2011, eleven months *after* the BTCA's passage. The pre-BTCA version of § 724(b)(2) that Stubbs invokes, in other words, never controlled this case. By the time the case converted to Chapter 7 in November 2011, implicating § 724(b)(2) for the first time, the BAPCPA version of § 724(b)(2) had been superseded already by the corrected BTCA version. Like the bankruptcy and district courts, 2015 WL 892363, at *3, 2014 WL 590481, at *3, we think this sequence of events is dispositive of Stubbs's retroactivity argument.

We recognize, of course, that the BTCA version of § 724(b)(2) is being applied in this case to conduct—the incurrence and approval of legal fees in the Chapter 11 proceeding—that predates the provision's enactment. But as the Supreme Court has made clear, that by itself does not ***173** trigger *Landgraf's* presumption against retroactivity. *Landgraf,* 511 U.S. at 269, 114 S.Ct. 1483 (statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment"); *see Gordon,* 637 F.3d at 459. Nor does application of a new statute to old conduct have a retroactive effect under *Landgraf* whenever it "upsets expectations based in prior law." 511 U.S. at 269, 114 S.Ct. 1483. Before enactment of the BTCA, Stubbs may have expected that if the Debtor's Chapter 11 bankruptcy case at some point converted to Chapter 7, *then* it would acquire a right to subordinate the IRS's secured claim under § 724(b)(2).[3] But such an inchoate expectation is not the kind of "vested right[ ] acquired under existing laws" that, if frustrated, gives rise to retroactivity concerns. *Id.* (citation omitted); *see Jaghoori v. Holder,* 772 F.3d 764, 771–72 (4th Cir.2014) (finding impermissible retroactive effect where application of new statute "takes away or impairs vested rights acquired under existing laws" (citation omitted)).

For its argument to the contrary, Stubbs relies primarily on *In re J.R. Hale Contracting Co.,* 465 B.R. 218 (Bankr.D.N.M.2011), in which a bankruptcy court held impermissibly retroactive the application of the BTCA version of § 724(b)(2) to a claim for Chapter 11 administrative expenses incurred prior to the BTCA's enactment. *Id.* at 224–25. But on the single fact most critical to our holding—that the pre-BTCA version of § 724(b)(2) was at no time applicable to this case—*J.R. Hale* is not on point. In *J.R. Hale,* unlike this case, the underlying bankruptcy case converted from Chapter 11 to Chapter 7 almost two years *before* enactment of the BTCA, so that the BAPCPA version of § 724(b)(2) *did* in fact govern the case for a period of time before the BTCA correction. *See id.* at 219. That distinction is fundamental to our analysis.

As we have emphasized, the retroactivity inquiry is a particularized one, asking "*not* whether the statute may possibly have an impermissible retroactive effect in any case, but specifically whether applying the statute *to the person objecting* would have a retroactive consequence in the disfavored sense." *Gordon,* 637 F.3d at 459 (emphasis in original) (citations and internal quotation marks omitted). We need not decide here whether application of the BTCA version of § 724(b)(2) in a case that converted to Chapter 7 while the prior version still controlled, as in *J.R. Hale,* would have an impermissible retroactive effect. It is enough for present purposes that *J.R. Hale* is no authority for finding retroactivity as "to the person objecting" in this case, in which the pre-BTCA version of § 724(b)(2) never had any controlling effect.

Accordingly, and like the district court, we hold that the bankruptcy court properly applied the BTCA version of § 724(b)(2) in effect when it rendered its decision. Under that provision, it is clear that Stubbs is not entitled to subordinate the IRS's secured tax claim in favor of its ***174** unsecured claim to Chapter 11 administrative expenses. Whether the same result would have obtained under the pre-BTCA version of § 724(b)(2), as urged by the Trustee and the United States, is a question we need not reach.

III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

All Citations

811 F.3d 166, 117 A.F.T.R.2d 2016-544, 62 Bankr.Ct.Dec. 23

Footnotes

1 Stubbs's total allowed compensation amounted to $213,408.06. But because the Debtor paid $27,977.85 of Stubbs's fees, Stubbs is now owed $185,430.21.

2 On appeal, Stubbs limits its retroactivity challenge to the $105,783.08 in Chapter 11 legal fees approved by the bankruptcy court prior to the BTCA's enactment date of December 22, 2010. Before the district court, Stubbs had argued that the BTCA version of § 724(b)(2) could not be applied to a total of $153,471.86 in unpaid fees, which included fees *incurred* before the BTCA was enacted but *approved* only after enactment.

3 Even that expectation, we note, would rest on the contested proposition that because of a drafting error, the BAPCPA version of § 724(b)(2) cannot be read to effectuate Congress' undisputed intent to exclude Chapter 11 expenses from subordination rights. We need not decide that question of statutory interpretation, given our holding that it is the BTCA version of § 724(b)(2), and not the BAPCPA version, that applies to this case. But given the confusion and flux surrounding the BAPCPA iteration of § 724(b)(2), any expectation Stubbs may have had that it could prevail under that provision should the Debtor's case convert to Chapter 7 was doubly contingent. *Cf. Velasquez–Gabriel,* 263 F.3d at 108–09 (likelihood of success under prior statute may inform retroactivity analysis).

2016 WL 660102
Only the Westlaw citation is currently available.
United States Bankruptcy Court,
N.D. Ohio, Western Division.

In re: Mark O. McVicker,
Sharon S. McVicker, Debtors.

Case No. 15–31428
|
Signed February 17, 2016

Synopsis
Background: Creditor moved to dismiss debtors' Chapter 7 case under "for cause" dismissal provision based on debtors' alleged bad faith in filing it.

[Holding:] The Bankruptcy Court, John P. Gustafson, J., held that Chapter 7 case could not be dismissed for debtors' alleged bad faith in filing it in attempt to discharge a single large indebtedness arising out of their guarantee of debt of business, and in not continuing to pay this debt from exempt retirement funds that debtors owned in amount more than four times amount of this debt.

Motion denied.

Attorneys and Law Firms

Gordon R. Barry, Toledo, OH, for Debtors.

MEMORANDUM OF DECISION RE: HUNTINGTON BANK'S MOTION TO DISMISS CASE UNDER 11 U.S.C. SECTION 707(a)

John P. Gustafson, United States Bankruptcy Judge

***1** This cause comes before the court on Huntington Bank's Motion to Dismiss Case Pursuant to 11 U.S.C. § 707 and for Extension of the Deadline to Object to Discharge. [Doc. # 39 & # 40].[1] The Debtors filed a Memorandum in Opposition to Creditor The Huntington, N.A.'s Motion to Dismiss [Doc. # 49], and Huntington Bank filed a Reply to Debtors' Memorandum in Opposition to Motion to Dismiss. [Doc. # 51]. An evidentiary hearing was held, at which the Debtors testified. Most of the underlying facts are not in dispute.

Huntington Bank (hereinafter "Huntington" or "Bank") seeks dismissal of this case based upon the Debtors' conduct in relation to a loan they took out to purchase rental property. In August of 2007, Cutting Edge Rentals, LLC took out a commercial loan in the amount of $175,000, which the Debtors both personally guaranteed. The funds were borrowed to consolidate three loans. The Huntington loan was secured by a mortgage on four rental apartments located at 2612 and 2652 Stitt Street in Toledo, Ohio [the "Stitt Street properties"]. The Stitt Street properties were owned by the Debtors personally. Part of the security for the loan was an assignment of rents in favor of the Bank.[2]

The apartments were rented out to various tenants, and payments on the loan were made, and kept current until November, 2014, a time period of a little more than seven years. In late 2007, the apartment identified as 2652 Stitt Street, Apartment A, was severely damaged by a tenant, and that unit remained uninhabitable through the date of filing. Mr. McVicker testified that he worked on the damaged apartment "as funds were available", with the last work on Apartment A having been done in the Spring or Summer of 2015. After the unit was damaged, Mr. McVicker estimated that he and his wife "were averaging approximately $900 a month out of pocket over and above the rents coming in." [Doc. # 40, Pl. Ex. 16, pp. 192–193].

In July of 2009, Debtor Mark McVicker retired[3] from Columbia Gas after working there for 39 years. Mr. McVicker received a year's severance from the company, meaning his income continued unchanged through July of 2010. He started receiving Social Security Disability as of August 1, 2010. In October of 2014, Debtor Sharon McVicker retired from her job as a librarian. The Debtors have additional income of about $850 a month from IRA withdrawals. After Sharon McVicker's retirement, the Debtors testified that they reevaluated their financial situation.

At the time of the Hearing, Mark McVicker was 64 years old. He has been diagnosed with prostate cancer. Sharon McVicker is 61 years old. She testified that she has back problems that makes it difficult to sit or stand for extended periods.

***2** The last payment on the Huntington loan was made in late November or early December of 2014. Mr. McVicker testified that the monthly payments were stopped to get Huntington Bank's attention, because their telephone calls to the bank, seeking to work something out on the loan, were not being returned. At some point, they hired an attorney, Howard Hershman, to represent them in negotiations with Huntington Bank.

Huntington contacted the McVickers after the default, and the parties had some discussions about alternatives to continuing payments on the loan. Mr. McVicker testified that the McVickers obtained at least one "Broker Price Opinion" ["BPO"] on the value of the Stitt Street properties. While he testified that he thought Huntington Bank was going to get their own BPO on the properties, Huntington elected to take a cognovit judgment against the McVickers after the first week of March, 2015. The Common Pleas Court "Order Granting Judgment in Favor of Plaintiff" reflects a filed stamped date of April 3, 2015. [Doc. # 40, Ex. 23, p. 295]. The McVickers learned of the judgment when they were served by certified mail.

Mr. McVicker stated that the issuance of the cognovit judgment prompted the McVickers to seek bankruptcy counsel. He also testified that Huntington suggested the McVickers file bankruptcy during the course of negotiations regarding the Huntington commercial loan. The Debtors filed the above captioned Chapter 7 case on May 4, 2015. [Doc. # 1].

The amount that remains owing on the loan secured by the apartments is approximately $125,000. [Pl. Ex. 1, Schedule D, p. 14]. Unsecured debts in this case total approximately $2,300, which were primarily obligations for medical and dental services. [*Id.,* at p. 17].

The Debtors have an IRA listed in the amount of $550,255.91, which was funded by a rollover from Mark McVicker's retirement from Columbia Gas. Sharon McVicker scheduled an IRA in the amount of $26,734.14. She also has a State Employees Retirement System pension. [*Id.,* at p. 11].

The Debtors own a home with a first mortgage of approximately $93,000. [*Id.,* at p. 14]. They listed the value of their residence at $200,000, and claimed the equity as exempt under Ohio's homestead exemption, O.R.C. § 2329.66(A)(1). [*Id.,* at 13].

Huntington asserts that this case was filed to get rid of one debt—the obligation owed to the bank and guaranteed by the McVickers. It is Huntington's position that the Debtors could have used their retirement savings, or their exempt home equity, to pay the commercial loan, and chose not to. The Bank points out that the McVickers' retirement savings is more than four times the amount of the loan owed to Huntington, [Doc. # 40, p. 11, ¶ 46], and that at the present rate of $850 per month being withdrawn from the retirement accounts, their retirement would last more than 50 years, which exceeds the Debtors expected life span. Huntington asserts that this warrants dismissal of the above captioned Chapter 7 case under 11 U.S.C. Section 707(a), because the case is filed in bad faith.

LAW AND ANALYSIS

[1] Huntington's Motion to Dismiss "for cause" is filed under 11 U.S.C. § 707(a), which states:

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

***3** (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

[2] While the statute does not specifically state that a Chapter 7 case can be dismissed for lack of good faith under § 707(a), controlling Sixth Circuit case law holds that it can.[4] The Sixth Circuit Court of Appeals has stated that "including" is not meant to be a limiting word. *See, Indus. Ins. Servs., Inc. v. Zick (In re Zick),* 931 F.2d 1124, 1126 (6th Cir.1991); *and cf., Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 373, 127 S.Ct. 1105, 1110–1111, 166 L.Ed.2d 956, 965–966 (2007)(stating that the nonexclusive list of causes justifying dismissal under § 1307(c) does not mention bad faith but recognizing that dismissal for bad faith is implicitly authorized by the words "for cause" in that section). The *Zick* court examined the case law and was "persuaded that lack of good faith [5] is a basis for dismissal under § 707(a)". *Zick*, 931 F.2d at 1127.

[3] While *Zick* holds that the facts establishing a lack of good faith "are as varied as the number of cases" [6], the decision also sets a high bar for dismissal. The use of § 707(a) to dismiss Chapter 7 cases based upon a lack of good faith "should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish life-style, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence." *Id.* at 1129. The *Zick* decision also explicitly endorsed the "smell test", which was described as having "particular merit". *Id.* at 1127.

[4] As the moving party, Huntington bears the burden of proving "cause" under § 707(a). *Simon v. Amir (In re Amir)*, 436 B.R. 1, 16 (6th Cir. BAP 2010); *In re Bage*, 2014 WL 4749072 at *3, 2014 Bankr. LEXIS 4069 at *7 (Bankr.N.D.Ohio Sept. 24, 2014); *In re McFadden*, 477 B.R. 686, 691 (Bankr.N.D.Ohio 2012).

***4** In this case, there does not appear to be a dispute that the debt owed to Huntington is "a large single debt" that the Debtors are seeking to avoid. While the amount owed to Huntington is approximately $125,000, the other unsecured debt in this case is approximately $2,300. Even deducting the value of $32,000 for the Stitt Street real estate that the Debtors listed on Schedule D, the potential unsecured deficiency claim of Huntington is clearly "a large single debt". *See e.g.*, *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1260 (11th Cir.2013)(debt of $161,383 out of a total debt of $319,000 qualified as a "large, single debt").

[5] However, courts have held that the presence of a single large debt, standing alone, "is insufficient to find cause for dismissal" of a Chapter 7 case. *In re Bage*, 2014 WL 4749072 at *3, 2014 Bankr. LEXIS 4069 at *9 (Bankr.N.D.Ohio Sept. 24, 2014); *In re Peterson*, 524 B.R. 808, 814 (Bankr.S.D.Ind.2015); *Modi v. Verani (In re Verani)*, 2015 WL 6146029 at *5, 2015 Bankr. LEXIS 3526 at *16 (Bankr.N.D.Ga. Oct. 15, 2015); *In re Ajunwa*, 2012 WL 3820638 at *7, 2012 Bankr. LEXIS 4096 at **22–23 (Bankr.S.D.N.Y. Sept. 4, 2012); *In re Sudderth*, 2007 WL 119141, at *2, 2007 Bankr. LEXIS 115 at *6 (Bankr.M.D.N.C.2007); *In re Keobapha*, 279 B.R. 49, 52–53 (Bankr.D.Conn.2002); 6 Collier on Bankruptcy ¶ 707.03[2], p. 707–18 (16th ed. 2013)("However, the fact that there is only one significant creditor, so that the bankruptcy case is essentially a two-party dispute is not, by itself, cause for dismissal.").

The existence of a large single debt arising from a personal guarantee of business debt has been described as "not uncommon" and "hardly remarkable". *See*, *In re Bushyhead*, 525 B.R. 136, 149 (Bankr.N.D.Okla.2015).

[6] Courts have looked for additional factors where there is a single (or very few) large creditor(s). The first is manipulation to reduce the number of creditors. *Zick*, 931 F.2d at 1126 n. 1 & 1128 ("the debtor's manipulations which reduced the creditors in this case to one"); *In re Peterson*, 524 B.R. 808, 814 (Bankr.S.D.Ind.2015)("whether the debtor has manipulated the bankruptcy process to frustrate one particular creditor"); *In re Spagnolia*, 199 B.R. 362, 365 (Bankr.W.D.Ky.1995)(citing *Zick*). The second factor that courts consider is whether there was evidence of an "intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence." *In re Gutierrez*, 528 B.R. 1, 15 (Bankr.D.Vt.2014)(quoting *In re Zick*, 931 F.2d at 1129). Third, the case law focuses on whether "[t]he debtor employed a deliberate and persistent pattern of evading a single major creditor." *In re Spagnolia*, 199 B.R. 362, 365 (Bankr.W.D.Ky.1995)(No. 11); *see also*, *Perlin v. Hitachi Capital Am. Corp. (In re Perlin)*, 497 F.3d 364, 374 (3rd Cir.2007).

Where the existence of a large single debt has been a major factor in granting dismissal it appears that the "accumulation of the debt" [7] often incurred through wrongful conduct by the debtor. *See*, *Grand Valley State Univ. v. Hodge*, 2004 U.S. Dist. LEXIS 6175 at *10 (W.D.Mich. March 30, 2004) ("in most cases in which a petition was found to be in bad faith for this reason, the debt was incurred by a defendant who had been found liable for some wrongdoing"), *adopted by*, *Grand Valley State Univ. v. Hodge*, 130 Fed.Appx. 793 (6th Cir.2005); Article: The Good Faith Fable of 11 U.S.C. § 707(a): How Bankruptcy Courts Have Invented A Good Faith Filing Requirement for Chapter 7 Debtors, 13 Bank. Dev. J. 61, 85 (Winter, 1996); *see also*, *In re Griffieth*, 209 B.R. 823, 830 (Bankr.N.D.N.Y.1996)(section titled: "Debtors Inaction Over a Period of Years Renders Their Tax Liability Self–Created"); *In re Eddy*, 288 B.R. 500 (Bankr.E.D.Tenn.2002)(failure to turnover life insurance proceeds that were to have been held in trust for surviving children). The business loan in this case was not wrongfully incurred, and it was paid down from $175,000 to $125,000 over a period of seven years [8] before Mrs. McVicker retired and the Debtors made the decision that it was time to stop using their income from other sources, like Social Security and retirement savings, to pay the commercial loan secured by the Stitt Street properties.

***5** **[7]** Here, the Debtors have not engaged in "excessive and continued expenditures", nor have they lived a "lavish" lifestyle. Mr. McVicker has social security disability income of $2,248 per month. Mrs. McVicker receives a pension of $606 per month. The McVickers withdraw monies from their retirement accounts in the approximate amount of $850 per month to cover living expenses of just over $3,700 a month. [Pl. Ex. 1, Sched. I & J]. They own a 2005 Ford Focus, a 2005 Ford F–250, and a 1987 Airstream Travel Trailer. [Pl. Ex. 1, Sched. B, p. 12]. The McVickers also maintain a Hartford life insurance policy with a premium of approximately $4,374 annually. The court does not find this to be indicia of "excessive expenditures" or a "lavish" lifestyle for purposes of Section 707(a).

In fact, it appears that the McVickers would be below the median income level for Ohio debtors. The Debtors list income of $3,704 per month, including $2,248 in Social Security which is not counted when "median income" is calculated. [Pl. Ex. 1, Schedule I, p. 20–21]. Gross income of $3,704 per month translates into an annual income of $44,448. Taking out the Social Security income that is statutorily excluded under 11 U.S.C. § 101(10A)(B), [9] the debtors' annual income for purposes of calculating whether the Debtors would be above, or below, the median income level is $17,472 [10]. For Ohio debtors who filed between April 1, 2015 and May 14, 2015, the median income level was $54,420 [11].

While the Debtors do not have "primarily consumer debts", making § 707(b) inapplicable, the choices Congress made in that subsection appear to be relevant in determining whether dismissal is appropriate under the *Zick* standard. [12] Accordingly, this court will look at the Congressional choices that were made in structuring 11 U.S.C. § 707.

Under Section 707(b), a creditor, like Huntington, would not have standing bring an action to dismiss for "abuse" in a case involving primarily consumer debts unless the debtors were over the median income level. *See,* § 707(b)(6); 6 Collier on Bankruptcy ¶ 707.03.[2], p. 707–20 (16th ed.2013). Only the bankruptcy judge, the Office of the United States Trustee, or in non-U.S. Trustee states, a bankruptcy administrator can bring an action for "abuse" by debtors who have income below the median level for their state. Moreover, § 707(b)(7) specifically forbids "ability to pay" arguments for consumer debtors who are below the median income level. The commentary in Collier goes even further: "It seems clear that the 'bright line test' of section 707(b)(7) means that no chapter 7 case should be dismissed based on a debtor's ability to pay if the debtor has an income below the safe harbor threshold." 6 Collier on Bankruptcy ¶ 707.04.[3][b], p. 707–30 (16th ed.2013). The treatise continues:

> ***6** The median income threshold adopted by Congress for means testing recognizes that families with incomes below that threshold do not have the ability to pay significant amounts to their creditors while maintaining a reasonable living standard. Courts should not attempt to evade this congressional intent by using some alternative means test to find "abuse" on the part of debtors whose incomes are below the applicable median income threshold.

6 Collier on Bankruptcy ¶ 707.04.[3][b], p. 707–31 (16th ed.2013). [13]

In enacting the 2005 BAPCPA amendments, Congress changed § 707(b)'s "substantial abuse" test by deleting the word "substantial" from the statute, permitting creditors to seek dismissal of Chapter 7 cases filed by consumer debtor under a new lower "abuse" standard. In doing so, Congress also added new statutory protections, preventing creditors from bringing actions against below median consumer debtors (§ 707(b)(6)), and protects those lower income debtors from having to respond to "ability to pay" arguments by any party in interest (§ 707(b)(7)).

[8] Debtors who do not have primarily consumer debts, like the McVickers, are protected—entirely—from an action to dismiss their case under § 707(b) because that provision is limited to cases "filed by an individual debtor under this chapter whose debts are primarily consumer debts". *See,* § 707(b). Thus, Huntington is proceeding under the more difficult standard of proof required under § 707(a), for debtors who do not have primarily consumer debts. The Bank is seeking dismissal under a standard where a finding of "cause" is limited to “egregious cases” under *Zick*. Huntington points to a lack of evidence of “belt tightening” as part of its argument that the Debtors should not be allowed to proceed in bankruptcy, because they have the ability to pay. It would be very odd to read into § 707(a) a requirement that debtors demonstrate that they engaged in “belt tightening” when the debtors are under-the-median non-consumer debtors. That cannot be an unbending prerequisite to obtaining relief under Chapter 7, when a creditor would not even have standing to question whether such a case was an “abuse” if the Debtors were consumer debtors. [14] Accordingly, it appears that courts are not required to mechanically impose a “belt tightening” requirement, particularly where debtors have income below the median income level, and are living within their means. [15] *See*, *In re Smith,* 468 B.R. 235, 239 (Bankr.W.D.Ky.2012)(in discussing *Spagnolia* factors: “the Debtor did not need to make lifestyle adjustments to curb a lavish lifestyle. As just stated, the Debtor lived a very frugal lifestyle, and did not live above his means.”); *First Capital Bank of Ky. v. Blok,* 2012 WL 1682042, 2012 U.S. Dist. LEXIS 66963 (S.D.Ind. May 14, 2012)(“First Capital attempts to liken the Debtors as the type of people who refuse to make lifestyle adjustments to pay their creditors. The evidence does not support this view”).

***7** Nor has there been any allegation, or evidence presented, regarding the concealment or misrepresentation of assets and/or sources of income. Thus, just looking at the factors specifically listed in *Zick,* the matter in issue would be whether the desire to discharge the single large debt owed to Huntington involved “conduct akin to fraud, misconduct, or gross negligence.” Here, there is no evidence of the Debtors having engaged in pre-petition transfers or exemption planning, intentionally reducing other debts to just leave the obligation to Huntington to be discharged, or being motivated by a purpose other than obtaining an economic fresh start. One of the facts that Huntington relies on is that “rental unit number 2652 A Stitt Street has been unoccupied and unfit for occupation for more than a year”. [Doc. # 40, ¶¶ 24–25, p. 5–6]. However, this does not appear to support Huntington's contention that something akin to fraud or sharp dealings occurred in this case. The unrebutted testimony of the Debtors was that the apartment was severely damaged, and became uninhabitable, in late 2007. The Debtors, with only the income from three rentable apartments, continued to make payments to Huntington on their loan from that date in late 2007 through the last payment on November 27, 2014. The Debtors did not immediately disregard their obligations under the loan agreement when they suffered a set back. Under these circumstances, it is hard to see how—when the testimony reflects that the rents from the three apartments do not support the loan payment today—that the Debtors were not engaging in some form of “belt-tightening” for more than six years to make their monthly payments to Huntington, even though the rentals almost certainly did not cash flow the loan.

The *Zick* decision also endorses the use of a “smell test” to determine whether a Chapter 7 filing meets the high bar of being the kind of egregious case that should be dismissed under § 707(a). This would appear to encompass more than the specific factors that were listed. [16] The *Zick* court also stated that the facts establishing a lack of good faith for purposes of § 707(a) “are as varied as the number of cases.”

In evaluating contested motions to dismiss under § 707(a), some courts in the Sixth Circuit have looked at a list of 14 factors set forth in the *Spagnolia* decision:

1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition.

2. The debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle.

3. The debtor filed the case in response to a judgment pending litigation, or collection action; there is an intent to avoid a large single debt.

4. The debtor made no effort to repay his debts.

5. The unfairness of the use of Chapter 7.

6. The debtor has sufficient resources to pay his debts.

7. The debtor is paying debts to insiders.

8. The schedules inflate expenses to disguise financial well-being.

9. The debtor transferred assets.

10. The debtor is over-utilizing the protection of the Code to the unconscionable detriment of creditors.

11. The debtor employed a deliberate and persistent pattern of evading a single major creditor.

12. The debtor failed to make candid and full disclosure.

13. The debts are modest in relation to assets and income.

14. There are multiple bankruptcy filings or other procedural “gymnastics.”,

In re Spagnolia, 199 B.R. 362, 365 (Bankr.W.D.Ky.1995); *see also, Grand Valley State Univ. v. Hodge,* 2004 U.S. Dist. LEXIS 6175, at *7 (W.D.Mich. March 30, 2004)(citing *Spagnolia* factors), *adopted by, Grand Valley State Univ. v. Hodge,* 130 Fed.Appx. 793 (6th Cir.2005); *In re Cassel l,* 1999 U.S. Dist. LEXIS 13349 at *13–15 (E.D.Mich. Aug. 13, 1999), *aff'd, Cassell v. Kurily (In re Cassell),* 230 F.3d 1357 (unpublished), 2000 WL 1478377, 2000 U.S.App. 25281 (6th Cir. Sept. 29, 2000)

Based on the evidence presented, it appears that some of the *Spagnolia* factors may apply to this case—specifically, numbers 3, 5, 6, and 10, as well as, perhaps, numbers 2 and 13. Factor number 3 relates to the Huntington debt being the largest debt and the primary motivation for the filing of this Chapter 7, which was discussed above. Weighing the rest of the factors, numbers 5, 6, 10, and 13, essentially turns on the question of whether the decision to file a Chapter 7 bankruptcy, rather than use exemptible homestead equity or retirement funds to pay the debt owed to Huntington, is an unfair use of Chapter 7.

1. Debtors' Exemption Rights Under The Bankruptcy Code.

[9] One of the most important guides in making a decision as to whether or not there is "unfairness" in a debtor's use of Chapter 7, or the extent to which a debtor is "over-utilizing" the protections of the Code, should be the relief Congress specifically provided in the legislation itself. [17] There are several instances in the Code where the exemption rights of debtors were balanced against the rights of creditors to the payment of their just debts. Those legislative choices, made by Congress, must inform the court's view of whether the Debtors in this case have overreached, and should be denied bankruptcy relief.

***8** One choice that Congress made was to protect exemptions from waiver. Under 11 U.S.C. § 522(e), any pre-petition waiver of exemption rights by a debtor in favor of a creditor holding an unsecured claim is unenforceable in a case under the Code. *See e.g., In re Kadoch,* 528 B.R. 626, 638–639 (Bankr.D.Vt.2015); *In re D'Italia,* 507 B.R. 769, 773–775 (Bankr.D.Mass.2014); 4 Collier on Bankruptcy ¶ 522.07, p. 522–43 (16th ed.2009).

Another choice was the Bankruptcy Code's exclusion of exempt assets from the statutory balance sheet in the definition of "insolvency" found in 11 U.S.C. § 101 (32)(A)(ii). One of the primary uses of this defined term is in the context of preferential transfer recovery—where debts have been paid to non-insider creditors during the 90 days prior to filing. By defining a debtor as "insolvent" based upon a balance sheet test that does not include exempt property, the statute requires disgorgement of preferential payments made on just debts, even in cases where the inclusion of exempt property would render a debtor solvent on a balance sheet basis.

In reorganization cases, the broadly used "best interest of creditors test" also reflects a choice where Congress put a debtor's right to benefit from exemptions ahead of a creditor's right to payment. *See,* 11 U.S.C. §§ 1129(a)(7)(A); 1225(a)(4); 1325(a)(4). In the context of a Chapter 13 repayment plan, the *Penland* court stated: "An exemption the legislature has provided should not be denied or impaired simply because a judge finds it to be out of proportion." *Penland v. Rakozy (In re Penland),* 2006 WL 6811002 at *7, 2006 Bankr. LEXIS 4838 at *21 (9th Cir. BAP Aug. 17, 2006). The *Penland* decision concludes: "Given that the legislative branch has specifically provided for the protection of exempt assets, any determination that the failure to use exempt assets to fund a plan constitutes bad faith should be supported by a finding that the Penlands affirmatively engaged in bad faith conduct, such as aggressive and fraudulent pre-bankruptcy planning." [18] *Penland,* 2006 WL 6811002 at *8, 2006 Bankr. LEXIS 4838 at *22.

A relatively recent Supreme Court decision has changed the legal landscape for exemptions. In *Law v. Siegel,* ––– U.S. ––––, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014), the United States Supreme Court addressed the question of whether a debtor's misrepresentations regarding a fraudulent lien would allow a trustee to surcharge an otherwise valid $75,000 exemption for the costs associated with recovering the concealed equity in the debtor's residence. The bankruptcy court had permitted the surcharge, apparently reasoning that it had the equitable and inherent power to do so to protect the integrity of the bankruptcy system. The Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals both affirmed. However, in a unanimous decision the Supreme Court reversed, stating that it was "hornbook law" that bankruptcy courts cannot "override explicit mandates of other sections of the Bankruptcy Code." *Siegel,* 134 S.Ct. at 1194, 188 L.Ed.2d at 153. Because 11 U.S.C. § 522(b)(3)(A) allows a debtor to exempt equity in his residence, and § 522(k) prohibits use of the exemption to pay "any administrative expense," the debtor was entitled to the benefit of the exemption, despite his misrepresentations regarding the fraudulent lien that made it appear there was no non-exempt equity in his residence.

***9** In addition to the holding on the specific issue of surcharge, the Supreme Court made an additional statement regarding exemptions, stating that the Bankruptcy Code does not confer "a general, equitable power in bankruptcy courts to deny exemptions based on a debtor's bad faith conduct." *Siegel,* 134 S.Ct. at 1196, 188 L.Ed.2d at 155. "[F]ederal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code." *Id.* (original emphasis on "federal law" omitted).

While the weight to be afforded to the *dicta* in *Siegel* remains an open question in some jurisdictions, the Sixth Circuit has held that: "Under *Siegel,* bankruptcy courts do not have authority to use their equitable powers to disallow exemptions or amendments to exemptions due to bad faith or misconduct." *Ellmann v. Baker (In re Baker),* 791 F.3d 677, 683 (6th Cir.2015).

Following *Siegel* and *Baker,* a recent decision from Tennessee held that even where debtors had allegedly engaged in fraudulent exemption planning, the exemptions would be allowed over the Chapter 7 trustee's objection. As the *Hurt* court stated: "exemption planning, even bad faith exemption planning does not necessarily justify disallowance of the exemption." *In re Hurt,* 542 B.R. 798, 802(Bankr.E.D.Tenn.2015). In the above captioned case, there is no evidence that the Debtors engaged in any "exemption planning". [19] The homestead exemption applies to real estate where the Debtors have lived for a number of years. The retirement funds are largely the product of Mr. McVicker working for Columbia Gas for most of his adult life.

Prior to the *Law v. Siegel* decision, there was at least one case where the ability to use exempt property to pay a debt (combined with other indicia of bad faith) was held to be a factor supporting dismissal under § 707(a). *See, In re Fiero,* 2008 WL 2045820, 2008 Bankr. LEXIS 1573 (Bankr.E.D.N.C. May 12, 2008)("The debtor has the ability to pay her debts, both from her income and from her exempt assets."). It is doubtful that *Fiero'* s reasoning would be found persuasive today. Essentially, a § 707(a) dismissal based upon an ability to pay using exempt property would be doing indirectly that which the Supreme Court has prohibited bankruptcy courts from doing directly—putting a constraint on exemptions without a clear statutory basis.

Two other subsections of the Bankruptcy Code where Congress sided with a debtor's exemption rights over a creditor's right to payment are 11 U.S.C. §§ 522(g) and (h). Under these provisions, individual chapter 7 debtors are entitled to avoid "preferential transfers" (that were not voluntarily made, or concealed) in order to protect their exemption rights in the property so transferred if the trustee does not seek to avoid those transfers. *See,* 5 Collier on Bankruptcy ¶ 547.11[2][a], p. 547–95 (16th ed.2014); *Dickson v. Countrywide Home Loans (In re Dickson),* 655 F.3d 585, 591–593 (6th Cir.2011); *McLane v. Bostater (In re McLane),* 526 B.R. 238 (Bankr.N.D.Ohio 2015). Thus, even when a debtor's property was taken by a creditor in payment of a just debt, and notwithstanding the fact that no creditor would benefit from the recovery of the transferred funds, the Bankruptcy Code specifically permits debtors to recover, and keep for their own use, involuntarily transferred property in which the debtor may claim an exemption.

***10** The Bankruptcy Code also provides for the avoidance of a creditor's valid judgment lien—even one of long standing —if that judgment lien impairs a debtor's exemption. *See,* 11 U.S.C. § 522(f). In 1994 Congress amended the language of § 522(f) to legislatively overrule cases like *In re Dixon,* 885 F.2d 327 (6th Cir.1989) that narrowly interpreted a debtor's right to use the judgment lien avoidance provision. *See, In re Holland,* 151 F.3d 547, 549 (6th Cir.1998). While one of Huntington's complaints regarding this case is that their cognovit judgment lien was avoided under § 522(f), that is a statutory right given to debtors by Congress.

[10] These examples of choices that Congress made regarding exemptions, as well as the recent holding in *Siegel,* support finding that the Bankruptcy Code does not support subordinating a debtor's ability to use a statutory right to claim an exemption to a creditor's right to payment of valid debts. Further, as one court has stated: "The purpose of a bankruptcy case is to allow debtors to avoid the payment of debt, preserve the exemptions they may have in property, [20] and obtain a fresh start. Preserving property and receiving a discharge of dischargeable debt are valid purposes for filing a bankruptcy case." *Modi v. Verani (In re Verani),* 2015 WL 6146029 at *5, 2015 Bankr. LEXIS 3526 at *16 (Bankr.N.D.Ga. Oct. 15, 2015).

2. Ohio Law Regarding Exemptions.

The homestead exemption claimed by the Debtors in this case is provided by an Ohio statute. As authorized by 11 U.S.C. § 522(b)(2), the Ohio legislature opted out of the federal exemptions provided in § 522(d). *See,* Ohio Rev.Code § 2329.662. As a result, Ohio debtors in bankruptcy may generally only claim a homestead exemption in an amount permitted under state law.

"Ohio law has provided for a Homestead Exemption for over 160 years." *In re Davis,* 539 B.R. 334, 349 (Bankr.S.D.Ohio 2015). Prior to 2008, Ohio had one of the lowest homestead exemptions in the country. The Ohio homestead exemption was $5,000 in 1980 [21] and it remained at that level until O.R.C. § 2329.66(A)(1) was amended in 2008, [22] increasing the Ohio homestead exemption to $20,200. Effective March 27, 2013, the Ohio homestead exemption increased to $125,000. *Id.* Unlike the period from 1980 to 2008, the Ohio homestead exemption is now subject to periodic adjustment, and is currently $132,900. *Id.* at n. 5.

[11] "Exemptions promote a variety of public-policy aims: (1) providing the debtor with that property which is necessary for their survival; (2) enabling the debtor to rehabilitate themselves; and (3) protecting the debtor's family from the adverse effects of impoverishment." *In re Felgner,* 2011 WL 5056994 at *2, 2011 Bankr. LEXIS 4118 at *4 (Bankr.N.D.Ohio 2011). "Without the homestead exemption, many debtors could be forced to sell their residence to satisfy creditors, potentially leaving the debtor homeless, shifting the costs of the debtor's care, at least temporarily, onto housing shelters or government programs, instead of creditors who were aware of nonpayment risks when extending credit." *In re Way,* 2014 WL 4658745 at *3, 2014 Bankr. LEXIS 3985 at *8 (Bankr.N.D.Ohio Sept. 17, 2014).

***11** While Ohio's homestead exemption has gone from one of the very lowest in the country to a comparatively generous level, the current amount of Ohio's homestead exemption was decided through the state legislative process. Bankruptcy Courts were not able to equitably expand the homestead exemption when it was $5,000 in 2007. To the extent that Huntington is attempting to equitably contract the homestead because it seems too generous—even though the full amount of the homestead exemption is not being utilized in this case [23] —the decision on the proper amount to be allowed as a homestead exemption by the Ohio legislature [24] is entitled to considerable weight in determining whether the use of that exemption is "cause" for dismissal, even under a federal statute like 11 U.S.C. § 707(a).

The *Zick* court stated that § 707(a) dismissal is limited to "egregious cases". There was no exemption planning, or asset transfers alleged to have occurred prior to the filing of this case. The Debtors simply have equity in a home they have owned for a substantial period of time. Thus, it is difficult to see how anything other than the dollar amount of the homestead exemption, as determined by the Ohio Legislature, would satisfy the *Zick* standard for involuntary dismissal of a non-consumer case. The amount provided for in § 2329.66(A)(1) may be overly generous—the Ohio Legislature may at some point reconsider and elect to reduce the exemption. But it is difficult to see how simply claiming an exemption in less than the full amount provided by Ohio law would rise to the level of being "egregious". *See e.g., In re Ajunwa,* 2012 WL 3820638 at *7, 2012 Bankr. LEXIS 4096 at *13 (Bankr.S.D.N.Y. Sept. 4, 2012) ("This Court cannot find a debtor's exercise of a right to use a state-authorized exemption to be an 'unfair manipulation' of the Code.").

It is true that the federal homestead exemption is less. At the time the McVickers filed this Chapter 7 case the homestead exemption provided by Bankruptcy Code Section 522(d)(1) was $22,975. Even with a combined total of $45,950 for both Mr. and Mrs. McVicker, that is less than the approximately $107,000 in equity that the Debtors appear to have in their residence. However, the enactment of Section 522(d) was an attempt to make exemptions more uniform throughout the country by establishing a *minimum* set of exemptions. *See, In re Sapp,* 81 B.R. 545, 547 (Bankr.W.D.Mo.1987)("Congress had spelled out in § 522(d) what it considered to be the basic minimums necessary to supply the fresh start"); *In re Kaufman,* 68 B.R. 391, 393 (Bankr.S.D.N.Y.1986); 4 Collier on Bankruptcy ¶ 522.02[l], p. 522–16 (16th ed.2009). The fact that the Debtors have claimed an exemption in excess of a minimum would not, in itself, support a finding that the Debtors' filing took advantage of the Bankruptcy Code in an "egregious" manner.

More relevant to this inquiry would be where the Code sets an *upper* limit on the homestead exemption. Congress enacted a homestead cap that would apply only to an interest in property acquired "during the 1215–day period preceding the date of the filing of the petition that exceeds the aggregate $155,675 in value in—(A) real or personal property that the debtor or a dependant of the debtor uses as a residence". *See,* 11 U.S.C. § 522(p)(1). There is a similar limitation imposed, capping the exemption at $155,675, if a debtor engaged in certain criminal conduct. *See,* 11 U.S.C. § 522(q). Like the Ohio homestead exemption, the $155,675 applies to each debtor's interest, making the total $311,350. *See,* 5 Collier on Bankruptcy ¶ 522.13[4], p. 522–127 (16th ed.2013). Accordingly, even where a debtor has done aggressive exemption planning, or committed certain bad acts—not even arguably present in this case—the Bankruptcy Code would permit allowance of a homestead exemption far in excess of what the Debtors have claimed in this case.

3. The Exclusion Of The Retirement Funds From The Bankruptcy Estate.

***12** Huntington also asserts that the failure to use retirement savings is a basis for dismissal of this case under § 707(a). The Debtors each have an IRA listed in the respective amounts of $550,255.91 and $26,734.14. [Pl. Ex. 1, Schedule B, p. 11].

Prior to 1992, there was a split of authority as to whether ERISA-qualified retirement funds were excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2) by "applicable nonbankruptcy law". That issue was decided, in favor of protecting ERISA-qualified accounts, in the Supreme Court's decision *Patterson v. Shumate,* 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992).

In 2005 [25], Congress clarified and expanded the exemption status of certain tax-qualified retirement plans. To protect individuals in states (like Ohio) that had opted-out of the federal exemptions, Congress added § 522(b)(3) to include retirement funds to the extent that the funds were in an account exempt from taxation under specified sections of the Internal Revenue Code.

> To expand the protection of certain tax-exempt retirement plans, Congress created as part of the 2005 Act a category of exemption rights that may be exercised by the debtor even if the debtor's state has opted out of the federal exemption scheme. In addition to exemptions under the laws of the debtor's domicile, the debtor is entitled to exempt under section 522(b)(3)(c) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code. These sections of the Internal Revenue Code deal with ... individual retirement accounts ("IRAs"); ....

5 Collier on Bankruptcy ¶ 522.10[9], p. 522–91 (16th ed.2014).

This new exemption provision was not contingent upon a determination as to whether or not the funds were "reasonably necessary for support of the debtor or the debtor's dependents." *Compare,* former 11 U.S.C. § 522(d)(10)(E) (2005), *with* 11 U.S.C. § 522(b)(3)(c); *see also,* House Report No. 109–31, Pt. 1, 109th Cong., 1st Sess, 63–64 (2005); *Bierbach v. Tabor (In re Tabor),* 433 B.R. 469, 474–475 (Bankr.M.D.Pa.2010). However, there is a statutory "cap" for individual retirement accounts. *See, Clark v. Rameker,* ––– U.S. ––––, 134 S.Ct. 2242, 2249, 189 L.Ed.2d 157, 167 (2014) ("Congress ... imposed a value limitation on the amount of exemptible retirement funds in a separate provision, § 522(n).").

Section 522(n) provides:

> (n) For assets in individual retirement accounts described in section 408 or 408A of the Internal Revenue Code of 1986, other than a simplified employee pension under section 408(k) of such Code or a simple retirement account under section 408(p) of such Code, the aggregate value of such assets exempted under this section, without regard to amounts attributable to rollover contributions under section 402(c), 402(e)(6), 403(a)(4), 403(a)(5), and 403(b)(8) of the Internal Revenue Code of 1986, and earnings thereon, shall not exceed $ 1,245,475 in a case filed by a debtor who is an individual, except that such amount may be increased if the interests of justice so require.

***13** Huntington points to the Debtors having "nearly $600,000 in cash available to them in various IRAs and related products, with which they could have easily paid off the loan more than 4 times over." [Doc. # 40, p. 2, ¶ 4]. But, even if the Congressionally imposed cap of $1,245,475 applied to the Debtors in this case, [26] the Debtors are well below that limit. This is an additional factor that weighs against a finding of "cause" based upon this being an "egregious case" under *Zick.*

Huntington focuses on the fact that the Debtors are currently only withdrawing $850 a month from their retirement savings. At that rate, even without factoring in interest, their retirement savings would last longer than their likely life span. The Bank also emphasizes the fact that the McVickers' retirement accounts are more than four times the amount of the remaining loan balance on the Huntington debt. However, a decision by Congress to protect retirement accounts at dollar levels even greater than the Debtors have in this case is not irrational or absurd. The United States Supreme Court has cited a House Report stating: " ' [t]he historical purpose' of bankruptcy exemptions has been to provide a debtor 'with the basic necessities of life' so that she 'will not be left destitute and a public charge.' " *Clark v. Rameker,* ––U.S. ––, 134 S.Ct. 2242, 2247 n. 3, 189 L.Ed.2d 157, 166 n. 3 (2014). Sickness, nursing care, assisted living expenses, inflation, the risk of possible reductions in government programs like Social Security and Medicare—there are many reasons why more than $850 a month might be required for the McVickers' to meet their reasonable needs in the future. *See, In re Karn,* 2014 WL 3844829 at *2, 2014 Bankr. LEXIS 3299 at *6–7 (Bankr.N.D.Ohio Aug. 4, 2014).

As the *Velis* court stated:

> There can be no doubt that Congress has expressed a deep and continuing interest in the preservation of pension plans, and in encouraging retirement savings, as reflected in the statutes which have given us ERISA, Keogh plans and IRAs. We believe it reasonable to conclude that Congress intended to provide protection against the claims of creditors for a person's interest in pension plans, unless vulnerable to challenge as fraudulent conveyances or voidable preferences.

Velis v. Kardanis, 949 F.2d 78, 82 (3d Cir.1991). Judge Kendig cited this policy [27] in a decision involving Chapter 13: "Congress elevated the public policy in favor of retirement savings above the bankruptcy policy that favors maximum repayment to unsecured creditors." *In re Sibila,* 2010 WL 4365741, at *5, 2010 Bankr. LEXIS 3843 at *15 (Bankr.N.D.Ohio Oct. 28, 2010); *See also, In re Egan,* 458 B.R. 836, 849 (Bankr.E.D.Pa.2011)(citing cases); *In re Yuhas,* 186 B.R. 381, 387 (Bankr.D.N.J.1995), *aff'd, Orr v. Yuhas (In re Yuhas),* 104 F.3d 612 (3rd Cir.1997).

4. Ability To Pay Is Not A Primary Consideration Under § 707(a).

***14** Huntington cites the amount of exempt property in this case as part of an argument for dismissal based on the Debtors' ability to pay. The *Zick* decision quoted from Collier: "Both the House and Senate Reports state [, however,] that: 'The section does not contemplate ... that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal....' " *In re Zick,* 931 F.2d 1124, 1127 (6th Cir.1991); *see also, In re Mohr,* 425 B.R. 457, 466 (Bankr.S.D.Ohio 2010)("While ability to pay is the primary focus for dismissal under § 707(b)'s abuse test, legislative history suggests that Congress did not intend ability to pay to be a primary consideration under § 707(a).").

5. Whether Debtors Are Permitted To Make A "Business Decision".

In Huntington's Motion To Dismiss Pursuant To 11 U.S.C. § 707(a), the bank emphasizes that Debtors made a unilateral business decision to stop paying the its loan, instead of using exempt assets to continue payments. [Doc. # 40, ¶¶ 4, 5, 17]. In contrast, the Debtors point to the change in their financial circumstances with Mrs. McVicker's retirement, and the fact that Huntington elected not to respond to their efforts to discuss the debt until there was a default.

The fact that bankruptcy offers advantages to a debtor is not, standing alone, a basis for finding bad faith. *See, In re James Wilson Assocs.,* 965 F.2d 160, 170 (7th Cir.1992)("It is not bad faith to seek to gain an advantage from declaring bankruptcy—why else would one declare it?"); *In re Blok,* 2011 WL 4344594 at *3, 2011 Bankr. LEXIS 3526 at *8 (Bankr.S.D.Ind. Sept. 15, 2011) ("As other courts have noted, debtors merely taking advantage of their legal rights is not, by itself, sufficient to support a finding of bad faith."), *aff'd, First Capital Bank of Ky. v. Blok,* 2012 WL 1682042, 2012 U.S. Dist. LEXIS 66963 (S.D.Ind. May 14, 2012); *In re Bingham,* 68 B.R. 933 (Bankr.M.D.Pa.1987)(filing on eve of effective date of amendment rendering debt nondischargeable is not bad faith). [28]

A review of the case law reflects that while having an economic motive for filing bankruptcy is not a basis for dismissal under § 707(a), two appellate courts have affirmed dismissals under § 707(a) based upon the presence of *non-economic* motives in filing for bankruptcy. *Krueger v. Torres (In re Krueger),* ––– F.3d ––––, ––––, ––––, 2016 WL 232014 at *6 & *9 (5th Cir.2016)(citing *Huckfeldt*); *Huckfeldt v. Huckfeldt (In re Huckfeldt),* 39 F.3d 829, 832–833 (8th Cir.1994)(non-economic motive of frustrating a divorce decree were unworthy of bankruptcy protection).

Here, the loan in issue was a commercial loan, made for a business purpose. There is no reason to think that Huntington relied on some special type of promise greater than the obligations associated with a business contract.

While the court has not addressed a case where a debtor's "business decision" was in issue, the question has arisen in connection with the actions of a creditor. In that case, a state court receiver had turned over almost $700,000 in settlement proceeds from a malpractice lawsuit to a bank, even though the bank did not have a security interest in the lawsuit or its proceeds. When the bank was asked to turnover the funds to the trustee, rather than doing what might be considered the "right thing", the bank made a business decision to assert its legal rights, and argued it should be able to keep the money. Specifically, the bank argued that it was not an "insider" for preference purposes, even though the bank had asked for the appointment of the individual selected as receiver, and that individual had allegedly ignored the limits placed on the receiver by the state court in paying over the settlement funds to the bank.

***15** **[12]** Following case law holding that a "banking relationship generally permits a bank to act in its own interests, as a creditor", this court allowed the bank to keep the monies that were, for purposes of the decision, assumed to have been wrongfully transferred to the bank. *See, Graham v. Huntington Nat'l Bank (In re Medcorp, Inc.),* 521 B.R. 259, 275 (Bankr.N.D.Ohio 2014). Similarly, where debtors have simply made a decision to "act in their own interests", without any showing of manipulation or over-reaching, the fact that a business decision was made fails to prove that this is an "egregious" case.

6. The Failure To Turn Over Rent Proceeds To Huntington.

One of the allegations that Huntington uses to support the Motion to Dismiss under § 707(a) is the Debtors' failure to turn over the rents received from the units that are leased. This is probably the strongest fact presented in support of dismissal by Huntington. It is undermined by two countervailing considerations: 1) some evidence that the rent monies may have been used for paying expenses associated with the Stitt Street properties; and 2) the fact that Section 523(a)(6) appears to provide a more specific remedy for conversion of the rents in derogation of Huntington's security interest, if in fact there has been a conversion of the rents.

[13] This court does not follow the line of decisions, like *Padilla,* holding that the existence of more narrow potential causes of action against a debtor (like § 523(a)(6)) prohibits dismissal under the more general provision of § 707(a). *See, Neary v. Padilla (In re Padilla),* 222 F.3d 1184, 1191–1194 (9th Cir.2000). *Padilla* and *Zick* are, in some ways, at opposite ends of the broad spectrum of case law interpreting § 707(a).

This does not mean that the viewpoint in *Padilla,* which focuses on the existence of more specific remedies, cannot be part of *Zick*-based analysis. *See, In re Bage,* 2014 WL 4749072 at *3, 2014 Bankr. LEXIS 4069 at *9–11 (Bankr.N.D.Ohio Sept. 24, 2014). In determining whether a Chapter 7 fact situation presents an "egregious case", courts should be permitted to consider whether other remedies, other than dismissal for a lack of good faith, are available to creditors. Here, an adversary proceeding (if Huntington elects to file one) would have the additional advantage of allowing a fuller exploration of the underlying facts, most of which were only touched on in the depositions of the McVickers attached as exhibits to Huntington's Motion.

7. The Smell Test.

For the reasons stated above, the actions of the Debtors in this case, when viewed as a whole or viewed in isolation, are not contrary to the purposes of the Bankruptcy Code. There were no prior bankruptcies, no evidence of either legal or financial manipulation, no transfers, no material misrepresentation or omissions in the schedules, neither Debtor is employed, they are not paying anyone else's expenses, the Debtors' lifestyle was (and is) not lavish, there is no "persistent pattern" of evading a single creditor—instead there is a history of years of payments before making the "business decision" to default.

Congress, and in this case the Ohio legislature, have made certain policy choices which elevate the protection of debtor's exempt property over the interests of creditors in being paid. Asserting those rights, without more, does not "undermine the integrity of the bankruptcy system." *In re McFadden,* 477 B.R. 686, 693 (Bankr.N.D.Ohio 2012); *In re Bage,* 2014 WL 4749072 at *3, 2014 Bankr. LEXIS 4069 at *9

(Bankr.N.D.Ohio Sept. 24, 2014). In short, this is not an "egregious case" under *Zick*.

***16** Therefore, for the reasons stated above,

IT IS ORDERED that Huntington's Motion to Dismiss Case Pursuant to 11 U.S.C. § 707(a) is Denied.

All Citations

--- B.R. ----, 2016 WL 660102

Footnotes

1 The docket reflects that duplicate Motions to Dismiss were filed by Huntington, each 337 pages, with exhibits. This memorandum will cite to Document # 40.

2 The loan was actually made by Sky Bank, which later merged with Huntington Bank.

3 Mr. McVicker testified that he felt he was "forced out" by the company. He had taken time off for health reasons, and was not allowed to return to work.

4 In other jurisdictions, 'Whether a chapter 7 case can be dismissed on bad faith grounds under section 707(a) is one of the older debates in bankruptcy law.' *In re Adolph*, 441 B.R. 909, 911 (Bankr.N.D.Ill.2011). Although *Zick* was decided prior to the 2005 BAPCPA amendments that substantially changed § 707(b), courts in the Sixth Circuit (as well as many courts outside the circuit) continue to follow *Zick*. *See e.g., In re Tow*, 2016 WL 74741 at *2, 2016 Bankr. LEXIS 29 at *4–6 (Bankr.N.D.Ohio Jan. 5, 2016). Additional reasons for the continued vitality of *Zick* after the BAPCPA amendments are found in *In re Yim Kealamakia*, 2013 Bankr. LEXIS 2777 at *14–22 (Bankr.D.Utah July 9, 2013)(§ 707(a) was part of the original Bankruptcy Code, while § 707(b) (in its earliest iteration) was not added until the 1984 BAFJA amendments.)

5 The *Zick* decision used the term "bad faith" 11 times, and the term "lack of good faith" 9 times. Courts often use the two terms interchangeably. *See, In re Wilcox*, 539 B.R. 137, 148 n. 17 (Bankr.S.D.Tex.2015); *In re Gutierrez*, 528 B.R. 1, 14 n. 5 (Bankr.D.Vt.2014).

6 *Zick*, 931 F.2d at 1127.

7 *McDow v. Smith*, 295 B.R. 69, 82 (E.D.Va.2003).

8 Payments of three years cited where debtor stopped payments and filed bankruptcy to avoid a single large debt. *See, In re Smith*, 468 B.R. 235, 239 (Bankr.W.D.Ky.2012)(case under § 707(b)).

9 *See, Baud v. Carroll*, 634 F.3d 327, 345–46 (6th Cir.2011)(Social Security was statutorily excluded from disposable income calculations by 11 U.S.C. § 101(10A)(B), which became part of the Bankruptcy Code in 2005).

10 Notably, this total does not include the rental income from the three Stitt Street apartments that have been rented. Those monies may first go to Cutting Edge Rentals, LLC. But even if the rental income were fully attributable to the debtors, the amount would have to be more than $3,000 a month to put them over the median income level. The evidence presented at the Hearing, and the transcript of the 2004 Examination submitted by Huntington suggests that the gross rental income from the Stitt Street apartments is no more than $1,350. [Doc. # 40, Pl. Ex. 16, p. 176]. If the rent was paid on time, the gross rental income would be $1,200 a month. [*Id.*, p. 177].

11 *See,* http://www.justice.gov/ust/eo/bapcpa/20150401/bci_data/median_income_table.htm

12 The *Zick* court looked at § 707(b) in considering *In re Latimer*, 82 B.R. 354 (Bankr.E.D.Pa.1988), quoting *In re Krohn*, 886 F.2d 123 (6th Cir.1989)(a § 707(b) case), and discussing the rationale of *In re Jones*, 114 B.R. 917 (Bankr.N.D.Ohio 1990).

13 It is not entirely clear that Collier intends to speak to both § 707(a) and § 707(b) in this passage. And, if that is the intent, it is even less clear that the Sixth Circuit would endorse the collapsing of the two subsections. However, the point being made by Collier supports this court's position that "belt tightening" is not an unvarying requirement that must be mechanically imposed on every debtor, regardless of their underlying financial circumstances.

14 The point here is a very narrow one. The case law regarding the relationship between § 707(a) and the changes made to § 707(b) by the BAPCPA amendments is far from settled. *See e.g., Perlin v. Hitachi Capital Am. Corp. (In re Perlin),* 497 F.3d 364, 369–371 (3rd Cir.2007)(holding that § 707(a) and § 707(b) are not a 'commonly associated group or series.'). Nevertheless, the structure of the two statutes—with § 707(b) excluding from its reach debtors who do not have primarily consumer debts and also providing additional protections to below-median-income debtors with consumer debts—does not support the idea that a showing of belt tightening is required by all debtors (particularly below-median-income debtors) to avoid "for cause" dismissal under § 707(a). Moreover, this is consistent with the statement in *Zick* that: "The section [§ 707(a)] does not contemplate ... that the ability of the debtor to repay his debts in whole or in part constitutes adequate

cause for dismissal....” *In re Zick*, 931 F.2d 1124, 1127 (6th Cir.1991); *also cf., In re Bushyhead,* 525 B.R. 136, 142–143 & 148 (Bankr.N.D.Okla.2015)(citing legislative history).

15 Of course, this discussion of income does not address Huntington's arguments regarding the size and scope of Debtors' exempt property, which are reviewed below.

16 Some decisions view *Zick* as endorsing a “totality of the circumstances” test. But that term does not appear in the *Zick* decision.

17 There is certainly a tension between the concerns expressed in *Huckfeldt* and the *Zick* “smell test”. The *Huckfeldt* court noted that earlier bankruptcy decisions had expressed concerns that the open-ended use of bad faith to dismiss Chapter 7 cases under § 707(a) would be too subjective. The fear being that “bad faith inquiry will be ‘employed as a loose cannon which is to be pointed in the direction of a debtor whose values do not coincide precisely with those of the court.’ *In re Latimer*, 82 B.R. 354, 364 (Bankr.E.D.Pa.1988). These are legitimate concerns.” *Huckfeldt v. Huckfeldt (In re Huckfeldt),* 39 F.3d 829, 832 (8th Cir.1994); *see also, In re Landes*, 195 B.R. 855, 863 (Bankr.E.D.Pa.1996); 13 Bank. Dev. J. 61, 91 (Winter, 1996)(“Possibly, the real reason these courts reached different outcomes from very similar facts is simply that the ‘smell test‘ was being administered through different noses.”). In an unpublished decision, the Sixth Circuit emphasized that the “smell test” should be based on objective factors. *See, Merritt v. Franklin Bank, N.A. (In re Merritt),* 2000 WL 420681, 2000 U.S.App. LEXIS 6877 (6th Cir. April 12, 2000).

18 The concurring opinion would have preferred to hold that “the implications of use or non-use of exempt assets is a fact-intensive inquiry that presents a question of degree that ultimately rests on the discretion of the trial judge in evaluating the totality of the circumstances.” *Penland*, 2006 WL 6811002 at *8, 2006 Bankr. LEXIS 4838 at *23.

19 The Debtors did benefit, and Huntington's position was eroded, by increases in the Ohio homestead exemption after the loan documents were executed on August 16, 2007. [Doc. # 40, Pl. Ex. 12, p. 106]. The documents reflect that the loan was made when the Ohio homestead exemption was $5,000. But, that is a consequence of changes in Ohio's homestead exemption provision, not transfers or other manipulations of property interests.

20 One of the main cases relied upon by Huntington in support of dismissal under § 707(a) is *In re 3710 Henricks Rd. Corp.*, 331 B.R. 757, 761–762 (Bankr.N.D.Ohio 2005). One important difference between that case and this one is that *Henricks* involved a corporation, which cannot claim exemptions (because that is a right limited to “an individual debtor” under § 522(b)), and cannot receive a “fresh start” because a Chapter 7 debtor receives a discharge “unless the debtor is not an individual” (§ 727(a)(1)). In the Bankruptcy Code, “individual” means a flesh-and-blood human being, not a business entity. *See e.g., Friedman v. Comm'r*, 216 F.3d 537, 548 n. 7 (6th Cir.2000).

21 *See, In re Hicks*, 3 B.R. 459 (Bankr.N.D.Ohio 1980)(Judge Harold F. White's discussion of the Ohio legislature enacting a $5,000 exemption in September of 1979).

22 *See, In re Davis*, 539 B.R. 334, 337 & n. 4 (Bankr.S.D.Ohio 2015)(“In 2008, the Ohio General Assembly amended Ohio Revised Code § 2329.66 to increase the Homestead Exemption to $20,200.00” & “The 2008 Amendment became effective September 30, 2008.”).

23 If the mortgage is $93,000 and the home is worth $200,000, the equity in the residence would be $107,000. Under Ohio law, each Debtor would be entitled to claim $132,900, and as a married couple filing jointly, they could protect up to $265,800. Thus, the actual amount of equity being protected here is less than half of the maximum allowed by the statute.

24 The issue of the proper deference to be given to legislatively created exemption statutes, and a bankruptcy judge's “sense of proportion” trace back at least as far as Judge Arnold's dissent in *Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871, 877–879 (8th Cir.1988).

25 “Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act) to correct perceived abuses of the bankruptcy system.” *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 559 U.S. 229, 231–32, 130 S.Ct. 1324, 1329, 176 L.Ed.2d 79, 84 (2010)

26 It appears that the cap would not apply because Mr. McVicker testified that the source of the funds for his IRA came from a rollover from his employer sponsored retirement account. *See*, 5 Collier on Bankruptcy ¶ 522.10[9], p. 522–92.1 (16th ed. 2014)(“This dollar limit does not apply to amounts in the IRA that are attributable to rollover contributions, and any earnings thereon, ...”).

27 It should be noted that there is significant disagreement about how much (if any) a debtor can voluntarily contribute toward retirement savings while repaying creditors under a bankruptcy plan. *See, Seafort v. Burden (In re Seafort),* 669 F.3d 662, 674 n. 7 (6th Cir.2012). In contrast, there is very little disagreement about the protections afforded long-standing retirement accounts in bankruptcy.

28 The *Bingham* decision was cited twice in *Zick*, although not for this proposition.

End of Document

544 B.R. 591
United States Bankruptcy Court,
W.D. Texas, El Paso Division.

In re: Clean Fuel Technologies
II, LLC, Alleged Debtor.

CASE NO. 15–30827–HCM
|
Signed February 04, 2016.

Synopsis

Background: Following dismissal of involuntary Chapter 7 petition filed against it, putative debtor moved for award of attorney fees against petitioning creditors.

Holdings: The Bankruptcy Court, H. Christopher Mott, J., held that:

[1] while there was a presumption in favor of award of attorney fees against unsuccessful petitioning creditors, that presumption could be rebutted based on totality of circumstances, and

[2] putative debtor was not entitled to award of fees.

Motion denied.

Attorneys and Law Firms

***593** Troy C. Brown, Troy C. Brown PC, Anthony, TX, for Alleged Debtor.

MEMORANDUM OPINION REGARDING COUNTERCLAIM

H. CHRISTOPHER MOTT, UNITED STATES BANKRUPTCY JUDGE

This case involves an unsuccessful Involuntary Petition filed under Chapter 7 of the Bankruptcy Code against an alleged debtor. The Court previously dismissed the Involuntary Petition, finding that the petitioning creditors did not meet the eligibility requirements established by statute and recent Fifth Circuit precedent. Now, ***594** The Empire Strikes Back [1] through a Counterclaim—the alleged debtor seeks recovery of attorney's fees and costs against the unsuccessful petitioning creditors under § 303(i) of the Bankruptcy Code.

The Court finds that, upon dismissal of an involuntary petition, a presumption arises in favor of awarding attorneys' fees and costs to the alleged debtor. In this case, however, the Court determines, based on the totality of the circumstances, the presumption of an award of attorneys' fees and costs to the alleged debtor has been overcome. As a result, the petitioning creditors in this case have dodged a Bullit [2] and the Counterclaim filed by this alleged debtor must be denied.

I.

INTRODUCTION

A. *Counterclaim*

On January 12, 2016, the Court conducted a trial on the Counterclaim (dkt # 55) ("Counterclaim") filed by Clean Fuel Technologies II, LLC ("Clean Fuel2"), as alleged debtor, under § 303(i) of the Bankruptcy Code. The Counterclaim was filed against petitioning creditors E.L. Hollingsworth & Company, Inc. ("ELH"), Pro Tech Diesel, Inc. ("Pro Tech"), TOP Worldwide, Inc. ("TOP"), and Terminal Supply Company ("Terminal Supply") (collectively "Petitioning Creditors").

B. *Jurisdiction*

This Court has jurisdiction over the Counterclaim pursuant to 28 U.S.C. §§ 157 and 1334. The Counterclaim arises in and under a bankruptcy case referred to this Court by the Standing Order of Reference entered in this District. The Counterclaim is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2). This Court is authorized to enter a final order and judgment with respect to the Counterclaim.

This Opinion constitutes the Court's findings of fact and conclusions of law with respect to the Counterclaim, in accordance with Rules 7052(a)(1) and 9014(c) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"). [3] In reaching its findings and conclusions set forth in this Opinion, the Court has considered and weighed all the evidence, the demeanor and credibility of witnesses, the admitted exhibits, arguments of counsel, and the pleadings and briefs filed by all parties in this case, regardless of whether they are specifically referenced in this Opinion. [4]

II.

PROCEDURAL BACKGROUND

A. ***Filing of Involuntary Petition***

On May 27, 2015, an Involuntary Petition under Chapter 7 of the Bankruptcy Code was filed against Clean Fuel2, as alleged debtor, by the Petitioning Creditors (dkt# 1) ("Involuntary Petition"). Each of the four Petitioning Creditors asserted their eligibility to file the petition under § 303(b) of the Bankruptcy Code.

***595** On June 19, 2015, Clean Fuel2 filed an Answer to the Involuntary Petition (dkt# 5). In its Answer, Clean Fuel2 denied that the Petitioning Creditors were eligible to file the Involuntary Petition, and set forth other allegations as affirmative defenses. On July 2, 2015, the Petitioning Creditors filed a Reply to the Answer (dkt# 21). The Petitioning Creditors and CleanFuel2 also filed Corporate Ownership Statements (dkt# 17, 18, 19, 20, 22). The Court immediately set a trial on the contested Involuntary Petition for July 16, 2015, consistent with the directive of Bankruptcy Rule 1013(a).

B. ***Trial and Dismissal of Involuntary Petition***

On July 16, 2015, the Court conducted a trial on the contested Involuntary Petition. At trial on the Involuntary Petition, several witnesses testified and numerous exhibits were admitted into evidence.

On July 20, 2015, the Court delivered its Oral Ruling on the contested Involuntary Petition and dismissed the Involuntary Petition ("Dismissal Ruling"). See written transcript of Dismissal Ruling (dkt# 54). On July 20, 2015, the Court entered an Order Dismissing the Involuntary Petition ("Dismissal Order") (dkt# 44). In the Dismissal Order, the Court retained jurisdiction to determine and adjudicate any timely filed counterclaim by Clean Fuel2 against the Petitioning Creditors under 11 U.S.C. § 303(i), and set deadlines for the filing of any counterclaim and an answer to any counterclaim.

C. ***Filing and Trial on Counterclaim***

On September 29, 2015, Clean Fuel2 timely filed a Counterclaim against the Petitioning Creditors (dkt# 55). In the Counterclaim, Clean Fuel2 requests a judgment against the Petitioning Creditors for reasonable attorneys' fees and costs incurred in the defense of the Involuntary Petition under 11 U.S.C. § 303(i)(1).

On October 30, 2015, the Petitioning Creditors timely filed their Answer to the Counterclaim (dkt# 56). At a status hearing held on December 10, 2015, respective counsel for Clean Fuel2 and for the Petitioning Creditors requested that an evidentiary trial be set on the merits of the Counterclaim. As a result, the Court set an evidentiary trial on the Counterclaim for January 12, 2016 (dkt# 59).

On January 12, 2016, the Court conducted a trial on the Counterclaim. At the conclusion of trial, the Court took its ruling on the Counterclaim under advisement. This Opinion sets forth the Court's ruling on the Counterclaim.

III.

FINDINGS OF FACT WITH FACTUAL BACKGROUND

The Court admitted certain exhibits into evidence at the trial on the Counterclaim on January 12, 2016. The exhibits submitted by Clean Fuel2, as alleged debtor, are referred to herein as "Ex. D-_". The exhibits submitted by the Petitioning Creditors, are referred to herein as "Ex. P-_".

Four witnesses testified in person at trial on the Counterclaim: (1) Mr. Jeff Berlin ("Mr. Berlin"), the Chief Financial Officer of ELH (a petitioning creditor); (2) Mr. Ricardo Rivera ("Mr. Rivera"), the President and owner of Pro–Tech (a petitioning creditor); (3) Mr. John Warren ("Mr. Warren"), the former Manager of Clean Fuel2 (the alleged debtor); and (4) Mr. Troy Brown ("Mr. Brown"), an attorney for and Vice President of Clean Fuel2. The testimony of Mr. Timothy Harrington ("Mr. Harrington"), the current Manager of CleanFuel2 (the alleged debtor), was received by deposition transcript and admitted ***596** at trial on the Counterclaim. *See* Ex. D–36, P–48.

At the trial on the Counterclaim, and upon request, the Court took judicial notice of the prior trial on the Involuntary Petition and of the exhibits admitted at such prior trial.

A. *Clean Fuel2 Formation and Business*

Clean Fuel2 (the alleged debtor) was formed in May 2014 as a Texas limited liability company. Clean Fuel2 is governed by an Operating Agreement dated May 29, 2014 ("Operating Agreement"). *See* Ex. P–1. According to the Operating Agreement, CleanFuel2 is a "manager-managed" company. The Manager of Clean Fuel2 from its Inception [5] in May 2014 through March 2015 was Mr. Warren. From March 2015 through the present date, Mr. Harrington has served as the Manager.

Clean Fuel2 has two member owners—Clean Fuel Technologies, LLC ("CleanFuel1") and Trucknology, LLC ("Trucknology"). CleanFuel1 owns an 85% membership interest in CleanFuel2. The owners of Clean Fuel1 include Mr. Warren as well as Mr. Harrington and Mr. Brown, attorneys for CleanFuel2. Trucknology owns the remaining 15% membership interest in CleanFuel2. The owners of Trucknology include Mr. Berlin and Mr. Christopher Shepard ("Mr. Shepard"). Mr. Berlin is the Chief Financial Officer of ELH and Mr. Shepard is the President of ELH. ELH is a large transportation and logistics trucking company headquartered in Michigan. TOP is a wholly owned subsidiary of ELH, and a transportation broker that moves freight.

Clean Fuel2 was formed to develop technology and manufacturing capabilities for "conversion kits" to be installed on diesel trucks. These conversion kits were to be used to convert diesel truck engines so that diesel trucks could run on liquefied natural gas, as well as diesel fuel. Since liquefied natural gas was less expensive than diesel fuel, if successful, these conversion kits could result in fuel cost savings in operating diesel trucks.

Clean Fuel1 is the predecessor to Clean Fuel2. Clean Fuel1 was already engaged in the development of these conversion kits, but lacked sufficient capital to complete what was called Phase 2 of the development process. So, the principals of Clean Fuel1 (Mr. Harrington, Mr. Brown, and Mr. Warren) approached the principals of ELH (Mr. Berlin and Mr. Shepard) in hopes of obtaining additional capital. As a result, Dangerous Liaisons [6] were created when Clean Fuel2 was born in May 2014. Clean Fuel2 was founded with its majority owner being Clean Fuel1 (controlled by Mr. Harrington, Mr. Brown, and Mr. Warren) and its minority owner being Trucknology (controlled by Mr. Berlin and Mr. Shepard). A conditional Assignment of the assets of Clean Fuel1 to Clean Fuel2 was executed about the same time. *See* Ex. D–1.

Unfortunately, multiple disputes soon arose between the members of Clean Fuel2—Clean Fuel1 (and its principals Mr. Harrington, Mr. Brown, and Mr. Warren) and Trucknology (and its principals Mr. Berlin and Mr. Shepard, who were also officers of creditors ELH and TOP). These disputes included capital contribution requirements referenced in the Operating ***597** Agreement and related conditional Assignment of the assets of Clean Fuel1 to Clean Fuel2. Essentially, much of this dispute centered around whether Trucknology satisfied its capital contribution requirements in the amount of $900,000 to Clean Fuel2 as set forth in the Operating Agreement and related Assignment. Trucknology takes the position that it satisfied this contribution requirement by arranging for Clean Fuel2 to enter into a loan agreement with Clean Energy Finance LLC ("Clean Energy Finance") for $925,000. Conversely, Clean Fuel1 takes the position that the Clean Energy Finance loan did not satisfy Trucknology's contribution requirements. Additional disputes arose regarding the quality of the conversion kits delivered by Clean Fuel2 to ELH and installed on diesel trucks operated by ELH, payment of rent by Clean Fuel2 under a sublease with ELH, payment of freight charges owed to TOP, and various other matters.

The short-lived Clean Fuel2 business venture never got off the ground. The Crash [7] of the venture occurred after a controversial meltdown meeting in December 2014. At the meeting, ELH made certain demands regarding defective conversion kits, which Clean Fuel2 disputed. ELH made demand for rent under a sublease of Clean Fuel2's facility located in Vinton, Texas. *See* Ex. P–20. ELH requested a change in the management structure of Clean Fuel2. Mr. Berlin resigned from his position as CFO of Clean Fuel2. A There Will Be Blood [8] attitude quickly developed, with litigation erupting between the parties in various courts, much of which is ongoing.

Clean Fuel2 was no longer operating as a business by the time the Involuntary Petition was filed against it on May 27, 2015. Bank account statements of Clean Fuel2 demonstrated that Clean Fuel2 only had a few hundred dollars in the bank in the months preceding the petition filing, and had received very few deposits and written very few checks. *See* Ex. P–30. Financial statements of Clean Fuel2 showed a loss of $913,229 with liabilities in excess of $1,564,000 and assets of $837,518 for the year ending December 2014. *See* Ex. P–2.

B. ***Involuntary Petition Trial and Dismissal Ruling***

The Petitioning Creditors filed the Involuntary Petition against Clean Fuel2 on May 27, 2015, and requested the Court to enter an order of relief under Chapter 7 of the Bankruptcy Code against CleanFuel2 (dkt# 1).

In the Involuntary Petition, the Petitioning Creditors alleged that the following amounts were owed by Clean Fuel2 under open account balances: ELH asserted a claim of $26,118; TOP asserted a claim of $2,595; Pro–Tech asserted a claim of $113,170; and Terminal Supply asserted a claim of $32,421. *See* Involuntary Petition (dkt# 1, pp. 2–4). The basis for the claims asserted by the Petitioning Creditors against Clean Fuel2 is summarized as follows. ELH asserted claims against Clean Fuel2 based on unpaid rent under a sublease, freight services, and management fees. TOP asserted a claim against Clean Fuel2 based on product shipping costs. Pro–Tech asserted a claim against Clean Fuel2 for diesel mechanic services. Terminal Supply asserted a claim against Clean Fuel2 based on sales of harness products.

***598** The Court conducted a trial on the contested Involuntary Petition on July 16, 2015. Several witnesses—including Mr. Harrington (of CleanFuel1 and CleanFuel2), Mr. Warren (of CleanFuel1 and CleanFuel2), Mr. Berlin (of ELH, TOP, and Trucknology), and Ms. Heather Cordova and Mr. Rivera (of Pro–Tech)—testified at this trial. Numerous exhibits were introduced by both Clean Fuel2 and the Petitioning Creditors.

On July 20, 2015, the Court delivered its Dismissal Ruling and dismissed the Involuntary Petition filed against Clean Fuel2. *See* written transcript of Dismissal Ruling (dkt# 54). In short, the Involuntary Petition was dismissed because the Court determined that the Petitioning Creditors were not eligible to file an Involuntary Petition under 11 U.S.C. § 303(b)(1)—as their claims were the subject of a bona fide dispute. In many respects, the Court's decision to dismiss the Involuntary Petition hinged on the Court's interpretation of the recent Fifth Circuit case of *In re Green Hills Dev. Co., LLC,* 741 F.3d 651 (5th Cir.2014). In *Green Hills,* the Fifth Circuit found that a bona fide dispute as to the *amount* of a petitioning creditor's claim makes a petitioning creditor ineligible to file an involuntary petition, due to amendments to the Bankruptcy Code. *Green Hills,* 741 F.3d at 657, 660. In so doing, the Fifth Circuit in *Green Hills* seemingly overruled, in part, its precedent in *In re Sims,* 994 F.2d 210, 221 (5th Cir.1993), where the Fifth Circuit suggested that a bona fide dispute as to the *amount* of a petitioning creditor's claim did not make the petitioning creditor ineligible to file an involuntary petition. *Green Hills,* 741 F.3d at 657.

Here, it appeared to the Court that the claims of the Petitioning Creditors against Clean Fuel2 were the subject of a bona fide dispute as to amount, even if there was no bona fide dispute as to some amount of liability.[9] As a result, the Court dismissed the Involuntary Petition against Clean Fuel2, stating that the dismissal was a "close" and "technical" call for the Court and recognizing that courts are divided over this legal issue. *See* Dismissal Ruling (dkt# 54, pp. 16, 17, 50).

C. ***Counterclaim for Attorneys' Fees and Costs***

In its Counterclaim against the Petitioning Creditors, Clean Fuel2 seeks an award of attorneys' fees totaling $17,171 and costs totaling $1,880 for defending the Involuntary Petition. *See* Invoices and Receipts at Exs. D–37 and D–39. At the trial on the Counterclaim, CleanFuel2 sought recovery of additional attorney's fees totaling $1,665 for preparation and pursuit of the Counterclaim. *See* Ex. D–38.

The attorneys' fees requested include legal services rendered by both Mr. Brown and Mr. Harrington. *See* Ex. D–37. Mr. Harrington, however, testified at the trial on the Involuntary Petition as a fact witness in his capacity as Manager of Clean Fuel2. He did not serve or appear as an attorney of record for Clean Fuel2 in this bankruptcy case.

Mr. Brown's legal services make up the bulk of the attorneys' fees requested by Clean Fuel2. *See* Exs. D–37 and D–38. Mr. Brown served as the attorney of record for Clean Fuel2 in this bankruptcy case and at the trials on both the Involuntary ***599** Petition and on the Counterclaim. Yet, Mr. Brown plays several other roles—Mr. Brown is an officer of Clean Fuel2, an owner of Clean Fuel2 (through Clean Fuel1), and had his law office in Vinton, Texas at Clean Fuel2's place of business (which was subleased by Clean Fuel2 from ELH). Mr. Brown also admitted that he had no written engagement letter for legal services with Clean Fuel2, and that, as of the date of the hearing on the Counterclaim, Clean Fuel2 had not paid him for any legal services.

The costs requested by Clean Fuel2 include reimbursement of airfare for Mr. John Berg (a Vice President of Clean Fuel2) for travel to the trial on the Involuntary Petition. *See* Ex. D–39. Yet, Mr. Berg did not testify and was not called as a witness.

The last time Clean Fuel2 actually conducted any business was in early 2015—many months prior to the filing of the Involuntary Petition. Clean Fuel2 has outstanding debts of more than $100,000, has not paid rent to ELH via the registry of the Texas state court as required by order of the state court, has little money in the bank, has no income, and has had judgments taken against it in various jurisdictions. *See* Ex. D–36, pp. 19–29; Ex. P–29, P–42, P–43, P–45, P–48. Meanwhile, Clean Fuel2 continues to litigate with ELH and TOP (through its owner-attorneys Mr. Brown and Mr. Harrington), despite stating that Clean Fuel2 is unable to pay court fees and costs. See Ex. P–40, P42, P–44, P–45, P–46; Ex. D–36, pp. 28–29.

Clean Energy Finance, a third party that made a secured loan of $925,000 to Clean Fuel2, has not been paid by Clean Fuel2. *See* Ex. D–16; Ex. D–36, pp. 21–22. Clean Energy Finance did not file a UCC–1 Financing Statement and has not perfected its security interest in the assets of Clean Fuel2. *See* Ex. P–47.

According to Mr. Berlin of ELH, Clean Fuel2 still has inventory and equipment sitting in warehouses throughout the country. Mr. Berlin testified that, in his view, the management of Clean Fuel2 is doing nothing to address its liabilities and assets in such warehouses. Mr. Berlin and Trucknology (as a minority member of Clean Fuel2), have no ability to manage or control Clean Fuel2's assets and liabilities since Clean Fuel2 is a manager-managed company. Mr. Harrington (of Clean Fuel1) is currently the Manager of Clean Fuel2—Mr. Warren (of Clean Fuel1) was the previous Manager of Clean Fuel2. Clean Fuel2 is controlled by its majority member (Clean Fuel1), and the principals of such majority member—Mr. Harrington, Mr. Brown, and Mr. Warren. Management of the defunct Clean Fuel2 seems content to just litigate and appeal any adverse rulings rendered against it and to simply ignore its other creditors.

In substance, this is the foundation behind the decision of the Petitioning Creditors to file the Involuntary Petition against Clean Fuel2—they lacked any remedy for The Hurt Locker [10] in which they found themselves. As a result, the Petitioning Creditors filed the Involuntary Petition seeking the appointment of an independent Chapter 7 bankruptcy trustee to collect and liquidate the remaining assets of Clean Fuel2, resolve claims, and pay Clean Fuel2's creditors from such liquidation.

IV.

CONCLUSIONS OF LAW WITH LEGAL ANALYSIS

A. *Summary of Counterclaim*

The Counterclaim filed by Clean Fuel2 requests the Court to award attorneys' ***600** fees and costs against the Petitioning Creditors under § 303(i)(1) of the Bankruptcy Code. The Counterclaim states that Clean Fuel2 "retained counsel and answered and defended" the Involuntary Petition and "incurred costs and reasonable attorneys' fees in the defense" of the Involuntary Petition (dkt # 55). In sum, Clean Fuel2 requests reimbursement of attorneys' fees of $17,171 and reimbursement of costs of $1,880 for defending the Involuntary Petition. Clean Fuel2 also seeks an additional $1,665 in attorneys' fees relating to prosecution of its Counterclaim.

B. *Summary of Petitioning Creditors' Answer and Trial Brief*

The Answer to the Counterclaim filed by the Petitioning Creditors contends that they should not be liable for any attorneys' fees or costs incurred by Clean Fuel2 in defense of the Involuntary Petition (dkt# 56). The Petitioning Creditors also specifically object to certain fees and costs requested by Clean Fuel2—such as any attorneys' fees for legal services rendered by Mr. Harrington (since he acted as a fact witness only and not an attorney), and the cost of Mr. Berg's airfare (since he did not testify at trial).

On January 11, 2016, the Petitioning Creditors filed their Trial Brief with respect to the Counterclaim (dkt# 66, 67). In general, the Trial Brief requests the Court to follow a line of cases granting wide discretion to the court in determining whether any award of attorneys' fees is justified under § 303(i)(1) of the Bankruptcy Code. The Petitioning Creditors cite to a number of factors and circumstances in support of their contention that Clean Fuel2 should not be entitled to any award of attorneys' fees and costs.

C. *Analysis of Statute and Case Law Precedent*

Section 303 of the Bankruptcy Code governs involuntary bankruptcy petitions. With respect to the Counterclaim filed by Clean Fuel2 against the Petitioning Creditors, the Bankruptcy Code provides, in relevant part, as follows:

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court ***may*** grant judgment—

(1) against the petitioners and in favor of the debtor for—

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioned that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; or

(B) punitive damages.

11 U.S.C § 303(i) (emphasis added).

[1] Based on the statute, an alleged debtor (like Clean Fuel2) who successfully defends against an involuntary petition *may* be awarded reasonable attorney's fees and costs from the unsuccessful petitioning creditors if three prerequisites are satisfied: (1) the court has dismissed the involuntary petition; (2) the dismissal was not with the consent of the alleged debtor and the petitioning creditors; and (3) the alleged debtor did not waive its right to recovery. In the present case, Clean Fuel2 has met these three statutory prerequisites. The Court dismissed the Involuntary Petition against Clean Fuel2, the dismissal was contested, and Clean Fuel2 has not waived its right to a judgment against the Petitioning Creditors. [11]

***601** So, the three statutory prerequisites to an alleged debtor's right to seek an award of attorneys' fees and costs are clear. However, the use of the discretionary term "may" in § 303(i) has resulted in different analytical approaches being used by the courts to determine when to actually award fees and costs. Although the differences in some of the approaches taken by courts are easily identified, other differences appear more subtle. So far, the Fifth Circuit has not directly addressed the approach to be used in awarding fees and costs under § 303(i) of the Bankruptcy Code.

[2] To start, some courts have noted that § 303(i) of the Bankruptcy Code can function as an "automatic" fee-shifting statute. This approach follows the "English Rule"—the loser pays. In simple terms, the unsuccessful petitioning creditor is Unforgiven [12] and must automatically pay the reasonable attorneys' fees and costs of the alleged debtor. *See generally* *In re Synergistic Tech., Inc.,* 2007 WL 2264700, at *5 (Bankr.N.D.Tex. Aug. 6, 2007); *In re Commonwealth Sec. Corp.,* 2007 WL 309942, at *6 (Bankr.N.D.Tex. Jan. 25, 2007) (discussing this approach). This Court, however, declines to follow the English Rule approach because the Court finds it removes the discretionary term "may" from the language of § 303(i) and erroneously replaces it with the mandatory directive "shall".

In stark contrast, some bankruptcy courts follow an approach where there is not even a presumption of an award of attorneys' fees at all—instead, the court only examines the "totality of the circumstances" in awarding fees under § 303(i) of the Bankruptcy Code. *See e.g.,* *Synergistic Tech.,* 2007 WL 2264700, at *5 ("This court concludes that, with respect to section 303(i)(1) attorney's fee shifting, a court looks at the totality of the circumstances. No presumptions apply one way or another."); *In re Allied Riser Commc'ns Corp.,* 283 B.R. 420, 424 (Bankr.N.D.Tex.2002) ("The statute does not provide anything more than a grant of authority."). This approach focuses heavily on the discretion implied by Congress's use of the term "may" in § 303(i).

[3] Finally, yet another approach taken by courts with respect to § 303(i) of the Bankruptcy Code harmonizes the two preceding approaches. In general, under this harmonized approach, the courts apply a "presumption" that attorneys' fees will be awarded against unsuccessful petitioning creditors, with the presumption being rebuttable based on the "totality of the circumstances" test. This harmonized "presumption" approach appears to be the majority view (with subtle differences), and has been followed by circuit courts that have addressed the issue. *See e.g.,* *Crest One Spa v. TPG Troy, LLC (In re TPG Troy, LLC),* 793 F.3d 228, 235 (2d Cir.2015) (supporting citations omitted); ***602** *Orange Blossom L.P. v. S. California Sunbelt Developers, Inc. (In re S. California Sunbelt Developers, Inc.),* 608 F.3d 456, 462 (9th Cir.2010) (§ 303(i)(1) is a fee-shifting provision that creates a "rebuttable presumption" in favor of an award of attorneys' fees); *Sofris v. Maple–Whitworth, Inc., et. al. (In re Maple–Whitworth, Inc.),* 556 F.3d 742, 746 (9th Cir.2009) (dismissal of involuntary petition creates a "rebuttable presumption" that fees will be awarded, which may be overcome by the "totality of circumstances"); *see also* *In re TRED Holdings, L.P.,* No. 10–40749, 2010 WL 3516171, at *7 (Bankr.E.D.Tex. Sept. 3, 2010); (§ 303(i)(1) raises a "rebuttable presumption" that reasonable fees and costs will be awarded and applying the totality of the circumstances test).

[4] **[5]** Under this "presumption" approach, the unsuccessful petitioning creditors bear the burden of establishing that factors exist that overcome the presumption of awarding fees under § 303(i) based upon the "totality of the circumstances" test. Courts have examined key factors to determine whether the petitioning creditors have overcome the presumption based on the "totality of the circumstances" test. These key factors include: (1) the merits of the involuntary petition; (2) the role of any improper conduct on the part of the alleged debtor; (3) the reasonableness of the actions taken by the petitioning creditors; and (4) the motivation and objectives behind the filing of the involuntary petition. *See e.g., TPG Troy,* 793 F.3d at 235 (supporting citations omitted); *S. California Sunbelt,* 608 F.3d at 462; *Higgins v. Vortex Fishing Sys., Inc. (In re Vortex Fishing Sys., Inc.),* 379 F.3d 701, 707 (9th Cir.2004). This list of key factors is not exhaustive, and "a bankruptcy court may, in its discretion, choose to consider other material factors it deems relevant." *Vortex Fishing,* 379 F.3d at 708.

This Court finds that the majority "presumption" approach —i.e., that a presumption exists that an award of attorneys' fees and costs will be made against unsuccessful petitioning creditors, but that the presumption may be rebutted based on the totality of the circumstances—is the most persuasive approach. In this Court's view, the "presumption" approach recognizes the seriousness of filing an involuntary petition by creating a presumption that fees will be awarded against creditors if they are unsuccessful. Yet this "presumption" approach still affords the court discretion on whether to award fees, consistent with the statutory term "may" used in § 303(i). This Court will, therefore, adopt this harmonized "presumption" approach.

[6] Given the subtle differences in even this majority "presumption" approach to awarding fees under § 303(i), the Court will apply the framework recently followed by the Second Circuit in *TPG Troy.* 793 F.3d at 235 (supporting citations omitted). In sum, the framework is as follows: § 303(i) of the Bankruptcy Code creates a "presumption" that fees and costs should be awarded to the alleged debtor if the involuntary petition is dismissed. The presumption of a fee award may be rebutted by the petitioning creditors with evidence that a fee award is not warranted based on the "totality of the circumstances" test. The totality of circumstances test involves a consideration of four key factors, as well as any additional material factors the court chooses to consider and deems relevant. *See e.g., TPG Troy,* 793 F.3d at 235 (supporting citations omitted); *Vortex Fishing,* 379 F.3d at 707–8. [13]

603 D. *Application of Presumption and Totality of Circumstances Test

[7] At the outset, the Court recognizes that there is a "presumption" in favor of awarding reasonable attorney's fees and costs to Clean Fuel2, since the Involuntary Petition filed by the Petitioning Creditors was dismissed after trial on the merits. The Petitioning Creditors have the burden of rebutting this presumption of an award of fees and costs, based on the totality of circumstances test.

Applying the totality of circumstances test, the Court has considered and evaluates the following factors.

1. *Merits of the Involuntary Petition*

First, the Court considers the merits of the Involuntary Petition filed by the Petitioning Creditors against Clean Fuel2. This first factor focuses on the degree to which an involuntary petition, though ultimately unsuccessful, had merit. *See e.g. Susman v. Schmid (In re Reid),* 854 F.2d 156, 161–2 (7th Cir.1988).

[8] Without doubt, the filing of an involuntary petition is a "severe" and "extreme" remedy that can have serious consequences for an alleged debtor, even if the petition is ultimately dismissed. *See e.g., Green Hills,* 741 F.3d at 655; *In re Tichy Elec. Co., Inc.,* 332 B.R. 364, 372 (Bankr.N.D.Iowa 2005) (supporting citation omitted). As a result, courts expect petitioning creditors to "carefully examine the risks undertaken in the filing of an involuntary petition." *In re Landmark Distrib., Inc.,* 189 B.R. 290, 306 (Bankr.D.N.J.2005); *see also In re Kidwell,* 158 B.R. 203, 213 (Bankr.E.D.Cal.1993) (noting that the operative principle behind § 303 is "one who swats at the hornet best kill it").

[9] But, as many courts have recognized, the "closer the question of dismissal, the less likely it may be appropriate to award" attorneys' fees under § 303(i). *See In re DSC, Ltd.,* 387 B.R. 174, 179 (Bankr.E.D.Mich.2008); *In re Ross,* 135 B.R. 230, 238 (Bankr.E.D.Pa.1991); *In re Scrap Metal Buyers of Tampa, Inc.,* 253 B.R. 103, 111 (M.D.Fla.2000) (affirming bankruptcy court's denial of fees in part because "the petition was dismissed by only a narrow margin"); *see also Reid,* 854

F.2d at 162 (affirming denial of attorneys' fees to debtor, when dismissal was a "close question").

Here, this first factor—the merits of the Involuntary Petition—supports a determination that fees and costs should not be awarded against the Petitioning Creditors. In dismissing the Involuntary Petition against Clean Fuel2, the Court stated that dismissal was a "close" and "technical" call for the Court. See Dismissal Ruling (dkt# 54, pp. 16, 17, 50). The Court's decision to dismiss the Involuntary Petition turned, in part, on the Court's interpretation of a recent 2014 decision by the Fifth Circuit in *Green Hills,* 741 F.3d at 657–660. As set forth in more detail above, in *Green Hills,* the Fifth Circuit determined that a bona fide dispute as to the *amount* of a petitioning creditor's claim makes a petitioning creditor ineligible to file an involuntary petition. The Fifth Circuit in *Green Hills* seemingly overruled, in part, its precedent in *In re Sims,* 994 F.2d at 221, which indicated that a bona fide dispute as to the amount of the debt did not make a petitioning creditor ineligible to file a petition. This change in the law was a primary impetus that led the Court to dismiss the Involuntary Petition.

At the same time, the Court recognized and the evidence in this case showed that Clean Fuel2 was not operating as a business at the time the Involuntary Petition ***604** was filed. Although perhaps An Inconvenient Truth [14] —it was readily apparent that Clean Fuel2 was a defunct non-operating entity. Clean Fuel2 had very little cash funds and was not paying creditors. *See* Ex. P–4, P–30. Instead, Clean Fuel2 was simply litigating with creditors like ELH, using the legal services provided by its controlling officers and owners, attorneys Mr. Brown and Mr. Harrington, at no real cost to Clean Fuel2.

In sum, applying the first factor, the Court concludes that the Involuntary Petition had substantial merit, though technically it was unsuccessful. Therefore, the Court finds that this first factor weighs against the presumption of awarding attorney's fees and costs to Clean Fuel2 under § 303(i) of the Bankruptcy Code.

2. *Role of Any Improper Conduct by the Alleged Debtor*

[10] Second, this Court considers the role of any improper conduct on the part of the Clean Fuel2. This second factor focuses primarily on the actions of the alleged debtor preceding and during adjudication of the involuntary petition. For example, if improper conduct by an alleged debtor leads to dismissal of an involuntary petition, courts have denied an award of attorneys' fees to the alleged debtor. *See e.g., Ross,* 135 B.R. at 238; *In re Amburgey,* 68 B.R. 768, 774 (Bankr.S.D.Ind.1987).

Here, the Petitioning Creditors contend that this second factor weighs against an award of attorneys' fees and costs to Clean Fuel2. In their Trial Brief, the Petitioning Creditors assert that the conduct of Clean Fuel2 demonstrated that it had simply ceased all operations, permitted judgments to be taken against it in Illinois, and had taken little or no action to care for or liquidate any of its tangible assets.

Although these actions and inactions by Clean Fuel2 are relevant with respect to other factors (discussed herein), the Court cannot conclude this is tantamount to "improper conduct" by Clean Fuel2. As a result, this second factor does not rebut the presumption that attorneys' fees and costs should be awarded to Clean Fuel2 under § 303(i)(1).

3. *Reasonableness of Actions Taken by Petitioning Creditors*

[11] Third, this Court considers the reasonableness of the actions taken by the Petitioning Creditors. This third factor examines whether the Petitioning Creditors were reasonable in the filing and pursuit of the Involuntary Petition against Clean Fuel2. "Creditors are justified in filing an involuntary bankruptcy against a debtor where exclusive bankruptcy powers and remedies may be usefully invoked to recover transferred assets, to insure an orderly ranking of creditors' claims and to protect against other creditors obtaining a disproportionate share of debtor's assets." *In re Hentges,* 351 B.R. 758, 772 (Bankr.N.D.Ok.2006); *see also Allied Riser,* 283 B.R. at 424. In addition, a court may find that the petitioning creditors acted reasonably when such actions were taken to prevent "future transfers or wasting or dissipation of assets or to investigate and challenge the legitimacy of entities that may be operating as alter egos of the debtor." *In re Hentges,* 351 B.R. at 772.

Here, the Court finds that the Petitioning Creditors acted reasonably in filing and pursuit of the Involuntary Petition. The Involuntary Petition was filed against Clean Fuel2 under Chapter 7 of the Bankruptcy Code, in the hope that a Chapter 7 ***605** bankruptcy trustee might serve as an unbiased administrator of any remaining Clean Fuel2 assets and claims. As an independent party, a Chapter 7 trustee could assess, collect, and liquidate the assets of Clean Fuel2 for the benefit of all creditors. The potential benefit of a Chapter 7 orderly liquidation of Clean Fuel2 is evident, given the apparent location of Clean Fuel2 tangible assets in various states and apparent lack of oversight over the assets by existing management of Clean Fuel2. The Petitioning Creditors also rightfully believed that adjudicating all claims of creditors against Clean Fuel2 in a single forum (the bankruptcy court) with an independent bankruptcy trustee, represented the most logical and orderly means of treating all creditors fairly and equally.

If the Involuntary Petition was granted, an independent bankruptcy trustee for Clean Fuel2 could have investigated several transactions involving Clean Fuel2, such as the conditional Assignment of assets from Clean Fuel1 to Clean Fuel2. A Chapter 7 bankruptcy trustee could also have used bankruptcy powers for the benefit of all creditors, such as possible recovery of allegedly improper transfers of funds of Clean Fuel2, and potential avoidance of the unperfected security interest held by Clean Energy Finance in the assets of Clean Fuel2 under § 544 of the Bankruptcy Code.

The evidence also demonstrated that Clean Fuel2 had not operated as a business since early 2015—several months before the Involuntary Petition was filed. Clean Fuel2 had only a few hundred dollars in the bank in the months preceding the Involuntary Petition and had received very few deposits and written very few checks. The existing management of Clean Fuel2 appeared unconcerned with the Gravity [15] of its dire financial condition and had taken little or no real action to address the collection and liquidation of its remaining tangible assets and pay creditors.

In sum, applying the third factor, the Court concludes that the actions of the Petitioning Creditors in the filing and pursuit of the Involuntary Petition against Clean Fuel2 were reasonable. This third factor weighs against the presumption of awarding attorneys' fees and costs to Clean Fuel2.

4. *Motivation and Objectives Behind Involuntary Bankruptcy Filing*

[12] Fourth, this Court considers the motivation and objectives of the Petitioning Creditors in filing the Involuntary Petition. This fourth factor, while similar to the first and third factors, focuses on a subjective and objective assessment of the motivations of petitioning creditors in filing an involuntary proceeding. *See e.g.*, *Vortex Fishing*, 379 F.3d at 707–8 (supporting citations omitted).

Here, the Court concludes that the Petitioning Creditors were motivated by the desire to have an independent Chapter 7 trustee appointed to collect and liquidate Clean Fuel2's remaining assets, adjudicate and resolve the claims of all creditors in one forum, and distribute the proceeds fairly to all creditors. For example, Mr. Berlin testified that Clean Fuel2 was involved in litigation with unpaid creditors in numerous venues. This statement was effectively confirmed by the documentary evidence and the testimony of the current manager of Clean Fuel2 (Mr. Harrington). Mr. Berlin also testified that Clean Fuel2 had inventory located in warehouses around the country, with little or no ability ***606** (or inclination) to collect and liquidate such assets. Mr. Berlin and Trucknology (as a minority member of Clean Fuel2), do not have the ability to manage or control Clean Fuel2's assets and liabilities, as Clean Fuel2 is a manager-managed company. Absent Chapter 7 bankruptcy, the Manager of Clean Fuel2 (currently Mr. Harrington) and its majority member Clean Fuel1 (controlled by Mr. Harrington, Mr. Brown, and Mr. Warren) remain in control of Clean Fuel2's remaining assets and liabilities.

At the trial on the Counterclaim, Clean Fuel2 argued that the filing of the Involuntary Petition was in bad faith, as it represented a "hostile takeover" attempt by the Petitioning Creditors—two of which are affiliated with Trucknology (a minority owner of Clean Fuel2). This argument reflects a basic misunderstanding of the Bankruptcy Code. The Involuntary Petition was filed against Clean Fuel2 under Chapter 7 of the Bankruptcy Code. If successful, an independent Chapter 7 trustee would have been appointed for Clean Fuel2. The bankruptcy trustee (not the Petitioning Creditors or Trucknology) would have taken exclusive control over the assets of Clean Fuel2. *See* 11 U.S.C. § 704. Indeed, transactions between Clean Fuel2 and the Petitioning Creditors, Trucknology and Mr. Berlin (as well as principals of Clean Fuel1), would be subject to examination and investigation by an independent Chapter 7 trustee.

[13] **[14]** Based on the record, the Court finds that the subjective and objective motives of the Petitioning Creditors in filing the Involuntary Petition against Clean Fuel2 were appropriate, reasonable, and in good faith. It must be recognized that a finding of bad faith by petitioning creditors is not required to award attorneys' fees and costs under § 303(i)(1) of the Bankruptcy Code. *See* *TPG Troy*, 793

F.3d at 235 (supporting citations omitted); *S. California Sunbelt,* 608 F.3d at 462; *Commonwealth Sec. Corp.,* 2007 WL 309942, at *6. A finding of bad faith in filing the involuntary petition is only required if an award of actual and punitive damages is made against petitioning creditors. *See* 11 U.S.C. § 303(i)(2). So the lack of bad faith, by itself, does not immunize petitioning creditors from an award of fees and costs. However, the presence or absence of bad faith is relevant in the exercise of the court's discretion on whether to award fees and costs. *See e.g., Reid,* 854 F.2d at 160.

In sum, applying the fourth factor, the Court concludes that the motivation and objectives of the Petitioning Creditors in the filing the Involuntary Petition against Clean Fuel2 were reasonable, appropriate, and in good faith. As a result, this fourth factor weighs against the presumption that attorneys' fees and costs under § 303(i)(1) should be awarded to Clean Fuel2.

5. *Other Material Factors and Considerations*

Finally, in determining whether attorneys' fees and costs should be awarded to Clean Fuel2, the Court considers the following additional factors to be material under the totality of circumstances test.

The attorneys' fees requested by Clean Fuel2 are comprised of legal services rendered by both Mr. Brown and Mr. Harrington. Mr. Harrington, however, testified at the trial on the Involuntary Petition as a fact witness in his capacity as Manager of Clean Fuel2. Mr. Harrington did not serve or appear as an attorney of record for Clean Fuel2 in this bankruptcy case. As a result, any award of attorneys' fees for services of Mr. Harrington would seem inappropriate and unreasonable.

Mr. Brown's legal services make up the majority of the attorneys' fees requested by Clean Fuel2. Although Mr. Brown served as the attorney of record for Clean Fuel2 in this bankruptcy case, Mr. Brown ***607** was simultaneously wearing several other hats. Mr. Brown is an officer of Clean Fuel2, an owner of Clean Fuel2 (through Clean Fuel1), and had his law office in Vinton, Texas at Clean Fuel2's place of business (which was subleased by Clean Fuel2 from ELH). [16] Mr. Brown does not have a written engagement letter for legal services with Clean Fuel2. Clean Fuel2 has not paid Mr. Brown for any legal services.

The Court believes that any award of attorneys' fees in this case would operate more as a personal reward to Mr. Brown (and Mr. Harrington) than to recompense Clean Fuel2 for any harm that Clean Fuel2 actually sustained from the Involuntary Petition. Clean Fuel2 has not truly incurred the expense of any attorneys' fees in this bankruptcy case—Clean Fuel2's attorneys are really its owners and officers who are engaged in a blood feud with minority member Trucknology (controlled by ELH principals). This feud has spilled over to this Court, but has been pending in several other courts, and seems to elucidate the personal agendas of these attorneys-owners-officers of Clean Fuel2.

Whether such agendas are justified or not is beyond the scope of and record in this bankruptcy case. What is clear from the record in this bankruptcy, however, is that CleanFuel2 has not suffered any real attorneys' fees expenses from the filing of the Involuntary Petition, and that the Court should exercise its discretion in this particular case by not awarding attorneys' fees and costs to Clean Fuel2.

In sum, the Court concludes that these other material factors weigh against the presumption that attorneys' fees and costs under § 303(i) should be awarded to Clean Fuel2.

V.

CONCLUSION

In a Reversal of Fortune, [17] the Court finds that the Petitioning Creditors have overcome the rebuttable presumption that attorneys' fees and costs should be awarded to Clean Fuel2 on its Counterclaim under § 303(i)(1) of the Bankruptcy Code. Based on the particular (and somewhat peculiar) facts and circumstances in this unsuccessful involuntary bankruptcy case, the Court determines that the Counterclaim filed by Clean Fuel2 against the Petitioning Creditors should be denied.

For the reasons set forth in this Opinion, the Court will enter a separate Order denying the Counterclaim (dkt# 55) filed by Clean Fuel2 against the Petitioning Creditors.

All Citations

544 B.R. 591

Footnotes

1 STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK (Lucasfilm 1980) (Academy Award for Best Sound).

2 BULLITT (Warner Brothers 1968) (Academy Award for Best Film Editing).

3 To the extent any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such.

4 Cents (pennies) are intentionally omitted by the Court in the dollar figures used in this Opinion. Sense, however, is not intentionally omitted.

5 INCEPTION (Warner Brothers 2010) (Academy Award for Best Achievement in Cinematography).

6 DANGEROUS LIAISONS (Lorimar Film Entertainment 1988) (Academy Award for Best Costume Design).

7 CRASH (Bob Yari Productions 2004) (Academy Award for Best Picture).

8 THERE WILL BE BLOOD (Miramax 2007) (Academy Award for Best Achievement in Cinematography).

9 The Court dismissed the Involuntary Petition based, in part, on Mr. Warren's testimony on July 16, 2015 that, as Manager of Clean Fuel2, he had not authorized purchases from some of the Petitioning Creditors. *See* Dismissal Ruling (dkt# 54, pp. 32–37, 44–46). Yet, at the subsequent trial on the Counterclaim on January 12, 2016, Mr. Warren testified that he had in fact authorized some purchases.

10 THE HURT LOCKER (Voltage Pictures 2008) (Academy Award for Best Picture).

11 The use of the term "judgment" in 11 U.S.C. § 303(i) may imply that the filing of an adversary proceeding (as opposed to the filing of a motion initiating a contested matter) is necessary for an alleged debtor to obtain an award of fees against unsuccessful petitioning creditors. However, the Fifth Circuit has recently recognized that an award of fees and costs against the signing petitioning creditors may be sought by filing a motion initiating a contested matter. *See In re McMillan,* 614 Fed.Appx. 206, 210 (5th Cir.2015) (unpublished opinion). This was the procedure used in the instant case. The alleged debtor, Clean Fuel2, filed the Counterclaim initiating a contested matter that requested an award of attorneys' fees and costs under 11 U.S.C. § 303(i) from the signing Petitioning Creditors.

12 UNFORGIVEN (Warner Brothers 1992) (Academy Award for Best Picture).

13 A trial court's decision on awarding attorneys' fees and costs under § 303(i) is reviewed on appeal for abuse of discretion. *See e.g., Susman v. Schmid (In re Reid),* 854 F.2d 156, 161 (7th Cir.1988).

14 AN INCONVENIENT TRUTH (Lawrence Bender Production 2006) (Academy Award for Best Documentary).

15 GRAVITY (Warner Brothers 2013) (Academy Award for Best Achievement in Cinematography).

16 The Court is not casting aspersions on Mr. Brown (who at all times conducted himself professionally), the Court is merely stating the facts as presented.

17 REVERSAL OF FORTUNE (Sovereign Pictures 1990) (Academy Award for Best Actor).

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811 F.3d 267
United States Court of Appeals,
Seventh Circuit.

IN RE Anna F. ROBINSON, Debtor–Appellee.
Appeal of Cynthia A. Hagan, Trustee–Appellant.

No. 14–3585.
|
Argued Sept. 29, 2015.
|
Decided Feb. 4, 2016.

Synopsis

Background: Trustee objected to Illinois state-law exemption claimed by debtor, a practicing Mormon, in a First Edition Mormon Bible in her possession. The United States Bankruptcy Court, Laura K. Grandy, J., 498 B.R. 207, sustained objection. Debtor appealed. The United States District Court for the Southern District of Illinois, Staci M. Yandle, J., 527 B.R. 314, vacated and remanded. Trustee appealed.

[Holding:] The Court of Appeals, Ripple, Circuit Judge, held that dollar-value limitation could not be read into statute exempting "necessary wearing apparel, bible, school books, and family pictures" where one did not appear.

Affirmed.

Attorneys and Law Firms

***267** Marcus H. Herbert, Attorney, Bankruptcy Advocates, LLP, Carbondale, IL, for Debtor–Appellee.

***268** Cynthia A. Hagan, Attorney, Hendricks & Hagan, Carbondale, IL, for Trustee–Appellant.

Before WOOD, Chief Judge, and EASTERBROOK and RIPPLE, Circuit Judges.

Opinion

RIPPLE, Circuit Judge.

Anna F. Robinson filed a Chapter 7 bankruptcy petition in the Southern District of Illinois seeking a discharge of unsecured debts. Ms. Robinson claimed an exemption for a rare, first edition Book of Mormon under the Illinois personal property exemption statute, 735 ILCS 5/12–1001(a), which provides an exemption for a bible. The bankruptcy court denied the exemption, but the district court reversed. Because we agree with the district court that the plain wording of the Illinois personal property exemption statute allows the exemption for Ms. Robinson's Book of Mormon, we affirm the district court's judgment.

I

BACKGROUND

A.

On February 25, 2013, Ms. Robinson filed a Chapter 7 bankruptcy petition in the Southern District of Illinois seeking to discharge unsecured debt in the amount of $23,834.00. Among her scheduled personal property, Ms. Robinson listed an "old Morm[o]n bible" of unknown value. [1] Ms. Robinson noted that she "ha[d] been told that there is a 100% exemption for bibles but valuable bibles may or may not be covered under such exemption." [2]

A trustee was appointed and, at the meeting of creditors, inquired about the Book of Mormon. Ms. Robinson confirmed that it was a rare, 1830 first edition Book of Mormon and that she possessed several additional copies of the Book of Mormon in print or digital form. On the basis of this information, the trustee filed an objection to the claimed exemption. The trustee acknowledged that 735 ILCS 5/12–1001(a) [3] provides an exemption for a "bible"; nevertheless, the trustee asserted that, given that Ms. Robinson owned many other copies of the Book of Mormon, the valuable first edition should be used for the benefit of the creditors.

During a hearing on the trustee's objection, Ms. Robinson testified that, in 2003, while employed at the local public library, she made an agreement with the library director that, if she cleaned out a storage area, she could use the area as an office and keep any books she found. While cleaning, Ms. Robinson found the Book of Mormon and later had it authenticated as an 1830 first edition Book of Mormon, one of only 5,000 copies printed by Joseph Smith. At the time, it was valued at $10,000.00. Ms. Robinson explained that she stores the Book of Mormon in a Ziploc bag to preserve it. She does not use it regularly, but does take it out occasionally to show her children and fellow church members.

On August 20, 2013, the bankruptcy court entered an order sustaining the trustee's objection. The bankruptcy court believed that "allowing the debtor's exemption w[ould] violate the intent and purpose ***269** of the statute," namely "to protect a bible of ordinary value so as not to deprive a debtor of a worship aid." [4]

Ms. Robinson moved to reconsider on the ground that the bankruptcy court's opinion was "unconstitutional, as it use[d] the exemption statute to interfere with a person's free exercise of their religion as they choose to exercise it" and that it interfered with her right to choose which items to exempt. [5] The bankruptcy court denied the motion because Ms. Robinson's arguments did not "fall into any of the exceptions under which a Motion for Reconsideration may be brought. Further, there [wa]s nothing in these arguments that indicate[d] that they were unavailable when the matter was previously argued." [6]

Ms. Robinson appealed. She argued to the district court that the bankruptcy court's decision ignored the plain meaning and structure of the statute, as well as the judicial rule that bankruptcy exemption statutes should be construed liberally in favor of the debtor. The district court determined that, because the legislature did not place a monetary limitation on the items exempted in 735 ILCS 5/12–1001(a), a bible is exempt without regard to its value. The district court therefore vacated the bankruptcy court's order denying the exemption; it also vacated the bankruptcy court's order denying the motion to reconsider. [7] The trustee timely appealed.

II

DISCUSSION

[1] **[2]** We review a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Matter of FedPak Sys., Inc.,* 80 F.3d 207, 211 (7th Cir.1996). Whether a debtor is entitled to a bankruptcy exemption is a question of law to be reviewed de novo. *Fowler v. Shadel,* 400 F.3d 1016, 1017 (7th Cir.2005).

[3] When interpreting a statute, here the Illinois personal-exemption statute, 735 ILCS 5/12–1001, "the primary rule of statutory construction is to ascertain and effectuate the legislature's intent. In doing so a court looks first to the statutory language itself. If the language is clear, the court must give it effect and should not look to extrinsic aids for construction." *In re Marriage of Logston,* 103 Ill.2d 266, 82 Ill.Dec. 633, 469 N.E.2d 167, 171 (1984); *see also In re Barker,* 768 F.2d 191, 194 (7th Cir.1985) (applying same).

[4] Our analysis, therefore, begins with the language of the statute, which provides in relevant part:

> The following personal property, owned by the debtor, is exempt from judgment, attachment, or distress for rent:
>
> (a) *The necessary wearing apparel, bible, school books, and family pictures of the debtor and the debtor's dependents;*
>
> (b) The debtor's equity interest, not to exceed $4,000 in value, in any other property;
>
> (c) The debtor's interest, not to exceed $2,400 in value, in any one motor vehicle;
>
> (d) The debtor's equity interest, not to exceed $1,500 in value, in any implements, ***270** professional books, or tools of the trade of the debtor;....
>
> ....
>
> If a debtor owns property exempt under this Section and he or she purchased that property with the intent of converting nonexempt property into exempt property or in fraud of his or her creditors, that property shall not be exempt from judgment, attachment, or distress for rent. Property acquired within 6 months of the filing of the petition for bankruptcy shall be presumed to have been acquired in contemplation of bankruptcy.
>
> The personal property exemptions set forth in this Section shall apply only to individuals and only to personal property that is used for personal rather than business purposes.

735 ILCS 5/12–1001 (emphasis added).

The trustee acknowledges that "the term 'bible' has a well settled meaning when standing alone"—"a religious text." [8] Moreover, it is not disputed that the Book of Mormon falls within this meaning. Finally, there is nothing in the wording of subsection (a) that imposes a dollar limit on the items listed therein. The trustee nevertheless maintains that the meaning of subsection (a), as applied to Ms. Robinson's Book of Mormon, "is not so clear" when it is "considered in the context of Section 1001." [9]

The trustee, however, does not point to anything in the language or structure of 735 ILCS 5/12–1001 that modifies or narrows the term as it is generally understood. As already noted, nothing suggests that the legislature meant to impose a dollar-value limitation on the items set forth in subsection (a). Indeed, given that other subsections of 735 ILCS 5/12–1001 include dollar-value limitations, it seems clear that the legislature *did not* intend to limit subsection (a) to items under a certain value.

The plain wording of the statute does support the trustee's argument that the exemption applies to *one* "bible." However, the trustee does not seek simply to limit Ms. Robinson to one Book of Mormon; the trustee seeks to limit Ms. Robinson to one Book of Mormon *of negligible monetary value.* Given that the legislature did not place a dollar limit on the subsection (a) exemptions as it did with exemptions in other subsections, this argument appears at odds with the wording and structure of the personal property exemption statute. [10]

Moreover, the "of negligible value" construction adopted by the bankruptcy court, and urged by the trustee, does not find support in case law. In *In re Deacon,* 27 F.Supp. 296 (S.D.Ill.1939), the court determined that "one watch, one consistory ring, [and] one diamond shirt stud" fell within the category of "necessary wearing apparel." If the statute were to be strictly construed to provide the debtor with the "bare necessities," none of these items should have been exempted. Moreover, in *In re Barker,* 768 F.2d 191 (7th Cir.1985), we noted that, in a case "where an exemption statute might be interpreted either favorably or unfavorably vis-á-vis a debtor, we should interpret the statute in a manner ***271** that favors the debtor." *Id.* at 196 (applying Illinois law).

Despite the clear language of subsection (a), the trustee maintains that the term "bible" is "susceptible to various interpretations and requires an examination of the legislative history to discern the legislature's intent." [11] She relies on this court's decision in *In re Barker* for support. *In re Barker,* however, did not speak to the meaning of 735 ILCS 5/12–1001(a). Instead, it addressed the issue whether the Illinois personal property exemption statute entitled a debtor to "stack" exemptions. *In re Barker,* 768 F.2d at 192. Specifically, in that case, the debtor had sought to apply both the $1200 exemption for a "motor vehicle" under 735 ILCS 5/12–1001(c) and the $2000 exemption for "any other property" under 735 ILCS 5/12–1001(b) to the same automobile. We concluded that it was not clear from the language of the statute whether the legislature intended a debtor to use the exemptions in this way. Consequently, given that Illinois exemptions were to be interpreted liberally in favor of the debtor, we held that the "debtor [wa]s entitled to stack his exemptions for the same motor vehicle under both subsections (b) and (c)." *In re Barker,* 768 F.2d at 196.

The trustee argues that the subsection (a) exemption, like the "any other property" exemption discussed in *In re Barker,* is susceptible to more than one interpretation. The trustee maintains that Ms. Robinson acknowledged as much when she wrote in her schedule "debtor has been told that there is a 100% exemption for bibles but valuable bibles may or may not be covered under such exemption." [12] The trustee also argues that the "interpretive conflict" between the parties here establishes that, like the exemption in *In re Barker,* the exemption in subsection (a) is ambiguous and therefore "is appropriately resolved by examining the legislative history of Section 1001(a) in order to determine the legislature's intent." [13]

We do not believe that the statement in Ms. Robinson's filing constitutes an admission that the statute is ambiguous. Instead, it simply acknowledges the absence of controlling case law interpreting the "bible" exemption to include a valuable religious text.

[5] Moreover, we cannot conclude that the "interpretive conflict" alone leads to the conclusion that the plain wording of the statute is ambiguous. The trustee and the bankruptcy court rely heavily on "the intent and purpose of the statute" to inform their understanding of the "bible" exemption. [14] In "ascertain[ing] and effectuat[ing] the legislature's intent," "a court looks first to the statutory language itself." *In re Marriage of Logston,* 82 Ill.Dec. 633, 469 N.E.2d at 171. It is only when "the meaning of an enactment is unclear from the statutory language itself" that "the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy, as well as other sources such as legislative history." *Home Star Bank & Fin. Servs. v. Emergency Care and Health Org.,* 379 Ill.Dec. 51, 6 N.E.3d 128, 135 (2014).

Relying on *In re Schoonover,* 331 F.3d 575 (7th Cir.2003), and *In re Clark,* 714 F.3d 559 (7th Cir.2013), *aff'd sub nom. Clark v. Rameker,* ––– U.S. ––––, 134 S.Ct. 2242, 189 L.Ed.2d 157 (2014), the trustee maintains that the bible exemption should ***272** not be applied in such a way as to negate the legislature's purpose and intent. In *In re Schoonover*, we refused to extend the exemption for social security benefits to "funds on deposit long after their receipt" that had been "commingl[ed] with the debtor's other assets." 331 F.3d at 577 (applying Illinois law). Similarly, in *In re Clark,* while applying a federal exemption, we simply refused to extend the exemption for retirement funds to include inherited funds that had originated in a parent's individual retirement account. We explained that,

> by the time the Clarks filed for bankruptcy, the money in the inherited IRA did not represent *anyone's* retirement funds. They had been Ruth's, but when she died they became no one's retirement funds. The account remains a tax-deferral vehicle until the mandatory distribution is completed, but distribution precedes the owner's retirement. To treat this account as exempt under § 522(b)(3)(C) and (d)(12) would be to shelter from creditors a pot of money that can be freely used for current consumption.

In re Clark, 714 F.3d at 561; *see also Clark,* 134 S.Ct. at 2247 (quoting same). In each of these cases, the debtors were asking the court to extend an exemption beyond its statutory meaning; the court refused to do so. Here, however, the debtor is simply asking the court to apply the plain wording of the statute. It is the trustee that is asking us to read a restriction—a dollar-value limitation—into the statute where one does not appear.

Finally, the trustee argues that, following the guidance of the Illinois Supreme Court in *In re Marriage of Logston,* it is appropriate to examine not only a statute's history, "but also the future consequences that would result from adopting one construction as opposed to another." 82 Ill.Dec. 633, 469 N.E.2d at 174. In *In re Marriage of Logston,* however, the court had concluded that the "statute [wa]s susceptible of two interpretations," and it therefore was "proper to examine sources other than its language for evidence of legislative intent." *Id.* 82 Ill.Dec. 633, 469 N.E.2d at 172. Here, by contrast, resort to other sources is not necessary because the statutory language is not ambiguous.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

All Citations

811 F.3d 267, 62 Bankr.Ct.Dec. 32

Footnotes

1 Bankr.R.1 at 12.

2 *Id.*

3 735 ILCS 5/12–1001, which designates exempt personal property, states in relevant part: "The following personal property, owned by the debtor, is exempt from judgment, attachment, or distress for rent: (a) The necessary wearing apparel, bible, school books, and family pictures of the debtor and the debtor's dependents[.]"

4 Bankr.R.22 at 7–8.

5 Bankr.R.27 at 3.

6 Bankr.R.40 at 3.

7 On appeal, the trustee also argues at length that the district court erred in vacating the bankruptcy court's order denying Ms. Robinson's motion for reconsideration. Because we, like the district court, conclude that the bankruptcy court's underlying judgment in favor of the trustee was in error, any arguments concerning the motion to reconsider are moot.

8 Appellant's Br. 13–14.

9 *Id.* at 13.

10 Although the trustee does not renew the argument in this court, there also is no merit to the argument that the term “necessary” applies to all of the terms in subsection (a) as opposed to simply “wearing apparel.” Although “necessary” certainly could be applied to the terms “wearing apparel,” “bible,” and “school books,” it would be difficult to say that any “family pictures” could be considered a necessity.

11 Appellant's Br. 12.

12 Bankr.R.1 at 12.

13 Appellant's Br. 14.

14 Bankr.R.22 at 7.

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811 F.3d 1030
United States Court of Appeals,
Eighth Circuit.

Jerry D. JONES, Plaintiff–Appellant
v.
BOB EVANS FARMS, INC.; Nick Noble; Joy Willis; Tresa Scroggins, Defendants–Appellees.
National Association of Consumer Bankruptcy Attorneys, Amicus on Behalf of Appellant(s).

No. 15–2068.
|
Submitted: Dec. 16, 2015.
|
Filed: Jan. 26, 2016.

Synopsis

Background: Former employee brought action against his former employer and several former co-workers, alleging employment discrimination in violation of federal and Missouri law. The United States District Court for the Western District of Missouri, Ortrie D. Smith, Senior District Judge, granted defendants' summary judgment motion, concluding that employee's failure to disclose his claims in Chapter 13 bankruptcy proceedings judicially estopped him from pursuing them. Employee appealed.

[Holding:] The Court of Appeals, Murphy, Circuit Judge, held that judicial estoppel barred employee's discrimination claims.

Affirmed.

West Headnotes (8)

[1] Federal Courts
Altering, amending, modifying, or vacating judgment or order; proceedings after judgment

Court of Appeals will review for an abuse of discretion a district court order denying a motion to amend a summary judgment order, or alternatively for relief from that order.

Cases that cite this headnote

[2] Federal Civil Procedure
Error by court

Motions to amend an order serve the limited function of correcting manifest errors of law or fact.

Cases that cite this headnote

[3] Federal Courts
Estoppel and waiver

Court of Appeals will review a district court's application of judicial estoppel for an abuse of discretion, affirming unless it plainly appears that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the proper factors.

Cases that cite this headnote

[4] Estoppel
Claim inconsistent with previous claim or position in general

"Judicial estoppel" is an equitable doctrine that prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.

2 Cases that cite this headnote

[5] Estoppel
Claim inconsistent with previous claim or position in general

Three factors inform a court's decision about whether judicial estoppel applies: first, a party's later position must be clearly inconsistent with its prior position, second, a court should consider whether a party has persuaded a court to accept its prior 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 third, a court should consider whether the party asserting inconsistent positions would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

3 Cases that cite this headnote

[6] **Bankruptcy**
In general; standing
Estoppel
Claim inconsistent with previous claim or position in general

Party who has filed for bankruptcy may be judicially estopped from pursuing a claim not disclosed in his or her bankruptcy filings.

Cases that cite this headnote

[7] **Bankruptcy**
In general; standing
Estoppel
Claim inconsistent with previous claim or position in general

Former employee was judicially estopped from asserting his federal- and Missouri-law employment discrimination claims against former employer and several former co-workers, where employee took inconsistent positions in his earlier-filed Chapter 13 case and present case, in that he failed to amend his bankruptcy schedules to include his discrimination claims, as required by order confirming his bankruptcy plan and despite his knowledge of those claims, thereby representing to bankruptcy court that no such claims existed, bankruptcy court adopted position that employee's discrimination claims did not exist by discharging his unsecured debts, and employee may have derived unfair advantage in Chapter 13 proceedings by concealing his claims.

2 Cases that cite this headnote

[8] **Bankruptcy**
In general; standing
Estoppel
Claim inconsistent with previous claim or position in general

In considering judicial estoppel for bankruptcy cases, the debtor's failure to satisfy its statutory disclosure duty is inadvertent only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.

1 Cases that cite this headnote

Attorneys and Law Firms

***1031** Brian J. Klopfenstein, Kearney, MO, argued, for appellant.

J. Erik Heath, San Francisco, CA, argued (Tara Twomey, National Consumer Bankruptcy Rights Center, San Jose, CA, on the brief), for amicus curiae National Assn. of Consumer Bankruptcy Attys., in support of appellant.

Jonathan R. Vaughn, Vorys, Sater, Seymour and Pease LLP, Columbus, OH, argued (James W. Pauley III, on the brief), for appellees Bob Evans Farms, Inc., Joy Willis, and Teresa Scroggins.

Before MURPHY, BENTON, and KELLY, Circuit Judges.

Opinion

MURPHY, Circuit Judge.

Jerry Jones brought this action against his employer Bob Evans Farms, Inc. (Bob Evans) and several Bob Evans employees, alleging employment discrimination in violation of federal and Missouri law. The district court [1] granted summary judgment for Bob Evans, concluding that Jones' failure to disclose his claims in his Chapter 13 bankruptcy proceedings judicially estopped him from pursuing them. Jones appeals, and we affirm.

1 The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

I.

Jones began working for Bob Evans in June 2009. A few months later he and his wife Sharron Shores filed for Chapter 13 bankruptcy. The trustee filed a motion with the bankruptcy court to deny confirmation of their plan because they had not included Shores' pending workers compensation claim in their bankruptcy schedules. Jones and Shores amended their schedules to include that claim and agreed to make any nonexempt proceeds from it available to their unsecured creditors. The bankruptcy court then confirmed their plan in January 2010. The confirmation order required Jones and Shores to report to the ***1032** trustee "any events affecting disposable income," specifically including lawsuits that were "received or receivable" during the term of their plan, which would not exceed five years.

Jones quit his job with Bob Evans in May 2012. Six months later he filed a charge of employment discrimination against Bob Evans with the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights, claiming that he had experienced race discrimination at work beginning in 2009. After Jones later received a right to sue letter, he filed this lawsuit in Missouri state court against Bob Evans and several of its employees in 2013, alleging violations of Title VII of the Civil Rights Act of 1964 and Missouri law. He did not report the lawsuit to the trustee, however. Bob Evans later removed the discrimination case to the federal district court.

The bankruptcy court terminated Jones and Shores' bankruptcy in July 2014, discharging unsecured debts of $146,499.58. Bob Evans and its employees then filed a motion for summary judgment in Jones' discrimination case which the district court granted, concluding that Jones was judicially estopped from pursuing his claims because he had not disclosed them in the bankruptcy court. The court found that Jones had intentionally failed to disclose his claims to the bankruptcy trustee and concluded that this failure was tantamount to a representation to the bankruptcy court that those claims did not exist. The district court thus concluded that Jones was judicially estopped from pursuing those claims.

Jones filed a motion with the bankruptcy court to reopen the bankruptcy estate, which was granted, and he amended his schedules to include his claims in the instant case. He also filed a motion in the district court, asserting that he had cured his failure to disclose by amending his schedules and requesting the court amend its prior order and deny summary judgment for Bob Evans or, alternatively, grant him relief from that order. The court denied Jones' motion, concluding that his "last minute candor" in reopening the bankruptcy estate did not prevent the application of judicial estoppel to bar his claims. Jones appeals.

II.

[1] **[2]** **[3]** We review the order denying Jones' motion to amend the summary judgment order or, alternatively, for relief from that order for an abuse of discretion. *See, e.g., United States v. Metro. St. Louis Sewer Dist.,* 440 F.3d 930, 933 (8th Cir.2006). Motions to amend "serve the limited function of correcting manifest errors of law or fact." *Id.* (internal quotation marks omitted). Here, Jones argues that the district court erred in concluding that judicial estoppel barred his claims. We review the district court's underlying application of judicial estoppel for an abuse of discretion, affirming "unless it plainly appears that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the proper factors." *Stallings v. Hussmann Corp.,* 447 F.3d 1041, 1046–47 (8th Cir.2006) (quoting *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.,* 374 F.3d 23, 32 (1st Cir.2004)).

[4] **[5]** **[6]** **[7]** Judicial estoppel is an equitable doctrine that "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting 18 James Wm. Moore et al., *Moore's Federal Practice* § 134.30 (3d ed.2000)). While "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," ***1033** three factors inform a court's decision about whether it should apply. *Id.* at 750, 121 S.Ct. 1808. First, a party's later position must be "clearly inconsistent" with its prior position. *Id.* Second, a court should consider whether a party has persuaded a court to accept its prior 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." *Id.* (internal quotation marks omitted). Finally, a court should consider whether the party asserting inconsistent positions "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751, 121 S.Ct. 1808. A party who has filed for bankruptcy may be judicially estopped from pursuing a claim not disclosed in his or her bankruptcy filings. *See Stallings,* 447 F.3d at 1047. For the following reasons, we conclude that the district court did not abuse its discretion in applying judicial estoppel to bar Jones' claims in this case.

The first *New Hampshire* factor supports the district court's application of judicial estoppel because Jones took inconsistent positions between his bankruptcy case and this case. Jones' failure to amend his bankruptcy schedules to include his discrimination claims "represented to the bankruptcy court that no such claims existed," and his assertion of those claims in this case is inconsistent with that prior position. *Id.* at 1049. The National Association of Consumer Bankruptcy Attorneys (NACBA) as amicus argues that Jones' failure to disclose his claims was not a representation that they did not exist because a Chapter 13 debtor has no obligation under the Bankruptcy Code or Rules to disclose causes of action arising after the filing of his bankruptcy petition. Our court has previously concluded, however, that a Chapter 13 debtor who does not amend his bankruptcy schedules to reflect a post petition cause of action adopts inconsistent positions in the bankruptcy court and the court where that cause of action is pending. *See id.; see also E.E.O.C. v. CRST Van Expedited, Inc.,* 679 F.3d 657, 679 (8th Cir.2012).

Furthermore, in its order confirming Jones' bankruptcy plan the bankruptcy court had expressly required him to report any future lawsuits to the trustee. We conclude that Jones' failure to report his claims to the trustee represented to the bankruptcy court that those claims did not exist regardless of whether he had an independent legal duty to amend his schedules. Jones contends that the bankruptcy court's order only required him to report legal claims to the extent that those claims resulted in disposable income, such as the proceeds from a settlement. We disagree, particularly because the order referred specifically to "lawsuits" rather than "judgments" or "settlements." Indeed, Jones concedes in his opening brief that "the cause of action [against Bob Evans] unquestionably should have been included [in amended schedules]" and that "his failure to amend was a mistake." We conclude that Jones' assertion of inconsistent positions in the courts supports the district court's application of judicial estoppel to bar his claims.

The second *New Hampshire* factor also supports the district court's application of judicial estoppel because the bankruptcy court, by discharging Jones' unsecured debts, adopted the position that his discrimination claims did not exist. *See, e.g., E.E.O.C.,* 679 F.3d at 679. NACBA argues that the bankruptcy court did not adopt Jones' position that he had no pending legal claims because it eventually reopened his bankruptcy estate and allowed him to add his discrimination claims to his schedules, but "the [bankruptcy] court's original discharge of the debt is sufficient acceptance of the debtor's position to provide a basis for judicial estoppel." *Stallings,* ***1034** 447 F.3d at 1048. We therefore conclude that the bankruptcy court accepted Jones' position that his claims in this case did not exist.

The third *New Hampshire* factor similarly favors the application of judicial estoppel because Jones could have derived an unfair advantage in the bankruptcy proceedings by concealing his claims. If Jones had disclosed his claims, for example, the trustee could have moved the bankruptcy court to order him to make the proceeds from any potential settlement available to his unsecured creditors.[2] *See, e.g., In re Waldron,* 536 F.3d 1239, 1245 (11th Cir.2008). NACBA argues that Jones did not in fact benefit from his failure to disclose his claims because as a Chapter 13 debtor he paid his creditors solely out of his income, and he received no income from those claims during his bankruptcy. "[J]udicial estoppel does not require that the nondisclosure must lead to a different result in the bankruptcy proceeding," however, and may apply based on a litigant's intent to mislead the court. *Robinson v. Tyson Foods, Inc.,* 595 F.3d 1269, 1275 (11th Cir.2010).

2 Notably, that is similar to what the trustee did with respect to Shores' workers compensation claim.

[8] Jones asserts that his failure to disclose his claims was inadvertent and that he did not intend to mislead the court, which would make the application of judicial estoppel improper. *See Stallings,* 447 F.3d at 1049. Nevertheless, "[a] debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Id.* at 1048 (emphasis omitted) (quoting *In re Coastal Plains, Inc.,* 179 F.3d 197, 210 (5th Cir.1999)). Here, it is undisputed that Jones had knowledge of his claims while his bankruptcy case was pending. In addition, our court has previously recognized that a Chapter 13 debtor who receives a right to sue letter from the EEOC while his bankruptcy case is pending has a motive to conceal his employment discrimination claims from that court. *Id.* at 1048. Moreover, even if a debtor's decision to reopen his bankruptcy estate and amend his schedules could show inadvertence, in this case Jones knew he had to disclose pending legal claims because the trustee had previously moved to deny plan confirmation after he failed to include Shores' workers compensation claim. The district court thus did not err in finding that Jones' failure to disclose his claims was intentional. Accordingly, and based on this analysis of the *New Hampshire* factors, we conclude that the district court did not abuse its discretion in applying judicial estoppel to bar Jones' claims.

III.

For these reasons we affirm the order of the district court.

All Citations

811 F.3d 1030, 128 Fair Empl.Prac.Cas. (BNA) 1181, 99 Empl. Prac. Dec. P 45,476

End of Document

812 F.3d 659
United States Court of Appeals,
Eighth Circuit.

In re Stephen D. McCORMICK, also known as Steve D. McCormick; Karen A. McCormick, Debtors
Starion Financial, Appellee
v.
Stephen D. McCormick; Karen A. McCormick, Appellants.

No. 15–1160.
|
Submitted: Oct. 20, 2015.
|
Filed: Feb. 1, 2016.

Synopsis

Background: Oversecured creditor appealed from order of the United States Bankruptcy Court for the District of North Dakota denying its motion to compel payment of attorney fees under confirmed plan of reorganization and granting Chapter 11 debtors' motion to disallow fees and costs claimed by creditor. The Bankruptcy Appellate Panel (BAP), Shodeen, J., 523 B.R. 151, reversed and remanded. Debtors appealed.

[Holding:] The Court of Appeals, Beam, Circuit Judge, held that the BAP's remand order was not a final, appealable order.

Appeal dismissed.

Attorneys and Law Firms

***660** Jon R. Brakke, argued, Caren W. Stanley, on the brief, Fargo, ND, for appellant.

Timothy Dwight Lervick, argued and on the brief, Bismarck, ND, for appellee.

Before WOLLMAN, BEAM, and GRUENDER, Circuit Judges.

Opinion

BEAM, Circuit Judge.

Stephen and Karen McCormick, debtors in a Chapter 11 bankruptcy proceeding, appeal the ruling of the Eighth Circuit Bankruptcy Appellate Panel (BAP). The BAP held that Starion Financial is entitled to recover the attorney's fees it incurred while collecting on its secured debt in the course of the McCormicks' bankruptcy proceedings.

The McCormicks and Starion entered into a series of loan transactions between December 2004 through June 2009. Pursuant to the various promissory notes and mortgages, the McCormicks were liable for payment of Starion's attorney's fees and costs if Starion was required to collect upon its debt. When the McCormicks defaulted on the loans, Starion and the McCormicks agreed upon a workout agreement wherein the McCormicks consented to the entry of judgment against them in a North Dakota state court on July 27, 2012, in the respective amounts of $2,078,034.26 and $1,000,000.

[1] Shortly thereafter, in August 2012, the McCormicks filed a voluntary Chapter 11 bankruptcy petition. In their second amended plan of reorganization, the McCormicks filed modification addendums, and as relevant here, one known as the Starion Addendum, in which the McCormicks again agreed to pay Starion's allowable attorney's fees and costs associated with the bankruptcy proceedings. Starion was required by the plan to submit an itemized statement of its claim for fees and expenses at least "ten days prior to the Effective Date of the Plan." The bankruptcy plan containing this addendum was confirmed by the bankruptcy court on September 13, 2013, and the effective date of the plan was October 15, 2013. On October 3, Starion submitted an itemized statement to the McCormicks setting out various costs including interest, late fees, real estate taxes, and appraisal and engineering fees. On October 7, Starion submitted an updated statement that included attorney's fees. The McCormicks took the position that Starion was not entitled to these amounts based either upon the plan or 11 U.S.C. § 506(b),[1] and refused to pay ***661** the amounts requested. Starion filed a motion requesting the bankruptcy court to compel payment of its attorney's fees in the amount of $125,014.64. The McCormicks argued to the bankruptcy court that there was no agreement for the payment of fees; the fee request was untimely; and the fees were not reasonable.

The bankruptcy court found that while Starion might well be oversecured (as required for payment of fees by § 506), its claim for fees arose from the judgments entered in North Dakota state court, and those judgments did not mention Starion's right to collect attorney's fees. Accordingly, the court denied the request for fees, based upon the lack of an agreement for fees. With regard to the timeliness of the fee request, the court found that the application for fees was untimely (because the October 3 filing did not contain the request for attorney's fees), but that the McCormicks were not prejudiced by such delay. The court did not ultimately decide the timeliness issue, however, finding that in light of its ruling that there was no agreement for fees, it need not decide the timeliness issue. The court did not address the reasonableness of the fee request itself.

Starion appealed to the BAP, which reversed and remanded. The BAP held that the bankruptcy court erroneously relied upon the state court judgments as the only possible "agreement" under which Starion's right to payment of its fees arose. The BAP found it was undisputed that the promissory notes, mortgages, workout agreement and other documents related to the loans between the parties contained attorney's fees provisions. *In re McCormick,* 523 B.R. 151, 154–56 (8th Cir. BAP 2014). The BAP reversed and remanded, stating, "For the reasons set forth, the decision of the bankruptcy court is reversed. The case is remanded for further proceedings to determine the reasonableness and the timeliness of the Appellant's Fee request." *Id.* at 156. The McCormicks appeal.

[2] [3] [4] "We have an independent obligation to examine our jurisdiction and must address any jurisdictional problems we perceive even if the issue has not been raised by the parties." *In re M & S Grading, Inc.,* 526 F.3d 363, 367 (8th Cir.2008). Jurisdiction over bankruptcy appeals is governed by 28 U.S.C. § 158(d)(1). Our jurisdiction over appeals from the BAP in bankruptcy matters extends to "final decisions, judgments, orders, and decrees." To determine the finality of an order entered before the conclusion of a bankruptcy case we consider:

> the extent to which (1) the order leaves the bankruptcy court nothing to do but execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; (3) the extent to which a later reversal on that issue would require recommencement of the entire proceeding.

In re Farmland Indus., Inc., 397 F.3d 647, 650 (8th Cir.2005) (quoting *In re Koch,* 109 F.3d 1285, 1287 (8th Cir.1997)).

[5] The BAP ordered the bankruptcy court on remand to determine the timeliness of the fee request, an issue with which the bankruptcy court wrestled, but which it ultimately did not decide. The bankruptcy court found that while the fee application was submitted four days late, the debtors were not prejudiced by the four-day delay, but the court did not decide "whether Starion should be excused from submitting an untimely claim ... despite the clear language of the plan requiring a timely submission." Because resolution of the timeliness and reasonableness of the fee application affect the merits of the underlying dispute over the fee request, the bankruptcy court on remand is ***662** left with more than a "purely mechanical or ministerial task." *In re Popkin & Stern,* 289 F.3d 554, 556 (8th Cir.2002). Indeed, the BAP's remand order leaves the bankruptcy court tasks which are *likely* to "generate a new appeal or to affect the issue that the disappointed party wants to raise on appeal." *In re Vekco, Inc.,* 792 F.2d 744, 745 (8th Cir.1986) (quoting *In re Fox,* 762 F.2d 54, 55 (7th Cir.1985)). Accordingly, we dismiss the appeal for lack of jurisdiction.

All Citations

812 F.3d 659, 62 Bankr.Ct.Dec. 25

Footnotes

1 A secured creditor claiming entitlement to attorney's fees and costs in a bankruptcy proceeding pursuant to 11 U.S.C. § 506(b) must establish for an allowed secured claim that: it was oversecured; an agreement or state statute authorizes attorney's fees; and the fees are reasonable. *In re Schriock Constr., Inc.,* 104 F.3d 200, 201 (8th Cir.1997).

811 F.3d 1020
United States Court of Appeals,
Eighth Circuit.

In re O & S TRUCKING, INC., Debtor.
O & S Trucking, Inc., Appellant
v.
Mercedes Benz Financial Services USA, doing business as Daimler Truck Financial, Appellee.

No. 15–2048.
|
Submitted: Nov. 17, 2015.
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Filed: Jan. 22, 2016.

Synopsis

Background: Order was entered confirming amended plan proposed by Chapter 11 debtor in response to ruling by the United States Bankruptcy Court for the Western District of Missouri, Arthur B. Federman, Chief Judge, 514 B.R. 296, on secured status of creditor's claim. Debtor appealed from plan confirmation order, and the United States Bankruptcy Appellate Panel for the Eighth Circuit, Kressel, J., 529 B.R. 711, dismissed. Debtor appealed.

[Holding:] The Court of Appeals, Gruender, Circuit Judge, held that imprecise language in debtor's amended Chapter 11 plan, providing that amount of creditor's secured claim was subject to adjustment, was insufficient, in absence of any objection by debtor to its amended plan, to permit debtor to appeal confirmation order as "person aggrieved" thereby.

Affirmed.

West Headnotes (7)

[1] Bankruptcy
Review of Appellate Panel

Court of Appeals reviews de novo the Bankruptcy Appellate Panel's (BAP's) determination that it lacks jurisdiction over appeal.

Cases that cite this headnote

[2] Bankruptcy
Effect

Bankruptcy court's interlocutory orders, determining secured status of creditor's claim and denying debtor's motion for reconsideration, merged into order confirming Chapter 11 plan.

Cases that cite this headnote

[3] Bankruptcy
Right of review and persons entitled; parties; waiver or estoppel

"Person aggrieved" standard for standing to appeal bankruptcy court's order is more limited than Article III standing or the prudential requirements associated therewith in order to ensure that bankruptcy proceedings, often administratively and procedurally unwieldy, are not prolonged by unnecessary appeals.

Cases that cite this headnote

[4] Bankruptcy
Right of review and persons entitled; parties; waiver or estoppel

To have standing to appeal bankruptcy court's order under "person aggrieved" doctrine, appellant must demonstrate that the challenged order directly and adversely affected his pecuniary interests.

Cases that cite this headnote

[5] Bankruptcy
Right of review and persons entitled; parties; waiver or estoppel

Generally, under "person aggrieved" doctrine, debtor lacks standing to appeal a judgment rendered wholly in his favor, except when there has been some error prejudicial to debtor or he has not received all he is entitled to.

Cases that cite this headnote

[6] **Bankruptcy**
Decisions Reviewable
Bankruptcy
Right of review and persons entitled; parties; waiver or estoppel

Debtor in Chapter 11 case, like debtor in Chapter 13 case, can obtain meaningful relief of ruling that caused her to propose an amended plan by objecting to her own amended plan and appealing the amended plan's confirmation.

Cases that cite this headnote

[7] **Bankruptcy**
Right of review and persons entitled; parties; waiver or estoppel

Imprecise language in debtor's amended Chapter 11 plan, providing that amount of creditor's secured claim was subject to adjustment based on outcome of pending appeal regarding bankruptcy court's interlocutory secured-status order, but without articulating debtor's objection to treatment of claim in amended plan or giving notice of debtor's intent to appeal plan confirmation order based on secured-status determination incorporated therein, was insufficient, in absence of any objection by debtor to its amended plan, to permit debtor to appeal confirmation order as "person aggrieved" thereby.

Cases that cite this headnote

Attorneys and Law Firms

***1021** Jonathan A. Margolies, argued, Kansas City, MO, for appellant.

Randall P. Mroczynski, argued, Costa Mesa, CA, (Jay N. Selanders, Kansas City, MO, on the brief), for appellee.

Before COLLOTON, GRUENDER, and SHEPHERD, Circuit Judges.

Opinion

GRUENDER, Circuit Judge.

After the bankruptcy court confirmed a reorganization plan proposed by O & S ***1022** Trucking, Inc. ("O & S"), O & S appealed to the Bankruptcy Appellate Panel ("BAP"). The BAP dismissed the appeal for lack of jurisdiction. We affirm.

I.

O & S owned and operated a fleet of commercial trucks. Many of these trucks were financed or leased from various entities, including Mercedes Benz Financial Services USA (doing business as "Daimler"). In May 2012, O & S filed a voluntary Chapter 11 bankruptcy petition. After Daimler filed a motion seeking adequate protection of its secured interest, Daimler and O & S negotiated an agreed order in which O & S promised to make protection payments to Daimler to cover, among other things, the erosion in value of the Daimler trucks that O & S retained. The parties calculated these protection payments based on their assessment of each truck's value, including $64,500 for each 2010 freightliner. O & S agreed to pay Daimler two percent of each truck's value each month.

After O & S filed a motion for determination of secured status, the bankruptcy court concluded that Daimler had a secured claim and an unsecured claim. The court calculated the secured-claim amount based on: (1) the value of the vehicle collateral retained by O & S and (2) O & S's net post-petition income from the Daimler trucks. The court assessed the present value of the vehicle collateral using the National Automobile Dealers Association retail value of $62,100 for each 2010 freightliner. The court calculated the net income from the Daimler trucks as $51,909.40, a sum that approximated O & S's revenue less its expenses and the protection payments.

O & S moved for reconsideration of the court's secured-status order, alleging several errors. First, O & S contended that the bankruptcy court erred when it relied on the present value of the trucks to calculate the vehicle-collateral sum. O & S argued that Daimler had been afforded a double recovery because the court did not reduce the present value based on the protection payments that O & S already had made. O & S also argued that the court erred by calculating the additional $51,909.40 net-income figure because Daimler had waived the right to any proceeds in the agreed protection order and because the relevant funds had been commingled with other funds in O & S's account. The bankruptcy court denied reconsideration.

O & S appealed the order and the denial of reconsideration, and the BAP eventually dismissed the appeal for lack of jurisdiction on September 15, 2014. However, while that appeal still was pending before the BAP, O & S proposed a new plan of reorganization to the bankruptcy court. This plan incorporated the bankruptcy court's secured-status order, stating that Daimler's secured claim amounted to $62,100 per truck in vehicle collateral plus $51,909.40 from net income. The plan also stated that this sum was "subject to adjustment" based on "the final outcome of the pending appeal of the Daimler Decision by Debtor and any subsequent appeal." During the confirmation hearing, the court found that the vehicle-collateral calculation was no longer relevant because O & S already had returned all of the retained trucks to Daimler. Accordingly, the court concluded that Daimler's secured claim was limited to $51,909.40. The bankruptcy court then confirmed the reorganization plan.

Following the plan's confirmation, O & S appealed to the BAP. In this appeal, O & S reiterated its argument that the bankruptcy court improperly had calculated the amount of Daimler's secured claim. O & S repeated its contention that the bankruptcy court's order afforded Daimler a double ***1023** recovery for the vehicle collateral. O & S further argued that the bankruptcy court erred when it supplemented the secured portion of Daimler's claim with an award of $51,909.40 as proceeds from the use of the Daimler trucks. Finally, O & S argued that the bankruptcy court erred by denying the motion for reconsideration. The BAP did not reach the merits of these claims, instead concluding that it lacked jurisdiction over the appeal. O & S now appeals the BAP decision to our court.

II.

[1] We review *de novo* the BAP's determination that it lacked jurisdiction over O & S's appeal. *See GAF Holdings, LLC v. Rinaldi (In re Farmland Indus., Inc.),* 567 F.3d 1010, 1016 (8th Cir.2009). Though the BAP listed two grounds for its decision to dismiss—mootness and lack of standing—we need only agree with one in order to affirm. *See McCarty v. Lasowski (In re Lasowski),* 575 F.3d 815, 817 (8th Cir.2009); *Schwartz v. Kujawa (In re Kujawa),* 323 F.3d 628, 629 (8th Cir.2003).

[2] O & S's notice of appeal to the BAP listed three orders —the secured-status order, the denial of reconsideration of the secured-status order, and the plan confirmation. At oral argument, the parties agreed that the first two orders were interlocutory and non-final when rendered. [1] Such interlocutory orders merge into a plan confirmation. *See Greenpoint Mortg. Funding, Inc. v. Herrera (In re Herrera),* 422 B.R. 698, 707 (9th Cir. BAP 2010), *aff'd & adopted sub nom. Home Funds Direct v. Monroy (In re Monroy),* 650 F.3d 1300, 1301 (9th Cir.2011); *cf. Bullard v. Hyde Savings Bank (In re Bullard),* 752 F.3d 483, 488 & n. 8 (1st Cir.2014), *aff'd sub nom. Bullard v. Blue Hills Bank,* 575 U.S. ———, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015). Accordingly, our standing analysis centers on O & S's ability to appeal from the plan confirmation. *Greenpoint Mortg. Funding, Inc.,* 422 B.R. at 707.

1 Prior to the plan's confirmation, O & S argued that the secured-status order and denial of reconsideration were final, appealable orders. O & S has abandoned this position in its present appeal. We note that if the orders were indeed final when rendered, we would lack jurisdiction to consider them now because O & S failed to timely appeal from the BAP's September 15 decision. *See* Fed. R.App. P. 4(a)(1)(A).

[3] **[4]** The BAP concluded that O & S did not have standing to challenge the bankruptcy court's order confirming its proposed plan. Although the modern Bankruptcy Code does not articulate a standard for appellate standing, our circuit consistently has applied a "person aggrieved" standard derived from the Bankruptcy Act of 1898. *See, e.g., Peoples v. Radloff (In re Peoples),* 764 F.3d 817, 820 (8th Cir.2014); *accord Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.),* 764 F.3d 1321, 1325 (11th Cir.2014), *cert. denied sub nom. Atkinson v. Ernie Haire Ford, Inc.,* 577 U.S. ———, 136 S.Ct. 104, 193 L.Ed.2d 36 (2015). This standard is "more limited than Article III standing or the prudential requirements associated therewith." *Harker v. Troutman (In re Troutman Enterprises, Inc.),* 286 F.3d 359, 364 (6th Cir.2002). "The principal policy underlying the heightened 'standing' requirement is that bankruptcy proceedings —often administratively and procedurally unwieldy—not be prolonged by unnecessary appeals." *Spenlinhauer v. O'Donnell,* 261 F.3d 113, 118 n. 4 (1st Cir.2001). Under the person-aggrieved doctrine, the appellant has the burden to demonstrate that "the challenged order directly and adversely affect[ed] his pecuniary interests." *Id.* at 118; *accord Fondiller v. Robertson (Matter of Fondiller),* 707 F.2d

441, 442 (9th Cir.1983) (explaining that a person is aggrieved if an order of ***1024** the bankruptcy court "diminish[ed] the debtor's property, increase[d] his burdens, or detrimentally affect[ed] his rights").

[5] Generally, under the person-aggrieved doctrine, a debtor lacks standing to appeal a judgment rendered wholly in his favor. *Houchin Sales Co. v. Angert,* 11 F.2d 115, 119 (8th Cir.1926). However, our court recognizes an exception "when there has been some error prejudicial to [the debtor], or he has not received all he is entitled to." *Id.* at 118–19. When a debtor invokes this exception at the conclusion of bankruptcy proceedings in order to appeal from a favorable plan-confirmation judgment, the exception runs into tension with the strong policy favoring finality. *See Trulis v. Barton,* 107 F.3d 685, 691 (9th Cir.1995) ("Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect."). Confronted with this tension, our court outlined the procedure through which a debtor may seek review from a confirmed plan in *Zahn v. Fink (In re Zahn),* 526 F.3d 1140 (8th Cir.2008).

In *Zahn,* we examined a case in which a Chapter 13 bankruptcy debtor sought review of an adverse interlocutory ruling. *Id.* at 1141. The debtor appealed the interlocutory order; however, the BAP dismissed the appeal for lack of jurisdiction because the panel concluded that the interlocutory ruling did not constitute a final, appealable order. *Id.; see Official Comm. of Unsecured Creditors v. Farmland Industries, Inc. (In re Farmland Indus., Inc.),* 397 F.3d 647, 649–50 (8th Cir.2005) (discussing the test for finality in bankruptcy proceedings). To obtain a final, appealable order, the debtor proposed a plan incorporating the bankruptcy court's allegedly erroneous interlocutory ruling. *In re Zahn,* 526 F.3d at 1141. The debtor then objected to her own plan, highlighting her opposition to this disputed provision. *Id.* at 1141–42. Over this objection, the bankruptcy court confirmed the debtor's proposed plan. *Id.* at 1142. The debtor then appealed to the BAP. *Id.* We held that this procedure properly preserved the issue for appeal and demonstrated person-aggrieved status. *Id.* at 1144. In sum, we concluded: "A debtor who objects to her own plan may be an aggrieved party and have standing to appeal confirmation of such plan." *Id.*

[6] In subsequent cases before bankruptcy courts, debtors have complied with this procedure in order to demonstrate standing as persons aggrieved by their plans' confirmations. *See, e.g., Fisette v. Keller (In re Fisette),* 455 B.R. 177, 180 (8th Cir. BAP 2011), *as revised* (Nov. 11, 2011); *Timothy v. Anderson (In re Timothy),* 442 B.R. 28, 29, 31 & n. 14 (10th Cir. BAP 2010). Though *Zahn* involved a Chapter 13 debtor, we note that *Zahn* applies equally in Chapter 11 proceedings because the person-aggrieved standing requirement extends to proceedings under both chapters. *See Sears v. U.S. Tr. (In re AFY),* 734 F.3d 810, 824 (8th Cir.2013) (applying the person-aggrieved doctrine in a Chapter 11 case), *cert. denied sub nom. Sears v. Badami,* 572 U.S. ——, 134 S.Ct. 2315, 189 L.Ed.2d 177 (2014). Thus, we hold that a debtor in Chapter 11, like a debtor in Chapter 13, "can obtain meaningful relief ... [by] objecting to her own amended plan and appealing the amended plan's confirmation." *In re Zahn,* 526 F.3d at 1143.

[7] As the BAP recognized, O & S did not follow the *Zahn* procedure because O & S failed to object to its proposed plan. The court thus did not have before it an objection from O & S when it confirmed the plan, and O & S did not obtain an adverse ruling along with the bankruptcy court's favorable confirmation judgment. *Cf.* ***1025** *Weston v. Mann (In re Weston),* 18 F.3d 860, 864 (10th Cir.1994) (stating that a creditor must raise an objection to attain person-aggrieved status); *Matter of Schultz Mfg. Fabricating Co.,* 956 F.2d 686, 690 (7th Cir.1992) (same); *In re Szostek,* 886 F.2d 1405, 1413 (3d Cir.1989) (stating that, as a general rule, the absence of an objection indicates acceptance of a plan's terms). The BAP found this omission fatal to O & S. On the facts of the present case, we agree.

On appeal to our court, O & S argues that it had standing despite its failure to comply with *Zahn* because the confirmed plan included a provision stating that the amount of Daimler's secured claim was "subject to adjustment" based on "the final outcome of the pending appeal of the Daimler Decision by Debtor and any subsequent appeal." We recognize that parties may use such language in a reorganization plan to condition the amount of a claim based on the outcome of then-pending litigation related to an interlocutory order. *See In re Farmland,* 397 F.3d at 650. And we note that this provision properly conditioned the amount of Daimler's claim on the outcome of the appeal from the secured-status order that had been pending before the BAP at the time of the plan's submission-an appeal that the BAP ultimately dismissed in a decision that O & S did not appeal to our court.

However, we conclude that the imprecise language used by O & S was insufficient to meet *Zahn's* requirement that a debtor object to a plan in order to demonstrate person-aggrieved status. The reservation did not articulate O & S's objection to the plan, nor did it specifically reference O & S's intent to appeal from the plan confirmation on the basis of the secured-status order incorporated therein. In light of the strong policy favoring finality in bankruptcy proceedings, we find that the language in the confirmed plan was not sufficient to reserve O & S's right to appeal from the plan confirmation or to place the bankruptcy court and creditors on notice that O & S would seek such relief.[2] *Cf. D & K Properties Crystal Lake v. Mut. Life Ins. Co. of New York,* 112 F.3d 257, 261 (7th Cir.1997) (refusing to enforce a broad reservation in a confirmed plan because "hold[ing] otherwise would eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan"); *Travelers Prop. Cas. Ins. Co. of Am. v. Nat'l Union Ins. Co. of Pittsburgh, Pa.,* 735 F.3d 993, 1002 (8th Cir.2013) (noting that, under Missouri law, ambiguities in contract are construed against the drafter); *Fieber's Dairy, Inc. v. Purina Mills, Inc.,* 331 F.3d 584, 587 (8th Cir.2003) (citing favorably to *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n,* 997 F.2d 581, 588 (9th Cir.1993), for the proposition that Chapter 11 plans are construed as contracts, which are interpreted under the governing state's law). We therefore conclude that the BAP correctly held that O & S failed to carry its burden to demonstrate standing.[3]

2 We need not determine whether other, more specific language would have been an appropriate substitute for *Zahn's* objection requirement. It is enough to say that the imprecise language employed here did not suffice.

3 Because we affirm based on standing, we do not reach the BAP's mootness determination.

III.

For the foregoing reasons, we agree that the BAP lacked jurisdiction over the appeal from the confirmation order, and we affirm.

All Citations

811 F.3d 1020, 62 Bankr.Ct.Dec. 26

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544 B.R. 407
United States Bankruptcy Appellate Panel
of the Eighth Circuit.

In re Casey Drew O'SULLIVAN, Debtor.
CRP Holdings, A–1, LLC, Creditor–Appellant
v.
Casey Drew O'Sullivan, Debtor–Appellee.

BAP No. 15–6020.
|
Submitted Nov. 23, 2015.
|
Filed Jan. 19, 2016.

Synopsis
Background: Chapter 7 debtor moved to avoid judgment lien on exemption-impairment grounds. The United States Bankruptcy Court for the Western District of Missouri, Cynthia A. Norton, J., 2015 WL 3526996, granted motion, and judgment creditor appealed.

Holdings: The Bankruptcy Appellate Panel, Kressel, J., held that:

[1] any fixing of judgment lien on property that Chapter 7 debtor owned as tenant by the entireties with his nondebtor-wife occurred after debtor had acquired his interest in property, thereby satisfying prerequisite for avoidance of judicial lien on exemption-impairment grounds, and

[2] judgment lien "fixed" to property that Chapter 7 debtor owned as tenant by the entireties with his nondebtor-wife, even though, under Missouri law, entireties property is not subject in any way to judgment entered against only one spouse.

Affirmed.

West Headnotes (16)

[1] Bankruptcy
Conclusions of law; de novo review

Bankruptcy Appellate Panel (BAP) reviews bankruptcy court's interpretation of the law de novo.

Cases that cite this headnote

[2] Bankruptcy
Effect as to Securities and Liens

Valid, pre-bankruptcy judgment liens ordinarily survive bankruptcy case and may be enforced even against exempt property, unless such liens are avoided.

Cases that cite this headnote

[3] Bankruptcy
Construction and Operation

Bankruptcy
Liens and security interests in general

Term "lien," as used in the Bankruptcy Code, is very broad and includes inchoate liens.

Cases that cite this headnote

[4] Bankruptcy
Liens Avoidable

Phrase "fixing of a lien," as used in bankruptcy statute authorizing debtor to avoid the fixing of certain liens on exemption-impairment grounds, means the "fastening of liability upon," and presupposes an object to which a liability can fasten. 11 U.S.C.A. § 522(f)(1).

Cases that cite this headnote

[5] Bankruptcy
Judicial liens

To avoid, on exemption-impairment grounds, the fixing of judicial lien on interest of the debtor in property, debtor must have possessed an interest to which the lien fixed, before it fixed. 11 U.S.C.A. § 522(f)(1).

Cases that cite this headnote

[6] Bankruptcy
Judicial liens

Debtor cannot avoid, on exemption-impairment grounds, a judicial lien that attached prior to debtor's acquisition of the liened property. 11 U.S.C.A. § 522(f)(1).

Cases that cite this headnote

[7] **Bankruptcy**
Effect of state law in general

Debtor's property interests are question of state law.

Cases that cite this headnote

[8] **Husband and Wife**
Tenancy by Entirety in General

Husband and Wife
Separate conveyance or mortgage

Under Missouri law, property conveyance to husband and wife as co-grantees presumably creates a tenancy by the entirety, such that a single entity, the marital community, owns the estate, and neither spouse has right, title, or interest alienable by his or her sole act.

Cases that cite this headnote

[9] **Judgment**
Property or Interest Affected and Extent of Lien

Under Missouri law, judgment liens attach only to lands, tenements, and hereditaments liable to be sold upon execution.

Cases that cite this headnote

[10] **Bankruptcy**
Judicial liens

Any fixing of judgment lien on property that Chapter 7 debtor owned as tenant by the entireties with his nondebtor-wife occurred after debtor had acquired his interest in property, thereby satisfying prerequisite for avoidance of judicial lien on exemption-impairment grounds, when creditor filed its notice of foreign judgment. 11 U.S.C.A. § 522(f)(1).

Cases that cite this headnote

[11] **Bankruptcy**
Judicial liens

Judgment lien “fixed” to property that Chapter 7 debtor owned as tenant by the entireties with his nondebtor-wife, as the term “fixed” was used in exemption-based lien avoidance provision, on filing of creditor's notice of foreign judgment, even though, under Missouri law, entireties property is not subject in any way to judgment entered against only one spouse. 11 U.S.C.A. § 522(f)(1).

Cases that cite this headnote

[12] **Husband and Wife**
Rights of creditors as to estate in entirety or in common

Under Missouri law, entireties property is not subject in any way to a judgment entered against only one spouse, nor can such a judgment affect any supposed separate interest of one spouse, because one spouse has no separate interest.

Cases that cite this headnote

[13] **Husband and Wife**
Survivorship

Under Missouri law, upon death of one spouse, surviving spouse continues to hold the whole title to entireties property because there is no one to share it, and not because of survivorship, which effects a change in the person only and not the estate.

Cases that cite this headnote

[14] **Husband and Wife**
Separate conveyance or mortgage

Husband and Wife
Rights of creditors as to estate in entirety or in common

Under Missouri law, no tenant by the entirety can convey his or her interest without being joined by the other spouse, and interest of neither spouse can be levied upon or sold under judgment against such one.

Cases that cite this headnote

[15] Bankruptcy
Liens Avoidable

Meaning of "fixing" as used in bankruptcy statute authorizing debtor to avoid the fixing of certain liens on exemption-impairment grounds, is very broad and includes the fixing of any lien, even unenforceable or unperfected liens. 11 U.S.C.A. § 522(f)(1).

Cases that cite this headnote

[16] Judgment
Title of Judgment Debtor

In Missouri, judgment liens which appear to be facially valid against a judgment debtor's property, but which, in effect, cannot be enforced against the property because such judgment liens did not attach to the property, can nonetheless create clouds upon the title to the property, affecting the marketability of title to the property, the value of the real estate, or the judgment debtor's disposition of the property.

Cases that cite this headnote

Attorneys and Law Firms

***409** Neil S. Sader, Kansas City, MO, for Appellant.

Norman E. Rouse, Joplin, MO, for Appellee.

Before KRESSEL, SCHERMER and NAIL, Bankruptcy Judges.

Opinion

KRESSEL, Bankruptcy Judge.

Judgment creditor CRP Holdings A–1, LLC appeals the June 4, 2015 order of the bankruptcy court [1] granting the debtor's motion to avoid its judgment lien. We have jurisdiction over this appeal under 28 U.S.C. § 158(c). We affirm.

1 The Honorable Cynthia A. Norton, United States Bankruptcy Judge for the Western District of Missouri.

BACKGROUND

The debtor, Casey Drew O'Sullivan, and his wife acquired a residence as tenants by the entirety in November 1995. The residence is located in Barton County, Missouri. CRP obtained a $765,151.18 judgment in the Circuit Court of Platte County, Missouri against the debtor and a related business on January 5, 2015. [2] The judgment was not against the debtor's wife. CRP then filed a Notice of Foreign Judgment, [3] registering the judgment on January 26, 2015, in the Circuit Court of Barton County, Missouri.

2 The file date stamp on the top of the judgment order is January 5, 2014, but the date next to the judge's signature is January 5, 2015, which serves as the effective date of the order.

3 The Notice of Foreign Judgment does not include the name or address of the debtor, but no party disputes its validity.

The debtor filed a chapter 7 petition on April 3, 2015 and listed his residence in his schedules. He valued the residence at $105,000.00, subject to a $95,134.04 mortgage of Heritage State Bank. He valued his apportioned interest in the residence at $52,500.00 and claimed a $15,000.00 exemption in that interest under both Mo. Rev. Stat. § 513.475 and 11 U.S.C. § 522(b)(3)(B). CRP did not object to the debtor's claimed exemptions. The debtor also filed a motion to avoid CRP's judgment lien against the residence. CRP objected to the motion, acknowledged that it had a judgment lien, but argued that its judgment lien did not attach to the residence. CRP further argued that because its judgment lien did not attach to the residence, then its lien did not fix upon the residence nor impair the debtor's exemption for lien avoidance purposes.

In deciding the motion, the bankruptcy court looked at § 522(f)(1)'s provision that a debtor "may avoid the fixing of a lien on an interest of the debtor in property...." The court then referred to *Farrey v. Sanderfoot,* 500 U.S. 291, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991), to ascertain the meaning of "fixing" as used in § 522(f)(1). The court noted that *Farrey* defined "fixing" as a temporal event, the "fastening of a liability" onto an interest of the debtor. The court then noted that the Missouri judgment lien statute provides that judgments "shall be liens on the real estate of the person against whom they are entered, situate in the county for which or in which the court is held." Construing *Farrey* 's definition of "fixing" relative to the Missouri statute for judgment liens, the bankruptcy court concluded as a matter of law that CRP's judgment lien "affixed" to the residence. The court then conducted a § 522(f)(2) exemption impairment analysis ***410** [4] and determined that CRP's lien impaired the debtor's exemptions. The bankruptcy court then entered an order overruling CRP's objection and granting the debtor's motion. CRP timely appealed.

4 CRP does not challenge this part of the bankruptcy court's decision.

In the bankruptcy court, CRP argued that its judgment lien did not attach to the residence and therefore did not fix upon the residence. On appeal, CRP concedes that its judgment lien attached to the residence, but argues that its judgment lien did not fix upon the debtor's tenant by the entirety property interest in the residence, because the debtor did not have an interest to which its judgment lien could fix.

STANDARD OF REVIEW

[1] This appeal turns on the bankruptcy court's interpretation of law, which we review *de novo. In re Cleaver,* 407 B.R. 354, 356 (8th Cir. BAP 2009).

DISCUSSION

[2] In the absence of an objection, property claimed as exempt is exempt. 11 U.S.C. § 522(*l*). Exempt property is not liable during or after the case for any debts, except debts secured by liens not avoided. *See* 11 U.S.C. § 522(c)(2) (stating that exempt property is liable during and after the case for debts secured by liens not avoided under § 522(f)). Thus, valid, pre-bankruptcy judgment liens ordinarily survive the bankruptcy case and can be enforced on exempt property, unless such liens are avoided. *Farrey v. Sanderfoot,* 500 U.S. 291, 297, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991). The debtor claimed a $15,000.00 exemption in his homestead interest under both Mo. Rev. Stat. § 513.475, Missouri's homestead exemption statute, and 11 U.S.C. § 522(b)(3)(B), which applies to a tenant by the entirety property interest exempt under applicable nonbankruptcy law. CRP did not object to the debtor's exemptions. Accordingly, the debtor's residence is exempt in the claimed amount. CRP objects, however, to the debtor's lien avoidance motion.

[3] Section 522(f)(1)(A) permits a debtor to avoid the lien of a judgment on exempt property; it provides:

> Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> (A) a judicial lien, other than a judicial lien that secures a debt of kind that is specified in section 523(a)(5);

11 U.S.C. § 522(f)(1)(A). A "judicial lien" is a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). A "lien" is "a charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). The term "lien" is "very broad" and "includes inchoate liens." H.R.Rep. No. 95–595, at 312 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6269. The lien at issue in this case was obtained by a judgment and thus falls within the scope of § 522(f)(1)(A).

[4] **[5]** **[6]** The Supreme Court held that under § 522(f)(1), a debtor cannot avoid a lien, unless the debtor acquired the property interest before the lien fixed. *Farrey v. Sanderfoot,* 500 U.S. 291, 301, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991). In the Court's view, in that portion of § 522(f)(1) which read, "the debtor may avoid the fixing of a lien on an interest ... in property," "fix" meant to "fasten a liability upon," *id.* at 296, 111 S.Ct. 1825, and "fixing" ***411** referred to a "temporal event," *id.*, or the "timing of an event," *id.* at 296 n. 3, 111 S.Ct. 1825, so that the "fixing of a lien" meant "the fastening of a liability," *id.* at 296, 111 S.Ct. 1825. "Fixing," then, presupposed an object to which a liability can fasten. *Id.* Thus, to avoid the fixing of a judicial lien on an interest of the debtor in property under § 522(f)(1), a debtor must have "possessed the interest to which the lien fixed, before it fixed." *Id.* at 299–301, 111 S.Ct. 1825. As one court stated, and whose reasoning was relied upon in *Farrey,* § 522(f)(1)'s use of "the phrase 'an interest in property of the debtor' rather than 'property of the debtor' prohibits the avoidance of a lien which has attached prior to the debtor's acquisition of the property." *In re McCormick,* 18 B.R. 911, 914 (Bankr.W.D.Pa.1982). In addition, *Farrey* did not make any distinctions under state law between "fixed" and "attached." Instead, *Farrey* equated both with "fasten." *Farrey* used the term "fixed" interchangeably with the term "attached" when it stated, "Therefore, unless the debtor had the property interest to which the lien *attached* at some point before the lien *attached* to that interest, he or she cannot avoid the fixing of the lien under the terms of §

522(f)(1)." 500 U.S. at 296, 111 S.Ct. 1825 (emphasis added). Applying *Farrey* 's construction of § 522(f)(1) to this case, we must determine whether the debtor had an interest in the residence, to which CRP's judgment lien later attached.

[7] **[8]** The debtor's property interest is a question of state law. Title to the residence was conveyed to the debtor and his wife as husband and wife by a general warranty deed in 1995. There is no indication that ownership of the residence changed since that time. Under Missouri law, a property conveyance to a husband and wife as co-grantees presumably creates a tenancy by the entirety, in such that a single entity—the marital community—owns the estate, and neither spouse has a right, title, or interest alienable by his or her sole act. *Fed. Nat'l Mortg. Ass'n v. Pace,* 415 S.W.3d 697, 703 (Mo.Ct.App.2013) (citation omitted). The parties agree that the debtor acquired a tenant by the entirety property interest in the residence in 1995. So clearly, the debtor had an interest in the property before CRP's judgment lien arose.

[9] **[10]** The next inquiry is when CRP's purported judgment lien fixed to the residence. "The lien of a judgment upon realty in Missouri is founded on statute." *Macke v. Byrd,* 131 Mo. 682, 33 S.W. 448, 449 (1895). In Missouri:

> 1. *Judgments* and decrees entered by the supreme court, by any United States district or circuit court held within this state, by any district of the court of appeals, by any circuit court and any probate division of the circuit court, except judgments and decrees rendered by associate, small claims and municipal divisions of the circuit courts, *shall be liens on the real estate of the person against whom they are entered, situate in the county for which or in which the court is held.*
>
> ....

Mo. Rev. Stat. § 511.350 (emphasis added). The judgment lien "commences upon entry of the judgment," Mo. Sup. Ct. R. 74.08, and extends to real estate owned at and after entry of the judgment, Mo. Rev. Stat. § 511.360. Filing a transcript of the judgment with the clerk of a circuit court in another county constitutes a lien on the judgment debtor's real estate located in the county of the registering court. Mo. Rev. Stat. § 511.440; Mo. Sup. Ct. R. 74.13. "Real estate," as used in the statutes, means "all estate and interest in lands, tenements and hereditaments liable to be sold upon execution." Mo. Rev. Stat. § 511.010. Judgment liens attach "only to ***412** 'lands, tenements and hereditaments liable to be sold upon execution.' " *Smith v. Thompson,* 169 Mo. 553, 69 S.W. 1040, 1042 (1902). CRP obtained a judgment on January 5, 2015 and filed a Notice of Filing of Foreign Judgment on January 26, 2015. CRP assumes, and no party objects, that by operation of Missouri law governing judgment liens, its judgment lien [5] attached to the residence upon the filing of its Notice of Foreign Judgment. Accordingly, any fixing of CRP's judgment lien occurred in January 2015, which is after the debtor acquired his interest in his residence.

5 CRP relies on the filing of its judgment as the basis of its judgment lien under the Missouri statutes providing for judgment liens on the debtor's "real estate." However, section 511.010 of the Missouri statutes defines "real estate" as "all estate and interest in lands, tenements and hereditaments *liable to be sold upon execution.*" Missouri common law provides that property under a tenancy by the entirety is not liable for execution for the individual judgment debt of one spouse. In addition, Missouri statute § 513.475 provides a homestead exemption from attachment and execution, up to a certain amount. Thus, although not addressed by either party in the bankruptcy court or on appeal, we have serious doubts as to whether CRP has a lien at all, much less one that attached or fixed to the debtor's interest in property.

[11] Having ascertained that CRP's lien fixed after the debtor acquired an interest in property, we would generally end our inquiry. If we read *Farrey* as permitting lien avoidance when the timing of the lien arose subsequent to the timing of the debtor's ownership in property, then the debtor prevails since the lien arose subsequent to the debtor's acquisition of the residence. But CRP argues that *Farrey* requires a lien to have attached under relevant law in a technical, enforceable sense in order for a debtor to avoid a lien. We disagree. The lien avoidance issue in *Farrey* was cabined to the timing of the lien. The Court did not decide whether the lien actually fixed upon a debtor's interest in property. There was no dispute as to the fixing, the enforceability, or the attaching of the lien in a technical sense under state law. To the contrary, the Court proceeded on the assumption that the parties correctly characterized the state law providing the property interest and lien. 500 U.S. at 299, 111 S.Ct. 1825. Clearly the Court felt that Congress intended a less restrictive meaning of "fixing" under § 522(f)(1) than the technical meaning that CRP urges us to adopt.

[12] **[13]** **[14]** To support its contention that its judgment lien did not attach to the debtor's interest in the residence, CRP argues that tenants by entirety property is not liable for the judgment debt of one spouse. Property held by tenants by the entirety is not subject in any way to the judgment of only one spouse; neither can the judgment "affect any supposed separate interest of the husband, for he has no separate interest." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shackelford,* 591 S.W.2d 210, 215 (Mo.Ct.App.1979). "Upon the death of one spouse the surviving spouse continues to hold the whole title because there is no one to share it —not because of survivorship, which effects a change in the person only and not the estate." *United States Fid. & Guar. Co. v. Hiles,* 670 S.W.2d 134, 137 (Mo.Ct.App.1984) (citation and quotation omitted). No tenant by the entirety can "convey his or her interest without being joined by the other" and "the interest of neither one could be levied upon or sold under judgment against such one." *Mahen v. Ruhr,* 293 Mo. 500, 240 S.W. 164, 166 (1922) (citation omitted). The lien of a judgment attaches only to property liable to be sold upon execution. *Smith v. Thompson,* 169 Mo. 553, 69 S.W. 1040, 1042 (1902). At the time of the docketing and registration of ***413** the judgment, the debtor and his spouse owned the residence under a tenancy by the entirety. CRP's judgment was not rendered against his spouse, so under the preceding authority, the residence was not liable to be sold upon execution. Therefore, CRP argues, the docketing and registration of its judgment did not attach an enforceable lien on the residence.

[15] All of that is true. Missouri law is very restrictive in terms of what constitutes a valid, enforceable judgment lien, but § 522(f)(1), however, uses a less restrictive meaning of "fix" for lien avoidance purposes. Congress explained that the purpose of lien avoidance in § 522 was to allow the debtor to "void *any* judicial lien on exempt property." H.R.Rep. No. 95–595, at 126 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6087 (emphasis added). If only choate liens or perfected liens were avoidable, then Congress would have used a technical term such as "attach." Instead, Congress used "fixing," which promotes the avoidance of any judicial liens, even inchoate, unenforceable, or unperfected judicial liens. In addition, Congress stressed that the term "lien" was "very broad" and "includes inchoate liens." H.R.Rep. No. 95–595, at 312 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6269. Therefore, the meaning of "fixing" as used under § 522(f)(1) is very broad to include the fixing of any lien, even unenforceable or unperfected liens. Even if we concede that the residence was not subject to CRP's lien and that the lien was therefore unenforceable, we would still find that an unenforceable judgment lien arose, so that it is possible for the debtor to avoid it under § 522(f).

As we discussed earlier, the Supreme Court recognized that Congress did not mean to limit the word "fixing" in § 522(f)(1) to the technical sense of "attachment" or any other state law technical characterization. In Congress's mind, a judgment should not impair an exemption in any sense. Congress picked the term "fixing" to describe the action creating the impairment.[6] Anything that casts a cloud or diminishes the value of an exemption is suspect and can be avoided.

6 While it is common for attorneys, courts, and sometimes Congress to talk about "avoiding" liens, virtually all avoidance powers in the Code speak about avoiding a transfer, i.e., the action creating the impairment. Indeed, the term "transfer" includes "the creation of a lien." 11 U.S.C. § 101(54)(A). Thus, Congress needed to choose an expansive term to express this action in § 522(f)(1). It chose "fix," or more precisely, its gerundial form, "fixing."

[16] Further, even if the docketing and registration of CRP's judgment lien did not attach an enforceable judgment lien to the residence, at a minimum, the judgment lien creates a cloud on the title to the residence. In Missouri, judgment liens which appear to be facially valid against a judgment debtor's property, but which, in effect, cannot be enforced against the property because such judgment liens did not attach to the property, can nonetheless create clouds upon the title to the property, affecting the marketability of title to the property, the value of the real estate, or the judgment debtor's disposition of the property. *See Rodgers v. First Nat. Bank of Appleton City,* 82 Mo.App. 377, 381–85 (Mo.Ct.App.1900) (finding that filing a transcript of the judgment created a cloud upon the title and rights of the judgment debtor to his real estate, when the judgment creditor did not have the right to enforce the judgment against the debtor's homestead: "The defendant, by filing the transcripts of its judgments, has cast a cloud over the title of the grantees, and caused the validity thereof to be doubted; and has thereby succeeded in depreciating its market value."). Permitting lien avoidance ***414** in this instance avoids such a result by undoing any cloud on the title to the residence. This result provides the debtor with a fresh start. *See* H.R.Rep. No. 95–595, at 118 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6079 ("[B]ankruptcy relief should be effective, and should provide the debtor with a fresh start."). And this result promotes Congressional intent for codifying lien avoidance. *See* H.R.Rep. No. 95–595, at 126 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6087 ("The debtor may void any judicial lien on exempt property.... [This] right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy.”).

The fact that CRP so strenuously contests the motion indicates that it thinks that its judgment or judgment lien has value. Of course, the judgment or judgment lien has value to CRP only if it diminishes or impairs the debtor's exemption.

CONCLUSION

For the reasons stated above, we AFFIRM.

All Citations

544 B.R. 407

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811 F.3d 1191
United States Court of Appeals,
Ninth Circuit.

David K. ZACHARY; Annmarie S. Snorsky, Debtors–Appellants,
v.
CALIFORNIA BANK & TRUST, Respondent–Appellee.

No. 13–16402.
|
Argued and Submitted Oct. 21, 2015.
|
Filed Jan. 28, 2016.

Synopsis
Background: Unsecured creditor objected to proposed plan of reorganization on grounds that it violated the so-called absolute priority rule. The United States Bankruptcy Court for the Eastern District of California, Thomas C. Holman, J., sustained the objection, and debtors' appeal was certified for direct appeal.

[Holding:] The Court of Appeals, Hurwitz, Circuit Judge, held that, as a matter of first impression in the circuit, the absolute priority rule continues to apply in individual Chapter 11 reorganizations after the amendments to the Bankruptcy Code enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), overruling *In re Friedman*, 466 B.R. 471, and abrogating *In re Anderson*, 2012 WL 3133895, and *In re Shat*, 424 B.R. 854.

Affirmed.

West Headnotes (11)

[1] **Bankruptcy**
Conclusions of law; de novo review
Bankruptcy
Review of Appellate Panel

Court of Appeals reviews de novo the bankruptcy court's and the Bankruptcy Appellate Panel's (BAP) interpretations of the bankruptcy statute.

Cases that cite this headnote

[2] **Statutes**
Burden of proof

Party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.

Cases that cite this headnote

[3] **Bankruptcy**
Voluntary Cases
Bankruptcy
In general; nature and purpose
Bankruptcy
Individual Debt Adjustment

Individual debtors have two basic options under the Bankruptcy Code: they can either liquidate their non-exempt assets under Chapter 7, or file for reorganization under Chapters 11 or 13.

Cases that cite this headnote

[4] **Bankruptcy**
Amount of indebtedness
Bankruptcy
In general; nature and purpose

Chapter 13 reorganization is only available to individual debtors whose debts fall below certain limits; individual debtors with more debt can only file for reorganization under Chapter 11, which is used primarily by debtors with ongoing businesses. 11 U.S.C.A. § 109(e).

Cases that cite this headnote

[5] **Bankruptcy**
Requisites of Confirmable Plan
Bankruptcy
Fairness and Equity; "Cram Down."

Individual debtor filing under Chapter 11 may confirm a plan of reorganization in one of two ways: first, by satisfying the bankruptcy court that the plan complies with each of the

16 paragraphs set forth in subsection (a) of the section of the Bankruptcy Code governing confirmation of Chapter 11 plans, including the requirement of obtaining the consent of each class of creditor, or, second, absent unanimous approval of the plan by each class of creditors, by "cramdown," that is, by satisfying the bankruptcy court that, notwithstanding any creditor's objections, the plan is "fair and equitable" to each creditor class. 11 U.S.C.A. § 1129(a), (b)(2).

Cases that cite this headnote

[6] **Bankruptcy**
Preservation of priority
Bankruptcy
Fairness and Equity; "Cram Down."

Debtor may "cram down" a Chapter 11 plan only if it complies with the Bankruptcy Code's absolute priority rule; that is, a bankruptcy judge may find that a debtor's plan is "fair and equitable" to an objecting creditor only if the plan complies with the absolute priority rule. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

Cases that cite this headnote

[7] **Bankruptcy**
Preservation of priority

"Absolute priority rule" is a judicially created concept, arising from the Bankruptcy Code's statutory requirement that a reorganization plan be "fair and equitable" to each class of creditors, which provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property under a reorganization plan. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

Cases that cite this headnote

[8] **Bankruptcy**
Property of Estate in General
Bankruptcy
Preservation of priority

Under the section of the Bankruptcy Code governing estate property, the "property of the estate," and, therefore, the property subject to the absolute priority rule in Chapter 11 cases, is the property the debtor owned as of the commencement of the case. 11 U.S.C.A. §§ 541(a)(1), 1129(b)(2)(B)(ii).

Cases that cite this headnote

[9] **Bankruptcy**
After-acquired property; proceeds; wages and earnings
Bankruptcy
Preservation of priority

Absolute priority rule continues to apply in individual Chapter 11 reorganizations after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amendments to the Bankruptcy Code, which merely have the effect of allowing individual Chapter 11 debtors to retain property and earnings acquired after the commencement of the case that would otherwise be excluded from the bankruptcy estate; overruling*In re Friedman,* 466 B.R. 471, and abrogating *In re Anderson,* 2012 WL 3133895, and *In re Shat,* 424 B.R. 854. 11 U.S.C.A. §§ 541, 541(a)(6, 7), 1115, 1129(b)(2)(B)(ii).

Cases that cite this headnote

[10] **Bankruptcy**
Fairness and Equity; "Cram Down."

Individual Chapter 11 debtor may not "cram down" a plan that would permit the debtor to retain prepetition property that is not excluded from the estate by the section of the Bankruptcy Code governing estate property, but may "cram down" a plan that permits the debtor to retain only postpetition property. 11 U.S.C.A. §§ 541, 541(a)(6, 7), 1115, 1129(b)(2)(B)(ii).

Cases that cite this headnote

[11] **Bankruptcy**
Scope of review in general
Bankruptcy
Review of Appellate Panel

Task of the Court of Appeals in reviewing the bankruptcy court's and the Bankruptcy Appellate Panel's (BAP) interpretations of the Bankruptcy Code is not to balance the equities, but to interpret the Code.

Cases that cite this headnote

Attorneys and Law Firms

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Matthew D. Murphey (argued), Penelope Parmes, Martin W. Taylor, Meghan Canty Sherrill, Troutman Sanders LLP, Irvine, CA, for Respondent–Appellee.

***1193** Appeal from the United States Bankruptcy Court for the Eastern District of California, Thomas C. Holman, Bankruptcy Judge, Presiding. D.C. No. 2:11–bk–42866.

Before: RICHARD A. PAEZ, MARY H. MURGUIA, and ANDREW D. HURWITZ, Circuit Judges.

OPINION

HURWITZ, Circuit Judge:

This case presents an arcane but important question of first impression in this Circuit: Does the absolute priority rule continue to apply in individual chapter 11 reorganizations after the amendments to the Bankruptcy Code enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")? We hold that it does.

I. Factual and Procedural Background

In September 2011, David K. Zachary and Annmarie S. Snorsky ("Debtors") filed a joint voluntary individual chapter 11 petition. The Debtors' operative plan of reorganization placed their largest unsecured creditor, California Bank & Trust ("California Bank"), into its own class of unsecured creditors and proposed to pay it $5,000 on its claim of nearly $2,000,000. California Bank's claim was thus "impaired under the plan." 11 U.S.C. § 1129(a)(8)(B).

California Bank objected, arguing that the plan violated the so-called absolute priority rule of 11 U.S.C. § 1129(b)(2)(B)(ii). The bankruptcy judge, disagreeing with the Ninth Circuit Bankruptcy Appellate Panel ("BAP") opinion in *In re Friedman,* 466 B.R. 471 (9th Cir. BAP 2012), sustained the objection, holding that "the absolute priority rule still prevails" in individual chapter 11 bankruptcies after the enactment of BAPCPA. [1]

Debtors filed a timely notice of appeal of the bankruptcy court's order sustaining California Bank's objection to their plan. The bankruptcy court certified the appeal, and this Court authorized a direct appeal. 28 U.S.C. § 158(a), (d)(2)(A).

II. Discussion

[1] **[2]** We review "de novo the bankruptcy court's and the BAP's interpretations of the bankruptcy statute." *In re Boyajian,* 564 F.3d 1088, 1090 (9th Cir.2009). "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504, 521, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989).

A. Individual chapter 11 bankruptcies and the absolute priority rule.

[3] **[4]** "Individual debtors have two basic options under the Code." *Ice House Am., LLC v. Cardin,* 751 F.3d 734, 736 (6th Cir.2014). They can either liquidate their non-exempt assets under chapter 7, or file for reorganization under chapters 11 or 13. *See* 11 U.S.C. §§ 701–84, 1101–46, 1301–30. A chapter 13 reorganization, however, is only available to individual debtors whose debts fall below certain limits. *See* 11 U.S.C. § 109(e). Individual ***1194** debtors with more debt can only file for reorganization under chapter 11, which is "used primarily by debtors with ongoing businesses." *Toibb v. Radloff,* 501 U.S. 157, 163, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991) (emphasis omitted).

[5] An individual filing under chapter 11 may confirm a plan of reorganization in one of two ways. The first is by satisfying the bankruptcy court that a plan complies with each of the sixteen paragraphs in 11 U.S.C. § 1129(a). Under this path, "[o]f particular note is the requirement of obtaining the consent of each class of creditor as required by paragraph (8) of § 1129(a)." *In re Friedman,* 466 B.R. at 480. Absent unanimous approval of the plan by each class of creditors, a debtor must pursue the second path to confirmation.

[6] Under the second path, a debtor can obtain confirmation by satisfying the bankruptcy court that, notwithstanding any creditor's objections, the plan is "fair and equitable" to each creditor class. 11 U.S.C. § 1129(b)(1), (2). Because this "nonconsensual method of confirmation" is obtained over creditor objection, it is known as a "cramdown." *In re Friedman,* 466 B.R. at 480. A debtor may cram down a plan only if it complies with the absolute priority rule in § 1129(b)(2)(B)(ii). Put another way, a bankruptcy judge may find that a debtor's plan is "fair and equitable" to an objecting creditor only if the plan complies with the absolute priority rule.

[7] The absolute priority rule is a "judicially created concept," with its genesis in "early twentieth-century railroad cases." *In re Friedman,* 466 B.R. at 478. It arose from the Bankruptcy Code's statutory requirement, now codified in 11 U.S.C. § 1129(b)(2), that a reorganization plan be "fair and equitable" to each class of creditors. The rule "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property under a reorganization plan." *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (alteration omitted) (quoting *In re Ahlers,* 794 F.2d 388, 401 (8th Cir.1986)). "The U.S. Supreme Court adopted the absolute priority rule to prevent deals between senior creditors and equity holders that would impose unfair terms on unsecured creditors." *In re Friedman,* 466 B.R. at 478; *see also N. Pac. Ry. Co. v. Boyd,* 228 U.S. 482, 503–04, 33 S.Ct. 554, 57 L.Ed. 931 (1913). The rule later "gained express statutory force, and was incorporated into Chapter 11 of the Bankruptcy Code adopted in 1978" as 11 U.S.C. § 1129(b)(2)(B)(ii). *Norwest,* 485 U.S. at 202, 108 S.Ct. 963.

Before the adoption of BAPCPA in 2005, it was clear that "no Chapter 11 reorganization plan can be confirmed over the creditors' legitimate objections (absent certain conditions not relevant here) if it fails to comply with the absolute priority rule." *Id.* At that time, the absolute priority rule provided:

> [T]he condition that a plan be fair and equitable with respect to a class [of creditors] includes the following requirements:
>
> ....
>
> (B) With respect to a class of unsecured claims—
>
> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) *the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.*

***1195** 11 U.S.C. § 1129(b)(2)(B)(ii) (1994) (emphasis added). Thus, under the pre-BAPCPA Bankruptcy Code, it was clear that "every unsecured creditor must be paid in full before the debtor can retain 'any property' under a plan." *Ice House,* 751 F.3d at 737 (quoting 11 U.S.C. § 1129(b)(2)(B)(ii)).

B. Amendment of the absolute priority rule by BAPCPA.

[8] Three provisions of the post-BAPCPA Bankruptcy Code intertwine to implement the absolute priority rule. First, § 541, which was not altered by BAPCPA, defines an estate in bankruptcy as "comprised of all" the property enumerated in that section, "wherever located and by whomever held," including "all legal or equitable interests of the debtor in property *as of the commencement of the case.*" 11 U.S.C. § 541(a), (a)(1) (emphasis added). Under this section, the "property of the estate," and, therefore, the property subject to the absolute priority rule in chapter 11 cases, is "the property the debtor owned 'as of the commencement of the case.' " *Ice House,* 751 F.3d at 737–38 (quoting 11 U.S.C. § 541(a)(1)).

The second relevant provision is § 1115, which was added in 2005 by BAPCPA. Pub.L. No. 109–8, § 321, 119 Stat. 23, 94–95 (2005). Section 1115, which only applies to individual chapter 11 proceedings, adds to the § 541 "property of the estate" certain property obtained by the debtor "after the commencement of the case":

> In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541—
>
> (1) all property of the kind specified in section 541 that the debtor acquires *after the commencement of the case* but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

(2) earnings from services performed by the debtor *after the commencement of the case* but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

11 U.S.C. § 1115(a) (emphasis added).

Finally, BAPCPA amended the absolutely priority rule itself, adding the underscored language to § 1129(b)(2)(B)(ii):

[T]he condition that a plan be fair and equitable with respect to a class [of creditors] includes the following requirements:

....

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, *except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.*

Pub.L. No. 109–8, § 321, 119 Stat. 23, 95 (emphasis added).

The new clauses in subsection (B)(ii) plainly create an exception to the absolute priority rule that applies only to a chapter 11 "case in which the debtor is an individual." 11 U.S.C. § 1129(b)(2)(B)(ii). But the question is, what is the exception's scope? Or, put another way, what property may an individual chapter 11 debtor retain "without running afoul of the absolute priority ***1196** rule"? *In re Friedman,* 466 B.R. at 487 (Jury, Bankr. J., dissenting).

C. Post–BAPCPA case law.

[9] "A significant split of authorities has developed nationally among the bankruptcy courts" regarding the answer to this question. *In re Maharaj,* 681 F.3d 558, 563 (4th Cir.2012) (describing division). Two conflicting positions have emerged: the "broad view" and the "narrow view." *Id.*

Courts applying the broad view hold that

by including in § 1129(b)(2)(B)(ii) a cross-reference to § 1115 (which in turn references § 541, the provision that defines the property of a bankruptcy estate), Congress intended to include the entirety of the bankruptcy estate as property that the individual debtor may retain, thus effectively abrogating the absolute priority rule in Chapter 11 for individual debtors.

Id. Under this view, an individual debtor is entitled to retain most prepetition and postpetition property and nonetheless cram down a plan over an unsecured creditor's objection. *See, e.g., In re Friedman,* 466 B.R. at 482; *In re Anderson,* No. 11–61845–11, 2012 WL 3133895, at *7 n. 6 (Bankr.D.Mont. Aug. 1, 2012); *In re Shat,* 424 B.R. 854, 868 (Bankr.D.Nev.2010); *In re Roedemeier,* 374 B.R. 264, 276 (Bankr.D.Kan.2007).

[10] Courts applying the narrow view instead hold "that the BAPCPA amendments merely have the effect of allowing individual Chapter 11 debtors to retain property and earnings acquired after the commencement of the case that would otherwise be excluded under § 541(a)(6) & (7)." *In re Maharaj,* 681 F.3d at 563. Under this view, an individual debtor may not cram down a plan that would permit the debtor to retain prepetition property that is not excluded from the estate by § 541, but may cram down a plan that permits the debtor to retain only postpetition property.

A split panel of the Ninth Circuit BAP accepted the broad view in *In re Friedman,* 466 B.R. at 484. But, all of our sister circuits that have considered the issue have adopted the narrow view, [2] as have a sizeable majority of the district, bankruptcy appellate, and bankruptcy courts. [3] We today agree with our sister circuits and overrule *In re Friedman.*

*1197 D. Interpretation of the BAPCPA amendments.

BAPCPA added § 1115 as an entirely new provision of the Bankruptcy Code. That section "expands the definition of 'property of the estate' in Chapter 11 cases to include, for the first time, property obtained by the debtor 'after the commencement of the case.' And all of that property, absent some other amendment to the Code, would be subject to the absolute-priority rule." *Ice House,* 751 F.3d at 738 (quoting 11 U.S.C. § 1115(a)(1), (2)). The new language in § 1129(b)(2)(B)(ii) added by BAPCPA obviously creates "an exception to the absolute-priority rule," but less obvious is "the exception's scope." *Id.* The key to that question is determining what the word "included" means in the phrase of § 1129(b)(2)(B)(ii) stating that "the debtor may retain property included in the estate under section 1115."

The *Friedman* majority determined:

> "Included" is not a word of limitation. To limit the scope of estate property in §§ 1129 and 1115 would require the statute to read "included, except for the property set out in Section 541" (in the case of § 1129(b)(2)(B)(ii)), and "in addition to, but not inclusive of the property described in Section 541" (in the case of § 1115).

466 B.R. at 482 (footnote omitted). In contrast, the Sixth Circuit's opinion in *Ice House* held:

> The critical language in § 1129(b)(2)(B)(ii) is that "the debtor may retain property included in the estate under section 1115." And the key word within that language is "included." "Include" is a transitive verb, which means it "shows action, either upon someone or something." Shertzer, *Elements of Grammar* 26 (1986). The action described by "include" is either "to take in as a part, an element, or a member" (first definition) or "to contain as a subsidiary or subordinate element" (second definition). *The American Heritage Dictionary* 913 (3d ed.1992). The first definition ("to take in") describes genuine action—grabbing something and making a part of a larger whole —whereas the second definition ("to contain") lends itself, more dryly, to a description of things that are already there —"the duties of a fiduciary include...." The first definition is plainly the better fit in § 1129(b)(2)(B)(ii): converted into the active voice, § 1129(b)(2)(B)(ii) refers to property that § 1115 includes in the estate, which naturally reads as "property that § 1115 takes into the estate," rather than as "property that § 1115 contains in the estate." Thus—employing this definition and converted into the active voice— § 1129(b)(2)(B)(ii) provides that "the debtor may retain property that § 1115 takes into the estate."

Ice House, 751 F.3d at 738–39 (alterations omitted). Under this reading, "what § 1115 takes into the estate is property 'that the debtor acquires *after* the commencement of the case,' " and it is only "*that* property" that " 'the debtor may retain' when his unsecured creditors are not fully paid." *Id.* at 739 (quoting 11 U.S.C. §§ 1115(a), 1129(b)(2)(B)(ii)) (internal punctuation omitted).

We agree with the Sixth Circuit. Section 1115 and the new clauses in § 1129(b)(2)(B)(ii) were both added by BAPCPA. Reading these two provisions as defining a new class of property that is exempt from the absolute priority rule nicely harmonizes the new provisions.[4] ***1198** *See In re Lively,* 717 F.3d 406, 409 (5th Cir.2013) ("[W]e are inclined to agree with the bankruptcy court in this case that the 'narrow' interpretation is unambiguous and correct.").

The history of the absolute priority rule also strongly supports the narrow view. Congress repealed the absolute priority rule in 1952, only to reinstate it in 1978, demonstrating that when it intends to abrogate the rule, it knows how to do so explicitly. *Compare* H.R.Rep. No. 822320 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1960, 1981–82, *with* Bankruptcy Code of 1978, Pub.L. No. 95–598, § 1129, 92 Stat. 2549, 2635–38 (codified in scattered sections of 11 and 28 U.S.C.).[5] More importantly, the Supreme Court has expressly warned against finding implied repeal of provisions of the Bankruptcy Code. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 380, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) ("Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute; it is most improbable that it would have been made without even any mention in the legislative history.") (citation omitted); *see also In re Maharaj,* 681 F.3d at 571 ("The canon against implied repeal is particularly strong in the field of bankruptcy law.").

Courts adopting the broad view have stressed that "Congress in adopting BAPCPA's individual debtor chapter 11 provisions borrowed provisions from chapter ***1199** 13," which does not have an absolute priority rule. *In re Friedman,* 466 B.R. at 483 (comparing, inter alia, §§ 1123(a)(8) and 1322(a)(1), §§ 1141(d)(5)(A) and 1328(a), and §§ 1127(e) and 1329(a)); *see also In re Shat,* 424 B.R. at 868 (noting "the host of change[s] to chapter 11 with respect to individuals, all made with the goal of shaping an individual's chapter 11 case to look like a chapter 13 case"); *In re Roedemeier,* 374 B.R. at 275 ("Many of the BAPCPA's changes to Chapter 11 apply only to individual debtors and are clearly drawn from the Chapter 13 model."). But if the BAPCPA amendments were intended to abrogate the absolute priority rule for chapter 11 individual debtors, Congress could have achieved that goal in a far more straightforward manner. Instead of adding language to § 1129(b)(2)(B)(ii), Congress simply could have made that provision inapplicable to individual chapter 11 reorganizations. *See In re Lively,* 717 F.3d at 410 (describing broad view as "a startling, and most indirect, way for Congress to have effected partial implicit repeal of the very provision that the section amended"). Or Congress could have raised the debt limits for chapter 13 cases, ushering more individuals into that regime. *See In re Maharaj,* 681 F.3d at 573 ("Congress could have effected the changes that Debtors argue it sought in a far less awkward and convoluted manner by simply raising the Chapter 13 debt limits and making additional individuals eligible to proceed under that chapter."); *see also Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.,* 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.") (citation omitted).

[11] We acknowledge that retaining the absolute priority rule in chapter 11 cases works a "double whammy" on a debtor because, under the BAPCPA amendments to § 1129(a)(15), he "must dedicate at least five years' disposable income to the payment of unsecured creditors, and—unlike a debtor in Chapter 13—is also subject to the absolute-priority rule (and thus cannot retain any pre-petition property) if he does not pay those creditors in full." *Ice House,* 751 F.3d at 740. But the broad view could exact a heavy penalty on a "crammed down" creditor, as this case illustrates. Our task is not to balance the equities, however, but to interpret the Bankruptcy Code. *See Norwest,* 485 U.S. at 209, 108 S.Ct. 963 (noting that relief from any unfairness in the statutory scheme "cannot come from a misconstruction of the applicable bankruptcy laws, but rather, only from action by Congress"). We conclude today that the BAPCPA amendments do not impliedly repeal the long-standing absolute priority rule.

CONCLUSION

The order of the bankruptcy court sustaining California Bank's objection to the Debtors' plan is **AFFIRMED.**

All Citations

811 F.3d 1191, 62 Bankr.Ct.Dec. 33, 16 Cal. Daily Op. Serv. 1075, 2016 Daily Journal D.A.R. 980

Footnotes

1 Debtors argue that *In re Windmill Farms, Inc.,* 70 B.R. 618 (9th Cir. BAP 1987), *rev'd on other grounds,* 841 F.2d 1467, 1474 (9th Cir.1988), "held that BAP decisions were binding on all bankruptcy courts in this circuit," and the bankruptcy court here was required to follow *In re Friedman.* Because we must today address the continued applicability of the absolute priority rule regardless of the precedential effect of BAP opinions, we pretermit consideration of the issue. *Cf. Bank of Maui v. Estate Analysis, Inc.,* 904 F.2d 470, 472 (9th Cir.1990) (O'Scannlain, J., specially concurring) (discussing need for judicial council action to make BAP decisions binding on all bankruptcy courts within the circuit).

2 *See Ice House,* 751 F.3d at 740 ("We therefore hold that the absolute-priority rule continues to apply to pre-petition property of individual debtors in Chapter 11 cases."); *In re Lively,* 717 F.3d 406, 410 (5th Cir.2013) ("The absolute priority rule, in particular, has been a cornerstone of equitable distribution for Chapter 11 creditors for over a century. We must presume Congress was well aware of that rule and, in the absence of a clearer directive, modified § 1129(b)(2)(B)(ii) in order to refine it, not reverse it, for individual debtors."); *In re Stephens,* 704 F.3d 1279, 1287 (10th Cir.2013) ("[W]e decline to find an implied repeal [of the absolute priority rule] here."); *In re Maharaj,* 681 F.3d at 575 ("[W]e believe that Congress did not intend to abrogate the absolute priority rule for individual Chapter 11 debtors.").

3 *See, e.g., In re Woodward,* 537 B.R. 894, 901 (8th Cir. BAP 2015); *In re Brown,* 505 B.R. 638, 648–49 (E.D.Pa.2014); *In re Tucker,* 479 B.R. 873, 877–78 (Bankr.D.Or.2012); *In re Arnold,* 471 B.R. 578, 613–14 (Bankr.C.D.Cal.2012); *In re Borton,* No. 09–00196–TLM, 2011 WL 5439285, at *4 (Bankr.D.Idaho Nov. 9, 2011); *In re Kamell,* 451 B.R. 505, 512 (Bankr.C.D.Cal.2011); *In re Draiman,* 450 B.R. 777, 821 (Bankr.N.D.Ill.2011); *In re Stephens,* 445 B.R. 816, 820–21 (Bankr.S.D.Tex.2011); *In re Karlovich,* 456 B.R. 677, 682 (Bankr.S.D.Cal.2010); and *In re Gbadebo,* 431 B.R. 222, 230 (Bankr.N.D.Cal.2010). *But see, e.g., In re Friedman,* 466 B.R. at 482; *In re Anderson,* 2012 WL 3133895, at *7 n. 6; *In re Shat,* 424 B.R. at 868; and *In re Roedemeier,* 374 B.R. at 276.

4 Some courts and commentators have suggested that the cross-reference in the second new clause in § 1129(b)(2)(B)(ii) to § 1129(a)(14), a provision involving domestic support obligations, is a scrivener's error and was meant to refer to §

1129(a)(15), which involves a new "best efforts" requirement added to chapter 11 by BAPCPA. *See, e.g., In re Lucarelli,* 517 B.R. 42, 47 n. 2 (Bankr.D.Conn.2014); *In re Lively,* 467 B.R. 884, 890 n. 3 (Bankr.S.D.Tex.2012); *In re Shat,* 424 B.R. at 860 n. 21; Ralph Brubaker, *The Absolute Priority Rule for Individual Chapter 11 Debtors: To Be or Not to Be?,* 32 No. 10 Bankr.L. Letter, at 5 (Oct. 2012) ("[A]s all fully recognize, the cross-reference in the absolute priority rule amendment to § 1129(a)(14) (dealing with full payment of domestic support obligations) was obviously a drafting error."). We need not decide that issue today. We note that although the reference to (a)(14) may have been a scrivener's error, it is "not an entirely absurd mixup.... One could easily assume that Congress wished to protect domestic support creditors by not allowing a debtor to keep any postpetition earnings—a form of Section 1115 property—so long as any domestic support obligation was not current." *In re Shat,* 424 B.R. at 860 n. 21.

5 The legislative history of the BAPCPA also bolsters the view that Congress did not intend to repeal the absolute priority rule. The Judiciary Committee Report describes "various consumer protection reforms" in BAPCPA, such as penalizing "a creditor who unreasonably refuses to negotiate" and requiring certain credit solicitations to "include enhanced consumer disclosures." H.R.Rep. No. 109–31(I), pt. 1, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89. But this list of protections does not include any supposed repeal of the absolute priority rule. It seems unlikely that Congress would address a cornerstone rule of bankruptcy practice "in the most oblique way possible, and yet omit any mention of this remedy from the legislative history." *In re Maharaj,* 681 F.3d at 575; *see also Dewsnup v. Timm,* 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) ("Furthermore, this Court has been reluctant to accept arguments that would interpret the [Bankruptcy] Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."); *In re Bonner Mall P'ship,* 2 F.3d 899, 913 (9th Cir.1993) ("Where the text of the Code does not unambiguously abrogate pre-Code practice, courts should presume that Congress intended it to continue unless the legislative history dictates a contrary result.") (citing *Dewsnup,* 502 U.S. at 419, 112 S.Ct. 773). It also seems unlikely that Congress would facilitate cramdowns, typically objected to by creditors, in an act designed "to correct perceived abuses of the bankruptcy system." *Ransom v. FIA Card Servs.,* 562 U.S. 61, 64, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 231–32, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010)); *see also In re Friedman,* 466 B.R. at 490 (Jury, Bankr. J., dissenting) ("[T]he purpose behind BAPCPA was to have debtors pay more, not less.").

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811 F.3d 1133
United States Court of Appeals,
Ninth Circuit.

Leslie T. GLADSTONE, Chapter 7 Trustee, Plaintiff–Appellee,
v.
U.S. BANCORP, a Delaware corporation; U.S. Bank N.A., a banking subsidiary; and Coventry First LLC, a Delaware limited liability company; Defendants–Appellants,
David M. Green, Debtor–In Re.

No. 13–55773.
|
Argued and Submitted June 2, 2015.
|
Filed Jan. 8, 2016.

Synopsis
Background: Trustee brought adversary proceeding to avoid and recover three undisclosed life settlements executed between debtor and purchasers as fraudulent transfers. The bankruptcy court granted purchasers' motion for summary judgment. Trustee appealed. The United States District Court for the Southern District of California, Cathy Ann Bencivengo, J., reversed the judgment entered by the bankruptcy court. Purchasers appealed.

Holdings: The Court of Appeals, Thomas, Chief Judge, held that:

[1] debtor's interests in term life insurance policies, including secondary market value of policies and resulting life settlements, constituted recoverable "interest of the debtor in property";

[2] life insurance policies and viatical settlements were not exempt;

[3] debtor waived his exemption to life insurance policies and viatical settlements;

[4] Court of Appeals would not reach issue on appeal of whether life insurance policies and viatical settlements were exempt;

[5] equitable tolling could apply to two-year limitations period for trustee's avoidance action to recover debtor's interests in term life insurance policies, including secondary market value of policies and resulting life settlements; and

[6] trustee was entitled to leave to amend her avoidance action.

Affirmed.

West Headnotes (14)

[1] **Bankruptcy**
Conclusions of law; de novo review
Bankruptcy
Clear error

Court of Appeals and federal district court review bankruptcy court's findings of fact for clear error, and its conclusions of law de novo.

Cases that cite this headnote

[2] **Bankruptcy**
Property or rights transferred

Debtor's interests in term life insurance policies, including secondary market value of policies and resulting life settlements, constituted recoverable "interest of the debtor in property" pursuant to fraudulent transfer section of Bankruptcy Code; debtor had legal and equitable interest in that property, property was not excluded from estate, and property was not subject of proper exemption. 11 U.S.C.A. §§ 541(a, b), 548(a)(1).

Cases that cite this headnote

[3] **Bankruptcy**
Property or rights transferred

When determining the scope of an "interest of the debtor in property" under the fraudulent transfers section of the Bankruptcy Code, a court looks first at the plain language, examining not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy; if the statutory language is unambiguous, the court's inquiry is at an end, but if the language is ambiguous, then it examines legislative history, and also looks to similar provisions within the statute as a whole and the language of related or similar statutes to aid in interpretation.

Cases that cite this headnote

[4] **Bankruptcy**
Legal or equitable interests in general
Bankruptcy
Operation and effect

All equitable and legal interests that the debtor has when the bankruptcy petition is filed become property of the estate, unless excluded by statute or properly exempted by the debtor; if no exclusion or exemption applies, or if the debtor has failed to claim qualifying property as exempt, then the debtor's interest in the property remains property of the bankruptcy estate. 11 U.S.C.A. § 541(a).

Cases that cite this headnote

[5] **Bankruptcy**
Insurance policies and liabilities thereon

Life insurance policies and viatical settlements are not excluded from becoming property of the bankruptcy estate. 11 U.S.C.A. § 541(b).

Cases that cite this headnote

[6] **Bankruptcy**
Timeliness

Life insurance policies and viatical settlements were not exempt, where debtor did not claim that property as exempt within period specified by Bankruptcy Rules and did not seek to amend the schedules. 11 U.S.C.A. § 522(*l*); Fed.Rules Bankr.Proc.Rule 4003(a), 11 U.S.C.A.; West's Ann.Cal.C.C.P. § 703.130.

Cases that cite this headnote

[7] **Bankruptcy**
Operation and effect
Bankruptcy
Waiver or Loss of Exemption

An exemption is provided only for the benefit of the debtor; if the exempt property is transferred, the debtor has in essence waived the exemption, and the transferee cannot avail herself of the exemption in a subsequent avoidance action.

Cases that cite this headnote

[8] **Bankruptcy**
Operation and effect
Bankruptcy
Waiver or Loss of Exemption

Debtor waived his exemption to life insurance policies and viatical settlements when he shifted beneficial interest of his insurance policies to removed third party purchasers, via his wife, and thus purchasers lacked standing to subsequently claim his exemption as defense to trustee's avoidance action. 11 U.S.C.A. §§ 522(*l*), 548(a)(1); Fed.Rules Bankr.Proc.Rule 4003(a), 11 U.S.C.A.; West's Ann.Cal.C.C.P. § 703.130.

Cases that cite this headnote

[9] **Bankruptcy**
Presentation of grounds for review

Court of Appeals would not reach issue on appeal of whether life insurance policies and viatical settlements were exempt, where third party purchasers did not present that argument either to bankruptcy or district court, and Court of Appeals declined to exercise its discretion to consider that argument for first time on appeal. 11 U.S.C.A. § 522(*l*); Fed.Rules Bankr.Proc.Rule 4003(a), 11 U.S.C.A.; West's Ann.Cal.C.C.P. § 703.130.

Cases that cite this headnote

[10] **Bankruptcy**
Time limitations; computation

Equitable tolling could apply to two-year limitations period for trustee's avoidance action to recover debtor's interests in term life insurance policies, including secondary market value of policies and resulting life settlements, where debtor concealed conveyance from trustee, third party purchasers necessarily knew that debtor had transferred beneficial interests in life insurance policy to his wife, trustee went to great lengths to discover multiple undisclosed life insurance policies held by debtor, and many delays were due to purchasers' requests or actions of their counsel. 11 U.S.C.A. §§ 546(a)(1)(A), 548(a)(1).

Cases that cite this headnote

[11] **Bankruptcy**

Time limitations; computation

The two-year limitations statute of limitations for trustee's avoidance action may be subject to equitable tolling. 11 U.S.C.A. § 546(a)(1).

1 Cases that cite this headnote

[12] **Limitation of Actions**

Discovery of Fraud

Limitation of Actions

Suspension or stay in general; equitable tolling

Under the equitable tolling doctrine, where a party remains in ignorance of a wrong without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

1 Cases that cite this headnote

[13] **Bankruptcy**

Pleading

Trustee was entitled to leave to amend her avoidance action to add allegations regarding postpetition transfer of term life insurance policy and to allege that policies were transferred directly by debtor to purchasers on particular date; although trustee previously amended the complaint, trustee discovered new evidence of executed copy of policy's beneficiary transfer form after purchasers did not initially produce that form in response to trustee's subpoena and form supported trustee's avoidance claim. 11 U.S.C.A. §§ 548, 549.

Cases that cite this headnote

[14] **Bankruptcy**

Scope of review in general

The Court of Appeals strictly reviews bankruptcy court's denial of leave to amend in light of the strong policy permitting amendment.

Cases that cite this headnote

Attorneys and Law Firms

***1135** Susan C. Stevenson (argued) and Jennifer E. Duty, Pyle Sims Duncan & Stevenson, San Diego, CA, for Defendants–Appellants.

Sean C. Coughlin (argued), Financial Law Group, La Jolla, CA, for Plaintiff–Appellee.

Roland R. Peterson and Angela M. Allen, Jenner & Block, LLP, Chicago, IL; Carl N. Wedoff, Jenner & Block, LLP, New York, N.Y., for Amicus Curiae National Association of Bankruptcy Trustees.

Appeal from the United States District Court for the Southern District of California, Cathy Ann Bencivengo, District Judge, Presiding. D.C. No. 3:12–cv–00424–CAB–BLM.

Before: SIDNEY R. THOMAS, Chief Judge, CONSUELO M. CALLAHAN, Circuit Judge and JAMES K. SINGLETON, * Senior District Judge.

OPINION

THOMAS, Chief Judge:

In recent years, a substantial market has developed for the purchase of unmatured term life insurance policies. In these "viatical settlement" or "life settlement" transactions, the policyholder receives a lump-sum settlement greater than the cash surrender value of the policy, but less than the policy's death benefit. The purchaser continues to pay the policy premiums, and collects the death benefit when the policyholder dies. The purchaser then typically offers the life insurance benefit of the policy to potential investors. *See* *Huskey v. Tolman (In re Tolman),* 491 B.R. 138, 144 (Bankr.D.Idaho 2013).

Viatical settlements often occur when the policyholder is terminally ill and needs funds to pay for end-of-life care or under ***1136** other circumstances when the policyholder needs "present cash more than the security of a death benefit." *Tolman,* 491 B.R. at 144; *see also* *Life Partners, Inc. v. Morrison,* 484 F.3d 284, 287 (4th Cir.2007). In this case, the purchasers paid approximately $507,000 for life settlements with the debtor and received $9,000,000 in death benefits when he died shortly thereafter.

The bankruptcy trustee filed an adversary proceeding to recover the market value of the life settlements. The question presented in this case is whether the debtor's interests in the term life insurance policies, including the secondary market value of the policies and resulting life settlements, constitute a recoverable "interest of the debtor in property" pursuant to 11 U.S.C. § 548(a)(1). We conclude that they do, and we affirm the judgment of the district court.

I

Facing financial difficulties, David Green filed a voluntary Chapter 7 bankruptcy petition on September 12, 2007. Leslie Gladstone (the "Trustee") was appointed Chapter 7 trustee of the bankruptcy estate (the "Estate"). David Green died on February 22, 2008, about five months after filing his Chapter 7 petition.

David Green failed to disclose a number of assets when he filed his Chapter 7 petition. This appeal concerns three undisclosed life settlements executed between David Green and Coventry First, LLC (collectively with U.S. Bancorp and U.S. Bank National Association, "Defendants"), which the Trustee seeks to avoid and recover as fraudulent transfers.

In the months preceding the filing of his Chapter 7 petition, David Green took steps to transfer ownership of the three policies to consummate the life settlements. David Green did not disclose any of the life settlements on the Statement of Financial Affairs he submitted with his Chapter 7 petition. Nor did he disclose the life settlements at his § 341 First Meeting of Creditors, when he was questioned under oath by the Trustee. The life settlements were negotiated in two sets of transactions, which were brokered by Robert Hamzey, a friend of the Greens.

The first set of transactions involved two Transamerica policies. Policy 3530 was issued to insure the life of David Green for his own benefit, with a face value of $2,000,000. Policy 4528 was issued to insure the life of David Green for his own benefit, with a face value of $4,000,000. David Green transferred the beneficial interest in the Transamerica policies to his wife, Eileen Green. Eileen Green subsequently signed a life settlement agreement to sell Policy 3530 for $5,000 and Policy 4528 for $188,000 to the Defendants. She received $193,000 from the Defendants about one month before David Green filed his bankruptcy petition. After his death five months later, Defendants received $6,000,000, the face value death benefits for the Transamerica policies.

The second set of transactions involved what became Protective Policy 3280. That policy was issued to insure the life of David Green for the benefit of Eileen Green, with a face value of $3,000,000. A month before filing bankruptcy, David and Eileen Green signed a life settlement agreement to convert the term life policy to a universal policy and sell it to Defendants for $280,000 plus $34,776.66 in premium reimbursements. Eileen Green transferred the beneficial interest of Protective 3280 to Defendants shortly before the bankruptcy. However, Protective did not transfer the policy to the Defendants until after the bankruptcy was filed, whereupon Eileen Green was paid $314,776.66 per the life settlement agreement. After David Green's death, Defendants ***1137** received the $3,000,000 proceeds from the policy.

In sum, Defendants paid approximately $507,000 for the life settlements and received $9,000,000 in death benefits when Green died a few months after the viatical settlement transactions. The following chart summarizes the three policies and life settlements at issue:

Policy	**Face Value**	**Settlement**	**Premium Reimbursement**
Transamerica 3530	$2,000,000	$ 5,000	none

Transamerica 4528	$4,000,000	$188,000	none
Protective 3280	$3,000,000	$280,000	$34,776.66

In addition to the life settlements at issue in this appeal, other assets connected to the Estate changed hands in the weeks and months leading up to David Green's bankruptcy filing. These assets include two other life insurance policies, a condominium, and a mortgage note owned by the Greens. None of the life settlements with Defendants and none of the foregoing other assets and transfers were disclosed when David Green filed his Chapter 7 petition on September 12, 2007, nor were they disclosed on his Section 341(a) questionnaire, or at the Section 341(a) meeting of creditors. These transactions frustrated the Trustee's task to assemble the bankruptcy estate.

The Trustee learned of David Green's death a few weeks after he died. Over a year later, by coincidence alone, she found out about David Green's undisclosed other assets and transfers at a Section 341 meeting in another bankruptcy proceeding to which she was appointed. Based on that information, and after Eileen Green and Hamzey declined to cooperate with her investigation that followed, the Trustee sought and received approval to conduct examinations of and document production by Eileen Green and Hamzey pursuant to Federal Rule of Bankruptcy Procedure 2004. At Hamzey's Rule 2004 examination, the Trustee gathered more information about other assets and transfers not at issue in this appeal. With this information in hand, the Trustee filed an initial adversary complaint seeking recovery and avoidance of the other assets and transfers and an emergency motion for extension of the statute of limitations. The bankruptcy court granted the motion, and the statute of limitations was extended to December 11, 2009.

On August 9, 2010, David Green's stepson Frank Ray called the Trustee's attorney and told him about the life settlements at issue in this appeal. The next day, Ray delivered copies of the relevant purchase agreements that documented the two life settlement transactions. Based on this information and documents subpoenaed from the Defendants, the Trustee filed the first amended complaint, which sought to avoid the transfer of the Transamerica and Protective life insurance policies to Defendants.

The Trustee pursued the adversary proceeding against Defendants in the months that followed, but was met with requests to postpone depositions and other discovery until after a hearing on Defendants' anticipated motion for summary judgment. The Trustee eventually received interrogatory answers and moved the bankruptcy court for leave to file a second amended complaint because discovery showed that the Protective 3280 life settlement did not become effective until after the bankruptcy ***1138** was filed and to make further allegations about the pre-petition transfers.

The bankruptcy court granted Defendants' motion for summary judgment and denied the Trustee's motion for leave to file the second amended complaint in a minute order. The bankruptcy court did not issue findings of fact and conclusions of law or otherwise state grounds upon which the motions were adjudicated.

The Trustee appealed the judgment of dismissal to the district court. The district court reversed the judgment entered by the bankruptcy court and reversed the bankruptcy court's order denying the Trustee leave to file the second amended complaint. This timely appeal followed.

II

[1] The district court heard the initial appeal pursuant to 28 U.S.C. § 158(a) (2012). We have jurisdiction to review the district court's order pursuant to 28 U.S.C. § 158(d)(1). “The role of the district court and this court are basically the same in the bankruptcy appellate process. Therefore, we review the bankruptcy court decision directly. We review the bankruptcy court's findings of fact for clear error, and its conclusions of law de novo.” *Microsoft Corp. v. DAK Indus., Inc. (In re DAK Indus., Inc.),* 66 F.3d 1091, 1094 (9th Cir.1995) (citations omitted). In conducting de novo review of the bankruptcy court's grant of summary judgment, we “must view the evidence in the light most favorable to the non-moving party and ‘determine whether there are any genuine issues of material fact and whether the bankruptcy court correctly applied the substantive law.’ ” *Caneva v. Sun*

Cmts. Operating Ltd. P'ship (In re Caneva), 550 F.3d 755, 760 (9th Cir.2008) (quoting *Parker v. Cmty. First Bank (In re Bakersfield Westar Ambulance, Inc.),* 123 F.3d 1243, 1245 (9th Cir.1997)).

III

[2] As we have noted, the question presented in this case is whether the debtor's interests in the term life insurance policies, including the secondary market value of the policies and resulting life settlements, constitute a recoverable "interest of the debtor in property" pursuant to 11 U.S.C. § 548(a)(1). The district court correctly held that they were.

A

[3] In determining the scope of an "interest of the debtor in property" under § 548, we begin with the statutory language of the Bankruptcy Code, employing the usual tools of statutory construction. We look first at the plain language, examining "not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Hawkins v. Franchise Tax Bd. of Cal.,* 769 F.3d 662, 666 (9th Cir.2014) (quoting *Children's Hosp. & Health Ctr. v. Belshe,* 188 F.3d 1090, 1096 (9th Cir.1999)). If the statutory language is unambiguous, our inquiry is at an end. *Id.* If the language is ambiguous, then we examine legislative history, and "also look to similar provisions within the statute as a whole and the language of related or similar statutes to aid in interpretation." *Id.* (quoting *United States v. LKAV,* 712 F.3d 436, 440 (9th Cir.2013)).

The Bankruptcy Code does not define "an interest of the debtor in property." However, we have guidance from the Supreme Court as to its meaning. The Court has explained that the phrase "is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." *Begier v. I.R.S.* 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990). Therefore, the interest must be analyzed under § 541, ***1139** which defines the property of the estate. *Id.* at 58–59, 110 S.Ct. 2258; *see also Taylor Assocs. v. Diamant (In re Advent Mgmt. Corp.),* 104 F.3d 293, 295 (9th Cir.1997) (confirming that "an interest of the debtor in property" under § 547 and § 548 is determined by whether the interest would have been "property of the estate" under § 541).

Under the Bankruptcy Code, the filing of a bankruptcy petition creates a bankruptcy estate. § 541(a). With certain exceptions, the estate is comprised of the debtor's legal or equitable interests in property "wherever located and by whomever held." *Id.* As the Supreme Court has noted, "Congress intended a broad range of property to be included in the estate." *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 204, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983); *see also Chappel v. Proctor (In re Chappel),* 189 B.R. 489, 493 (9th Cir.BAP 1995) ("The legislative history of the Bankruptcy Code reveals that the concept of property of the estate is to be interpreted broadly.").

Indeed, the legislative history indicates that § 541(a) would "bring anything of value that the debtors have into the estate." H.R. Rep. 95–595 (1977), at 176, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6136. The scope of § 541(a) of the Bankruptcy Code is much greater than that of the prior Bankruptcy Act of 1898. *Coben v. LeBrun (In re Golden Plan of Cal., Inc.),* 37 B.R. 167, 169 (Bankr.E.D.Cal.1984).

The debtor held the ownership title to the life insurance policies prior to their transfer. "[P]roperty of the estate" includes all property in which the debtor has legal title except "to the extent of an equitable interest in such property that the debtor does not hold." *In re Advent Mgmt. Corp.,* 104 F.3d at 295. As indicated by the life settlements in this case, the term life insurance policies owned by the debtor had market value to the debtor independent of the death benefit or equitable beneficial interest. Therefore, because all of the debtor's legal and equitable interests became part of the bankruptcy estate when the case was commenced, his interest in the term life insurance policies and the life settlements would have been part of the bankruptcy estate under § 541(a) if he had not transferred them. Accordingly, the life insurance policies constitute "an interest of the debtor in property" within the meaning of § 548, except to the extent that a third party had a beneficial or equitable interest.

B

Two sections of the Bankruptcy Code allow a debtor to retain assets that would otherwise form part of the bankruptcy estate under § 541(a) and be subject to creditors' claims: § 541(b) and § 522. Section 541(b) identifies certain types of property that are expressly excluded from the bankruptcy estate from the outset. Section 522 provides an avenue for the debtor to exempt certain property from the estate.

[4] In short, all equitable and legal interests that the debtor has when the bankruptcy petition is filed become property of the estate, unless excluded by statute or properly exempted by the debtor. If no exclusion or exemption applies, or if the debtor has failed to claim qualifying property as exempt, then the debtor's interest in the property remains property of the bankruptcy estate. Therefore, the property falls within the reach of § 541(a), unless excluded by § 541(b) or properly exempted under § 522.

1

[5] The district court properly concluded that the life settlements at issue were not excluded from the estate under § 541(b). In contrast to the broad scope of § 541(a), § 541(b) sets forth "narrow ***1140** exceptions to the interests of the debtor which are not considered as property of the estate." *Southtrust Bank of Ala., N.A. v. Thomas (In re Thomas),* 883 F.2d 991, 995 (11th Cir.1989). Neither life insurance policies, nor viatical settlements are listed among the § 541(b) exclusions. Therefore, under its plain terms, they are not excluded from becoming property of the bankruptcy estate pursuant to § 541(b). *Wallace v. Crawford (In re Meyers),* 483 B.R. 89, 98 (Bankr.W.D.N.C.2012).

Defendants argue that life insurance policies and life settlements are excluded from the bankruptcy estate by a judicially created exclusion. Based on a line of authority tracing to Supreme Court decisions interpreting the Bankruptcy Act of 1898, Defendants contend that the Estate's interest is limited to the cash surrender value of the life insurance policies. The policies at issue have no cash surrender value, so if Defendants are correct, the Trustee's avoidance action fails as a matter of law.

However, Defendants' argument is premised on a provision of the Bankruptcy Act of 1898, which was abrogated by the adoption of the Bankruptcy Code in 1978. Section 70(a) of the Bankruptcy Act of 1898 specified, in relevant part:

> That when any bankrupt shall have any insurance policy, which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets[.]

This section's purpose was "construed ... to vest the surrender value in the trustee for the benefit of the creditors, and not otherwise to limit the bankrupt in dealing with his policy." *Burlingham v. Crouse,* 228 U.S. 459, 473, 33 S.Ct. 564, 57 L.Ed. 920 (1913); *see also In re Holden,* 114 F. 650, 652 (9th Cir.1902). Defendants argue that this authority implies that life settlements are excluded from a bankruptcy estate.

Burlingham, Holden, and their progeny, including *Lekas v. Mann (In re Lekas),* 299 B.R. 597, 602 (Bankr.D.Ariz.2003), do not state the rule defining the scope of a bankruptcy estate under the Bankruptcy Code, which supplanted the Bankruptcy Act of 1898. Rather, *Burlingham* interprets a section of the Bankruptcy Act of 1898, which is no longer in force. Because Green's bankruptcy was filed after October 1, 1979, the Bankruptcy Code applies, not the prior Bankruptcy Act of 1898. *See Washburn & Roberts, Inc. v. Park East (In re Washburn & Roberts, Inc.),* 795 F.2d 870, 873 (9th Cir.1986) ("Congress provided that in any bankruptcy case commenced after October 1, 1979, the old Bankruptcy Act of 1898 would not apply."). The Court's construction of § 70(a) in *Burlingham* was accordingly abrogated by statute when the Bankruptcy Reform Act of 1978 was enacted.

Indeed, Congress specifically eliminated the prior section 70(a) in adopting the § 541(b) exclusions. *See* Bankruptcy Reform Act of 1978, Pub.L. No. 95–598, § 541, 92 Stat. 2549 (1978). Congress was well aware of not only the prior statutory provision, but the case law interpreting it. *In re Meyers,* 483 B.R. at 98. Because the prior exclusion was not included among the exclusions listed in § 541(b) when the Bankruptcy Code was enacted, "the canon *expressio unius est exclusio alterius* ... has force" as "the items expressed are ***1141** members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody*

Coal Co., 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) (quoting *United States v. Vonn,* 535 U.S. 55, 65, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002)). The legislative history of the Bankruptcy Reform Act of 1978 demonstrates that Congress considered the definition of estate property presented in § 70(a) of the Bankruptcy Act of 1898. *See* H.R.Rep. No. 95–595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323–24. Therefore, "it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Barnhart,* 537 U.S. at 168, 123 S.Ct. 748. [1]

The structure of the Bankruptcy Code buttresses our conclusion. In dealing with the issue of life insurance, Congress chose not to exclude it from the estate under § 541(b), but to provide an elective exemption under § 522, which provided an exemption for "[a]ny unmatured life insurance contract owned by the debtor, other than a credit life insurance contract." 11 U.S.C. § 522(d)(7).

Even if it were not inapposite due to statutory abrogation, *Burlingham* and its progeny are not on point with the facts of David Green's bankruptcy. The district court correctly observed that *Burlingham* is not controlling because the Court did not "specifically address the possibility of the policies being sold on the secondary market[.]" This century-old decision cannot be fairly read to state binding precedent as to the treatment of life settlements by a bankruptcy trustee, as the secondary market for life insurance policies and the life settlement industry developed only in the last 30 years. In fact, shortly after it decided *Burlingham,* the Court in *Cohen* presciently recognized that a rule categorically excluding a life insurance policy from a bankruptcy estate would make the policies a vehicle for subterfuge. *Cohen v. Samuels,* 245 U.S. 50, 53, 38 S.Ct. 36, 62 L.Ed. 143 (1917) ("[T]o hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets and, it might be, a refuge for fraud.").

For all these reasons, the district court correctly concluded that the debtor's interests in life insurance policies and life settlements were not excluded from the property of the bankruptcy estate pursuant to § 541(b). [2]

***1142** 2

[6] The second method by which property may be removed from the bankruptcy estate is by exemption under § 522. In contrast to the operation of the prior Bankruptcy Act of 1898, the property of the estate created at the commencement of a case under the Bankruptcy Code includes even exempt property. *Taylor v. Freeland & Kronz,* 503 U.S. 638, 642, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). However, the debtor may exempt certain property from the bankruptcy estate by taking affirmative steps to claim the property as exempt under § 522. *Id.; see also Woodson v. Fireman's Fund Ins. Co. (In re Woodson),* 839 F.2d 610, 616 n. 8 (9th Cir.1988).

Section 522(d) enumerates federal exemptions available to the debtor. However, under § 522(b)(2), "[t]his exemption scheme can be supplanted by states that choose to provide their own menu of exemptions." *Orange Cnty.'s Credit Union v. Garcia (In re Garcia),* 709 F.3d 861, 864 (9th Cir.2013). California has elected to opt-out of the federal exemptions, so California state law exemptions apply. *Id.;* see also Cal.Code Civ. Proc. § 703.130.

The Defendants claim, in the alternative to their § 541(b) argument, that the life insurance settlements are exempt under § 522 because California has opted out of the federal exemption schedule, and California provides an exemption pursuant to Cal.Code Civ. Proc. § 704.100.

This proposition is dubious, at best. [3] However, it is unnecessary for us to reach the merits of it for three independent reasons: the debtor did not claim the property as exempt; the Defendants lack standing to raise the argument; and the Defendants failed to present the argument to the district court.

First, the debtor did not claim the settlements or insurance policies as exempt within the required period. Section 522(*l*) requires the debtor to file a list of property to be claimed as exempt. Federal Rule of Bankruptcy Procedure 4003(a) requires the debtor to list exempt property on the schedule of assets, and Rule 1007(c) requires the debtor to file the schedule with the voluntary bankruptcy petition. A debtor may, pursuant to Rule 1009(a), seek to amend an exemption claim before the case is closed. The debtor did not claim the property as exempt within the period specified by the Rules and did not seek to amend the schedules. In short, there is no exemption claim pending as to the relevant assets.

[7] **[8]** Second, the Defendants lack standing to raise this issue. "[A]n exemption is provided only for the benefit of the debtor," *Fox v. Smoker (In re Noblit),* 72 F.3d 757, 758 (9th Cir.1995). "If the exempt property is transferred, the debtor has in essence waived the exemption, and the transferee cannot avail herself of the exemption in a subsequent avoidance action." *Id.* Here, David Green waived his exemption when he shifted the beneficial interest of his insurance policies to Defendants, via his wife. Defendants, removed third parties, lack standing to now claim his exemption as a defense to the Trustee's avoidance action. *Id.* at 758–59.

[9] Third, the Defendants did not present this argument either to the bankruptcy or district courts. We decline to exercise our discretion to consider arguments raised for the first time on appeal. *See* ***1143** *Robinson v. Jewell,* 790 F.3d 910, 915 (9th Cir.2015).

Therefore, without reaching the merits and unnecessarily opining on an issue of state law, we reject Defendants' argument that the property is exempt under § 522.

C

Because the debtor had a legal and equitable interest in the property at issue within the meaning of § 541(a), the property was not excluded from the estate under § 541(b), and the property was not the subject of a proper exemption in this case, we agree with the district court that it constituted "an interest of the debtor in property" within the meaning of § 548.

IV

[10] **[11]** **[12]** The district court also properly held that the Trustee's avoidance action was not time-barred because the debtor's fraudulent concealment equitably tolled the statute of limitations from commencing. The trustee's avoidance action was subject to the two-year limitations period in § 546(a)(1)(A). The statute of limitations in § 546(a)(1) may be subject to equitable tolling. *Ernst & Young v. Matsumoto (In re United Ins. Mgmt., Inc.),* 14 F.3d 1380, 1387 (9th Cir.1994). "Under the equitable tolling doctrine, where a party 'remains in ignorance of [a wrong] without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' " *Id.* at 1384 (brackets in original) (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 363, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991)).

There is no serious dispute that David Green or his agents took steps to conceal the life settlement transactions with Defendants by transferring the beneficial interest in the policies to his wife before the sale to Defendants was completed. Nor is there any serious dispute that other assets of the estate were concealed. The record shows that the trustee diligently pursued collection of assets, but was prevented from discovering the existence of the life settlement transactions because of the debtor's actions to conceal them. The district court properly concluded, based on the undisputed facts, that application of equitable tolling was appropriate.

Defendants argue that equitable tolling is inapplicable because they are innocent third parties who did not intentionally conceal facts from the Trustee. This argument is foreclosed by *In re Olsen,* in which we applied equitable tolling to cut off a third party's limitations claim where the debtors—not the third party—concealed a conveyance from the Trustee. *Olsen v. Zerbetz (In re Olsen),* 36 F.3d 71, 72–73 (9th Cir.1994); *see also Holmberg v. Armbrecht,* 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946) ("Equity will not lend itself to ... fraud [that prevents the plaintiff from being diligent] and historically has relieved from it.").

Furthermore, the record shows that the Defendants necessarily knew that the debtor had transferred the beneficial interests in the life insurance policy to his wife. It further shows that the Trustee went to great lengths to discover the multiple undisclosed life insurance policies held by the debtor, and that many of the delays documented in the record were due to the Defendants' requests or the actions of Defendants' counsel.

Under the principles established in *Lampf,* 501 U.S. at 363, 111 S.Ct. 2773, the statute of limitations was tolled until the fraudulent transfers were revealed to the Trustee's attorney by David Green's stepson on August 10, 2010. The first amended ***1144** complaint, filed on February 1, 2011, was therefore filed within the two-year § 546(a)(1)(A) limitations period.

V

[13] **[14]** Finally, the district court correctly concluded that the bankruptcy court should have granted the Trustee leave to amend her avoidance action. The Trustee sought to add allegations regarding the post-petition transfer of the Protective policy and to allege that the policies were transferred directly by David Green to Defendants in April 2007. The bankruptcy court denied leave to amend but provided no reasons for the denial. We "strictly review[ ]" the bankruptcy court's denial of leave to amend "in light of the strong policy permitting amendment." *Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill,* 130 F.3d 432, 439 (9th Cir.1997) (internal quotation omitted).

The Trustee sought leave to amend because she discovered new evidence: an executed copy of the Protective beneficiary transfer form. Defendants did not initially produce that form in response to the Trustee's subpoena. Any delay associated with the Trustee's motion therefore stems in part from Defendants.

Amendment under these circumstances would not have been futile. The Protective form supports the Trustee's § 549 avoidance claim. Taken with the policy favoring amendment, these factors outweigh the fact that the Trustee previously amended the complaint. *Cf. Allen v. City of Beverly Hills,* 911 F.2d 367, 373 (9th Cir.1990). The district court properly held that the Trustee should have been granted leave to amend.

VI

The district court properly concluded that summary judgment was not appropriate, and that the Trustee should have been granted leave to amend. We affirm the district court and remand for further proceedings consistent with this opinion. We need not, and do not, reach any other issues urged by the parties.

AFFIRMED.

All Citations

811 F.3d 1133, 62 Bankr.Ct.Dec. 6, 16 Cal. Daily Op. Serv. 211, 2016 Daily Journal D.A.R. 162

Footnotes

* The Honorable James K. Singleton, Senior District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

1 This conclusion dispatches Defendants' argument that Green's trustee lacked power to change the beneficiary named in Green's policies after he filed for bankruptcy. Defendants support that argument with decisions interpreting the Bankruptcy Act of 1898 and associated jurisprudence. *See In re Herrell,* 210 B.R. 386, 390 (Bankr.N.D.Fla.1997); *Lekas,* 299 B.R. 597, 603 (Bankr.D.Ariz.2003). Because we hold that the 1978 Act expanded a Trustee's interest in the life insurance policy of a debtor, we find unpersuasive those holdings that predicate a Trustee's power to change beneficiaries on surrender values. *See Lekas,* 299 B.R. at 602 (citing, *inter alia, Herrell,* 210 B.R. at 390); *see also Meyers,* 483 B.R. at 103 ("I therefore respectfully disagree with *Herrell's* conclusion about these Act decisions construing Section 70a(5). They, like Section 70a(5), have been superseded by the Bankruptcy Code."). Each policy in this case empowered Green to change the policy's beneficiary. As a result, and for reasons provided above, that power passed to the Trustee upon the filing of Green's petition. § 541(a)(1).

2 Defendants also suggest that § 541(d) is a basis to exclude the policies from the bankruptcy estate. This claim is easily dispatched because that section of the Bankruptcy Code "was adopted by Congress to address bona fide secondary mortgage market transactions," *Chbat v. Tleel (In re Tleel),* 876 F.2d 769, 773 (9th Cir.1989), and is therefore plainly inapposite.

3 Cal.Code Civ. Proc. § 704.100(a) provides that unmatured life insurance policies are exempt without making a claim. However, it specifically excludes the policy loan value, which represents the policyholder's equitable interest.

2016 WL 494592
United States Court of Appeals,
Ninth Circuit.

In re THE VILLAGE AT LAKERIDGE, LLC, fka Magnolia Village, LLC, Debtor,
U.S. Bank N.A., Trustee, et al., by and through CWCapital Asset Management LLC, solely in its capacity as Special Servicer, Appellant,
v.
The Village at Lakeridge, LLC, Appellee,
Robert Alan Rabkin, Real Party in Interest.
In re the Village at Lakeridge, LLC, fka Magnolia Village, LLC, Debtor,
U.S. Bank N.A., Trustee, et al., by and through CWCapital Asset Management LLC, solely in its capacity as Special Servicer, Appellant,
v.
The Village at Lakeridge, LLC, Appellee,
Robert Alan Rabkin, Real Party in Interest.

Nos. 13–60038, 13–60039.
|
Argued and Submitted Oct. 22, 2015.
|
Filed Feb. 8, 2016.

Synopsis
Background: In a Chapter 11 bankruptcy proceeding, the trustee moved to designate creditor's claim and disallow creditor's vote to confirm reorganization plan. The United States Bankruptcy Court for the District of Nevada, Bruce T. Beesley, J., granted the motion in part, and denied the motion in part. Parties cross-appealed. The Bankruptcy Appellate Panel (BAP), Kirscher, Pappas, and Taylor, JJ., 2013 WL 1397447, affirmed in part, reversed in part, and vacated in part. Trustee appealed.

Holdings: The Court of Appeals, N.R. Smith, Circuit Judge, held that:

[1] creditor did not become a statutory insider solely by acquiring a claim from a statutory insider, and

[2] creditor did not qualify as non-statutory insider.

Affirmed.

Clifton, Circuit Judge, filed opinion, concurring in part and dissenting in part.

West Headnotes (22)

[1] **Bankruptcy**
Finality

A decision of the Bankruptcy Appellate Panel (BAP) is considered final and appealable where it (1) resolves and seriously affects substantive rights and (2) finally determines the discrete issue to which it is addressed. 28 U.S.C.A. § 158(d).

Cases that cite this headnote

[2] **Bankruptcy**
Finality

When the Bankruptcy Appellate Panel (BAP) affirms or reverses a bankruptcy court's final order, the BAP's order is final and appealable. 28 U.S.C.A. § 158(d).

Cases that cite this headnote

[3] **Bankruptcy**
Court of Appeals
Bankruptcy
Finality

If the Bankruptcy Appellate Panel (BAP) remands to the bankruptcy court for factual determinations on a central issue, its order is not final and the Court of Appeals lacks jurisdiction to review the order. 28 U.S.C.A. § 158(d).

Cases that cite this headnote

[4] **Bankruptcy**
Scope of Review in General
Bankruptcy
Review of Appellate Panel

The Court of Appeals reviews the bankruptcy court's decision independent of the decision of the Bankruptcy Appellate Panel (BAP).

Cases that cite this headnote

[5] **Bankruptcy**
Conclusions of Law; De Novo Review

Whether an insider's status, as would disallow his vote to confirm Chapter 11 reorganization claim, transfers when he sells or assigns his claim to a third party presents a question of law subject to de novo review. 11 U.S.C.A. §§ 101(31), 1129(a)(10).

Cases that cite this headnote

[6] **Bankruptcy**
Conclusions of Law; De Novo Review

Establishing the definition of non-statutory insider status, for purpose of determining who may vote to confirm Chapter 11 reorganization plan, is a purely legal inquiry subject to de novo review. 11 U.S.C.A. § 1129(a)(10).

Cases that cite this headnote

[7] **Bankruptcy**
Determination

Whether a specific person qualifies as a non-statutory insider, for purpose of determining whether or not that person may vote to confirm a Chapter 11 reorganization plan, is a question of fact. 11 U.S.C.A. § 1129(a)(10).

Cases that cite this headnote

[8] **Bankruptcy**
Clear Error

The Court of Appeals reviews factual findings in a bankruptcy case for clear error.

Cases that cite this headnote

[9] **Bankruptcy**
Insiders, Acceptance By

An "insider," who is disallowed from voting to confirm Chapter 11 reorganization plan, is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms' length with the debtor. 11 U.S.C.A. § 101(31).

Cases that cite this headnote

[10] **Bankruptcy**
Construction and Operation

A "non-statutory insider" is a person who is not explicitly listed as an insider in the bankruptcy code, but who has a sufficiently close relationship with the debtor to fall within the definition. 11 U.S.C.A. § 101(31).

Cases that cite this headnote

[11] **Bankruptcy**
Insiders, Acceptance By

A creditor does not become a statutory insider, who will be disallowed from voting to confirm a Chapter 11 reorganization plan, solely by acquiring a claim from a statutory insider. 11 U.S.C.A. §§ 101(31), 1129(a)(10).

Cases that cite this headnote

[12] **Bankruptcy**
Transfer or Assignment

Because insider status, for bankruptcy purposes, is not a property of a claim, general assignment law, in which an assignee takes a claim subject to any benefits and defects of the claim, does not apply in the context of a bankruptcy proceeding. 11 U.S.C.A. § 101(31).

Cases that cite this headnote

[13] **Bankruptcy**
Construction and Operation
Bankruptcy
Transfer or Assignment

The insider status of a person who acquires a claim from another, in a bankruptcy proceeding, is a question of fact that must be determined after the claim transfer occurs. 11 U.S.C.A. § 101(31).

Cases that cite this headnote

[14] **Bankruptcy**
Insiders, Acceptance By

Whether a creditor is an insider, as will disallow his vote to confirm Chapter 11 reorganization plan, is a factual inquiry that must be conducted on a case-by-case basis. 11 U.S.C.A. §§ 101(31), 1129(a)(10).

Cases that cite this headnote

[15] **Bankruptcy**
Insiders, Acceptance By

A court cannot assign non-statutory insider status, as will disallow creditor from voting to confirm Chapter 11 reorganization plan, to a creditor simply because it finds the creditor and debtor share a close relationship. 11 U.S.C.A. §§ 101(31), 1129(a)(10).

Cases that cite this headnote

[16] **Bankruptcy**
Insiders, Acceptance By

A creditor is not a "non-statutory insider," who is disallowed from voting to confirm Chapter 11 reorganization plan, unless (1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications listed in the Bankruptcy Code, and (2) the relevant transaction is negotiated at less than arm's length. 11 U.S.C.A. §§ 101(31), 1129(a)(10).

Cases that cite this headnote

[17] **Bankruptcy**
Insiders, Acceptance By

Having, or being subject to, some degree of control is one of many indications that a creditor may be a non-statutory insider, who is disallowed from voting to confirm Chapter 11 reorganization plan, but actual control is not required to find non-statutory insider status. 11 U.S.C.A. §§ 101(31), 1129(a)(10).

Cases that cite this headnote

[18] **Bankruptcy**
Insiders, Acceptance By

A creditor's access to the debtor's inside information may, but not shall, warrant a finding of non-statutory insider status, for purpose of determining if creditor is disallowed from voting to confirm Chapter 11 reorganization plan. 11 U.S.C.A. §§ 101(31), 1129(a)(10).

Cases that cite this headnote

[19] **Bankruptcy**
Clear Error

A bankruptcy court's factual finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

Cases that cite this headnote

[20] **Bankruptcy**
Findings of Fact

So long as the bankruptcy court's findings of fact are plausible in light of the record viewed in its entirety, the Court of Appeals cannot reverse even if the Court of Appeals would have weighed the evidence differently. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.; 28 U.S.C.A. § 158(d).

Cases that cite this headnote

[21] **Bankruptcy**
Insiders, Acceptance By

Creditor who purchased unsecured debt from sole owner of limited liability corporation (LLC), the Chapter 11 debtor, did not qualify as "non-statutory insider," and thus, was not disqualified from voting to confirm debtor's reorganization plan; although creditor had close personal relationship with one managing board member of the sole owner of the LLC, and that board member approached the creditor with an offer to sell the owner's unsecured debt, creditor did not know and had no relationship with four other managing board members, creditor had no control over the one managing board member with whom he had a relationship, they had separate finances, lived separately, and conducted business separately, and although creditor understood that debtor LLC was in bankruptcy and the purchase amounted to a risky investment, it was a relatively small investment for him, and creditor did not know about the reorganization plan at the time or that his vote would be required to confirm it. 11 U.S.C.A. §§ 101(31), 1129(a)(10).

Cases that cite this headnote

[22] Bankruptcy

Findings of Fact

The Court of Appeals cannot substitute its judgment for that of the bankruptcy court simply because it is convinced that it would have decided the case differently.

Cases that cite this headnote

Attorneys and Law Firms

Gregory A. Cross, Keith C. Owens (argued), Jennifer L. Nassiri (argued), Venable LLP, Los Angeles, CA, for Appellant.

Alan R. Smith (argued), Holly E. Estes, Law Offices of Alan R. Smith, Reno, NV, for Debtor/Appellee.

Appeal from the Ninth Circuit, Bankruptcy Appellate Panel, Kirscher, Pappas, and Taylor, Bankruptcy Judges, Presiding. D.C. Nos. 13–60038, 13–60039.

Before: RICHARD R. CLIFTON and N. RANDY SMITH, Circuit Judges, and ROBERT S. LASNIK, [*] Senior District Judge.

Opinion by Judge N.R. SMITH; Partial Concurrence and Partial Dissent by Judge CLIFTON.

OPINION

N.R. SMITH, Circuit Judge:

***1** Before a bankruptcy court may confirm a reorganization plan in a Chapter 11 bankruptcy, it must determine if any of the persons voting to accept the plan are insiders. [1] Insiders are either statutory or non-statutory. To be a "statutory insider," a creditor *must* fall within one of the categories listed in 11 U.S.C. § 101(31). A creditor does not become an insider simply by receiving a claim from a statutory insider. To be a non-statutory insider, the creditor must have a close relationship with the debtor and negotiate the relevant transaction at less than arm's length. Thus, Dr. Robert Rabkin does not qualify as a statutory or non-statutory insider. [2]

I. Factual Proceedings

A. The Parties

The debtor, Village at Lakeridge, LLC ("Lakeridge"), has only one member: MBP Equity Partners 1, LLC ("MBP"). MBP is managed by a board of five members, one of whom is Kathie Bartlett. [3] Bartlett shares a close business and personal relationship with Rabkin, which is unrelated to Bartlett's position with MBP.

U.S. Bank National Association ("U.S. Bank") is successor trustee to Greenwich Financial Products, Inc., the company through which Lakeridge financed a property purchase. At the time Lakeridge filed for bankruptcy, U.S. Bank was one of two creditors holding a claim on Lakeridge's assets. U.S. Bank held a fully secured claim worth about $10 million, and MBP held an unsecured claim worth $2.76 million.

B. Bankruptcy Court Proceedings

Lakeridge filed for Chapter 11 relief on June 16, 2011. On September 14, Lakeridge filed a Disclosure Statement and an initial Plan of Reorganization. Shortly thereafter, MBP's board decided to sell MBP's unsecured claim. [4] Bartlett, on behalf of MBP's board, approached Rabkin with an offer to sell the claim. On October 27, Rabkin purchased the claim for $5,000. In its Disclosure Statement, Lakeridge classified Rabkin's claim as a "Class 3 general unsecured claim."

On June 7, 2012, U.S. Bank deposed Rabkin, questioning him about his relationship with Lakeridge, MBP, and Bartlett. In his testimony, Rabkin indicated he had little knowledge of, and no relationship with, Lakeridge or MBP before he acquired MBP's claim. However, Rabkin testified that he had a close relationship with Bartlett, that he saw her regularly, including the day of the deposition, and that he had attended a meeting with his counsel and Lakeridge's counsel one hour before the deposition. Rabkin testified that he purchased MBP's unsecured claim as a business investment, that he had not known how much his claim was worth before the deposition, and that he knew the claim was a risky investment. Rabkin further testified that, prior to the deposition, he had not known his distribution under the proposed reorganization plan was $30,000. Rabkin claimed to have no interest in Lakeridge other than receiving a return on his investment.

U.S. Bank, through counsel, offered to purchase Rabkin's claim for $50,000 at the deposition. Rabkin said he would consider the offer. U.S. Bank, in an attempt to compel an immediate answer, increased its offer to $60,000. Rabkin again agreed to consider the offer, refusing to provide an answer on the spot. After Rabkin consulted with counsel, he did not respond to the offer. The offer lapsed. At a hearing on August 29, 2012, Rabkin stated he had felt pressured to accept U.S. Bank's cash offer while he was under oath, without having time to review it first. [5]

***2** On July 1, 2012, U.S. Bank moved to designate Rabkin's claim and disallow it for plan voting purposes ("Designation Motion"). U.S. Bank contended Rabkin was both a statutory and non-statutory insider, and that the assignment to Rabkin was made in bad faith. The bankruptcy court held an evidentiary hearing on the Designation Motion on August 1, 2012. In its subsequent order ("Designation Order"), the court held Rabkin was not a non-statutory insider, because:

> (a) Dr. Rabkin does not exercise control over [Lakeridge;] (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay [her] bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin[;] (e) Ms. Bartlett does not pay [Dr.] Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin.

The court also held that Rabkin did not purchase MBP's claim in bad faith. However, the court designated Rabkin's claim and disallowed it for plan voting, because it determined Rabkin had become a statutory insider by acquiring a claim from MBP. In other words, the bankruptcy court determined that, when a statutory insider sells or assigns a claim to a non-insider, the non-insider becomes a statutory insider as a matter of law.

Lakeridge and Rabkin both timely appealed the Designation Order, challenging the court's finding that Rabkin was a statutory insider for purposes of plan voting. U.S. Bank cross-appealed, challenging the findings that Rabkin was not a non-statutory insider and had not purchased MBP's claim in bad faith.

C. Bankruptcy Appellate Panel

[1] [2] [3] The United States Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") affirmed in part, reversed in part, and vacated in part the Designation Order. The BAP reversed the finding that Rabkin had become a statutory insider as a matter of law by acquiring MBP's claim and affirmed the findings that Rabkin was not a non-statutory insider and that the claim assignment was not made in bad faith. [6] The BAP held that insider status cannot be assigned and must be determined for each individual "on a case-by-case basis, after the consideration of various factors." Finally, the BAP held Rabkin could vote to accept the Lakeridge plan under 11 U.S.C. § 1129(a)(10), because he was an impaired creditor who was not an insider. U.S. Bank appealed. We have jurisdiction under 28 U.S.C. § 158(d), [7] and we affirm.

II. Standard of Review

[4] [5] [6] We review the bankruptcy court's decision independent of the BAP's decision. *See Boyajian v. New Falls Corp. (In re Boyajian),* 564 F.3d 1088, 1090 (9th Cir.2009). Whether an insider's status transfers when he sells or assigns the claim to a third party presents a question of law. *Miller Ave. Prof'l & Promotional Servs., Inc. v. Brady (In re Enter. Acquisition Partners),* 319 B.R. 626, 630 (9th Cir. BAP 2004). Establishing the definition of non-statutory insider status is likewise a purely legal inquiry. We review questions of law de novo. *Stahl v. Simon (In re Adamson Apparel),* 785 F.3d 1285, 1289 (9th Cir.2015).

***3 [7] [8]** Whether a specific person qualifies as a non-statutory insider is a question of fact. *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman),* 126 B.R. 63, 70 (9th Cir. BAP 1991), *overruled on other grounds by Zachary v. Cal. Bank & Tr.,* No. 13–16402, ––– F.3d ––––, 2016 WL 360519 (9th Cir. Jan. 28, 2016). We review factual findings for clear error. *In re Adamson Apparel,* 785 F.3d at 1289.

III. Discussion

[9] "An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms [*sic*] length with the debtor." S.Rep. No. 95–989, at 25 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5810; H.R.Rep. No. 95–595, at 312 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6269. We recognize two types of insiders: statutory insiders and non-statutory insiders. Statutory insiders, also known as "per se insiders," are persons explicitly described in 11 U.S.C. § 101(31), such as "person[s] in control of the debtor." § 101(31). As a matter of law, a statutory insider has a sufficiently close relationship with a debtor to warrant special treatment. *In re Enter. Acquisition Partners,* 319 B.R. at 631. No one suggests Rabkin qualifies as a statutory insider in his own right.

[10] A non-statutory insider is a person who is not explicitly listed in § 101(31), but who has a sufficiently close relationship with the debtor to fall within the definition. *See Schubert v. Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.),* 554 F.3d 382, 395 (3d Cir.2009) ("[I]n light of Congress's use of the term 'includes' in § 101(31), courts have identified a category of creditors, sometimes called 'non-statutory insiders,' who fall within the definition but outside of any of the enumerated categories."); *see also* § 101(31) (stating that "[t]he term 'insider' *includes* " the listed categories (emphasis added)); § 102(3) (explaining that "includes" is "not limiting").

A. Statutory Insider Status

[11] [12] [13] U.S. Bank asserts that Rabkin became a statutory insider when he acquired a claim from MBP. We disagree. A person does not become a statutory insider solely by acquiring a claim from a statutory insider for two reasons. First, bankruptcy law distinguishes between the status of a claim and that of a claimant. Insider status pertains only to the claimant; it is not a property of a claim. Because insider status is not a property of a claim, general assignment law—in which an assignee takes a claim subject to any benefits and defects of the claim—does not apply. Second, a person's insider status is a question of fact that must be determined after the claim transfer occurs. *See Concord Square Apartments of Wood Cty., Ltd. v. Ottawa Props., Inc. (In re Concord Square Apartments),* 174 B.R. 71, 75 (Bankr.S.D.Ohio 1994). This determination does not ignore the public policy behind protecting secured creditors' interests in bankruptcy cases, as explained below.

***4** The term "insider," as used in the bankruptcy code, is a noun, referring to a person (as defined at § 101(41)). *See, e.g.,* § 101(31) (defining "insider" as a person with a particular relationship with the debtor); *see also* § 1129(a)(10) (explaining that a court can cram down a reorganization plan when at least one class of impaired claims has voted to accept the plan, not including "any acceptance of the plan by an insider"). The term "insider" is not, as U.S. Bank argues, an adjective used to describe the property of a claim. [8]

[14] Whether a creditor is an insider is a factual inquiry that must be conducted on a case-by-case basis. *See, e.g., In re Friedman,* 126 B.R. at 67, 70–71 (describing in detail the alleged insiders' relationships with the debtor); *Miller v. Schuman (In re Schuman),* 81 B.R. 583, 586–87 (9th Cir. BAP 1987) (per curiam) (analyzing facts to determine whether the debtor and alleged insider had a sufficiently close relationship to warrant finding insider status). Courts may not bypass this intensive factual analysis by finding that a third party became an insider as a matter of law when he acquired a claim from an insider. If so, a third-party assignee could be foreclosed from voting a claim acquired from an insider, even if the entire transaction was conducted at arm's length. The bankruptcy code did not intend this result.

Further, if a third party could become an insider as a matter of law by acquiring a claim from an insider, bankruptcy law would contain a procedural inconsistency wherein a claim would *retain* its insider status when assigned from an insider to a non-insider, but would *drop* its non-insider status when assigned from a non-insider to an insider. *See In re Applegate Prop., Ltd.,* 133 B.R. 827, 833 (Bankr.W.D.Tex.1991) (holding that an insider of a Chapter 11 debtor may never vote a claim toward plan confirmation, even if the insider acquired the claim from a non-insider); *In re Holly Knoll P'ship,* 167 B.R. 381, 385 (Bankr.E.D.Pa.1994) (same).

Section 1129 of Title 11 contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan. A court may confirm a plan only if, among other requirements: (1) the plan and plan proponent comply with the bankruptcy code; (2) the plan is proposed in good faith; (3) the plan proponent has disclosed the identity of all insiders and potential insiders; (4) at least one class of impaired claims has accepted the plan (and no insider can vote); and (5) the plan "is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." § 1129. In addition, a court "may designate any entity whose acceptance or rejection of [a] plan was not in good faith, or was not solicited or procured in good faith." § 1126(e). Therefore, U.S. Bank overstates its argument that, unless we reverse the BAP, debtors will begin assigning their claims to third parties in return for votes in favor of plan confirmation. [9] We fail to see how establishing a rule that insider status transfers as a matter of law would better protect the creditors' rights than the current factual inquiry. [10]

***5** In conducting a factual inquiry for insider status, courts should begin with the statute. If the assignee fits within a statutory insider classification on his own, the court's review ends; it need not examine the nature of the statutory insider's relationship to the debtor. *See* *In re Enter. Acquisition Partners,* 319 B.R. at 631. Because Rabkin did not become a statutory insider by way of assignment and was not a statutory insider in his own capacity, we must determine whether the bankruptcy court erred in finding that Rabkin was not a non-statutory insider.

B. Non–Statutory Insider Status

[15] **[16]** Non-statutory insiders are the functional equivalent of statutory insiders and, therefore, must fall within the ambit of § 101(31). *See* *In re Winstar Commc'ns, Inc.,* 554 F.3d at 395. A creditor is not a non-statutory insider unless: (1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length. [11] *See Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.),* 531 F.3d 1272, 1277 (10th Cir.2008). A court cannot assign non-statutory insider status to a creditor simply because it finds the creditor and debtor share a close relationship. *See* *id.* at 1277–78.

[17] **[18]** A court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm's length. Having—or being subject to—some degree of control is one of many indications that a creditor may be a non-statutory insider, but actual control is not required to find non-statutory insider status. [12] *See* *id.* at 1277 n. 5. Likewise, access to the debtor's inside information may—but not shall—warrant a finding of non-statutory insider status. *See* *id.* at 1277.

[19] **[20]** U.S. Bank asserts the bankruptcy court erred in holding Rabkin was not a non-statutory insider. We review the bankruptcy court's factual finding for clear error. [13] *In re Friedman,* 126 B.R. at 70; Fed.R.Civ.P. 52(a)(6). "A finding is 'clearly erroneous' when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948). We apply this highly deferential standard to findings of fact, because "[f]indings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations." *Rand v. Rowland,* 154 F.3d 952, 957 n. 4 (9th Cir.1998) (en banc); *see also* Fed.R.Civ.P. 52(a)(6) ("[T]he reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). Therefore, so long as the bankruptcy court's findings are "plausible in light of the record viewed in its entirety," we cannot reverse even if we "would have weighed the evidence differently." *Anderson v. City of Bessemer,* 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

***6** **[21]** **[22]** The bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous. [14] U.S. Bank presents no evidence that Rabkin had a relationship with Lakeridge comparable to those listed in § 103(31). Rather, the evidence shows Rabkin had little knowledge of Lakeridge—or its sole member MBP—prior to acquiring MBP's unsecured claim, much less access to inside information. Rabkin does not control MBP or Lakeridge, nor does Lakeridge or MBP have any control over Rabkin. U.S. Bank has shown that Rabkin had a close personal and business relationship with Bartlett, and that Bartlett approached Rabkin, and only Rabkin, with an offer to sell MBP's claim. However, Bartlett does not control MBP or Lakeridge. Rather, Bartlett was one of MBP's five managing members, all of whom discussed potential buyers and agreed to offer the claim to Rabkin. Rabkin did not know, and had no relationship with, the remaining four managing members of MBP.

U.S. Bank has not shown that Rabkin's relationship with Bartlett—who is indisputably a statutory insider of MBP and Lakeridge—is sufficiently close to compare with any category listed in § 103(31). Rabkin had no control over Bartlett, and Bartlett had no control over Rabkin. Rabkin and Bartlett kept separate finances, lived separately, and conducted business separately. The bankruptcy court properly evaluated these factors to determine whether Rabkin's relationship with Bartlett was close enough to make him an insider who was conducting business at less than arm's length with MBP. [15] Nothing in § 101(31) or case law indicates it would be improper for a debtor to sell, or even give, a claim to a friend if the friend is acting of his own volition and neither party is engaged in bad faith. *See In re Friedman,* 126 B.R. at 70 ("The case law that has developed ... indicates that not every creditor-debtor relationship attended by a degree of personal interaction between the parties rises to the level of an insider relationship.").

Both Rabkin and Bartlett testified that, although Rabkin knew Lakeridge was in bankruptcy and that purchasing the claim was a risky investment, when Rabkin purchased the claim he did not know about Lakeridge's plan of reorganization or that his vote would be required to confirm it. Although Rabkin did not conduct an extensive inquiry into the claim's value prior to purchasing it, Rabkin explained that it was a small investment upon which Bartlett had indicated he could make a profit and "due diligence would have been very expensive." [16] Although Rabkin allowed U.S. Bank's offer to purchase the claim for $50,000 to lapse and subsequently voted in favor of Lakeridge's reorganization plan, he did so on the understanding that Lakeridge would amend the reorganization plan to increase his payout to an amount comparable to that offered by U.S. Bank.

These facts do not leave us with a "definite and firm conviction that a mistake has been committed." *See U.S. Gypsum Co.,* 333 U.S. at 395, 68 S.Ct. 525. Rather, the bankruptcy court's finding that, on the record presented, Rabkin was not a non-statutory insider is entirely plausible, and we cannot reverse even if we may "have weighed the evidence differently." *See Anderson,* 470 U.S. at 574, 105 S.Ct. 1504.

IV. Conclusion

***7** The BAP properly reversed the bankruptcy court's holding as to Rabkin's statutory insider status and affirmed the bankruptcy court's holding as to Rabkin's non-statutory insider status. Because Rabkin is neither a statutory nor non-statutory insider, the BAP properly reversed the portion of the bankruptcy court's order that excluded Rabkin's vote for plan confirmation purposes. Therefore, the judgment of the BAP is **AFFIRMED.**

CLIFTON, Circuit Judge, concurring in part and dissenting in part:

I agree with the legal conclusion that a person does not necessarily become a statutory insider solely by acquiring a claim from a statutory insider, as discussed in section III.A of the majority opinion. As long as the interest previously owned by a statutory insider was acquired by an independent party, for bona fide reasons, uninfected with the unique motivations of the insider, there is no reason that the insider taint should always be unshakeable. The consideration of whether the insider status should stick to the interest properly depends on the particular circumstances and is appropriately treated as something to be determined based on the facts of the situation. But it is clear to me, based on the facts of this case, that Robert Rabkin should be viewed as a non-statutory insider, and the bankruptcy court should treat his claim as such. I respectfully dissent as to Section III.B.

The majority opinion, at ––– – ––––, defines a creditor as a non-statutory insider when "(1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length." I agree.

The facts make it clear that this transaction was negotiated at less than arm's length. Rabkin paid $5,000 to MBP (the sole member of the debtor, Lakeridge), for an unsecured claim against Lakeridge nominally worth $2.76 million. MBP did not offer the interest to anyone else. The purchase was not solicited by Rabkin. It was proposed to Rabkin by Kathie Bartlett, a member of the MBP board. There was no evidence of any negotiation over price—Rabkin didn't offer less, and MBP didn't ask for more. Rabkin knew little if anything about Lakeridge (or, for that matter, MBP) before he bought the claim, nor did he conduct any investigation to ascertain the current value of that unsecured claim. Even after he purchased the claim, he did not bother to find out more about what it might be worth. Prior to his deposition Rabkin did not even know what the proposed plan of reorganization would pay him for the claim. After he learned that the payment under the plan would be $30,000, he was offered as much as $60,000 for his interest, but he declined that offer. [1]

The motives of MBP and Bartlett are clear and not denied. MBP is the sole member of Lakeridge. The Lakeridge reorganization plan cannot be approved unless there is a class of creditors willing to vote to approve it. Without the sale of this claim to Rabkin and his anticipated vote to approve the plan, that plan is dead in the water, Lakeridge will be liquidated, and there will be no hope for MBP to obtain anything for either the unsecured claim or, more importantly, its ownership of Lakeridge. It may have wanted to recover something from its unsecured claim, but it did not look for the best possible price because its Lakeridge ownership was far more important. MBP was primarily motivated to place the unsecured claim in the hands of a friendly creditor who could be counted on to vote in favor of the reorganization plan, opening the door to the possibility of obtaining approval of the proposed plan of reorganization.

***8** Rabkin's motivation is a bit murkier, but it is clear that the transaction cannot be understood as a primarily economic proposition on his part. There was no evidence that he had a habit of making blind bets, say by helping out Nigerian princes or buying the Brooklyn Bridge. There is an alternative explanation that makes a lot more sense. As the majority opinion acknowledges, at ––––, Rabkin had a "close business and personal relationship" with Bartlett, the person who proposed this transaction to him. I don't have to know the precise details of the relationship between Rabkin and Bartlett to conclude that it offers the only logical explanation for Rabkin's actions here. He did a favor for a friend, and if it made some money for himself, so much the better.

Rabkin may not have been setting out to lose money or planning simply to give $5,000 to Bartlett, but that is not the standard. *Black's Law Dictionary* (10th ed.2014) defines "arm's length transaction" as follows:

> 1. A transaction between two unrelated and unaffiliated parties. 2. A transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises.

Rabkin and Bartlett were not "unrelated and unaffiliated parties." The transaction was not conducted "as if the parties were strangers." It was not an arm's length transaction. As a result, under the definition recognized by the majority, Rabkin was a "non-statutory insider" because "the relevant transaction [was] negotiated at less than arm's length."

Rabkin at no point attempted to negotiate the price of his purchase, research the value of the claim that was offered to him, or otherwise behave in a manner that suggests that he took his acquisition seriously as an economic investment. This "compels the conclusion" that Rabkin and Bartlett's relationship was "close enough to gain an advantage attributable simply to affinity rather than to the course of dealings between the parties." *In re Kunz,* 489 F.3d 1072, 1079 (10th Cir.2007) (quoting *In re Enter. Acquisition Partners, Inc.,* 319 B.R. 626, 631 (9th Cir. BAP 2004)); *see also, Matter of Holloway,* 955 F.2d 1008, 1011 (5th Cir.1992).

Moreover, though the majority opinion treats the bankruptcy court's determination that Rabkin was not a non-statutory insider as a factual finding subject to review only for clear error, I do not think that reflects a correct understanding of what the bankruptcy court decided. The specific facts of the episode were not seriously contested. Rather, the majority simply accedes to the bottom-line adjudication that, based on those facts, Rabkin was not an insider.

But that finding turns at least as much on the legal standard that defines a non-statutory insider as it does on the facts. Look at what the bankruptcy court said in explaining its conclusion that Rabkin was not a non-statutory insider, quoted by the majority opinion, at ––––:

> ***9** (a) Dr. Rabkin does not exercise control over [Lakeridge;](b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay [her] bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin[;] (e) Ms. Bartlett does not pay [Dr.] Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin.

This list of facts would support a finding that Rabkin and Bartlett are separate financial entities, but it does not show that this transaction was conducted as if they were strangers. At no point does the bankruptcy court mention or refer to an "arm's length transaction" at all, let alone provide a sufficient basis for a finding that Rabkin and Bartlett were unrelated or dealt with each other as strangers. That is the standard the majority opinion and I both agree should apply, but it was not the standard actually applied by the bankruptcy court. The majority disagrees, stating, at ––––n. 15, that the bankruptcy court's order "is a description of why the transaction was conducted at arm's length," but the majority opinion is conspicuously silent in explaining how the facts actually justify any such finding.

That tells me that the problem here is not with the facts as found by the bankruptcy court but with the legal test that the bankruptcy court applied. What standard did the bankruptcy court apply to determine whether this transaction was conducted at arm's length, by parties acting like they were strangers? We don't know, because the bankruptcy court order never discussed the concept. At a minimum, this makes Rabkin's status a mixed question of law and fact, subject to de novo review. *See In re Bammer,* 131 F.3d 788, 792 (9th Cir.1997) ("Mixed questions presumptively are reviewed by us de novo because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles.").

I do not need to pursue that question further here, though, because even if the clear error standard applies, the finding that Rabkin was not a non-statutory insider cannot survive scrutiny. The majority opinion states three separate times, at ––––, –––– n. 14 & 20, that we cannot reverse under the clear error standard simply because we would have decided the case differently, a telling sign that even the majority recognizes that support for the finding is thin at best. It even suggests, at –––– n. 14, that this dissent presents nothing more than a statement of how I would have decided the case sitting as a bankruptcy judge. But my dissent is based on far more than a mere alternative view of the evidence. I cannot fathom how anyone could reasonably conclude that this transaction was conducted as if Rabkin and Bartlett were strangers. The clear error standard is not supposed to provide carte blanche approval of whatever the bankruptcy court might have found. That is especially true here, where the bankruptcy court never actually stated a finding that the transaction was at arm's length or that the parties conducted the transaction as if they were strangers. Under the proper definition of "arm's length transaction," Rabkin's acquisition of the claim was a transaction "negotiated at less than arm's length." He was a non-statutory insider, and his claim should be treated as such.

***10** The majority's holding also has the troubling effect of creating a clear path for debtors who want to avoid the limitations the Bankruptcy Act places on reorganization plans. The Act allows courts to confirm bankruptcy plans if each class of claims or interests impaired under the plan votes to accept the plan. 11 U.S.C. § 1129(a)(8). Perhaps recognizing that unanimous agreement on a given bankruptcy plan would sometimes prove impossible, Congress also created an exception to § 1129(a)(8) allowing debtors to "cram down" a bankruptcy plan over the objections of some debtor classes. The cramdown provision allows courts to approve a bankruptcy plan so long as all provisions of § 1129(a) are met except for § 1129(a)(8), and the proposed plan is fair, equitable, and does not discriminate unfairly. 11 U.S.C. § 1129(b)(1). Even in the case of a cramdown, though, "at least one class of claims that is impaired under the plan [must have] accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10).

The legislative history on § 1129 is sparse and provides little insight into Congress's motives, [2] but in accordance with one of the most basic tenets of statutory interpretation, we must "interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. U.S. E.P.A.,* 942 F.2d 1427, 1432 (9th Cir.1991). Here, we are obligated to interpret § 1129 as a whole and in a way that gives each of its provisions meaning. A cramdown plan cannot be approved unless it is accepted by at least one class of impaired creditors.

Yet the majority opinion effectively renders that statutory requirement meaningless. Under the holding here, insiders are free to evade the requirement simply by transferring their interest for a nominal amount (perhaps a few peppercorns) to a friendly third party, who can then cast the vote the insider could not have cast itself.

Contrary to the majority's assurances, the requirement that all votes be cast in good faith is not a check on this behavior. In the memorandum disposition issued alongside this opinion, we conclude that Rabkin's vote for the plan was cast in good faith because Appellants had not proven that he had "ulterior motives" for his vote to approve the plan beyond personal enrichment. By this standard, a savvy debtor can comply with the good faith requirement by following a simple formula: develop a reorganization plan that would provide a payout on the insider claim if approved, and then sell the claim to a friendly third party for a price lower than the payout.

This enables the debtor to maneuver the third party into a position where it would be foolish not to vote for approval of the reorganization plan, ensuring a "yes" vote and thereby allowing the debtor to effectively avoid the requirement under § 1129(a)(10) that at least one non-insider must approve the plan.

***11** Congress cannot have intended this outcome. If it had, it would not have required that at least one class of impaired creditors—excluding insiders—vote for a plan before it can be approved. Our holding here effectively negates that part of the statute.

I respectfully dissent.

All Citations

--- F.3d ----, 2016 WL 494592, 62 Bankr.Ct.Dec. 44

Footnotes

* The Honorable Robert S. Lasnik, Senior District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

1 11 U.S.C. § 1129(a)(10) ("The court shall confirm a plan only if all of the following requirements are met: ... If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.").

2 In this opinion, we address only Rabkin's statutory and non-statutory insider status. We resolve the remaining claims in a memorandum disposition filed concurrently with this opinion.

3 Although Bartlett signed Lakeridge's bankruptcy petition and all related documents on behalf of Lakeridge, she testified that she did not have authority to make decisions for MBP—or Lakeridge—on her own.

4 Bartlett testified that MBP's board decided to sell its claim for two reasons: (1) the claim was useless to MBP because it could not vote the claim in favor of its reorganization plan; and (2) the board believed there "may be a tax advantage in selling [the] claim."

5 The district court judge explained that he "underst[ood] the doctor or many people would have been put off by [U.S. Bank's approach to acquiring Rabkin's claim] and [he didn't] think it[was] at all surprising that [Rabkin] would reject it and not really be interested in dealing with the people who made the offer to him thereafter."

6 The question of bad faith is addressed in the memorandum disposition filed concurrently with this opinion and will not be addressed here.

7 Under 28 U.S.C. § 158(d), we "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" of the BAP. A decision is considered "final and ... appealable where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." *Dye v. Brown (In re AFI Holding, Inc.),* 530 F.3d 832, 836 (9th Cir.2008) (quoting *Schulman v. California (In re Lazar),* 237 F.3d 967, 985 (9th Cir.2001)). When the BAP "affirms or reverses a bankruptcy court's final order," the BAP's order is also final. *Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.),* 968 F.2d 887, 895 (9th Cir.1992). However, if the BAP "remands for factual determinations on a central issue, its order is not final and we lack jurisdiction to review the order." *Id.*

The bankruptcy court issued two orders: (1) the Designation Order (finding that Rabkin was not a non-statutory insider and had not acted in bad faith, but nevertheless designating his claim and disallowing it for plan voting purposes because he had acquired the claim from a statutory insider) and (2) the Discovery Order (denying U.S. Bank's Discovery Motions). Both bankruptcy court orders "finally determine[d]" Rabkin's right to vote on Lakeridge's reorganization plan and were therefore final orders. *See In re AFI Holding, Inc.,* 530 F.3d at 836.

However, the BAP's decision as issued was not final, because, although it affirmed and reversed portions of the bankruptcy court orders, it also remanded for discovery to allow factual determinations central to Rabkin's non-statutory insider status and ability to vote on Lakeridge's reorganization plan.

To make the BAP's decision final, U.S. Bank withdrew its arguments concerning the Discovery Order at oral argument, removing the need for remand. Because U.S. Bank withdrew its appeal concerning the Discovery Order, we will not discuss it in this opinion. Nor may U.S. Bank seek to enforce the BAP's holding on that issue at the bankruptcy court level.

8 If U.S. Bank's argument were true, we would expect to find references to "the holder of an insider claim" rather than "an insider" in the bankruptcy code.

9 For this assertion, U.S. Bank cites *In re Heights Ban Corp.,* 89 B.R. 795 (Bankr.S.D.Iowa 1988). There, the court concluded insider status must transfer with a claim upon assignment, otherwise "the operation of section 1129(a) would be seriously undermined. Debtors unable to obtain the acceptance of an impaired creditor simply could assign insider claims to third parties, who in turn could vote to accept." *Id.* at 799. Although the language in that case supports U.S. Bank's position, the facts do not. The assignor in *In re Heights Ban Corp.* transferred more than his claim; he and his co-shareholders also transferred their shareholder interests in the debtor to the assignee. *Id.* The court concluded that the assignors' and assignee's interests were "so interlocked ... [as to be] indistinguishable with respect to the debtor for purposes of section 1129(a)(10)." *Id.* Thus, the assignee became an insider by becoming a shareholder of the debtor, not simply by acquiring a claim from a statutory insider.

10 U.S. Bank correctly points out that this court previously determined insider status does transfer with a claim under the general law of assignment. *See Greer West Inv. Ltd. P'ship v. Transamerica Title Ins. (In re Greer West Inv. Ltd. P'ship),* No. 94–15670, 1996 WL 134293 (9th Cir. Mar. 25, 1996) (unpublished). However, Ninth Circuit Rule 36–3 prohibits parties from citing "[u]npublished dispositions ... of this Court issued before January 1, 2007 ... to the courts of this circuit." Thus, U.S. Bank should not have relied upon, or cited, *In re Greer West* in its arguments, and we are not bound by the decision.

11 An "arm's length transaction" is: "1. A transaction between two unrelated and unaffiliated parties. 2. A transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises." *Transaction, Black's Law Dictionary* (10th ed.2014). The dissent quotes both definitions, but interprets them to mean that *any* affinity between two parties renders a transaction less than arm's length rather than returning to the definition in § 101(31) for guidance. *See* Dissent at ––––.

12 As noted by the Tenth and Third Circuits, if actual control were required for non-statutory insider status, all non-statutory insiders would also be statutory insiders under 11 U.S.C. § 101(31). § 101(31)(A)(iv) (defining "insider" as a "corporation of which the debtor is a director, officer, or *person in control* " (emphasis added)); § 101(31)(B)(iii), (C)(v) (defining "insider" as a "person in control of the debtor"); *In re Winstar Commc'ns, Inc.,* 554 F.3d at 396; *In re U.S. Med., Inc.,* 531 F.3d at 1279. Such construction of § 101(31) would render meaningless the language: "the term 'insider' *includes.*"

13 The dissent argues that "Rabkin's status [is] a mixed question of law and fact, subject to de novo review." Dissent at ––––. Stating that an issue is a "mixed question" is simply the dissent's backdoor to reassessing the facts. As stated in Section II, we have two distinct issues in question, each with a different standard of review. First, we reviewed de novo the bankruptcy court's definition of non-statutory insider status, which is a purely legal question. Now, we must analyze whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review.

14 The dissent explains how it would have decided this case had it been sitting as the bankruptcy court judge. However, it was not the bankruptcy court judge. The dissent did not preside over the evidentiary hearing and did not hear the evidence in person. This court cannot substitute its judgment for that of the bankruptcy court "simply because it is convinced that it would have decided the case differently." *Anderson,* 470 U.S. at 573, 105 S.Ct. 1504.

15 The dissent asserts that the bankruptcy court applied the wrong legal standard because it did not state the words "arm's length transaction" in its final order. Dissent at ––––. The court's failure to use the words "arm's length transaction" is irrelevant. The court's entire explanation is a description of why the transaction was conducted at arm's length and, hence, why Rabkin was not an insider. The court should not be discredited for listing the specific facts that made the transaction arm's length rather than merely stating a conclusion.

16 The dissent argues that "the only logical explanation for Rabkin's actions" is that "[h]e did a favor for a friend." Dissent at ––––. However, the bankruptcy court's explanation that Rabkin made a speculative investment at a relatively low cost and with the potential for a big payoff is equally logical.

1 The offer was made in a crude manner at Rabkin's deposition by the attorney for U.S. Bank. The manner in which the offer was presented and the demand for an immediate response weighs against putting much weight on Rabkin's rejection of the offer. Even after reflection and consultation with his counsel, however, Rabkin declined the offer and did nothing to pursue any opportunity to realize more than $30,000 for his interest. That behavior does not support the view that his motivations were purely economic or that his decision-making was that of a party acting at arm's length without regard for his personal relationship with an insider.

2 As the Fifth Circuit has noted, "the scant legislative history on § 1129(a)(10) provides virtually no insight as to the provision's intended role." *In re Vill. at Camp Bowie I, L.P.,* 710 F.3d 239, 246 (5th Cir.2013) (citing National Bankruptcy Conference, *Reforming the Bankruptcy Code: The National Bankruptcy Conference's Code Review Project* 277 (1994) (noting that the legislative history of § 1129(a)(10) "is murky, shedding little light on its intended role"); Scott F. Norberg,

Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11, 46 U. Kan. L.Rev. 507, 538 (1998) (noting that "[t]he legislative history ... sheds little light on the rationale for section 1129(a)(10)")).

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United States Court of Appeals,
Eleventh Circuit.

Sandra SLATER, Plaintiff–Appellant,
v.
U.S. STEEL CORPORATION, Defendant–Appellee.

No. 12–15548.
|
Feb. 24, 2016.

Synopsis
Background: Former employee brought action against her former employer, alleging sex and race discrimination. After former employee filed a Chapter 7 bankruptcy petition without listing the discrimination action as an unliquidated claim, the United States District Court for the Northern District of Alabama, Karon Owen Bowdre, J., 2012 WL 4478981, dismissed the action under the doctrine of judicial estoppel, and former employee appealed.

[Holding:] The Court of Appeals held that doctrine of judicial estoppel barred former employee's claims after employee failed to disclose those claims in her Chapter 7 bankruptcy petition.

Affirmed.

Tjoflat, Circuit Judge, filed specially concurring opinion.

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Alabama. D.C. Docket No. 2:09–cv–01732–KOB.

Before TJOFLAT and WILLIAM PRYOR, Circuit Judges, and SCOLA, [*] District Judge.

Opinion

PER CURIAM:

***1** The equitable doctrine of judicial estoppel, also known as the doctrine of preclusion of inconsistent positions, "precludes a party from asserting a ... position that contradicts or is inconsistent with a prior position taken by the same party." 18 James Wm. Moore et al., Moore's Federal Practice ¶ 131.13[6][a] (3d ed.2015). The doctrine differs from the doctrines of issue and claim preclusion in that the policy animating it "is not [primarily] concerned with preserving the finality of judgments" but is concerned, instead, with "the orderly administration of justice and regard for the dignity of court proceedings." *Id.* ¶ 131.13[6][c]. The doctrine may be invoked by a third party: that is, someone who was not a party in the adversary's prior proceeding and therefore would suffer no prejudice were the adversary permitted to go forward with the inconsistent position. *Id.* ¶ 134.33[1] . [1]

[1] This is so in our circuit. We do not require that the party invoking the doctrine have been a party in the prior proceeding. "The doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, ... [w]hile privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required." *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282, 1286 (11th Cir.2002) (alteration in original) (quotation marks omitted) (quoting *Ryan Operations G.P. v. Santiam–Midwest Lumber Co.,* 81 F.3d 355, 360 (3d Cir.1996)).

I.

A.

[2] The case at hand is an employment-discrimination action brought by Sandra Slater against United States Steel Corporation ("U.S.Steel"), her former employer. [2] Slater raises two issues on appeal: (1) whether the District Court correctly granted summary judgment to U.S. Steel on her claim for "racial ... discrimination," and (2) whether the District Court correctly dismissed other employment-discrimination claims based on judicial estoppel that had proceeded past summary judgment and were set for trial. We affirm the District Court on both issues. [3]

Twenty-one months after bringing this lawsuit, Slater, represented by separate counsel, filed a Chapter 7 bankruptcy petition. [4] In filling out the Statement of Financial Affairs part of her petition, Slater, under penalty of perjury, answered "none" to the Personal Property Schedule B question asking whether she had any "contingent and unliquidated claims" and "none" to the Statement of Financial Affairs question asking whether she was, or had been within one year immediately preceding the filing of her petition, "a party" to any "suits and administrative proceedings."

[3] When U.S. Steel learned of the bankruptcy case—that Slater's Chapter 7 petition had not disclosed the employment-discrimination claims she was pursuing against it in the District Court and that the Chapter 7 Trustee was treating the bankruptcy as a "no asset" case [5] and had filed a Report of No Distribution with the Bankruptcy Court—it moved the District Court alternatively to dismiss the case or for summary judgment. U.S. Steel argued that the case should be dismissed because Slater lacked standing to prosecute it [6] or that summary judgment should be granted under the doctrine of judicial estoppel pursuant to *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir.2002), and its progeny. [7] *Burnes* was an employment-discrimination case like Slater's that was dismissed because the plaintiff, who was in bankruptcy, failed to disclose the pendency of federal-district-court litigation to the Bankruptcy Court.

***2** On receiving U.S. Steel's alternative motions, Slater immediately amended her bankruptcy petition to identify her lawsuit against U.S. Steel and the claims being litigated. [8] Slater also filed with the District Court a memorandum in opposition to U.S. Steel's motions and an affidavit stating that she did not intentionally withhold mention of her lawsuit in her bankruptcy petition and that when she realized what she had done, she had her bankruptcy attorney amend her answers to the Statement of Financial Affairs questions to reveal the current litigation.

In her memorandum, Slater argued that invoking the doctrine of judicial estoppel would be inappropriate for three reasons, two based on the United States Supreme Court's decision in *New Hampshire v. Maine,* 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), the third based on the Fourth Circuit's decision in *Folio v. City of Clarksburg,* 134 F.3d 1211 (4th Cir.1998). First, Slater argued that judicial estoppel would be inappropriate under *New Hampshire* because she had not " 'succeeded in persuading [the bankruptcy] court to accept [her] position' " that she had no claims pending against U.S. Steel, because she had not yet received a discharge of her debts by the Bankruptcy Court, and therefore had created " 'no risk of inconsistent court determinations' " that could pose a "threat to judicial integrity." Second, Slater contended that judicial estoppel should not be invoked because allowing her employment-discrimination case to go forward would not give her an " 'unfair advantage or impose an unfair detriment on' " U.S. Steel. And third, to be estopped, Slater argued that she "must have acted intentionally, not inadvertently" in failing to disclose the litigation against U.S. Steel in her Chapter 7 petition and, as indicated in her affidavit, her failure to disclose her claims and the litigation was inadvertent.

While U.S. Steel's alternative motions were pending, the following occurred. First, the Bankruptcy Court approved the application of the trustee of Slater's bankruptcy estate to employ the lawyers representing Slater in her case against U.S. Steel as special counsel for the bankruptcy estate and, in that capacity, continue to pursue the claims being litigated. Second, a short time later, Slater, through counsel, petitioned the court to convert her Chapter 7 case to a Chapter 13 case. The court granted her motion, and Slater promptly filed a Chapter 13 petition and an Amended Personal Property Schedule B. Three months later, the Bankruptcy Court affirmed the plan Slater proposed for the payment of her debts over a period of forty-two months.

[4] The District Court ruled on U.S. Steel's alternative motions while Slater's plan was being carried out. The court declared moot U.S. Steel's motion to dismiss the case on the ground that Slater lacked standing. A Chapter 13 debtor has standing to prosecute a claim of the bankruptcy estate as the debtor in possession, [9] and the court found that Slater was appearing in that capacity.

B.

***3** The District Court concluded that the doctrine of judicial estoppel as formulated in *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir.2002), and *Robinson v. Tyson Foods, Inc.,* 595 F.3d 1269 (11th Cir.2010), controlled its decision. In *Burnes,* we observed that

> [i]n the Eleventh Circuit, courts consider two factors in the application of judicial estoppel to a particular case. First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system.

291 F.3d at 1285 (quotation marks and citation omitted) (quoting *Salomon Smith Barney, Inc. v. Harvey,* 260 F.3d 1302, 1308 (11th Cir.2001), *vacated on other grounds,* 537 U.S. 1085, 123 S.Ct. 718, 154 L.Ed.2d 629 (2002)). In *Robinson,* we observed that "[w]hen considering a party's intent [under the second prong of our test] ... the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." 595 F.3d at 1275 (quotation marks omitted) (quoting *Barger,* 348 F.3d at 1295–96).

U.S. Steel was entitled to summary judgment, the District Court held, because it established both *Burnes* factors as a matter of law. The court summarily dispatched Slater's argument that U.S. Steel failed to establish the two *New Hampshire* factors she had cited in her memorandum in opposition to U.S. Steel's alternative motions with the statement that *Burnes* "[i]ncorporat[ed] those considerations" in "outlin[ing][the] two factors whose presence call for the imposition of judicial estoppel."

The District Court viewed *Burnes* and *Robinson* as controlling its decision because, like Slater's case, they

> involved the plaintiff's inconsistent sworn testimony in two separate proceedings, a bankruptcy proceeding and a federal employment discrimination case. In both cases, the plaintiff failed to disclose the existence of the pending lawsuit seeking monetary compensation as an asset in the bankruptcy proceeding. The Eleventh Circuit found in both cases that the plaintiff had a duty to disclose the federal lawsuit as an asset; that the failure to reflect the lawsuit in the bankruptcy case was a breach of that duty resulting in inconsistent positions under oath; that the district court, in its discretion, could infer from the record the requisite intent to make a mockery of the judicial system; and thus, that the court's application of the doctrine of judicial estoppel to grant summary judgment was not clear error. [10]

Just like the plaintiffs in *Burnes* and *Robinson,* Slater took inconsistent positions under oath when she breached the duty to disclose her ongoing employment discrimination claims in her bankruptcy petition. So the question the District Court had to decide, in order to grant U.S. Steel summary judgment, was whether Slater's inconsistencies were "calculated to make a mockery of the judicial system." *See Burnes,* 291 F.3d at 1285 (quotation marks omitted) (quoting *Salomon,* 260 F.3d at 1308). In the District Court's words, in answering that question, it had to "analyze [Slater's] intent, because the Eleventh Circuit requires intentional contradictions, not simple error or inadvertence." The District Court noted that, in *Robinson,*

> ***4** the Eleventh Circuit explained that 'the relevant inquiry is intent at the time of non-disclosure'—the motive to conceal is measured prior to the time the adversary discovers and reveals the concealment. It further explained that ... 'the motive to conceal stems from the *possibility* of defrauding the courts and not from any actual fraudulent *result.*'

The District Court stated, "The Eleventh Circuit emphasized, not only in *Robinson* but also in *Burnes,* that waiting until after being caught to rectify the omission is too little, too late." In *Burnes,* the District Court noted,

> the Eleventh Circuit ... explain[ed] that allowing a plaintiff to amend his bankruptcy petition 'only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. The so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets.'

Because Slater amended her Chapter 7 petition "only after U.S. Steel caught and exposed her omission," the District Court concluded that "allowing her to do so without penalty would encourage rather than discourage debtors like her to conceal their assets unless or until they are caught." To avoid this consequence, and because it inferred that Slater's concealment of her claims against U.S. Steel when she filed her Chapter 7 petition was intentional and not inadvertent, the District Court concluded that she intended "to make a mockery of the judicial system" and granted U.S. Steel a final judgment dismissing her case.

Slater appeals the District Court's judgment. For the reasons that follow, we affirm.

II.

[5] Slater seeks the vacation of the District Court's judgment and a remand of the case for further proceedings on two alternative grounds. [11] First, Slater argues that the District Court failed to give appropriate weight to two of the three factors the Supreme Court deemed critical in *New Hampshire* in considering whether to apply the doctrine of judicial estoppel. Second, she contends, the *New Hampshire* factors aside, that the District Court erred in applying Eleventh Circuit precedent. [12]

[6] Judicial estoppel is an equitable doctrine. We review a trial court's decision whether to apply the doctrine for abuse of discretion. *Robinson v. Tyson Foods, Inc.,* 595 F.3d 1269, 1273 (11th Cir.2010). An abuse of discretion occurs when the court bases its ruling on an incorrect legal standard. *Klay v. United Healthgroup, Inc.,* 376 F.3d 1092, 1096 (11th Cir.2004) (citing *Martin v. Automobili Lamborghini Exclusive, Inc.,* 307 F.3d 1332, 1336 (11th Cir.2002)).

III.

[7] The overriding purpose of the doctrine of judicial estoppel as stated in *New Hampshire* and by the federal circuits is "to prevent the perversion of the judicial process," indeed "the essential integrity of [that] ... process, by prohibiting parties from changing positions according to the exigencies of the moment." *See New Hampshire v. Maine,* 532 U.S. 742, 749–50, 121 S.Ct. 1808, 1814–15, 149 L.Ed.2d 968 (2001) (quotation marks and citations omitted) (citing the doctrine's purpose as expressed in various federal courts of appeal). The doctrine has been applied broadly to legal proceedings in various contexts before a variety of tribunals, including administrative forums. 18 James Wm. Moore et al., Moore's Federal Practice ¶ 134.30, at 69–70 (3d ed.2015).

***5** **[8]** The doctrine is ordinarily applied in two scenarios. The first is where the party asserting the doctrine was a party in the earlier proceeding in which the party's adversary took a position inconsistent with the position the adversary is currently advancing. *New Hampshire* presents this scenario. The second scenario is where the party asserting the doctrine was not a party in the earlier proceeding and thus did not have to deal with the position its adversary took in that proceeding. *Burnes* presents this scenario. [13]

In this part of our opinion, we consider whether, as Slater contends, the District Court erred, and thus abused its discretion, in failing to give appropriate weight to two of the three factors that led the Supreme Court to rest its *New Hampshire* decision on judicial estoppel. When we compare the factual predicate that prompted the Court to apply the doctrine in that case with the factual predicate that prompted the District Court to apply the doctrine we articulated in *Burnes,* we find that the factual predicates are materially dissimilar. This being so, we conclude that *New Hampshire* did not govern the District Court's application of judicial estoppel in Slater's case.

A.

New Hampshire v. Maine involved a boundary dispute. New Hampshire brought an original action in the Supreme Court in 2000 seeking a decree fixing the New Hampshire—Maine boundary that follows the Piscataqua River. New Hampshire, 532 U.S. at 745, 121 S.Ct. at 1812. New Hampshire "contend[ed] that the inland river boundary 'run[s] along the low water mark on the Maine shore,' ... and assert[ed] sovereignty over the entire river." *Id.* at 747, 121 S.Ct. at 1813 (second alteration in the original). Maine moved the Court to dismiss New Hampshire's complaint on the ground that "two prior proceedings—a 1740 boundary determination by King George II and a 1977 consent judgment entered by th[e] Court—definitively fixed the Piscataqua River boundary at the middle of the river's main channel of navigation" and thus should be given preclusive effect. *Id.* at 745, 121 S.Ct. at 1812. Maine argued that three distinct doctrines—claim preclusion, issue preclusion, and judicial estoppel—required the complaint's dismissal. Def.'s Mot. to Dismiss and Br. in Supp. of Mot. to Dismiss, *New Hampshire,* 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (No. 130), 2000 WL 35258927, at *20–30.

The Court granted Maine's motion. In doing so, it "pretermit[ted] the States' competing historical claims along with their arguments on the application *vel non* of the res judicata doctrines commonly called claim and issue preclusion." *New Hampshire,* 532 U.S. at 748, 121 S.Ct. at 1814. Instead, the Court concluded that "a discrete doctrine, judicial estoppel, best fit[ ] the controversy." *Id.* at 749, 121 S.Ct. at 1814.

After noting that "[c]ourts have observed that the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *id.* at 750, 121 S.Ct. at 1815 (alterations and quotation marks omitted) (quoting *Allen v. Zurich Ins. Co.,* 667 F.2d 1162, 1166 (4th Cir.1982)), the Court identified the three factors that "typically inform the decision whether to apply the doctrine in a particular case":

> ***6** First, a party's later position must be "clearly inconsistent" with its earlier position. Second, ... whether the 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." Absent success in a prior proceeding, a party's later inconsistent position introduces "no risk of inconsistent court determinations," and thus poses little threat to judicial integrity.... [T]hird[,] ... whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750–51, 121 S.Ct. at 1815 (quotation marks and citations omitted).

The Court found the second and third factors dispositive, as the following passage of its opinion indicates:

> [C]onsiderations of equity persuade us that application of judicial estoppel is appropriate in this case. Having convinced this Court to accept one interpretation of "Middle of the River," and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense. Were we to accept New Hampshire's latest view, the "risk of inconsistent court determinations" would become a reality. We cannot interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process.

Id. at 755, 121 S.Ct. at 1817 (citation omitted) (quoting *United States v. C.I.T. Constr. Inc.,* 944 F.2d 253, 259 (5th Cir.1991)).

The factual predicate that prompted the Court to apply the doctrine was this: permitting New Hampshire to go forward would be unfair to Maine. New Hampshire got what it wanted in the 1977 consent decree. Now it wanted the Court to effectively undo that decree and afford it an additional advantage at Maine's expense. The Court dismissed New Hampshire's complaint because it could not give New Hampshire what it wanted without undermining the integrity of the judicial process.

B.

Burnes v. Pemco Aeroplex, Inc. involved inconsistent positions taken by a debtor in a Chapter 7 bankruptcy case and in an employment-discrimination case. [14] 291 F.3d 1282, 1284 (11th Cir.2002). The salient facts were these.

In July 1997, Levi Billups petitioned the Bankruptcy Court for the Northern District of Alabama for Chapter 13 relief. *Id.* On January 30, 1998, "Billups filed a charge of discrimination with the EEOC against Pemco." *Id.* In December 1999, he and thirty-five other Pemco employees brought a lawsuit against Pemco alleging discrimination in the workplace in violation of Title VII of the Civil Rights Act of 1964. *Id.* Billups, however, did not amend his Chapter 13 schedule of assets to reflect the lawsuit. *Id.*

***7** In October 2000, the Bankruptcy Court converted Billups's Chapter 13 case to a Chapter 7 case and "ordered Billups to [submit] amended or updated schedules to the Chapter 7 trustee reflecting any financial changes since he first filed schedules with the bankruptcy court." *Id.* Billups filed the amended schedules, but he failed to update them to reflect the lawsuit. *Id.* In January 2001, after the bankruptcy trustee filed a "no asset" report, the Bankruptcy Court, acting on the report, ordered Billups's debts discharged. *Id.* Pemco learned of Billups's bankruptcy after his Chapter 7 case had closed. *See id.* After it discovered that Billups failed to disclose the Title VII litigation in his bankruptcy filings, it moved the District Court for summary judgment, asserting judicial estoppel.

The District Court granted the motion because the material facts before it fit hand in glove with the facts in *Chandler v. Samford University,* 35 F.Supp.2d 861 (N.D.Ala.1999). Mem. Op. at 5, *Burnes v. Pemco Aeroplex, Inc.,* No. 2:99–cv–03280–WMA (N.D. Ala. June 4, 2001), ECF No. 53. In that case, the plaintiff, Joycealyn Chandler, filed a Title VII race-discrimination suit against Samford University, her former employer. *Chandler,* 35 F.Supp.2d at 862. After her Chapter 13 bankruptcy case had been converted to a Chapter 7 case, she failed to inform the Bankruptcy Court of the lawsuit. *Id.* at 862–63. The Bankruptcy Court, finding that she had no reachable assets, ordered Chandler's debts discharged. *Id.* at 863. Samford University, having learned of the bankruptcy and Chandler's failure to reveal her lawsuit during the bankruptcy proceedings, moved the District Court for summary judgment, asserting judicial estoppel. *Id.*

The District Court in *Chandler* considered the application of judicial estoppel "to be one of first impression for ... the Eleventh Circuit," but

> join[ed] the multitude of courts recognizing the doctrine of judicial estoppel as a bar to a debtor's assertion of a claim not identified as an asset in an earlier bankruptcy proceeding. In doing so, th[e] court accept[ed] the two-pronged analysis requiring a demonstration that the assertion of the claim is inconsistent with the earlier non-disclosure and that the assertion of inconsistent positions is an attempt to deliberately manipulate the judicial system.

Id. at 864. Finding that Chandler had been well aware of her duty to inform the Bankruptcy Court of her pending Title VII suit [15] and had "an obvious motive for concealing her claims against Samford," the court applied the doctrine and refused to entertain her claims. *Id.* at 865.

The District Court granted Pemco's motion for summary judgment on June 4, 2001, six days after the opinion in *New Hampshire* came down. [16] Mem. Op. at 1, *Burnes v. Pemco Aeroplex, Inc.*, No. 2:99–cv–03280–WMA (N.D. Ala. June 4, 2001), ECF No. 53. One of the issues Billups presented to this court on appeal was whether *New Hampshire* effectively overruled *Chandler's* judicial-estoppel analysis, which the District Court had applied in reaching its decision. We addressed the issue after restating the *Chandler* analysis to conform to Eleventh Circuit precedent. *Burnes,* 291 F.3d at 1285–86. Citing *Salomon Smith Barney, Inc. v. Harvey,* 260 F.3d 1302, 1308 (11th Cir.2001), *vacated on other grounds,* 537 U.S. 1085, 123 S.Ct. 718, 154 L.Ed.2d 629 (2002), we said that in deciding whether to apply judicial estoppel, two factors are considered: (1) whether the party against whom the doctrine is invoked is asserting a position that is inconsistent with a position the party took in a prior proceeding under oath; and (2) whether the party is asserting the inconsistent position with the intent to make a mockery of the judicial system. [17] *Burnes,* 291 F.3d at 1285. We then acknowledged the three factors that informed the *New Hampshire* decision:

> ***8** (1) whether the present position is 'clearly inconsistent' with the earlier position; (2) whether the party succeeded in persuading a tribunal to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding creates the perception that either court was misled; and (3) whether the party advancing the inconsistent position would derive an unfair advantage on the opposing party.

Id. (citing *New Hampshire,* 532 U.S. at 750–51, 121 S.Ct. at 1815). We noted that the Supreme Court had been quick to say that these factors did not constitute " 'inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel,' " as " '[a]dditional considerations may inform the doctrine's application in specific factual contexts.' " *Id.* (quoting *New Hampshire,* 532 U.S. at 750–51, 121 S.Ct. at 1815). We accordingly concluded that "the two factors applied in the Eleventh Circuit are consistent with the Supreme Court's instructions [in *New Hampshire*], and provide courts with sufficient flexibility in determining the applicability of the doctrine of judicial estoppel based on the facts of a particular case." *Id.* at 1285–86.

We then held that each of the two judicial-estoppel factors spelled out in *Salomon* had been met. *Id.* at 1286–88. First, Billups took an inconsistent position under oath when he represented that he had no assets in the form of pending legal claims despite the fact that he was in the process of pursuing a Title VII claim against Pemco.[18] *Id.* at 1286. Second, the District Court did not err when it inferred from the record that Billups intended to make a mockery of the judicial system because he had knowledge of his undisclosed claims and a motive to conceal them .[19] *Id.* at 1286–88. That Billups stood to gain an advantage by concealing the claims from the Bankruptcy Court was undisputed. *Id.* at 1288. "It is unlikely he would have received the benefit of a conversion to Chapter 7 followed by a no asset, complete discharge had his creditors, the trustee, or the bankruptcy court known of a lawsuit claiming millions of dollars in damages." *Id.*

In an attempt to avoid the dismissal of his claims, Billups argued that he should be permitted to re-open his bankruptcy case to comply with the Bankruptcy Court's order that he inform the Chapter 7 trustee of his lawsuit against Pemco. *Id.* We rejected the argument and affirmed the District Court's judgment. Allowing Billups to re-open his case and amend his bankruptcy filings to reveal his lawsuit against Pemco, "would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets." *Id.*

The factual predicate that prompted this court to apply the doctrine was this: Billups intentionally concealed from the Bankruptcy Court his claim against Pemco thereby depriving the Chapter 7 trustee of the ability to intervene and prosecute his claim for the benefit of the bankruptcy estate and his creditors. If this court permitted Billups to re-open his bankruptcy case, it would be condoning his behavior, and, to the extent that such behavior would be noised about, it would be encouraging future debtors to follow suit. In short, we would be undermining the administration of the bankruptcy law and the integrity of the judicial process.

***9** We reiterated this concern in *Barger v. City of Cartersville,* 348 F.3d 1289 (11th Cir.2003). The City of Cartersville demoted Barger from her position as Personnel Director to customer-sales representative on January 8, 2001. *Id.* at 1291. On July 18, 2001, Barger sued the City in the District Court claiming that her demotion violated the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family Medical Leave Act. *Id.* For relief, she sought reinstatement to her Personnel Director position. *Id.* On September 4, 2001, Barger, represented by a bankruptcy attorney, petitioned the Bankruptcy Court for Chapter 7 protection. *Id.* The lawsuit with the City was not disclosed in the Statement of Financial Affairs and Personal Property Schedule B, which the attorney prepared and she signed under penalty of perjury. *Id.*

On November 7, 2001, after negotiations with the City failed, her employment attorney amended her complaint against the City to add claims for compensatory and punitive damages. *Id.* The next day, at a meeting of creditors, Barger told her bankruptcy attorney, and in turn, the trustee, about her case against the City. *Id.* She told them that she was seeking reinstatement to her former position, as Personnel Director, but omitted to say that she was also seeking damages. *Id.* Despite this, no amendment was made to the Statement of Financial Affairs and Personal Property Schedule B to reflect the pending lawsuit. *See id.*

The Bankruptcy Court subsequently granted Barger a complete discharge of her debts; it was a "no asset discharge." *Id.* When the City learned that Barger had been in bankruptcy and had concealed her case against the City from the Bankruptcy Court, it moved the District Court for summary judgment, asserting that the doctrine of judicial estoppel barred Barger's claims. *Id.* Barger responded by moving the Bankruptcy Court to reopen her Chapter 7 case, so that the trustee of her bankruptcy estate could prosecute the pending lawsuit in her stead. *Id.* at 1291–92. The Bankruptcy Court, over the City's objection, granted her motion and reopened the case for that purpose, finding that Barger " 'did not conceal the [discrimination] claim or attempt to obtain a financial advantage for herself'. In the Bankruptcy Court's estimation, the failure to list the discrimination suit in Barger's Statement of Financial Affairs was caused by her bankruptcy attorney's 'inadvertence' and had no substantive effect on the bankruptcy petition." *Id.* at 1292 (alteration in original). Despite these findings, the District Court granted the City's motion for summary judgment. *Id.*

On appeal, we considered the trustee of Barger's bankruptcy estate the appellant since Barger's claims constituted property of the estate. *Id.* at 1292–93. But we attributed to the trustee Barger's conduct in determining whether the District Court had abused its discretion in invoking judicial estoppel to bar the claims. *Id.* at 1295.

***10** In seeking the reversal of the District Court's judgment, the trustee focused on the District Court's rejection of the Bankruptcy Court's findings and its substitution for such findings the determination that Barger intended to manipulate the judicial system. *Id.* The trustee cited the following undisputed facts: (1) Barger's attorney failed to list her lawsuit against the City in the Statement of Financial Affairs despite the fact that she specifically told him about the suit; (2) Barger informed the trustee about her suit against the City during the creditors' meeting; and (3) the Bankruptcy Court reopened Barger's Chapter 7 case so that the trustee could prosecute the suit against the City. *Id.*

We upheld the District Court's determination notwithstanding those undisputed facts. As for the first fact, we attributed to Barger her attorney's failure to list the lawsuit against the City as an asset of the bankruptcy estate because she voluntarily hired the attorney and could not avoid the consequences of his acts or omissions. *Id.* Her "remedy is against the attorney in a suit for malpractice." *Id.* (quotation marks omitted) (quoting *Link v. Wabash R.R. Co.,* 370 U.S. 626, 634 n. 10, 82 S.Ct. 1386, 1390 n. 10, 8 L.Ed.2d 734 (1962)). But "[e]ven if [her] failure to disclose could be blamed on her attorney, the nondisclosure could not in any event be considered inadvertent" and thus excusable for judicial-estoppel purposes. *Id.* A "debtor's failure to satisfy [her] statutory disclosure duty is 'inadvertent' only when ... the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Id.* at 1296 (quotation marks omitted) (quoting *In re Coastal Plains, Inc.,* 179 F.3d 197, 210 (5th Cir.1999)). Barger obviously had knowledge of the undisclosed claims against the City and she had a motive to conceal the claims because "by omitting the claims, she could keep any proceeds for herself and not have them become part of the bankruptcy estate. Thus, [her] knowledge of her discrimination claims and motive to conceal them [were] sufficient evidence from which to infer her intentional manipulation." *Id.* (citing *Burnes,* 291 F.3d at 1287).

We discounted the second fact for the reason that when asked by the trustee for "the monetary value of the lawsuit, [Barger] informed him that she only sought reinstatement of her previous position with the City of Cartersville. Barger did not tell the trustee that she was also seeking backpay, liquidated damages, compensatory damages, and punitive damages." *Id.* As for the third fact, we said this:

> Barger's attempt to reopen the bankruptcy estate to include her discrimination claim hardly casts her in the good light she would like. She only sought to reopen the bankruptcy estate after the defendants moved the district court to enter summary judgment against her on judicial estoppel grounds. "Allowing [a debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtor's assets." As such, Barger's disclosure upon re-opening the bankruptcy estate deserves no favor.

***11** *Id.* at 1297 (alteration in original and citation omitted) (quoting *Burnes,* 291 F.3d at 1288). [20]

C.

The policy the Supreme Court implemented in *New Hampshire* and this court implemented in *Burnes* was the same: the protection of "the integrity of the judicial process" by preventing "the perversion" of that process by parties who would "deliberately chang[e] positions according to the exigencies of the moment." *New Hampshire,* 532 U.S. at 749–50, 121 S.Ct. at 1814 (quotation marks omitted). While the policy was the same, the factual contexts of the two cases were as different as night and day. In *Burnes,* the issue was whether the debtor intentionally concealed the claims he was prosecuting against his employer from the Bankruptcy Court, and if so, whether in prosecuting those same claims in District Court, he intended to make a mockery of the judicial system. The fact that Pemco had established *New Hampshire's* second factor—that Billups had "succeeded in persuading [that] court to accept" his position—was not dispositive. The concealment of his claims against Pemco had already performed its odious service, undermining the orderly administration of justice in his bankruptcy case. The concealment continued to do that until he was caught. In short, to give dispositive weight to *New Hampshire's* second factor would be to hold that judicial estoppel is inapplicable in the *Burnes* scenario until after the bankruptcy case has run its course and plaintiff's debts have been discharged.

New Hampshire's third factor is also not dispositive. That factor applies in the *New Hampshire* scenario but not the *Burnes* scenario, as is presented in the instant case. Allowing Slater's claims to go forward could not—in *New Hampshire's* sense of the words—give Slater an "unfair advantage" or impose on U.S. Steel an "unfair detriment" because U.S. Steel had not been burdened with opposing Slater's claims in the Bankruptcy Court. These words apply only in a two-case setting, where the party asserting the doctrine was a party in the earlier proceeding.

In sum, Slater's argument that the District Court erred in failing to give these *New Hampshire* factors appropriate weight, and thus abused its discretion in barring her claims on the judicial estoppel ground, fails. [21]

IV.

Slater argues alternatively that the District Court erred in applying Eleventh Circuit precedent, namely *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir.2002), and *Robinson v. Tyson Foods, Inc.,* 595 F.3d 1269 (11th Cir.2010). In both of those cases, the Bankruptcy Court had accepted, albeit tacitly, the debtor's failure to disclose as property of the bankruptcy estate claims the debtor was litigating in federal district court. That is, in each case, the bankruptcy proceeding had run its course. We find no merit in Slater's argument for two reasons.

[9] **[10]** First, this court's precedent in cases involving the non-disclosure in bankruptcy of claims the debtor is simultaneously prosecuting in federal district court does not require, as a condition precedent to the application of judicial estoppel, the termination of the bankruptcy proceedings. Whether the bankruptcy proceeding has ended is not dispositive. The factors that trigger the application of the doctrine are (1) an inconsistent position taken under oath in the Bankruptcy Court, and (2) advancing an inconsistent position in the District Court with the intent to make a mockery of justice.

***12** Second, to condition the invocation of judicial estoppel on what transpires in the bankruptcy case after the debtor's failure to list the claim being litigated in the District Court has been discovered would, as the *Burnes* Court explained, "only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets." *Burnes,* 291 F.3d at 1288.

V.

For the foregoing reasons, the judgment of the District Court is

AFFIRMED.

TJOFLAT, Circuit Judge, specially concurring:

I concur in the court's judgment because the result is dictated by Eleventh Circuit precedent. I write separately because that precedent, the doctrine of judicial estoppel as laid out in *Burnes v. Pemco Aeroplex, Inc.* [1] and *Barger v. City of Cartersville,* [2] was wrongly decided. The consequences of today's decision make the problem clear: U.S. Steel is granted a windfall, Slater's creditors are deprived of an asset, and the Bankruptcy Court is stripped of its discretion.

Sandra Slater filed a Chapter 7 bankruptcy petition twenty-one months after bringing suit for employment discrimination against her former employer, U.S. Steel. [3] Under oath, she failed to list that suit as a contingent asset on her bankruptcy petition. Upon discovery, U.S. Steel moved the District Court to bar the suit on judicial-estoppel grounds. According to U.S. Steel, Slater's inconsistent positions would "make a mockery of the judicial system ." [4]

While U.S. Steel's motion was pending, the Bankruptcy Court first learned of Slater's nondisclosed suit during a hearing on a related matter. [5] The bankruptcy judge noted that he "normally ... g[ot] [motions based on nondisclosed lawsuits] after they've settled them." [6] The Bankruptcy Judge's statement suggests that he hears about contingent assets, like lawsuits, somewhat regularly and usually only after their values become fixed. Having Slater's employment-discrimination claims go undisclosed, then, did not appear particularly troubling from the judge's perspective. He was willing to let Slater pursue her claims.

The District Court then granted summary judgment to U.S. Steel. The District Judge, concluding—correctly—that *Burnes* and *Barger* eliminated the Bankruptcy Judge's reasoned discretion in such circumstances, found that judicial estoppel barred Slater's claim. Judicial estoppel requires the court to consider two factors: "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." [7] That Slater took inconsistent positions was uncontested and the District Court inferred the requisite intent to "make a mockery of the judicial system" from Slater's failure to list her claims on the bankruptcy petition. It granted summary judgment based on judicial estoppel in part to protect the integrity of the Bankruptcy Court. Today we affirm that decision.

***13** The results of today's decision speak for themselves. U.S. Steel no longer faces a set of potentially meritorious employment-discrimination claims. Judicial estoppel disposes of Slater's claims, without examination on the merits; indeed, the doctrine blocks them altogether. U.S. Steel is free and clear from any liability it may have owed to Slater. Conversely, for Slater's creditors, there will be no recovery on the claims, which belonged, by operation of law, to the bankruptcy estate the moment Slater filed her bankruptcy petition. And, the Bankruptcy Court, despite expressing no concern about the late-arriving claim, receives no "protection" through the doctrine. Instead, its experience and discretion are disregarded in favor of the District Court's judgment.

This special concurrence proceeds in three parts.[8] In Part I ., I provide a brief overview of how the bankruptcy process is designed to work in the absence of judicial estoppel, with particular emphasis placed on the roles played by the trustee and the bankruptcy judge. In Part II., I trace the doctrine of judicial estoppel's historical development in the Eleventh Circuit. In Part III., I turn to the stark implications that stem from the continued application of judicial estoppel as required by *Burnes* and *Barger*. I conclude by calling for en banc review to set straight the doctrine of judicial estoppel.

I.

The Eleventh Circuit's judicial-estoppel precedent to be applied by Article III courts in bankruptcy proceedings, which works instead against the structure and purpose of the bankruptcy system, fails to accord the broad deference to the bankruptcy courts that Congress intended. Before explaining why this is so, I begin with an overview of the relevant dynamics present in these proceedings for the those not already familiar.

The federal bankruptcy laws are designed to "give[ ] ... the honest but unfortunate debtor ... a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[9] In exchange for the discharge of his debts, the debtor is required, to the extent possible, to make his creditors whole with the property he owns at the time of bankruptcy.[10] Because the debtor's property is self-reported, "the importance of full and honest disclosure [in a bankruptcy case] cannot be overstated."[11] Candor is unquestionably "crucial to the effective functioning of the federal bankruptcy system."[12]

The role of the bankruptcy judge is, of course, to resolve disputes that arise. But the bankruptcy judge's time is also often occupied in a broad supervisory manner, generally ensuring that the case is administered in a "just, speedy, and inexpensive" manner.[13] "[T]he bankruptcy court is the ultimate custodian of the estate."[14]

Filing a petition "creates an estate [that is] comprised of ... all legal or equitable interests of the debtor in property as of the commencement of the case," regardless of where such property is located or who holds it.[15] Thus, as a matter of law, the estate—not the debtor—owns all assets the moment the debtor files his bankruptcy petition. Additionally, an automatic stay protects all assets of the estate, also as a matter of law, as soon as the petition is filed.[16] The stay protects against, as relevant here, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[17]

***14** A bankruptcy trustee[18] is appointed to represent the estate and guide the bankruptcy case through the process to its conclusion.[19] The trustee is an indispensable party to the bankruptcy because the bankruptcy process is complex, is not self-executing, and requires the good faith of all involved. The trustee is a fiduciary to the estate.[20] The Bankruptcy Court and the trustee work together supervising the case, marshalling all of the debtor's assets for distribution to the creditors.

The district courts have jurisdiction over bankruptcy cases,[21] though the district courts may provide in their local rules that bankruptcy cases be referred to the bankruptcy courts.[22] If an order of the Bankruptcy Court is appealed, the District Court sits as an appellate court in reviewing the Bankruptcy Court's order.[23] The District Court is bound to a clear-error standard for the Bankruptcy Court's factual findings and an abuse-of-discretion standard for the Bankruptcy Court's discretionary decisions, such as the decision whether to reopen a case.[24] Orders resulting from the District Court's review may then move through the normal federal appellate process.[25]

I now turn to the evolution of judicial estoppel, a supposedly equitable doctrine overlaying this intricately designed bankruptcy system, which has managed to strip the Bankruptcy Court of its broad discretion as the "ultimate custodian of the estate." [26]

II.

As Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4477 observes, "[T]he number of federal appellate decisions grappling with [the doctrine of judicial estoppel] has grown dramatically."

> The cases tend to cluster around a few salient points, leaving uncertainty in between. Some sense of order can be found by focusing on three major approaches. The *narrowest approach* precludes inconsistent positons only on a theory akin to equitable estoppel, requiring reliance by a party who would be injured by permitting a change of position. A *more open approach,* which has become dominant in the federal courts, looks for reliance by an adjudicating tribunal. This approach in turn blends into a *still more open-ended approach* that, by seeking to prevent a party from "playing fast and loose" with the courts, implies distinctions between seemly and unseemly adversary behavior. All of these approaches must come to terms with the well-entrenched principle that modern procedure welcomes inconsistent positions in the course of a single litigation. [27]

Each of these approaches is solicitous of one or more discrete interests. The "narrowest approach" protects a party who has relied on its adversary's former position from the injury it would suffer if the court allowed the adversary to abandon its former position and pursue a contrary position. This approach also protects the court's integrity, which may be called into question if it issues a decision that appears to be unjust. The "more open approach" protects the previous court's appearance of competence by not issuing a ruling the previous court should have made but did not. The "still more open-ended approach" protects the court from inconsistent pleadings that are not barred by the doctrines of issue and claim preclusion but are disrespectful of the judicial process. This Circuit's doctrine best resembles the "still more open-ended approach." [28]

***15** In the remainder of Part II., I trace the evolution of judicial estoppel in this circuit. In its first iteration, the doctrine required that the inconsistent positions at issue be taken under oath in separate judicial proceedings. To invoke the doctrine, a party had to show that its adversary was advancing a position in the District Court that was inconsistent with a position it took in an earlier judicial proceeding. The doctrine assumed that the adversary's first position was true, and its second position false. The District Court invoked the doctrine and estopped the adversary from asserting the second position to protect the judicial system's integrity. Allowing the adversary to go forward with a false claim would be to tolerate the perversion of the judicial process and that, obviously, would undermine the integrity of the judicial process.

Over time, this formulation of the doctrine changed. The requirement of an oath in both the prior proceeding and the District Court was modified to exclude the oath in the District Court. [29] Moreover, the "prior proceeding" requirement was also changed such that the "prior" proceeding no longer needs to come first in time. If, for example, the adversary's position under oath is that the claim he is litigating in the District Court does not exist, the District Court must dismiss the claim on the merits. That is, the doctrine assumes that the position stated under oath is true, and that the position in the District Court is therefore false. The District Court therefore invokes the doctrine and estops the adversary's position to vindicate the integrity of the prior proceeding.

A. [30]

The doctrine of judicial estoppel first appeared in Eleventh Circuit precedent [31] in 1953, in *Livesay Industries, Inc. v. Livesay Window Co.* [32] For our purposes, however, the doctrine expressed in *Burnes* and *Barger* sprouts from a 1973 decision, *Johnson Service Co. v. Transamerica Insurance Co.* [33] In *Johnson Service,* the party asserting the doctrine was not a party in the prior proceeding—the *Burnes* scenario. [34] Sitting in diversity and therefore bound to apply the relevant state law, the *Johnson Service* Court looked to the Supreme Court of Texas's pronouncement in *Long v. Knox,* [35] which provided that

> "[t]he doctrine of judicial estoppel is not strictly speaking estoppel at all but arises from positive rules of procedure based on justice and sound public policy. It is to be distinguished from equitable estoppel based on inconsistency in judicial proceedings because the elements of reliance and injury essential to equitable estoppel need not be present. Under the doctrine of judicial estoppel ... a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertion sought to be made. It ... is not necessary that the party invoking this doctrine have been a party to the former proceeding." [36]

***16** The *Johnson Service* Court then explained that,

> *Judicial estoppel* is a technical rule designed to meet needs of broad public policy. It *is directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings.* Because the rule looks toward cold manipulation and not an unthinking or confused blunder, it has never been applied where plaintiff's assertions were based on ... inadvertence[ ] or mistake. [37]

Thus, Wright, Miller & Cooper's "still more open-ended approach" gained its first foothold.

Having already been applied when the party asserting judicial estoppel was not a party to the prior proceeding, the next appearance of the doctrine involved the *New Hampshire* scenario [38] in which the party asserting estoppel was a party to the prior proceeding. Like *Johnson Service, American National Bank of Jacksonville v. Federal Deposit Insurance Corp.* [39] was a diversity case in which the court was tasked with applying state law . [40] The *American National Bank* Court cited *Johnson Service* for the proposition that "[j]udicial estoppel is applied to the calculated assertion of divergent sworn positions." [41] It also noted that "[t]he doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings." [42]

B.

In 1988, this court, in *Chrysler Credit Corp. v. Rebhan,* [43] considered for the first time whether to recognize judicial estoppel as a federal rule and thus part of the law of the Eleventh Circuit. *Chrysler Credit* presented the *New Hampshire* scenario and involved the application of the Bankruptcy Code. [44] The debtor, [45] Rebhan, was attempting to maintain a factual position under oath in an adversary proceeding initiated by Chrysler Credit that was directly contrary to the factual position he had pursued under oath against Chrysler Credit in a state court. [46] Chrysler Credit objected, arguing that judicial estoppel barred Rebhan's position. The Bankruptcy Court agreed, the District Court affirmed, and Rebhan appealed to this court. In that this court was "not bound ... to apply any rigid formulation of the doctrine," having previously applied judicial estoppel only as state law, it looked to "common law or to the policies supporting the doctrine itself for guidance," and specifically to the Texas law that had informed the *Johnson Service* Court's decision. [47] Importantly, the court commented on the purpose of judicial estoppel. It found that the doctrine's purpose was to prevent parties from "attempt[ing] to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings," [48] and affirmed the lower courts' rejection of Rebhan's position because he was attempting to manipulate the Bankruptcy Court's decision. [49]

Three years later, this court once again applied the doctrine of judicial estoppel as federal law in a case presenting the *New Hampshire* scenario. In *McKinnon v. Blue Cross & Blue Shield of Alabama,* [50] we adopted the state-law formulation articulated in *American National Bank:* "Judicial estoppel is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings" [51] (collectively the "divergent-sworn-positions-and-mockery-of-justice rule"). [52] The divergent-sworn-positions requirement had previously been adopted into federal law through *Chrysler Credit,* and *McKinnon* added the "mockery of justice" language to federal law. This divergent-sworn-positions-and-mockery-of-justice rule was then applied verbatim in *Talavera v. School Board of Palm Beach County* [53] and *Taylor v. Food World, Inc.* [54]

***17** In *Salomon Smith Barney, Inc. v. Harvey,* [55] a diversity case, the court looked to *federal* law instead of *state* law for the elements of judicial estoppel. [56] After quoting the federal divergent-sworn-positions-and-mockery-of-justice rule the court explained what the party asserting judicial estoppel must establish in order to prevail. "This circuit's approach contemplates two elements. First, it must be shown that the allegedly inconsistent positions were made under oath in *a prior proceeding.* Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system" [57] (collectively the "two-element statement"). [58]

Although the *Salomon* Court was applying a state-law formulation of judicial estoppel, in referring to "[t]his circuit's approach" the court created the impression that it was dealing with the doctrine as a federal, not a state, rule. This made the Court's quotation of the divergent-sworn-positions-and-mockery-of-justice rule problematic. The question was whether the juxtaposition of the divergent-sworn-positions-and-mockery-of-justice rule's description of "inconsistent pleadings" as "divergent sworn positions" with the two-element statement that the "inconsistent positions [must be] made under oath in a prior proceeding" merely reinforced the divergent-sworn-positions-and-mockery-of-justice rule's requirement that the first, as well as the second, of the "divergent sworn positions" be under oath, or instead whether it meant that only the first of the divergent positions needed to be under oath.

Without elaboration, the *Burnes* and *Barger* Courts would subsequently conclude, by implication and in the context here, that the two-element statement amounted to a proper interpretation of the divergent-sworn-positions-and-mockery-of-justice rule that only the position taken in "a prior proceeding" needed to be under oath. [59] Moreover, the "prior" proceeding could actually be a subsequent proceeding. [60] In *Burnes,* the first proceeding was the lawsuit the debtor filed in the District Court; the second proceeding was the debtor's Chapter 7 case. Similarly, in *Barger,* the first proceeding was the District Court action; the second proceeding was the Chapter 7 case. In both situations, the second proceeding became the "prior proceeding" because it was the only proceeding in which the debtor asserted the positon under oath that triggered the application of judicial estoppel. The debtor's position in the District Court was not asserted under oath because verified pleadings are no longer required by the Federal Rules of Civil Procedure. [61] The divergent-sworn-positions-and-mockery-of-justice rule's "divergent sworn positions" element thus fell by the wayside. [62]

C.

1.

Judicial estoppel's next doctrinal development, in *Burnes,* occurred when this court changed its focus from protecting the integrity of the judicial system to punishing debtors who do not fully disclose their assets. Because *Burnes* followed directly on the heels of the Supreme Court's decision in *New Hampshire v. Maine,* [63] the court first had to consider that case's impact on the Circuit's own precedent. In *New Hampshire,* the Supreme Court identified three factors that guided its judicial-estoppel analysis—the degree to which the two statements at issue were inconsistent; whether a judicial tribunal accepted the earlier position so that it would appear, if a later court adopts a contrary position, that either court had been misled; and whether the party advancing the inconsistent position would derive an "unfair advantage or impose an unfair detriment on the opposing party if not estopped" [64] —but went on to conclude that these factors were not "inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." [65] Against this uncertain backdrop, the *Burnes* Court recited verbatim the divergent-sworn-positions-and-mockery-of-justice rule [66] and followed it with the two-element statement:

> ***18** In the Eleventh Circuit, courts consider two factors in the application of judicial estoppel to a particular case. "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." [67]

The court then considered whether basing the application of judicial estoppel on these two factors would comport with the Supreme Court's "instructions" in *New Hampshire,* and concluded that the two factors "provide courts with sufficient flexibility in determining the applicability of the doctrine of judicial estoppel based on the facts of a particular case." [68]

Addressing the first factor, the *Burnes* Court focused solely on the debtor's position before the Bankruptcy Court, [69] stating that there was "no debate that [the debtor's] financial disclosure forms were submitted under oath to the bankruptcy court; therefore, the issue bec[ame] one of intent." [70] That is, were the inconsistent positions the debtor had taken "calculated to make a mockery of the judicial system"? Specifically, when he amended his bankruptcy schedules pursuant to the Bankruptcy Court's order but failed to disclose his Title VII claim and the lawsuit against his employer, was the nondisclosure inadvertent or mistaken?

Appearing to equate the phrase "calculated to make a mockery of the judicial system" with the phrase "intentional manipulation" of the system, the court observed that "several circuits, in considering the particular issue of judicial estoppel and the omission of assets in a bankruptcy case, have concluded that deliberate or intentional manipulation can be inferred from the record." [71] Then, citing decisions of other circuits, the court reasoned that whether an intent to manipulate the system can be inferred turns on whether the debtor, *at the time* he breached the duty to disclose the claim, either lacked knowledge of the claim or had no motive for concealing it. [72] If the debtor knew of the claim or had a motive for concealing it, the failure to disclose the claim could not have been inadvertent or a mistake. [73]

The court concluded that the record before it contained "sufficient evidence from which to infer intentional manipulation by [the debtor]" [74] as a matter of law, and thus affirmed the District Court's grant of summary judgment to the defendant. The debtor obviously knew about the Title VII litigation pending against the defendant when he amended his schedule of assets but failed to disclose the litigation, and he had a motive for concealing it:

> As to motive, it is undisputed that [the debtor] stood to gain an advantage by concealing the claims from the bankruptcy court. It is unlikely he would have received the benefit of a conversion to Chapter 7 followed by a no asset, complete discharge had his creditors, the trustee, or the bankruptcy court known of a lawsuit claiming millions of dollars in damages. [75]

***19** That the debtor's failure to disclose the claim could be remedied if his Chapter 7 case were reopened was, in the court's view, irrelevant because

> [t]he success of our bankruptcy laws requires a debtor's full and honest disclosure. Allowing [the debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets. [76]

Shifting the focus of the judicial-estoppel inquiry from preserving the integrity of the judicial system to punishing the debtor for failing to fully disclose his assets, the *Burnes* Court set the stage for the doctrine's final extension in *Barger*.

2.

a.

Barger v. City of Cartersville [77] further weakened the intent requirement by reinforcing *Burnes's* conclusion that it would diminish debtors' "necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets" if a noncompliant debtor were "allow[ed] to back up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary." [78] In Barger, the debtor, Donna Barger, sued the City of Cartersville after a demotion, seeking reinstatement. [79] Shortly thereafter, she also sought Chapter 7 bankruptcy relief. [80] While her bankruptcy estate was being administered, she amended her complaint against the City to seek compensatory and punitive damages in addition to reinstatement. [81] Because she was now seeking damages, she was required to amend her bankruptcy filings but failed to do so. [82]

When the City discovered this it moved the District Court for summary judgment based on judicial estoppel, and the bankruptcy trustee intervened. [83] The debtor responded by moving the Bankruptcy Court to reopen her case [84] so she could disclose the litigation. [85] Although the City objected to reopening the case [86] the court exercised its discretion and granted Barger's motion. [87]

As indicated in the order, the court first decided that it had the authority to reopen the Chapter 7 case. [88] Under 11 U.S.C. § 350(b), the case could be "reopened ... to administer assets, to accord relief to the debtor, or for other cause." [89] The claims against the City, which became assets of the debtor's estate on the filing of the Chapter 7 petition but were not scheduled, remained assets of the estate after the case closed since the claims had not been abandoned by the trustee [90] or otherwise administered. "It would ordinarily follow," the court concluded, "that the case should be reopened to administer the claim[s] for the benefit of creditors." [91] The Bankruptcy Court did, however, address the question of whether the doctrine of judicial estoppel, as applied in *Burnes,* should foreclose Barger's motion. In the court's mind, the question turned on whether the debtor, in failing to amend her schedules, "operate[d] with an intentional or manipulative disregard of the legal system or the bankruptcy processes in this Court." [92] The court found that she had not.

> ***20** She truthfully and voluntarily disclosed the existence of the Litigation to the Trustee, the person responsible for pursuing it, whether or not it had been scheduled. Her counsel's failure to amend her schedules could not, and did not, gain any advantage for her and, indeed, that failure was actually adverse to her interests. Her counsel has admitted that this failure was inadvertent oversight and there is nothing in the record or this Court's experience that would indicate otherwise.
>
> The Federal Rules of Bankruptcy Procedure are to be construed "to secure the just, speedy, and inexpensive determination of every case and proceeding." FED. R. BANKR.P. 1001. It would not serve the objectives of those Rules to hold that, in these circumstances, Debtor's failure to amend schedules to list a claim that had been voluntarily disclosed to the Chapter 7 Trustee at the § 341(a) meeting of creditors should preclude reopening of the case to correct that failure. To the contrary, because the voluntary disclosure to the trustee served the same substantive purpose as an amendment, because Debtor did not and could not benefit by the failure to amend, and because the failure is due to inadvertence, the just determination of this case requires reopening so that the claim can be administered. [93]

Assuming, however, that the debtor was at fault for failing to amend her schedules, the court noted that the bankruptcy law provided "punishments other than judicial estoppel that can be directed at a debtor, rather than the estate and creditors," to deter debtors from concealing their assets, including sanctions under Rule 9011 of the Federal Rules of Bankruptcy Procedure, [94] revocation of the discharge, [95] or denial of any exemption in the claim and its proceeds. [96] Recognizing that judicial estoppel was a discretionary doctrine, [97] the court concluded that the "important interests of creditors, militate[d] against its application." [98]

> It [would be] incongruous to punish Debtor's creditors and impair their prospects for a potential recovery in the bankruptcy case in order to improve the City's judicial estoppel argument in District Court. In *In re Daniel,* 205 B.R. 346 (Bankr.N.D.Ga.1997) (Murphy, J.), the court observed that reopening a bankruptcy case in order for a debtor to disclose an asset is appropriate even if it deprives a defendant of a judicial estoppel defense. [99]

Moreover, "[a]ny advantage which Debtor may have gained by omitting the asset from her schedules is eliminated by reopening, amending the schedules and allowing the Chapter 7 Trustee to administer the asset." [100] The court concluded that "the interests of Debtor's creditors override any detriment that the City may sustain as a result of reopening the case and that the Debtor's conduct does not preclude such reopening." [101]

The District Court then applied judicial estoppel and granted the City's motion for summary judgment. [102] In doing so, the court effectively rejected the Bankruptcy Court's findings and conclusions, and substituted its own, to-wit: the debtor, in failing to list the claims and her lawsuit against the City in her schedules, intended to manipulate the judicial system. [103]

b.

***21** On appeal, this court applied the two-element statement in determining whether the City had established the defense of judicial estoppel. [104] This meant the City's task was two-fold: "First, ... [Barger]'s allegedly inconsistent positions must have been 'made under oath in a prior proceeding.' Second, the 'inconsistencies must be shown to have been calculated to make a mockery of the judicial system.' " [105]

The City, of course, could show that the claims Barger was asserting in the District Court were inconsistent with the claims she had presented to the Bankruptcy Court and that her Statement of Financial Affairs to the Bankruptcy Court was, by its very nature, under oath. [106]

Having satisfied the first prong, the City still had to show that Barger filed the false statement with the intent to manipulate the judicial system:

> [T]he issue here is intent. For purposes of judicial estoppel, intent is a purposeful contradiction—not simple error or inadvertence. "[D]eliberate or intentional manipulation can be inferred from the record," where the debtor has knowledge of the undisclosed claims and has motive for concealment. [107]

Because the court accepted that Barger's intent to manipulate the judicial system was inferable as a matter of law, the City was able to make this showing and thus satisfy both prongs of the test. [108] The court noted that Barger had knowledge of the claims she was pursuing against the City at the time she failed to disclose the claims, and found that she had a motive for concealing them. [109]

> Barger appeared to gain an advantage when she failed to list her discrimination claims on her schedule of assets. Omitting the discrimination claims from the schedule of assets appeared to benefit her because, by omitting the claims, she could keep any proceeds for herself and not have them become part of the bankruptcy estate. Thus, Barger's knowledge of her discrimination claims and motive to conceal them are sufficient evidence from which to infer her intentional manipulation. [110]

The court affirmed the District Court's application of judicial estoppel because the City had satisfied the two-element statement's requirements.

3.

Though the doctrine of judicial estoppel as expressed by *Burnes* and *Barger* continues to be binding precedent in this circuit, [111] a subsequent panel reached a directly contrary decision in *Parker v. Wendy's International, Inc.,* [112] a case presenting a set of facts materially indistinguishable from those in *Barger.* [113] The *Parker* Court concluded that "[t]he correct analysis here compels the conclusion that judicial estoppel should not be applied at all" to bar the trustee of the bankruptcy estate from pursuing an undeclared lawsuit. [114] Because the trustee had not been "tainted or burdened by the debtor's misconduct"—the post-petition inconsistent statements in the Bankruptcy Court and in the District Court—it would be inappropriate to punish the trustee in the debtor's stead, and by extension deprive the debtor's creditors of property that belonged, by operation of law, to the estate. [115]

***22** Notably, though the *Parker* panel cited each *New Hampshire, Burnes,* and *Barger* multiple times, it never explained why *Barger* did not dictate the result. [116] Many courts and commentators have cited *Parker* favorably, often mistakenly referring to *Parker* as the Eleventh Circuit's controlling statement of judicial estoppel. [117] Indeed, the Fifth Circuit, sitting en banc, relied extensively on *Parker's* logic to overturn a panel decision applying judicial estoppel to bar an innocent trustee from pursuing an undisclosed claim. [118] As the decision in *Parker* demonstrates, the current state of our judicial-estoppel jurisprudence is both confused and confusing, calling to mind the old saw that justice ought not be dispensed under a rule that varies by the length of the presiding judge's foot . [119]

D.

In sum then, trying to reconcile this court's decisions applying judicial estoppel as a uniform doctrine proves problematic, to say the least. The vast majority of the decisions discussed above fall in the category Wright, Miller & Cooper labels the "still more open-ended approach." [120] And with minimal exception, all focus on and penalize the same "unseemly adversarial behavior"—taking false positions under oath. [121]

Judicial estoppel first became this court's law in *Chrysler Credit*, which involved statements under oath in two forums, a North Carolina court and the Bankruptcy Court, and held that the doctrine's purpose was to prevent parties from "attempt[ing] to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings." [122] In so many words, we said that permitting a party to assert under oath a position directly contrary to a position he had taken under oath in a former judicial proceeding would pervert the judicial process. [123] Judicial estoppel, in barring the asserted position, protects that process.

In *McKinnon*, the court adhered to the *Chrysler Credit* formulation of the doctrine and said, in effect, that in attempting to manipulate the court system through the assertion of divergent sworn positions, a party was "making a mockery of justice by inconsistent pleadings." [124] In *Salomon*, a diversity case, [125] after reiterating verbatim the divergent-sworn-positions-and-mockery-of-justice rule, the court stated that: "[t]his circuit's approach contemplates two elements. First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system," [126] the two-element statement. Because the court was applying a state-law version of judicial estoppel, the added sentence had no effect on the federal version of the doctrine this court had adopted in *Chrysler Credit* and applied foursquare in *McKinnon.*

Nine months later, in *Burnes*, a federal-question case, the court treated *Salomon* as if it were a federal-question case rather than a diversity case and adopted the two-element statement as expressing the burden of proof a party must satisfy to invoke judicial estoppel before the District Court. [127] A party need only show that the debtor is prosecuting a claim that he had not disclosed to the Bankruptcy Court as required by 11 U.S.C. § 521(a).

***23** The *Burnes* Court would have realized, of course, that there is a difference between the requirements of the divergent-sworn-positions-and-mockery-of-justice rule and the two-element statement in terms of what a party must prove to establish the judicial-estoppel defense and that it was bound to apply the divergent-sworn-positions-and-mockery-of-justice rule, if applicable. I assume that the court considered the divergent-sworn-positions-and-mockery-of-justice rule inapplicable in the sense that *Chrysler Credit* (which *McKinnon* followed) set an example by formulating a version of judicial estoppel appropriate for the specific factual situation presented in that case. [128] *Chrysler Credit* gave the court leeway to do the same thing, to fashion a rule for the specific situation at hand. [129] Moreover, as the court noted, the Supreme Court in *New Hampshire* acknowledged that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." [130]

So, the *Burnes* Court formulated a different version of judicial estoppel, one appropriate for the situation before it. Judicial estoppel can apply even though the debtor's inconsistent position in the District Court is not under oath. This no doubt explains why the *Burnes* opinion does not identify the position the debtor took under oath in that court. [131] All that matters is that the debtor got caught prosecuting a lawsuit he had concealed from the Bankruptcy Court. The *Barger* Court thereafter applied *Burnes's* formulation of the doctrine to estop a bankruptcy trustee who had been substituted as plaintiff for the debtor, who lacked standing to sue. [132]

Under *Barger*, a trustee will be able to avoid summary judgment only if, on the evidence presented, [133] it could reasonably be inferred that at the time the debtor failed to disclose the claim and the litigation to the Bankruptcy Court, the debtor either lacked knowledge of the claim or a motive for concealing it or, conversely, that the nondisclosure was inadvertent or a mistake. [134]

As a practical matter, the evidence will yield neither inference. [135] Moreover, that the trustee lacked knowledge of the debtor's nondisclosure or the nondisclosure was the debtor's lawyer's fault is irrelevant. [136] In truth, to say that a trustee could avoid summary judgment if he established that the debtor's nondisclosure was inadvertent or a mistake is to say that the trustee could not establish either fact. The words inadvertent and mistake are meaningless.

Given this reality, a bankruptcy trustee has two options. The first assumes that the value of the debtor's previously undisclosed claim is such that it would be prudent to expend the funds necessary to seek en banc review of the *Barger* precedent. Two alternative routes to the en banc court would be available. The first would begin in the District Court. The trustee would intervene in the case the debtor brought in the District Court and suffer an adverse judgment there and in this court on appeal. [137] The second would begin in the Bankruptcy Court. The trustee would commence an adversary proceeding and suffer an adverse judgment there, in the District Court, [138] and in this court on appeal. [139]

***24** The second option, which the trustee would take if the value of the claim did not counsel taking the first option, would be to abandon the claim pursuant to 11 U.S.C. § 554, [140] in which event the claim would revert to the debtor. The claim would be worthless. The party potentially liable on the claim would not honor the claim because, if the debtor sued, judicial estoppel would bar the claim. [141]

In sum, as long as the *Barger* decision continues to be binding precedent, the trustee of the bankruptcy estate will be unable to step in for the debtor and prosecute the claim he tried to conceal from the Bankruptcy Court. By operation of law, due to a judgment based on judicial estoppel, the claim will be conveyed from the bankruptcy estate to the party potentially liable to the estate, or the claim will be abandoned to the debtor as a worthless asset.

Allowing the first of these two outcomes by continuing to apply a precedent that has long been detached from its moorings in equity only guarantees the very mockery of justice the doctrine of judicial estoppel was designed to avoid.

III.

In Part III., having discussed the doctrine's historical underpinnings at some length, I begin unpacking the effect of the judicial estoppel mandated by *Burnes v. Pemco Aeroplex, Inc.* [142] and *Barger v. City of Cartersville* [143] by explaining how their continued application fails both to preserve the integrity of the judicial system and to punish and deter oath-breaking. Then, I turn to the impropriety of fashioning such an equitable remedy in the face of the perfectly adequate range of criminal and civil legal remedies designed by Congress to apply across proceedings in the bankruptcy system, which are in clear tension with the invocation of judicial estoppel. I conclude my analysis with the observation that this state of affairs, which cannot be justified as an exercise of this or any court's equitable power and works to impugn, rather than preserve, the judicial system's integrity, must be set straight by the en banc court.

A.

1.

Before explaining why applying judicial estoppel as required by *Burnes* and *Barger* fails to achieve that doctrine's purpose, it is first necessary to flush out exactly what that purpose is and what it is not. Judicial estoppel, properly understood, is concerned with the "integrity of the judicial system, not the litigants." [144] It focuses on the " 'judicial process' " [145] — specifically, the intentional use of " 'inconsistent positions' " [146] or " 'inconsistent pleadings' " [147] to "manipulate the judicial system" [148] or to " 'make a mockery of the judicial system.' " [149] What might constitute "a mockery of justice" is elusive. Our cases don't define the phrase. [150] I assume that the intentional manipulation of a judicial system would constitute a mockery of justice.

The doctrine's *sine qua non* in the context we're dealing with here is that the debtor's position in the Bankruptcy Court is under oath and is false. [151] It is false because his position in the District Court is inconsistent with that position. [152] If the debtor's position in the Bankruptcy Court is not under oath, the doctrine does not apply—even if the debtor intends to manipulate the judicial system.

***25** *Burnes* and *Barger* involved two judicial systems, [153] the District Court's and the Bankruptcy Court's. [154] Did the District Court apply the doctrine of judicial estoppel and bar the claims in those cases to protect the integrity of both judicial systems or only one? I posit that the District Court applied the doctrine to protect the system in the Bankruptcy Court only, [155] to cause future debtors to make a full disclosure of their assets—here, assets in the form of actionable claims for damages. [156]

The opinions in *Burnes* and *Barger* all but say this explicitly. The opinions emphasize at length the need for debtors to disclose their assets and potential assets to the Bankruptcy Court as required by 11 U.S.C. §§ 521(a)(1)(B)(i) and (iii). Moreover,

> [t]he duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change. Full and honest disclosure in a bankruptcy case is crucial to the effective functioning of the federal bankruptcy system. For example, creditors rely on a debtor's disclosure statements in determining whether to contest or consent to a no asset discharge. Bankruptcy courts also rely on the accuracy of the disclosure statements when considering whether to approve a no asset discharge. Accordingly, the importance of full and honest disclosure cannot be overstated. [157]

The *Burnes* and *Barger* debtors failed to disclose the claims they were pursuing, so the dispositive question became whether they intended to mislead the Bankruptcy Court. In both cases, the District Court found the intent to mislead as a matter of law and, applying the doctrine, granted summary judgment. [158] In affirming the judgments, this court made it clear that the invocation of judicial estoppel was necessary to protect the bankruptcy system, not the processing of litigation in the District Court. [159] Indeed, the opinions in *Burnes* and *Barger* have nothing to say about the judicial process in the District Court except to state, or imply, that the debtor took an inconsistent position in that court. [160] The inconsistent position made false the debtor's position in the Bankruptcy Court and thus set the stage for judicial estoppel to perform its service—the protection of the integrity of the bankruptcy system.

The District Court does not need protection from a litigant's assertion of an inconsistent claim (or defense), even where, in another proceeding, the litigant denied under oath the existence of the claim or defense. In fact, the assertion of inconsistent claims (or defenses) is commonplace in district court litigation. The Federal Rules of Civil Procedure permit their assertion. As Rule 8(d)(3) provides, “A party may state as many separate claims or defenses as it has, regardless of consistency.” [161]

The *Burnes* and *Barger* opinions contain no mention of Rule 8(d)(3), much less an explain why it is inoperative when the previous statement was under oath, but operative when the previous statement was not under oath. I fail to comprehend why an oath should make a difference.

***26** Prior inconsistent statements made under oath are ubiquitous in litigation regardless of the forum in which they are made. They occur in all sorts of settings—on deposition or in sworn answers to interrogatories in the case being litigated or in previous proceedings. Prior inconsistent statements are the stuff of impeachment on cross-examination. If made by a party, the party's adversary may introduce them into evidence as admissions. [162]

Striking a meritorious claim that has been pled as permitted by Rule 8—because the claimant previously swore that the claim did not exist—in order to protect the integrity of the judicial process in the District Court is inconceivable to me. [163] I cannot imagine a District Judge dismissing a cognizable claim simply because the debtor previously stated under oath that the claim did not exist. The *Barger* Court, however, read *Burnes* as commanding District Judges to do just that, even though the claim no longer belongs to the debtor, but to the bankruptcy estate instead, and that the estate's trustee is pursuing the claim for the benefit of the creditors, who are innocent of the debtor's transgression.

In affirming the dismissal of the trustee's claims, the *Barger* Court acknowledged that the trustee was faultless, [164] and thus beyond sanction. The court also knew that the creditors would be bearing the loss of the claims' value, which the District Court's judgment would, by operation of law, transfer to the defendant as a pure windfall. The rationale for such a disposition is the one the court borrowed from *Burnes*. The trustee's claim must be dismissed in order to stimulate the “necessary incentive [of future debtors] to provide the bankruptcy court with a truthful disclosure of [their] assets.” [165] Presumably, once debtors realized the harm they will cause their creditors if they are caught hiding their assets, and the shame that may engender, they may think twice. The loss of future relationship with some of their creditors will move debtors to make a truthful disclosure of their assets.

The Bankruptcy Court in *Barger* read *Burnes* as using judicial estoppel as a means of punishing oath-breaking. In overruling the City's objection to the debtor's motion to reopen her Chapter 7 case, the court addressed the City's *Burnes*-based argument—that the debtor had to pay a penalty for concealing her claims—thusly:

> If there are adverse consequences that a debtor should suffer due to omission of a scheduled claim, there are *punishments* other than judicial estoppel that can be directed at a debtor, rather than the estate and creditors, such as sanctions under Fed. R. Bankr.P. 9011, revocation of the discharge, or denial of any exemption in the claim and its proceeds. [166]

Burnes and *Barger* imply that judicial estoppel's service is to stimulate the full disclosure, or deter the concealment, of debtors' assets, not to punish the debtor. I agree with the Bankruptcy Court. The doctrine's service is punishment.

2.

***27** Having described the subtle yet crucial shift in the motivating rationale behind judicial estoppel that occurred in *Burnes* and *Barger,* it should not be hard to understand why borrowing an equitable remedy specially fashioned for the preservation of the integrity of the judicial system to punish inconsistent pleadings will fail to achieve either the former or the latter. Debtors will be prompted to make full disclosure of their assets, instead of hiding them, when they realize, on reflection, that if they are caught hiding them, they will be penalized. The debtors in *Burnes* and *Barger* were caught, but were they penalized? They gave up property that wasn't theirs. But that was the extent of it. [167]

Standing alone, relieving a thief of stolen property is unlikely to deter theft. If anything, it would encourage more theft. Applying the equitable remedy of judicial estoppel—to the exclusion of the extensive, but apparently inadequate, range of criminal and civil legal remedies for oath-breaking—would guarantee that all that would happen to debtors who get caught prosecuting undisclosed claims would be that those claims get dismissed. The only downside for the debtor, therefore, is the psychic cost to his conscience and the expense of bringing suit. There is simply no deterrence for the cold and calculating litigant, who stands to gain much and lose nothing.

B.

Not only is the particular equitable remedy *Burnes* and *Barger* created ineffective, but resorting to an equitable remedy to punish oath-breaking debtors itself is inappropriate, given the extensive range of perfectly adequate criminal and civil legal remedies with which the logic and effect of judicial estoppel are at odds. I accept for the moment that the doctrine's objective is not to punish the debtor but to motivate debtors to make full disclosure of their assets [168] and turn to the effect *Barger's* pursuit of that objective has on the Bankruptcy Court's application of the rules and statutory provisions, criminal as well as civil, Congress has set in place to achieve it. [169] I begin, in Part III.B.1., with Rule 1009 of the Federal Rules of Bankruptcy Procedure and 11 U .S.C. § 350 because their immediate purpose is to foster full disclosure of assets and thereby "secure the just, speedy, and inexpensive determination of every case and proceeding." [170] Part III.B.2. next explains how *Barger* obstructs the Bankruptcy Court's ability to use Rule 1009 and § 350 and the other tools it has been provided to foster full disclosure. And Part III.B.3. explains the intolerable dilemma *Barger* has created for the Bankruptcy Courts.

1.

The full and complete scheduling of a debtor's assets as required by the Bankruptcy Code does not always happen. Omissions frequently occur in the Statement of Financial Affairs and Schedules of Assets and Liabilities a debtor files with his bankruptcy petition, [171] and they occur when, as in *Burnes,* the debtor amends his schedules as the bankruptcy estate is being administered. [172] The Supreme Court, in proposing Rule 1009 to Congress, and Congress, in adopting it, [173] realized this, so Rule 1009 provides that "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." [174] These filings may be amended to include an asset of the bankruptcy estate whether the debtor's failure to list the asset earlier was inadvertent or a mistake or was "calculated to make a mockery of the judicial system." [175]

***28** Sometimes a debtor's failure to disclose an asset of the estate is not discovered until after the case is closed. Since the asset had never been scheduled and the bankruptcy trustee, obviously unaware of the asset, had not abandoned it, the asset is still property of the bankruptcy estate. [176] The asset is in limbo. The debtor can't possess or otherwise realize it; neither can the trustee of the bankruptcy estate because he has been discharged. Congress anticipated this situation. In enacting 11 U.S.C. § 350, it gave the Bankruptcy Court discretion to reopen a closed case on "motion of the debtor or other party in interest," [177] in order "to administer" for the benefit of the creditors an asset that had not been scheduled. [178] The court may exercise such discretion whether or not the debtor's failure to schedule the asset was inadvertent or a mistake or was intentional. [179]

This is what happened in *Barger*. Barger had not scheduled her claims for damages so she moved the Bankruptcy Court to reopen her Chapter 7 case to list them. [180] The City objected, citing *Burnes.* [181] If the City's objection to reopening Barger's case were an attempt to exercise control over Barger's claims, it could constitute a violation of the stay that had automatically been put in place by 11 U.S.C. § 362(a)(3) the moment Barger filed her Chapter 7 petition. [182] The court, however, did not view the objection in that way. Instead, it treated the objection as the City framed it, an argument that Barger should be punished for falsifying her schedules. [183] Accordingly, in ruling on the motion to reopen and the City's objection, the court treated the motion and the objection as raising mutually exclusive issues. [184]

The court reopened the case because reopening is ordinarily granted for the benefit of the creditors—to enable the administration of assets of the estate that were not scheduled or abandoned by the trustee. [185] In the matter before it, the court said that "it [would be] incongruous to punish [Barger's] creditors and impair their prospects for a potential recovery ... in order to improve the City's judicial estoppel argument in the District Court." [186] It therefore granted the debtor's motion. [187] The court left the issue of punishment for the District Court to decide. [188]

2.

Barger has obstructed the Bankruptcy Court's ability to use the tools Congress has provided to motivate debtor compliance with the disclosure requirements of 11 U.S.C. §§ 521(a)(1)(B)(i) and (iii) and Rule 1007 of the Federal Rules of Bankruptcy Procedure. [189] And Barger did so not in an appeal, under 28 U.S.C. § 158(d)(1), from a District Court decision affirming or reversing on interlocutory appeal the Bankruptcy Court's decision to reopen under 11 U.S.C. § 350, but in an appeal, under 28 U.S.C. § 1291, of the District Court's decision estopping the trustee's claims on summary judgment.

Barger nevertheless appears to be a *de novo* review of the Bankruptcy Court's decision to reopen. It also gives the appearance that this court was exercising its supervisory power [190] over the Bankruptcy Court, instructing the court that, at bottom, it is to deny reopening in any case in which the debtor omitted to schedule a lawsuit he brought on a claim that belonged to the bankruptcy estate and filed a motion to reopen after the party he sued discovered the omission.

***29** The District Court, following *Burnes*, estopped the estate's claims for damages because Barger's failure to schedule them after her complaint had been amended to seek damages against the City was neither inadvertent nor a mistake. [191] On appeal, the bankruptcy trustee argued that the Bankruptcy Court's decision to reopen should be reviewed under the abuse-of-discretion standard and therefore affirmed unless the facts supporting the decision were clearly erroneous. Treating the case as if it were an appeal under § 158(d)(1), the trustee submitted that the findings of fact set out in the Bankruptcy Court's order issued pursuant to Rule 52(a) of the Federal Rules of Civil Procedure were fully supported by the record and justified the court's decision to reopen notwithstanding Barger's failure to amend her schedules and list the lawsuit pending against the City. [192] The court found the failure irrelevant since the trustee knew about the litigation. This court, essentially disregarding the Bankruptcy Court's findings and conclusions, found on the same record that Barger's failure to amend her schedules was intentional, not inadvertent or a mistake, and therefore was a calculated attempt to manipulate the judicial system. *Burnes* required that the District Court's application of judicial estoppel be affirmed.

I translate the affirmance into a statement that the Bankruptcy Court abused its discretion in reopening Barger's case because it based its decision on an error of law. This court held that the Bankruptcy Court erred in applying *Burnes's* test for determining whether the debtor's failure to amend her schedules amounted to a calculated attempt to manipulate the judicial system. That test, again, is whether the nondisclosure was inadvertent or a mistake. If Barger was unaware of the lawsuit or had no motive for pursuing it, the nondisclosure would be inadvertent and thus could not be considered a calculated attempt to manipulate the judicial system. But she failed the test: Barger was plainly aware of the lawsuit and had a motive for pursuing it; she would reap the benefit of any recovery the lawsuit might yield. Judicial estoppel accordingly applied as a matter of law. Because it did, the reopening constituted an abuse of discretion.

That said, I sense that the *Barger* Court did not view its decision as a review of the Bankruptcy Court's decision to reopen. If it did, the court would have discussed § 350 and Rule 1009 and the policies and the Congressional intent they implement. But neither § 350 nor Rule 1009 was mentioned. They didn't have to be. All that mattered was that Barger failed to amend her schedules to disclose the claims in litigation. The failure constituted a statement, under penalty of perjury, that she had no claims for damages pending against the City, a statement that Barger knew was false. Because it was, Barger, in making it, intended to manipulate the bankruptcy system.

However one views the *Barger* Court's § 1291 decision —whether it constituted a review of the Bankruptcy Court's decision to reopen or punishment for the debtor's false schedules—its negative effect on the ability of the Bankruptcy Courts to use the tools Congress provided to enhance full disclosure of assets is clear. As an initial matter, § 350 and Rule 1009, the primary tools for ensuring full disclosure, are for all practical purposes rendered inoperative. If a case has been closed, reopening the case under § 350 to allow the debtor to amend his schedules pursuant to Rule 1009 and list a previously nonscheduled claim will turn out to be a useless act once the party sued discovers the nondisclosure. The party will immediately move the District Court to dismiss the debtor from the case for lack of standing, and the court must grant the motion. If, after the debtor's schedules have been amended, the bankruptcy trustee persuades the District Court to vacate its dismissal and intervenes in place of the debtor or initiates an adversary proceeding in the Bankruptcy Court, the trustee will be confronted with judicial estoppel.

***30** If a case remains open and the debtor amends his schedules to reveal the nondisclosed claim, the trustee will similarly be faced with judicial estoppel. Even if suit has not been filed, if the debtor's claim is cognizable (and ready for suit) and the defendant potentially liable learns of the claim and informs the bankruptcy trustee, the defendant will have set the stage for invoking judicial estoppel to bar the trustee's appearance in the District Court or before the Bankruptcy Court in an adversary proceeding.

Moreover, the secondary tools Congress has provided to enhance full disclosure of assets are also rendered practically inoperative. [193] The *In re Barger* Court opined that those tools, when used, are fully capable of deterring debtors from concealing their assets and that any deterrence judicial estoppel might provide would be problematic at best. Moreover, a full weighing of the equities—the effect on the interests of creditors, the debtor, the City and the publiccounseled reopening the debtor's case.

3.

In addition to rendering all but inoperative the tools Congress has provided to enhance the full disclosure of a debtor's assets, *Barger* has created a serious dilemma for a Bankruptcy Court presented, as was the case in *Barger*, with a debtor's motion to reopen in order to schedule an unscheduled claim after the District Court has dismissed the claim because the debtor lacked standing to prosecute it. The Bankruptcy Court has two choices. It can heed the dictates of *Barger* and sustain the objection to reopening. Or it can disregard the dictates of *Barger* and grant the debtor's motion to reopen. I consider in order the consequences that result from the exercise of choices.

An immediate consequence of denying reopening is that the court may have sanctioned the violation of the automatic stay. [194] How? The court has placed its imprimatur on an "act[, i.e., the objection to reopening,] to exercise control over property of the estate." [195] Assuming that the denial would not violate the stay, what happens to the asset, the claim? The claim occupies the same status it was occupying after the District Court dismissed the debtor's case. The claim had neither been scheduled nor abandoned. [196] The claim "remains property of the estate." [197] And under 11 U.S.C. § 362(c)(1), the automatic "stay of an act against [the unscheduled claim] continues until such property is no longer property of the estate." [198] In short, since the claim cannot be disturbed, it remains in limbo. Because the claim is in limbo, the objecting party, who obtained the ruling he sought, has received a windfall. The windfall is an indefinite postponement of the reopening of the debtor's bankruptcy case; following reopening it might be sued by the trustee or named as a respondent in an adversary proceeding. That is not likely to occur unless the claim is very valuable and the creditors have gone hence without day.

***31** If the Bankruptcy Court disregards *Barger's* dictates and reopens the case, the consequences are those that flow from a debtor's amendment of his schedules in a bankruptcy case that has not been closed. The trustee can move the District Court to vacate the dismissal of the debtor's claim and obtain intervention or he can initiate an adversary proceeding in the Bankruptcy Court. Assuming that granting judgment to the party the trustee is suing in order to punish the debtor for his post-petition conduct—filing false schedules—would not violate the automatic stay, the trustee will be estopped.

C.

Despite this court's assertions to the contrary, [199] the supposedly equitable doctrine of judicial estoppel as formulated in *Burnes* and applied in *Barger*—supposedly a doctrine of inconsistent pleadings—is not a doctrine of inconsistent pleadings. Nor is it an equitable doctrine. Instead, it is a quasi-criminal sanction—created by this court and masked as judicial estoppel—to punish debtors who make false statements under oath about the existence of actionable claims they are prosecuting in the District Court. The application of this doctrine is akin to abuse of process, the common-law tort, [200] and thus impugns the integrity of the District Court. At the same time it blemishes the reputation of the Bankruptcy Court and impedes its ability "to secure the just, speedy, and inexpensive determination of every case and proceeding" [201] pending before it.

1.

The doctrine of judicial estoppel, as formulated first in *McKinnon v. Blue Cross & Blue Shield of Alabama* [202] and later in *New Hampshire v. Maine*, [203] focuses on the second of the litigant's two inconsistent pleadings or positions. The court strikes the second position, the one immediately before it, because the party is trifling or playing "fast and loose" with the court. [204] The *Burnes–Barger* doctrine focuses on the litigant's position in the Bankruptcy Court, whether or not it is his second position. The question is instead whether the litigant's position in the Bankruptcy Court is inconsistent with his position in the District Court. If it is, the court strikes the position in the District Court. That position is stricken because the position in the Bankruptcy Court, which the litigant took under oath, was false.

The position the litigant is pursuing in the District Court is a prepetition claim. It existed before he petitioned the Bankruptcy Court for relief. If he files suit before repairing to the Bankruptcy Court, that is his first position; he has a claim for damages. If he then files for bankruptcy and denies the existence of the claim, that is his second position; he has no claim for damages. Under the doctrine as formulated in *McKinnon*, the second position is rejected. Under the *Burnes–Barger* doctrine, however, the first position is rejected.

If the litigant files for bankruptcy first and schedules no claim (because it does not then exist), and then files suit (because it does exist at some later point), the question becomes whether the claim was cognizable [205] when he filed for bankruptcy or became cognizable afterwards. If the claim became cognizable afterwards, his first bankruptcy position—that the claim does not exist—was true. Once the claim became cognizable and he filed suit, though, the litigant's first position became false because he did not update it, by amending his bankruptcy schedules, the moment the claim became cognizable. The litigant's failure to amend itself becomes his second position and is accepted by the court while his first position is rejected as false.

***32** In sum, it doesn't matter which of the two inconsistent positions is the "second" position, that is, the one the divergent-sworn-positions-and-mockery-of-justice rule would reject, because the *Burnes–Barger* doctrine is not concerned with inconsistent pleadings. All that matters is that the debtor falsified his bankruptcy position under oath, and that cannot be tolerated.

2.

The *Burnes–Barger* doctrine is not an equitable doctrine because its application produces at-least-inequitable results, if not manifestly unjust ones. A debtor deprives his bankruptcy estate of an asset by concealing it. Then the District Court, acting as a court of equity, furthers the deprivation by giving the asset to the defendant, who owes the claim's value to the bankruptcy estate, as a pure windfall. The estate's creditors, who are totally innocent, provide the windfall. The explicit rationale for doing this is that the deprivation deters future debtors from concealing assets of the bankruptcy estate. The implicit rationale is that the bankruptcy courts are either unwilling or incapable of providing such deterrence. [206]

All of this aside, I will assume that the *Burnes–Barger* doctrine is indeed an equitable doctrine and examine it in the light of the traditional maxims of equity. [207] I start with the parties whose interests the doctrine implicates. There is the party asserting the doctrine, the defendant. The defendant simply wants to avoid liability by having the estate's claim rejected. The defendant's role is that of an informant. It informs the court that the debtor has lied under oath in the Bankruptcy Court in failing to disclose the litigation at hand. Anyone aware of the debtor's bankruptcy proceedings could perform the same service. The defendant, therefore, is simply not a party for purposes of weighing the equities.

The Bankruptcy Court, in contrast, is a party because the integrity of its processes and its reputation for competency are implicated. Likewise, the trustee is a party because, as part of his fiduciary duties, he must marshal and administer the assets of the bankruptcy estate. The trustee does that for the benefit of the creditors, so they, too, are parties. The debtor was a party, but he has exited the stage because his claim has, by operation of law, been transferred to the administration of his estate. His interest is in obtaining a discharge of his debts, and that is a matter the Bankruptcy Court will handle.

The District Court is also a party, and it also has at stake its integrity. Inconsistent pleadings, however, whether or not under oath, are of no concern. Rule 8(d) of the Federal Rules of Civil Procedure permits inconsistent pleadings, and in my view, equity would not countenance a judge-made rule to negate that feature of Rule 8. Neither is the fact that the trustee's likely key witness in the suit, the debtor, lied under oath. Prior inconsistent statements, whether or not under oath, are grist for the litigation mill.

***33** Additionally, applying judicial estoppel in the circumstances depicted in *Barger* and in the case at hand necessarily precludes the bankruptcy courts from exercising the case-specific discretion that Congress intended. I focus on the situation in *Barger* because the Bankruptcy Court's interest in that case is a matter of record, as discussed in the *In re Barger* Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. [208] In a nutshell, the Bankruptcy Court reopened the debtor's Chapter 7 case because Barger's damages claims against the City had value and the creditors were entitled to the benefit of that value.

The District Court in *Barger* nevertheless estopped the trustee's claims to punish Barger for failing to amend her schedules and list her claims against the City. But the Bankruptcy Court had already considered the matter of punishment. It was well aware of the sanctions the law provides—the criminal law and the bankruptcy law—and concluded that none applied. If the court had "reasonable grounds for believing" that Barger had committed perjury, it would have reported the matter to the U.S. Attorney, as required by 18 U.S .C. § 3057. [209] But no grounds were present. [210] The District Judge agreed with the Bankruptcy Judge. Otherwise, since § 3057 applies to a District Judge just as it applies to a Bankruptcy Judge, the District Judge would have reported the matter to the U.S. Attorney. Yet, this court agreed with the District Judge that the debtor's failure to amend her schedules constituted a false statement under oath, and that she had to be punished. The punishment? Not under the criminal law of perjury [211] or of contempt, [212] but under a judge-made rule that punishes innocent parties in the debtor's stead.

In the end, the parties with the most as stake, the Bankruptcy Court and the creditors, ask the District Court to withhold the judicial-estoppel remedy. Rather than make them whole, it will cause them irreparable harm. In applying the doctrine notwithstanding their request and against the clear thrust of governing law, the District Court undermines its own integrity in the eyes of the public and implies that the Bankruptcy Court is either unwilling or incapable of overseeing debtor compliance with the law.

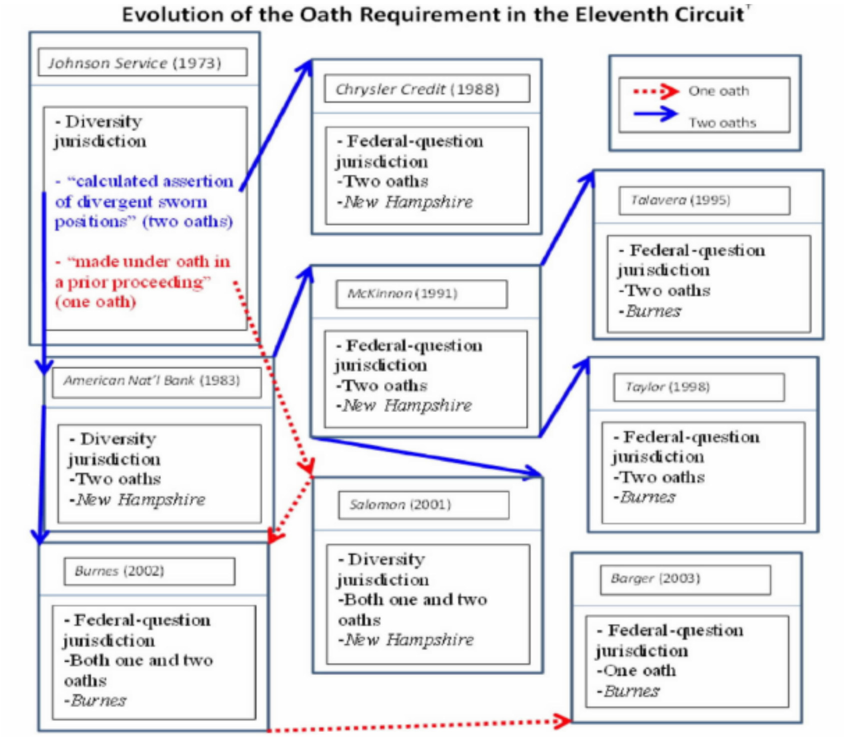
The only solution to this unfortunate predicament is the en banc court.

Case: 12–15548 Date Filed: 02/24/2016 Page: 106 of 112

APPENDIX I.

Evolution of the Oath Requirement

in the Eleventh Circuit †



† This visual aid should be read as follows. The arrows show that the language in the case at the tail of the arrow was adopted in the case at the head of the arrow. For example, *Johnson Service*'s "calculated assertion of divergent sworn positions" language was adopted in *Chrysler Credit*, indicating that two oaths were required for the application of judicial estoppel. Similarly, *Johnson Service*'s "made under oath in a prior proceeding" language was adopted in *Salomon*, and *McKinnon*'s inheritance of the "calculated assertion of divergent sworn positions" language was adopted in *Salomon*, making it unclear whether one or two oaths were required. The cases proceed in roughly chronological order from the top-left corner to the bottom-right corner. The text inside each case box indicates whether there was federal-question or diversity jurisdiction in the case, whether it cited the language for one oath or for two oaths, and whether the case presented either a *Burnes* or a *New Hampshire* scenario. *See* note 1 of the Timeline of Judicial Estoppel Cases in the Eleventh Circuit for a brief explanation of these scenarios.

Timeline of Judicial Estoppel
Cases in the Eleventh Circuit

Case name	Citation	Date	Jurisdiction	***Burnes* or *NH* ?** †	**One oath or two?** ‡
Johnson Serv. Co. v. Transamerica Ins. Co.	485 F.2d 164	1973	Diversity	*Burnes*	Either
Am. Nat'l Bank of Jacksonville v. Fed. Deposit Ins. Corp.	710 F .2d 1528	1983	Diversity	*NH*	Two

Chrysler Credit Corp. v. Rebhan	842 F.2d 1257	1988	Federal question	*NH*	Two
McKinnon v. Blue Cross & Blue Shield of Ala.	935 F.2d 1186	1991	Federal question	*NH*	Two
Talavera v. School Bd. of Palm Beach Cty.	129 F.3d 1214	1995	Federal question	*Burnes*	Two
Taylor v. Food World, Inc.	133 F.3d 1419	1998	Federal question	*Burnes*	Two
Salomon Smith Barney, Inc. v. Harvey	260 F.3d 1302	2001	Diversity	*NH*	Either
Burnes v. Pemco Aeroplex, Inc.	291 F.3d 1282	2002	Federal question	Burnes	Either
Barger v. City of Cartersville	348 F.3d 1289	2003	Federal question	*Burnes*	One

APPENDIX II.

***34** The following is a list of court of appeals, district court, and bankruptcy court decisions within the Eleventh Circuit that cite *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir.2002), *Barger v. City of Cartersville,* 348 F.3d 1289 (11th Cir.2003), or both as of February 22, 2016. I have included only cases that cite *Burnes* or *Barger* for judicial estoppel purposes. The first four columns indicate the year the case was decided, the court that decided the case, the case name, and the case citation. The last three columns are coded as follows. For the "Application of JE" column, "C.A." indicates that the court cited and applied judicial estoppel, "C.N.A." indicates that the court cited and did not apply judicial estoppel, "C.D.A." indicates that the court cited the doctrine disapprovingly, but still applied judicial estoppel, and "C.D.N.A." means the court cited the doctrine disapprovingly and did not apply judicial estoppel. For the "Burnes/Barger" column, entries with only "Burnes" or "Barger" mean that only that one case was cited, and an entry of "Burnes/Barger" means both cases were cited. For the final, "Bankruptcy Context" column, "Yes" indicates that the case occurred in the bankruptcy context, and "No" indicates that the case did not occur in the bankruptcy context.

* Subsequent case history omitted from citation.

Eleventh Circuit Cases Citing *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002) and/or *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003)

Year	Court	Case	Citation	Application of JE	Burnes/Barger	Bankruptcy Context
2016	11th Cir.	Hoefling v. City of Miami	No. 14-12482, slip op. (11th Cir. Jan. 25, 2016)	C.N.A.	Burnes	No
2016	11th Cir.	Palmer Ranch Holdings Ltd. v. Comm'r	No. 14-14167, slip op. (11th Cir. Feb. 5, 2016)	C.N.A.	Burnes	No
2016	DC	Ortega v. Bel Fuse, Inc.	No. 15-21229-CIV, 2016 WL 524223 (S.D. Fla. Feb. 10, 2016)	C.N.A.	Burnes	Yes
2016	DC	Shields v. Univ. of W. Ala.	No. 7:14-CV-02190-LSC, 2016 WL 193074 (N.D. Ala. Jan. 15, 2016)	C.A.	Burnes/Barger	Yes
2016	Bk	In re Guerra	No. 8:11-BK-15663-MGW, 2016 WL 350848 (Bankr. M.D. Fla. Jan. 28, 2016)	C.N.A.	Burnes	Yes
2015	11th Cir.	Anderson v. Brown Indus.	614 F. App'x 415 (11th Cir. 2015)	C.A.	Burnes	No
2015	11th Cir.	D'Antignac v. Deere & Co.	604 F. App'x 875 (11th Cir. 2015)	C.A.	Burnes/Barger	Yes
2015	11th Cir.	Ward v. AMS Servicing, LLC	606 F. App'x 508 (11th Cir. 2015)	C.A.	Burnes	Yes
2015	DC	Advantus, Corp. v. Allen	No. 3:13-CV-1430-J-32PDB, 2015 WL 4429199 (M.D. Fla. July 20, 2015)	C.A.	Burnes/Barger	Yes
2015	DC	Allen v. Senior Home Care, Inc.	No. 14-81408-CIV, 2015 WL 1097408 (S.D. Fla. Mar. 11, 2015)	C.N.A.	Burnes	Yes
2015	DC	Banks v. Tanner Med. Ctr., Inc.	No. 1:12-CV-4450-RWS, 2015 WL 1481472 (N.D. Ga. Mar. 31, 2015)	C.A.	Burnes	Yes
2015	DC	Brown v. Winn-Dixie Stores, Inc.	No. CV 214-052, 2015 WL 3440614 (S.D. Ga. May 21, 2015) *	C.A.	Burnes/Barger	Yes
2015	DC	Copeland v. Birmingham Nursing & Rehabilitation Center, LLC	No. 2:14-cv-1523-JHH, 2015 WL 4048647 (N.D. Ala. July 1, 2015)	C.A.	Burnes/Barger	Yes
2015	DC	Ellis v. CB & T Bank of Middle Ga.	No. 5:14-CV-102 CAR, 2015 WL 1636822 (M.D. Ga. Apr. 13, 2015)	C.A.	Burnes/Barger	Yes
2015	DC	Kenton v. Big Lots Stores, Inc.	81 F. Supp. 3d 1290 (N.D. Ala. 2015)	C.A.	Burnes/Barger	Yes
2015	DC	Lee v. Morgan	No. 2:14-CV-01204-RDP, 2015 WL 1958880 (N.D. Ala. May 1, 2015)	C.A.	Burnes/Barger	Yes
2015	DC	Marshall v. Sandersville R.R. Co.	No. 5:12-CV-125 MTT, 2015 WL 3648605 (M.D. Ga. June 10, 2015)	C.N.A.	Burnes/Barger	Yes
2015	DC	Moomer v. Rooms to Go Ala. Corp.	No. 2:13-cv-2199-SLB, 2015 WL 4426085 (N.D. Ala. July 20, 2015)	C.N.A.	Burnes	Yes
2015	DC	MTI Trucking, Inc. v. Progressive Mountain Ins. Co.	No. 1:14-CV-02913-RWS, 2015 WL 4077747 (N.D. Ga. July 6, 2015)	C.A.	Burnes/Barger	Yes
2015	DC	Nichols v. Ala. State Bar	No. 2:15-cv-179-WMA, 2015 WL 3823929 (N.D. Ala. June 19, 2015)	C.N.A.	Burnes	No
2015	DC	Perez v. Anastasia M. Garcia, P.A.	No. 15-20615-CIV, 2015 WL 5050548 (S.D. Fla. Aug. 26, 2015)	C.N.A.	Burnes/Barger	No
2015	DC	Pharma Supply, Inc. v. Stein	No. 14-80974-CIV, 2015 WL 328218 (S.D. Fla. Jan. 26, 2015)	C.N.A.	Burnes	No
2015	DC	Phillips v. Ocwen Loan Servicing, LLC	92 F. Supp. 3d 1255 (N.D. Ga. 2015) *	C.N.A.	Burnes	Yes
2015	DC	Prison Legal News v. Jones	No. 4:12cv239-MW/CAS, 2015 WL 5047957 (N.D. Fla. Aug. 27, 2015) *	C.N.A.	Burnes	No
2015	DC	Smith v. Haynes & Haynes PC	No. 2:14-CV-1534-RDP, 2015 WL 4159024 (N.D. Ala. July 10, 2015)	C.A.	Burnes/Barger	Yes
2015	DC	Usery v. Allstate Fire and Cas. Ins. Co.	No. 5:13-CV-83 LJA, --- F. Supp. 3d ---, 2015 WL 8773291 (M.D. Ga. Dec. 14, 2015)	C.N.A.	Burnes/Barger	Yes
2015	Bk	In re Buckley	No. 12-65735-MHM, 2015 WL 798525 (Bankr. N.D. Ga. Feb. 17, 2015)	C.N.A.	Barger	Yes
2015	Bk	In re Fundamental Long Term Care, Inc.	542 B.R. 590 (Bankr. M.D. Fla. 2015)	C.A.	Burnes	Yes
2015	Bk	In re Kimrov, Inc.	534 B.R. 219 (Bankr. M.D. Ga. 2015)	C.N.A.	Burnes/Barger	Yes
2015	Bk	In re Kourogenis	539 B.R. 625 (Bankr. S.D. Fla. 2015)	C.N.A.	Burnes	Yes
2015	Bk	In re S & Shack, LLC	No. 09-67151-MGD, 09-68410-MGD, 2015 WL 1523635 (Bankr. N.D. Ga. Feb. 13, 2015)	C.A.	Burnes	Yes
2015	Bk	In re Trigiant Holdings, Ltd.	523 B.R. 273 (Bankr. S.D. Fla. 2015)	C.N.A.	Burnes	Yes
2015	Bk	In re Wells	No 13-15309-BKC-RBR, 2015 WL 8928352 (Bankr. S.D. Fla. Nov. 3, 2015)	C.A.	Burnes	Yes
2014	11th Cir.	Baloco v. Drummond Co., Inc.	767 F.3d 1229 (11th Cir. 2014)	C.A.	Burnes	No
2014	11th Cir.	Dunn v. Advanced Med. Specialties, Inc.	556 F. App'x 785 (11th Cir. 2014)	C.A.	Burnes/Barger	Yes
2014	11th Cir.	Marable v. Marion Military Inst.	595 F. App'x 921 (11th Cir. 2014)	C.A.	Burnes	Yes
2014	DC	Banks v. Tanner Med. Ctr., Inc.	No. 1:12-CV-4450-RWS, 2014 WL 8391889 (N.D. Ga. Sept. 10, 2014)	C.A.	Burnes/Barger	Yes
2014	DC	Ratdorf v. Athens Archery, Inc.	No. 13-0316-CG-B, 2014 WL 1826617 (S.D. Ala. May 8, 2014)	C.A.	Burnes/Barger	Yes
2014	DC	EMCASCO Ins. Co. v. Knight	No. CV-12-S-1890-NW, 2014 WL 5020044 (N.D. Ala. Oct. 7, 2014)	C.A.	Burnes	Yes
2014	DC	Fletcher v. Supreme Beverage Co.	No. 2:11-cv-8036-MHH, 2014 WL 3518294 (N.D. Ala. Oct. 31, 2014)	C.N.A.	Burnes	Yes
2014	DC	Jolly v. AirTran Airways, Inc.	No. 1:13-CV-2061-TWT, 2014 WL 414224 (N.D. Ga. Feb. 4, 2014)	C.N.A.	Burnes	Yes
2014	DC	Kunstmann v. Aaron Rents, Inc.	No. 2:08-cv-01969-KOB, 2014 WL 1388587 (N.D. Ala. Apr. 9, 2014)	C.A.	Burnes/Barger	Yes
2014	DC	Milan v. Wells Fargo & Co.	507 B.R. 386 (S.D. Fla. 2014) *	C.A.	Burnes/Barger	Yes
2014	DC	Norman v. Norman	No. CV-12-J-2136-S, 2014 WL 457710 (N.D. Ala. Feb. 4, 2014)	C.A.	Burnes/Barger	Yes
2014	DC	Pringle v. Family Dollar Stores of Ga., Inc.	No. cv-112-064, 2014 WL 4955386 (S.D. Ga. Sept. 30, 2014)	C.N.A.	Burnes	Yes
2014	DC	Reinhardt v. Accurate Mach. & Tool, LLC	No. 14-CIV-20136, 302 F.R.D. 675 (S.D. Fla. Oct. 2, 2014)	C.N.A.	Burnes	No
2014	DC	Smith v. Werner Enters., Inc.	65 F.Supp.3d 1345 (S.D. Ala. 2014)	C.N.A.	Burnes/Barger	Yes
2014	DC	Summerall v. Kelly	No. 5:12-CV-66-Oc-10PRL, 2014 WL 1393186 (M.D. Fla. Apr. 3, 2014)	C.A.	Burnes/Barger	Yes
2014	DC	Tolen v. Target Corp.	No. 4:14-cv-3, 2014 WL 6908866 (S.D. Ga. Dec. 8, 2014)	C.N.A.	Burnes	Yes
2014	DC	Vignoli v. Clifton Apartments, Inc.	No. 12-CV-24906, 2014 WL 6850778 (S.D. Fla. Dec. 3, 2014)	C.N.A.	Burnes/Barger	No
2014	DC	Walker v. Orkin, LLC	No. 5:13-CV-126 MTT, 2014 WL 1572535 (M.D. Ga. Apr. 17, 2014)	C.A.	Burnes/Barger	Yes
2014	DC	Young v. City of Mobile	No. CIV.A. 13-00586-KD-B, 2014 WL 3870736 (S.D. Ala. Aug. 7, 2014)	C.N.A.	Burnes/Barger	Yes
2014	Bk	In re Flat Foliage, L.C.	No. 10-27532-BKC-LMI, 2014 WL 2616618 (Bankr. S.D. Fla. June 11, 2014)	C.N.A.	Burnes	Yes
2014	Bk	In re Gregg	No. 11-40125JTL, 2014 WL 3335505 (Bankr. M.D. Ga. July 7, 2014)	C.A.	Barger	Yes
2014	Bk	In re McDaniel	523 B.R. 895 (Bankr. M.D. Ga. 2014)	C.N.A.	Burnes/Barger	Yes
2014	Bk	In re PMP Enters., Inc.	517 B.R. 350 (Bankr. M.D. Ga. 2014)	C.N.A.	Burnes	Yes
2014	Bk	In re Presta	No. 3:09-bk-1222-JAF, 2014 WL 2448444 (Bankr. M.D. Fla. May 28, 2014)	C.A.	Burnes	Yes
2013	DC	Antietam Indus., Inc. v. Morgan Keegan & Co., Inc.	No. 6:12-cv-1250-Orl-36TBS, 2013 WL 1213059 (M.D. Fla. Mar. 25, 2013)	C.N.A.	Burnes	No
2013	DC	Apotex, Inc. v. UCB, Inc.	970 F. Supp. 2d 1297 (S.D. Fla. 2013)	C.A.	Burnes	No
2013	DC	Brothers v. Bojangles' Rests., Inc.	No. CV-12-BE-2212-E, 2013 WL 6145332 (N.D. Ala. Nov. 21, 2013)	C.A.	Burnes/Barger	Yes
2013	DC	D'Antignac v. Deere & Co.	No. CV 110-116, 2013 WL 6380413 (S.D. Ga. Dec. 5, 2013) *	C.A.	Burnes/Barger	Yes
2013	DC	Drakes v. Glenwood, Inc.	No. 2:10-CV-2659-VEH, 2013 WL 3396944 (N.D. Ala. June 28, 2013)	C.N.A.	Burnes/Barger	Yes
2013	DC	Helton v. Tolson, Inc.	No. 6:11-cv-02646-LSC, 2013 WL 1767831 (N.D. Ala. Apr. 23, 2013)	C.A.	Burnes	Yes
2013	DC	Pate v. Infirmary Health Sys., Inc.	No. CIV.A. 12-00513-KD-C, 2013 WL 5234302 (S.D. Ala. Sept. 17, 2013)	C.A.	Burnes/Barger	Yes
2013	DC	Perkins v. Berg Spiral Pipe Corp.	No. CIV.A. 12-0468-CG-N, 2013 WL 489164 (S.D. Ala. Feb. 7, 2013)	C.A.	Burnes/Barger	Yes
2013	DC	Stuart v. Resurgens Risk Mgmt., Inc.	No. 1:11-cv-04291-RWS, 2013 WL 2903571 (N.D. Ga. June 12, 2013)	C.N.A.	Burnes/Barger	Yes
2013	DC	Taylor v. Novartis Pharm. Corp.	506 B.R. 157 (S.D. Fla. 2013)	C.A.	Burnes/Barger	Yes
2013	DC	Thompson v. EarthLink Shared Servs., LLC	958 F.Supp.2d 1317 (N.D. Ala. 2013)	C.N.A.	Burnes/Barger	Yes
2013	DC	Willis v. Homesite Ins. Co. of the Midwest	No. CV 4:10-1953-RDP, 2013 WL 4013477 (N.D. Ala. Aug. 6, 2013)	C.A.	Burnes/Barger	Yes
2013	DC	Webb v. Solomon Law Grp., P.A.	No. 8:09-cv-1207-T-17AEP, 2013 WL 4719343 (M.D. Fla. 2013)	C.N.A.	Burnes	Yes
2013	Bk	In re D'Antignac	No. 05-10620, 2013 WL 1084214 (Bankr. S.D. Ga. Feb. 19, 2013)	C.N.A.	Barger	Yes
2013	Bk	In re Dig. Commc'n Networks, Inc.	496 B.R. 219 (Bankr. M.D. Fla. 2013)	C.N.A.	Barger	Yes
2013	Bk	In re Fields	No. 11-26036-BKC-13, 12-00125, 2013 WL 1136925 (Bankr. Mar. 19, 2013)	C.N.A.	Burnes	Yes
2013	Bk	In re Foster	No. 11-30021, 2013 WL 5376049 (Bankr. S.D. Ga. Sept. 24, 2013)	C.A.	Burnes	Yes
2013	Bk	In re Irvin Lending Grp., LLC	No. 11-41963 (Bankr. S.D. Ga. Jan. 9, 2013)	C.A.	Burnes	Yes
2013	Bk	In re James	487 B.R. 587 (Bankr. N.D. Ga. 2013)	C.N.A.	Burnes	Yes
2013	Bk	In re Mixon	No. 11-41508 (Bankr. S.D. Ga. 2013)	C.A.	Burnes	Yes
2013	Bk	In re Mourtet	493 B.R. 640 (Bankr. S.D. Fla. 2013)	C.N.A.	Burnes	Yes
2013	Bk	In re Palm Beach Fin. Partners, L.P.	517 B.R. 310 (Bankr. S.D. Fla. 2013)	C.N.A.	Burnes	Yes
2013	Bk	Riggins v. Ambrose	500 B.R. 190 (Bankr. N.D. Ga. 2013)	C.N.A.	Burnes/Barger	Yes
2012	11th Cir.	Jones v. United States	467 F. App'x 815 (11th Cir. 2012)	C.A.	Burnes/Barger	Yes
2012	DC	Asiom Worldwide, Inc. v. HTRD Grp. Hong Kong Ltd.	No. 8:11-cv-1468-T-33TBM, 2012 WL 4077585 (M.D. Fla. July 18, 2012)	C.N.A.	Burnes/Barger	No
2012	DC	Burch v. AmeriOne, Inc.	No. 7:11-CV-2342-RDP, 2012 WL 1566155 (N.D. Ala. Apr. 25, 2012)	C.A.	Burnes/Barger	Yes
2012	DC	Chin v. Hyundai Motor Mfg. Alabama LLC	No. 2:11CV363-CSC, 2012 WL 1161443 (M.D. Ala. Apr. 6, 2012)	C.A.	Burnes/Barger	Yes
2012	DC	Carter v. Hartford Fire Ins. Co.	No. 1:11-cv-04008-TWT-GGB, 2012 WL 4088523 (N.D. Ga. Sept. 17, 2012)	C.A.	Barger	Yes
2012	DC	Cashatt v. Merrimac Assocs., Inc.	853 F. Supp. 2d 1244 (N.D. Ga. 2012)	C.N.A.	Burnes	Yes
2012	DC	Evans v. Books-A-Million	907 F. Supp. 2d 1284 (N.D. Ala. 2012)	C.A.	Burnes	No
2012	DC	Huff v. Macon Behavioral Health Treatment	No. 5:11-CV-455 MTT, 2012 WL 1344855 (M.D. Ga. Apr. 18, 2012)	C.A.	Burnes/Barger	Yes
2012	DC	Lay v. Hixon	No. 09-0075-WS-M, 2012 WL 1946346 (S.D. Ala. May 30, 2012)	C.N.A.	Burnes	No
2012	DC	Likes v. DHL Exp. (USA), Inc.	No. 2:08-cv-00428-AKK, 2012 WL 8499752 (N.D. Ala. Mar. 7, 2012)	C.N.A.	Burnes	Yes
2012	DC	Lopez v. F.D.I.C.	No. 2:10-CV-00158-RWS, 2012 WL 1898798 (N.D. Ga. May 23, 2012)	C.A.	Burnes	Yes
2012	DC	Marable v. Marion Military Inst.	906 F. Supp. 2d 1237 (S.D. Ala. 2012) aff'd, 595 F. App'x 921 (11th Cir. 2014)	C.A.	Burnes/Barger	Yes
2012	DC	Morton v. Bank of Am. Corp.	No. 5:12-CV-188 CAR, 2012 WL 3901749 (M.D. Ga. Sept. 7, 2012)	C.A.	Burnes/Barger	Yes
2012	DC	Reynolds v. Ala. Dep't of Transp.	No. 2:85CV665-MHT, 2012 WL 1110121 (M.D. Ala. Apr. 3, 2012)	C.N.A.	Burnes/Barger	Yes
2012	DC	Slater v. U.S. Steel Corp.	No. CV-09-BE-1732-S, 2012 WL 4478881 (N.D. Ala. Sept. 25, 2012)	C.A.	Burnes/Barger	Yes
2012	DC	Smith v. Wayne Farms, L.L.C.	No. CV-11-S-3590-NE, 2012 WL 1746857 (N.D. Ala. May 16, 2012)	C.A.	Burnes/Barger	Yes
2012	DC	Terrell v. Rathman	No. 1:11-cv-00199-WMA-HGD, 2012 WL 4939128 (N.D. Ala. Sept. 13, 2012)	C.A.	Burnes	No
2012	DC	U.S. ex rel. Bibby v. Wells Fargo Bank, N.A.	906 F.Supp.2d 1288 (N.D. Ga. 2012)	C.N.A.	Burnes/Barger	Yes
2012	Bk	In re SGL, LLC	No. 09-12684-BKC-AJC, 2012 WL 2673254 (Bankr. S.D. Fla. 2012)	C.N.A.	Burnes	Yes
2012	Bk	In re Tinney	No. 07-42020-JJR13, 2012 WL 2742457 (Bankr. N.D. Ala. July 9, 2012)	C.N.A.	Burnes	Yes
2011	11th Cir.	Warfield v. Stewart	434 F. App'x 777 (11th Cir. 2011)	C.N.A.	Burnes	No
2011	DC	Abauso v. Royal Atl. Developers, Inc.	854 F. Supp. 2d 1219 (S.D. Fla. 2011)	C.A.	Burnes/Barger	Yes
2011	DC	Dorsett v. Flagstar Bank	No. CV 210-181, 2011 WL 6152940 (S.D. Ga. Dec. 8, 2011)	C.N.A.	Burnes/Barger	Yes
2011	DC	Daniels v. Tucker	No. 5:09cv326/RS/EMT, 2011 WL 7153921 (N.D. Fla. Nov. 22, 2011)	C.N.A.	Burnes	No
2011	DC	Farr v. Hall Cty.	No. 2:11-CV-00074-RWS, 2011 WL 5921462 (N.D. Ga. Nov. 28, 2011)	C.N.A.	Burnes/Barger	Yes
2011	DC	Mac v. Brooks	No. 3:11cv313-WHA, 2011 WL 3734685 (M.D. Ala. Aug. 25, 2011)	C.N.A.	Burnes	No
2011	DC	Mason v. Mitchell's Contracting Serv., LLC	816 F. Supp. 2d 1178 (S.D. Ala. 2011)	C.A.	Burnes/Barger	Yes
2011	DC	Mathews v. Wagner & Hunt, P.A.	No. 10-61566-CIV, 2011 WL 1876582 (S.D. Fla. May 17, 2011)	C.N.A.	Burnes	Yes
2011	DC	Nettles v. State Farm Fire & Cas. Co.	No. 4:10-CV-106 CDL, 2011 WL 2462556 (M.D. Ga. June 17, 2011)	C.N.A.	Burnes/Barger	Yes
2011	DC	Pace v. Hurst Boiler & Welding Co.	No. 7:10-CV-116 HL, 2011 WL 97244 (M.D. Ga. Jan. 12, 2011)	C.A.	Burnes/Barger	Yes
2011	DC	Reynolds v. Ala. Dep't of Transp.	No. 2:85CV665-MHT, 2011 WL 2653244 (M.D. Ala. July 6, 2011)	C.A.	Burnes/Barger	Yes
2011	DC	Schreiber v. Ocwen Loan Servicing, LLC	No. 5:11-CV-211-OC-32TBS, 2011 WL 6055417 (M.D. Fla. Dec. 6, 2011)	C.N.A.	Burnes/Barger	Yes
2011	DC	United States v. All Funds in the Account of Prop. Futures, Inc.	820 F. Supp. 2d 1305 (S.D. Fla. 2011)	C.N.A.	Burnes	No
2011	Bk	In re Auto Sense of Tampa, LLC	449 B.R. 584 (Bankr. M.D. Fla. 2011)	C.N.A.	Burnes	Yes
2010	11th Cir.	Hamilton v. Sec'y, DOC	410 F. App'x 216 (11th Cir. 2010)	C.N.A.	Burnes	No
2010	11th Cir.	Robinson v. Tyson Foods, Inc.	595 F.3d 1269 (11th Cir. 2010)	C.A. (majority); C.D.A. (concurrence)	Burnes/Barger	Yes
2010	DC	Coombs v. Red Coats, Inc.	No. 1:09-CV-3058-TWT-ECS, 2010 WL 2674425 (N.D. Ga. May 28, 2010)	C.N.A.	Burnes	Yes
2010	DC	Fla. Farm Bureau Gen. Ins. Co. v. Cossville Ferigno	No. 3:09CV145/MCR/EMT, 2010 WL 3927816 (N.D. Fla. Sept. 30, 2010)	C.N.A.	Burnes	No
2010	DC	Heath v. Winn-Dixie Stores, Inc.	No. CIV.A. 09-0619-WS-N, 2010 WL 4496798 (S.D. Ala. Nov. 1, 2010)	C.A.	Burnes/Barger	Yes
2010	DC	In re Tyson Foods, Inc.	732 F.Supp.2d 1363 (M.D. Ga. 2010)	C.A.	Burnes/Barger	Yes

2010	DC	Pyyevich v. World Mortg. Co.	No. 6:08-cv-404-Orl-28KRS, 2010 WL 3310721 (M.D. Fla. July 29, 2010)	C.N.A.	Burnes	No
2010	DC	Reynolds v. Ala. Dep't of Transp.	No. CIV.A.2:85CV665-MHT, 2010 WL 1058284 (M.D. Ala. Apr. 21, 2010)	C.A.	Burnes/Barger	Yes
2010	DC	Solomon Tech., Inc. v. Toyota Motor Corp.	No. 8:05-cv-1702-T-MAP, 2010 WL 715243 (M.D. Fla. Jan. 26, 2010)	C.A.	Burnes	No
2010	DC	State Farm Fire and Cas. Co. v. Billingsley	No. 09-0367-KD-C, 2010 WL 1511560 (S.D. Ala. Apr. 14, 2010)	C.N.A.	Burnes	Yes
2010	DC	Wesley v. Nat'l Mentor Healthcare, LLC	No. CIV.A.1:09-CV-978-TWT, 2010 WL 538759 (N.D. Ga. Feb. 8, 2010)	C.N.A.	Barger	Yes
2010	DC	York v. People for the Ethical Treatment of Animals	No. 2006CV557PTM29SPC, 2010 WL 3744815 (M.D. Fla. Sept. 21, 2010)	C.N.A.	Burnes/Barger	Yes
2010	Bk	In re Bowers	No. 6:98-bk-08958-KSJ, 2010 WL 4117490 (Bankr. M.D. Fla. Oct. 18, 2010)	C.N.A.	Burnes	Yes
2010	Bk	In re Jusko	No. 09-12516-BKC-AJC, 2010 WL 5018355 (Bankr. Dec. 3, 2010)	C.N.A.	Burnes	Yes
2010	Bk	In re Sandlin	No. 06-87792-TOM-13, 2010 WL 1416499 (Bankr. N.D. Ala. Apr. 8, 2010)	C.N.A.	Barger	Yes
2010	Bk	In re Shelton	No. 07-81534-JAC-7, 2010 WL 1740210 (Bankr. N.D. Ala. Apr. 26, 2010)	C.A.	Burnes/Barger	Yes
2010	Bk	In re Vasko	No. 09-79334-MGD, 2010 WL 4638600 (Bankr. N.D. Ga. Aug. 6, 2010)	C.A.	Burnes	Yes
2009	DC	Bandar v. Triple Star Seafood, Inc.	No. 4:07-CV-430-SPM, 2009 WL 903351 (N.D. Fla. Apr. 1, 2009)	C.N.A.	Burnes	Yes
2009	DC	Bishop's Prop. & Invs., LLC v. Protective Life Ins. Co.	507 F. Supp. 2d 1354 (M.D. Ga. 2009)	C.A.	Burnes	No
2009	DC	Coppedge v. Suntrust Banks, Inc.	No. CIV.A. 3:08-CV-25(HL), 2009 WL 111639 (M.D. Ga. Jan. 14, 2009)	C.A.	Burnes/Barger	Yes
2009	DC	Evans v. Potter	No. 1:08-CV-1687-TWT, 2009 WL 529599 (N.D. Ga. Feb. 27, 2009)	C.N.A.	Burnes	Yes
2009	DC	Great Lakes Reinsurance (UK) PLC. v. Roca	No. 07-23322-CIV, 2009 WL 200257 (S.D. Fla. Jan. 23, 2009)	C.N.A.	Burnes	No
2009	DC	Mahon v. Nat'l Dairy Holdings, L.P.	No. CIV.A. 1:08CV174-TFM, 2009 WL 653224 (M.D. Ala. Mar. 10, 2009)	C.N.A.	Burnes/Barger	Yes
2009	DC	Reynolds v. Ala. Dep't of Transp.	No. 2:85cv665-MHT, 2009 WL 4456309 (M.D. Ala. Nov. 24, 2009)	C.A.	Burnes	Yes
2009	DC	Roots v. Morehouse Sch. of Med., Inc.	No. CIVA1:07-CV-00112JOF, 2009 WL 4798217 (N.D. Ga. Dec. 8, 2009)	C.N.A.	Burnes/Barger	Yes
2009	DC	Russell v. Promove, LLC	No. CIVA 1:06-CV-0659RWS, 2009 WL 1285885 (N.D. Ga. May 5, 2009)	C.N.A.	Burnes/Barger	Yes
2009	DC	Wolf v. Amerisourcebergen Drug Corp.	No. 08-80287-CIV, 2009 WL 2730167 (S.D. Fla. Aug. 23, 2009)	C.N.A.	Burnes/Barger	Yes
2009	Bk	In re Dreiling	403 B.R. 829 (Bankr. N.D. Ala. 2009)	C.A.	Burnes/Barger	Yes
2009	Bk	In re Varns	No. 08-11824-DHW, 2009 WL 1311392 (Bankr. M.D. Ala. May 11, 2009)	C.N.A.	Burnes	Yes
2009	Bk	In re Webb	No. 96-74639, 2009 WL 6499123 (Bankr. N.D. Ga. Aug. 26, 2009)	C.N.A.	Burnes	Yes
2008	11th Cir.	Betancur v. U.S. Atty. Gen.	261 F. App'x 218 (11th Cir. 2008)	C.N.A.	Burnes	No
2008	DC	Ameritox, Ltd. v. Aegis Servs. Corp.	No. 07-80498-CIV, 2008 WL 4540063 (S.D. Fla. Oct. 10, 2008)	C.N.A.	Burnes	No
2008	DC	Geico Cas. Co. v. Beauford	No. 8:05-cv-0697-T-24 EAJ, 2008 WL 2600861 (M.D. Fla. June 30, 2008)	C.A.	Burnes	No
2008	DC	Jackson v. Advanced Disposal Servs.	No. 3:07-CV-773-J-20TEM, 2008 WL 958110 (M.D. Fla. Apr. 8, 2008)	C.N.A.	Burnes/Barger	Yes
2008	DC	Mack v. Labor	No. 08-80646-CIV, 2008 WL 4793745 (S.D. Fla. Oct. 27, 2008)	C.N.A.	Burnes	Yes
2008	DC	Oldfield v. Dolgencorp, Inc.	No. 3:08CV317/RS-EMT, 2008 WL 5391688 (N.D. Fla. Dec. 18, 2008)	C.A.	Burnes/Barger	Yes
2008	DC	Pendlebury v. Starbucks Coffee Co.	No. 04-80521-CIV, 2008 WL 763213 (S.D. Fla. Mar. 13, 2008)	C.N.A.	Burnes	No
2008	DC	Wood v. Green	No. 3:07CV95/MCR/EMT, 2008 WL 3200659 (N.D. Fla. Aug. 4, 2008)	C.N.A.	Burnes/Barger	Yes
2008	Bk	In re Brooks	No. 06-81704-JAC-7, 2008 WL 1721876 (Bankr. N.D. Ala. Apr. 10, 2008)	C.A.	Barger	Yes
2008	Bk	In re Hackney	No. 07-40952-JJR-11, 2008 WL 4850040 (Bankr. N.D. Ala. Oct. 10, 2008)	C.A.	Burnes	Yes
2008	Bk	In re Shelar	No. 07-12927-WHD, 2008 WL 3814791 (Bankr. N.D. Ga. Sept. 4, 2008)	C.N.A.	Burnes/Barger	Yes
2008	Bk	Thompson v. Quarles	392 B.R. 517 (Bankr. S.D. Ga. 2008)	C.D.N.A.	Burnes/Barger	Yes
2007	11th Cir.	Casanova v. Pre Sols., Inc.	228 F. App'x 837 (11th Cir. 2007)	C.A.	Burnes/Barger	Yes
2007	11th Cir.	Parlow v. Inglis Mkts., Inc.	236 F. App'x 549 (11th Cir. 2008)	C.A.	Burnes	Yes
2007	11th Cir.	State Farm Fire and Cas. Co. v. Simmons	217 F. App'x 851 (11th Cir. 2007)	C.A.	Burnes	Yes
2007	DC	Brown v. Brock	No. 5:04-CV-339 (CAR), 2007 WL 2128191 (M.D. Ga. July 25, 2007)	C.A.	Burnes/Barger	Yes
2007	DC	Crosby v. Mobile Cty.	No. CIV.A.04-0144-CG-M, 2007 WL 4125895 (S.D. Ala. Nov. 14, 2007)	C.N.A.	Burnes/Barger	Yes
2007	DC	Isaac v. Am. Intercontinental Univ.	No. 1:05-CV-2859-JEC, 2007 WL 1959200 (N.D. Ga. June 28, 2007)	C.A.	Burnes/Barger	Yes
2007	DC	Kuehn v. Cadle Co.	No. 5:04CV-432-OC-10GRJ, 2007 WL 809656 (M.D. Fla. Mar. 15, 2007)	C.N.A.	Burnes/Barger	Yes
2007	DC	McKenzie v. Citation Corp., LLC	No. CIV.A. 05-0138-CG-C, 2007 WL 1424555 (S.D. Ala. May 11, 2007)	C.N.A.	Burnes/Barger	Yes
2007	DC	SPM Holdings, Ltd. v. Banc Of Am. Sec., LLC	No. 06-80652-CIV-RYSKAMP, 2007 WL 7124464 (S.D. Fla. Feb. 12, 2007) *	C.N.A.	Burnes/Barger	No
2007	DC	Tedford v. United States	No. 8:05CV1017-T-30TGW, 2007 WL 1098506 (M.D. Fla. Apr. 12, 2007)	C.N.A.	Burnes/Barger	Yes
2007	DC	The Coca-Cola Co. v. Pepsi-Cola Co.	500 F. Supp. 2d 1364 (N.D. Ga. 2007)	C.A.	Burnes	No
2007	Bk	In re Engelbrecht	368 B.R. 898 (Bankr. M.D. Fla. 2007)	C.N.A.	Burnes/Barger	Yes
2007	Bk	In re Freeman	378 B.R. 717 (Bankr. S.D. Ga. 2007)	C.N.A.	Burnes/Barger	Yes
2007	Bk	In re Jones	381 B.R. 555 (Bankr. M.D. Fla. 2007)	C.N.A.	Burnes/Barger	Yes
2007	Bk	In re Lentek Int'l	377 B.R. 396 (Bankr. M.D. Fla. 2007)	C.N.A.	Burnes	Yes
2007	Bk	In re Lobo	No. 06-12979-BKC-PGH, 2007 WL 4317271 (Bankr. S.D. Fla. Nov. 15, 2007)	C.A.	Burnes	Yes
2007	Bk	In re Paze Tr. of Paze Irrevocable Tr.	376 B.R. 334 (Bankr. M.D. Fla. 2007)	C.N.A.	Burnes	Yes
2007	Bk	In re Reed	No. 04-13062, 2007 WL 274322 (Bankr. S.D. Ala. Jan. 26, 2007)	C.N.A.	Burnes	Yes
2007	Bk	In re Tarver	No. 05-12038-DHW, 2007 WL 1876369 (Bankr. M.D. Ala. June 28, 2007)	C.N.A.	Burnes	Yes
2007	Bk	In re Taylor	369 B.R. 303 (Bankr. M.D. Fla. 2007)	C.N.A.	Burnes/Barger	Yes
2006	11th Cir.	Ajaka v. BrooksAmerica Mortg. Corp.	453 F.3d 1339 (11th Cir. 2006)	C.N.A.	Burnes	Yes
2006	11th Cir.	Bridge Capital Invs, II v. Susquehanna Radio Corp.	458 F.3d 1212 (11th Cir. 2006)	C.N.A.	Burnes	Yes
2006	11th Cir.	Strauss v. Rent-A-Ctr., Inc.	192 F. App'x 821 (11th Cir. 2006)	C.N.A.	Burnes/Barger	Yes
2006	11th Cir.	United States v. Campa	459 F.3d 1121 (11th Cir. 2006)	C.N.A.	Burnes	No
2006	DC	Balmeris v. Nicholson	No. 8:05-CV-778-T-23TGW, 2006 WL 3359684 (M.D. Fla. Nov. 20, 2006)	C.A.	Burnes/Barger	Yes
2006	DC	Carroll v. Henry Cty.	336 B.R. 578 (N.D. Ga. 2006)	C.N.A.	Burnes	Yes

2006	DC	Casanova v. Pre Sols., Inc.	No. 1:04-CV-2653-RLV, 2006 WL 5451195 (N.D. Ga. Mar. 29, 2006)	C.A.	Burnes	Yes
2006	DC	ranklin v. Blue Cross & Blue Shield of Fla., Inc., Short Term Disability Pl	No. 3:06CV181J32TEM, 2006 WL 2792893 (M.D. Fla. Sept. 27, 2006)	C.N.A.	Barger	No
2006	DC	Hobson v. Nat'l Fin. Servs. Corp.	No. 8:05-CIV1798T17MAP, 2006 WL 1804582 (M.D. Fla. June 27, 2006)	C.A.	Burnes	Yes
2006	DC	Jones v. Comm. Newspapers, Inc.	No. 3:05-cv-240-J-16MMH, 2006 WL 2507618 (M.D. Fla. Aug. 28, 2006)	C.N.A.	Burnes	Yes
2006	DC	Kennedy v. Jim's Formal Wear Co.	No. CIVA1:05CV1282JEC, 2006 WL 2661264 (N.D. Ga. Sept. 14, 2006)	C.N.A.	Burnes/Barger	Yes
2006	DC	Lott v. Reliable Roofing	No. 1:05CV479-WHA, 2006 WL 2056582 (M.D. Ala. July 24, 2006)	C.A.	Burnes/Barger	Yes
2006	DC	Marshall v. Electrolux Home Prods., Inc.	No. 605CV-1587ORL-18KRS, 2006 WL 3756574 (M.D. Fla. Dec. 19, 2006)	C.A.	Burnes/Barger	Yes
2006	DC	Moore v. Food's Stores of Tenn., Inc.	No. 4:05CV133 CDL, 2006 WL 2374760 (M.D. Ga. Aug. 16, 2006)	C.A.	Burnes/Barger	Yes
2006	DC	Parlow v. Inglis Mkts., Inc.	No. CIV.A. 1:05CV1647JOF, 2006 WL 949934 (N.D. Ga. Apr. 11, 2006) *	C.A.	Burnes/Barger	Yes
2006	DC	Smith v. Scales Express, Inc.	No. Civ.A. 05-0551-BH-B, 2006 WL 2190575 (S.D. Ala. Sept. 7, 2006)	C.N.A.	Burnes	Yes
2006	DC	Smith v. Scales Express, Inc.	No. 05-331-BH-B, 2006 WL 2190575 (S.D. Ala. Aug. 2, 2006)	C.N.A.	Burnes	Yes
2006	DC	Snowden v. Food's Stores of Tenn., Inc.	409 F. Supp. 2d 1347 (M.D. Ala. 2006)	C.N.A.	Burnes/Barger	Yes
2006	DC	Stephens v. Hoffmann-La Roche, Inc.	No. 8:04 CV 2645 T 30TBM, 2006 WL 3694614 (M.D. Fla. Dec. 13, 2006)	C.N.A.	Burnes/Barger	Yes
2006	DC	Wheeler v. Fla. Dep't. of Corrections	No. 3:04-cv-1147-J-32MCR, 2006 WL 2303114 (M.D. Fla. Aug. 9, 2006)	C.N.A.	Burnes/Barger	Yes
2006	Bk	In re Full Gospel Assembly of Delray Beach, Inc.	No. 05-29067-BKC-JKO, 2006 WL 3022110 (Bankr. S.D. Fla. Dec. 14, 2006)	C.N.A.	Burnes	Yes
2006	Bk	In re Parker	351 B.R. 790 (Bankr. N.D. Ga. 2006)	C.A.	Barger	Yes
2006	Bk	In re Suddeth	No. BKR. 04-63227, 2006 WL 6591618 (Bankr. N.D. Ga. Apr. 4, 2006)	C.N.A.	Barger	Yes
2005	11th Cir.	Muse v. Accord Human Res., Inc.	129 F. App'x 487 (11th Cir. 2005)	C.N.A.	Burnes	Yes
2005	11th Cir.	Palmer & Cay, Inc. v. Marsh & McLennan Cos., Inc.	404 F.3d 1297 (11th Cir. 2005)	C.N.A.	Burnes	No
2005	11th Cir.	Transamerica Leasing, Inc. v. Inst. of London Underwriters	430 F.3d 1326 (11th Cir. 2005)	C.N.A.	Burnes	No
2005	DC	Ajaka v. BrooksAmerica Mortg. Corp.	No. CIVA1:03CV0977RBM, 2005 WL 6075771 (N.D. Ga. Mar. 16, 2005) *	C.A.	Burnes/Barger	Yes
2005	DC	Allapattah Servs., Inc. v. Exxon Corp.	372 F. Supp. 2d 1344 (S.D. Fla. 2005)	C.A.	Burnes	No
2005	DC	Artoine & Gina Keeling, Inc. v. Corrin Corp.	No. 02-22353-CIV, 2005 WL 6111611 (S.D. Fla. Jan. 26, 2005)	C.N.A.	Barger	No
2005	DC	Brown v. Brock	No. 5:04CV339DF, 2005 WL 1429736 (M.D. Ga. June 13, 2005) *	C.A.	Burnes	Yes
2005	DC	Davis v. Valley Hosp. Servs., LLC	372 F. Supp. 2d 641 (M.D. Ga. 2005) *	C.N.A.	Barger	Yes
2005	DC	DePaola v. Nissan Hosp. Am., Inc.	No. Civ.A. 1:04CV267-W, 2005 WL 2122265 (M.D. Ala. Jan. 28, 2005)	C.N.A.	Burnes	Yes
2005	DC	Gipson v. Cross Country Bank	354 F. Supp. 2d 1278 (M.D. Ala. 2005)	C.N.A.	Burnes	No
2005	DC	Killebrew v. CSX Transp., Inc.	Nos. Civ.A. 203CV09-0D, Civ.A. 203CV1284D, Civ.A. 204CV900D, 2005 WL 1705636 (M.D. Ala. July 19, 2005)	C.N.A.	Burnes/Barger	Yes
2005	DC	Squam v. DynCorp. Tech. Servs., LLC	409 F. Supp. 2d 1082 (M.D. Ala. 2005)	C.N.A.	Burnes	Yes
2005	DC	Strauss v. Rent-A-Center, Inc.	No. 6:04-cv-1135ORL22KRS, 2005 WL 2647889 (M.D. Fla. Oct. 17, 2005)	C.A.	Burnes/Barger	Yes
2005	Bk	In re Farmer	324 B.R. 908 (Bankr. M.D. Ga. 2005)	C.N.A.	Burnes	Yes
2005	Bk	In re Heidkamp	334 B.R. 703 (Bankr. M.D. Fla. 2005)	C.N.A.	Burnes	Yes
2005	Bk	In re Phillips	329 B.R. 904 (Bankr. M.D. Ga. 2005)	C.N.A.	Burnes	Yes
2005	Bk	In re Transit Grp., Inc.	332 B.R. 45 (Bankr. M.D. Fla. 2005)	C.N.A.	Burnes/Barger	Yes
2004	11th Cir.	Parker v. Wendy's Intern., Inc.	365 F.3d 1268 (11th Cir. 2004)	C.N.A.	Burnes/Barger	Yes
2004	Bk	In re Baldwin	307 B.R. 251 (Bankr. M.D. Ala. 2004)	C.N.A.	Burnes/Barger	Yes
2004	Bk	In re Moore	312 B.R. 402 (Bankr. N.D. Ala. 2004)	C.N.A.	Burnes/Barger	Yes
2004	Bk	In re Rochester	308 B.R. 596 (Bankr. N.D. Ga. 2004)	C.N.A.	Burnes/Barger	Yes
2004	Bk	In re Williams	310 B.R. 442 (Bankr. N.D. Ala. 2004)	C.A.	Burnes/Barger	Yes
2003	11th Cir.	Barger v. City of Cartersville, Ga.	348 F.3d 1289 (11th Cir. 2003)	C.A. (majority); C.N.A. (dissent)	Burnes	Yes
2003	11th Cir.	De Leon v. Comcar Indus., Inc.	321 F.3d 1289 (11th Cir. 2003)	C.A.	Burnes	Yes
2003	11th Cir.	In re Coz	338 F.3d 1238 (11th Cir. 2003)	C.A.	Burnes	Yes
2003	DC	Kroll v. Home Depot U.S.A., Inc.	No. Civ.A. CV202-115, 2003 WL 25332985 (S.D. Ga. Aug. 20, 2003)	C.A.	Burnes	Yes
2003	DC	Walton v. Life Ins. Co. of Ga.	No. Civ.A. 1:02-CV3489TWT, 2003 WL 22059116 (N.D. Ga. Aug. 22, 2003)	C.A.	Burnes	Yes
2003	Bk	In re Barrera	292 B.R. 806 (Bankr. M.D. Fla. 2003)	C.N.A.	Burnes	Yes
2003	Bk	In re Galbreath	No. 99-60317, 2003 WL 26110288 (Bankr. S.D. Ga. Aug. 27, 2003)	C.N.A.	Burnes	Yes
2003	Bk	In re Haskett	297 B.R. 637 (Bankr. N.D. Ala. 2003)	C.N.A.	Burnes/Barger	Yes
2003	Bk	In re Henderson	297 B.R. 875 (Bankr. M.D. Fla. 2003)	C.N.A.	Burnes	Yes
2003	Bk	In re Huggins	305 B.R. 63 (Bankr. N.D. Ala. 2003)	C.A.	Barger	Yes
2002	DC	Gonzalez v. M/V DESTINY	No. 00-1696-CIV, 2002 WL 31492167 (S.D. Fla. Sept. 30, 2002)	C.A.	Burnes	No
2002	DC	Lane v. Health Options, Inc.	221 F. Supp. 2d 1301 (S.D. Fla. 2002)	C.N.A.	Burnes	Yes
2002	DC	Walker v. Delta Air Lines, Inc.	No. Civ.A. 1:01CV0558-TWT, 2002 WL 32156202 (N.D. Ga. 2002)	C.A.	Burnes	Yes
2002	Bk	In re Barger	279 B.R. 900 (Bankr. N.D. Ga. 2002)	C.N.A.	Burnes	Yes
2002	Bk	In re Old Naples Secs., Inc.	311 B.R. 607 (Bankr. M.D. Fla. 2002)	C.A.	Burnes	Yes
2002	Bk	In re Peagler	307 B.R. 270 (Bankr. M.D. Ala. 2002)	C.N.A.	Burnes	Yes

All Citations

--- F.3d ----, 2016 WL 723012

Footnotes

* Honorable Robert N. Scola, Jr., United States District Judge for the Southern District of Florida, sitting by designation.

1 "The majority rule is that a party is not required to have been a party to the prior proceeding to be able to invoke judicial estoppel." 18 James Wm. Moore et al., Moore's Federal Practice, ¶ 134.33[1] (3d ed.2015).

2 Slater's complaint contained three counts. In Count One, Slater alleged that U.S. Steel discriminated against her on the basis of gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e *et seq.* ("Title VII"), when U.S. Steel (1) refused to count the time Slater spent in its Gary, Indiana mill toward her seniority status at its Fairfield, Alabama mill; (2) assigned Slater to perform menial janitorial duties; and (3) refused to train Slater to operate heavy machinery. In addition, the District Court interpreted Count One to make out a "claim for sex discrimination based on *quid pro quo* discrimination."

In Count Two, Slater alleged that U.S. Steel retaliated against her, in violation of Title VII and 42 U.S.C. § 1981, when it laid her off after she complained about (1) "racial and sexual discrimination" and (2) U.S. Steel's decision to retain a white woman with less than three years of service at U.S. Steel, while laying off more-senior African–American employees during a round of layoffs supposedly restricted to employees with three years of service or less.

In Count Three, Slater attempted to recast each of the previous allegations as "racial and sexual discrimination," in violation 42 U.S.C. § 1981.

3 The District Court correctly granted U.S. Steel summary judgment on Slater's claim for racial discrimination based on disparate treatment "because ... [Slater] failed to present evidence that ... [U.S. Steel] treated similarly situated white employees more favorably and ha[d] failed to establish her *prima facie* case on th[e] claim." We agree. We review the District Court's grant of summary judgment de novo. *Cook v. Bennett,* 792 F.3d 1294, 1298 (11th Cir.2015). As part of her prima facie case, Slater needed to prove: (1) she belonged to a protected class; (2) she was qualified for her job; (3) she suffered an adverse employment action; and (4) the employer treated a similarly situated employee outside of her protected class more favorably. *Flowers v. Troup Cty. Sch. Dist.,* 803 F.3d 1327, 1336 (11th Cir.2015); *Maynard v. Bd. of Regents,* 342 F.3d 1281, 1289 (11th Cir.2003) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)). Slater, who is black, contended that Carolyn Farless, a white woman, is a similarly situated employee outside of Slater's protected class who was treated more favorably because Farless had been allowed to transfer service time earned at a different worksite to Farless's current worksite to count toward her seniority status, while Slater was not able to transfer her service time. Farless is not a proper comparator because, unlike Slater, she was not a transfer employee. Similarly situated employees must be "nearly identical to the plaintiff in order 'to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.' " *Silvera v. Orange Cty. Sch. Bd.,* 244 F.3d 1253, 1260 (11th Cir.2001) (quoting *Maniccia v. Brown,* 171 F.3d 1364, 1368–69 (11th Cir.1999)).

Slater also argues that *Ricci v. DeStefano,* 557 U.S. 557, 577–78, 129 S.Ct. 2568, 2672–73, 174 L.Ed.2d 490 (2009) (discussing the prohibition on disparate-impact discrimination), applies to her claim for racial discrimination. Because this argument was raised for the first time on appeal, we decline to address it. *See, e.g., Reider v. Philip Morris USA, Inc.,* 793 F.3d 1254, 1258 (11th Cir.2015).

The other claims disposed of on summary judgment that Slater has not appealed are affirmed by operation of law.

4 Chapter 7 Voluntary Pet., *In re Slater,* No. 11–02865 (Bankr.N.D. Ala. June 2, 2011), ECF No. 1.

5 A no-asset bankruptcy case is one in which no non-exempt assets are sold to pay the debtor's creditors. *See Barger v. City of Cartersville,* 348 F.3d 1289, 1291 (11th Cir.2003) ("Since it was a 'no asset discharge', no assets were distributed and the trustee was relieved of all further duties."); *In re Baitcher,* 781 F.2d 1529, 1530 (11th Cir.1986) ("It had been a 'no assets' bankruptcy in which all the creditors got nothing.").

6 Once Slater petitioned the Bankruptcy Court for Chapter 7 relief, all of her assets, including her claims against U.S. Steel, became assets of the bankruptcy estate by operation of law. *See* 11 U.S.C. § 541 (2012). Only the trustee of the bankruptcy estate would have standing to pursue her claims against U.S. Steel.

7 *See* Br. of U.S. Steel in Supp. of Mot. to Dismiss Compl. or, in the alternative, for Summ. J. at 6, *Slater v. U.S. Steel Corp.,* No. 2:09–cv–01732–KOB (N.D.Ala. Aug. 16, 2011), ECF No. 67 (citing the following employment-discrimination cases: *Robinson v. Tyson Foods, Inc.,* 595 F.3d 1269,1272 (11th Cir.2010); *Barger,* 348 F.3d at 1297; *De Leon v. Comcar Indus., Inc.,* 321 F.3d 1289, 1292 (11th Cir.2003); *Burnes,* 291 F.3d at 1289; *Pavlov v. Ingles Mkts., Inc.,* No. 06–16011, 2007 WL 1649099, at *1 (11th Cir. June 6, 2007); *Casanova v. Pre Sols., Inc.,* No. 06–12417, 2007 WL 934424, at *2 (11th Cir. Mar.28, 2007); *Hands v. Winn–Dixie Stores, Inc.,* No. 09–0619–WS–N, 2010 WL 4496798, at *5 (S.D.Ala. Nov.1, 2010)).

8 Fed. R. Bankr.P. 1009(a) ("A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.").

9 "The Chapter 13 debtor remains in possession of all property of the estate, both exempt and non-exempt." David S. Kennedy, *Chapter 13 Under the Bankruptcy Code,* 19 Mem. St. U.L.Rev. 137, 139 (1989) (citing 11 U.S.C. § 1306(b) (2012)). The debtor in possession has many of the rights and powers of a trustee. *See* 11 U.S.C. § 1303 (2012). The

debtor in possession also retains standing to pursue a claim of the bankruptcy estate. *Crosby v. Monroe Cty.,* 394 F.3d 1328, 1331 n. 2 (11th Cir.2004) (citing 11 U .S.C. § 1303; Fed. R. Bankr.P. 6009; *In re Mosley,* 260 B.R. 590, 595 (Bankr.S.D.Ga.2000)).

10 The District Court observed that Slater failed to address *Burnes, Robinson,* and the similar decisions U.S. Steel cited in its Brief in Support of Motion to Dismiss Complaint or, in the alternative, for Summary Judgment. Slater chose, instead, to rely on the fact that her failure to disclose the claims against U.S. Steel was "inadvertent and has ... been rectified," that the Bankruptcy Court took "no final action" on the failure, and that U .S. Steel had suffered no harm.

11 Slater's opening brief on appeal does not frame the argument alternatively. We do so because, giving the brief a fair reading, we sense that Slater is contending that the District Court misapplied *New Hampshire* and Eleventh Circuit precedent.

12 Slater also argues that judicial estoppel is not applicable here because the bankruptcy trustee is the real party in interest, and the bankruptcy trustee has not made any inconsistent statements. This argument fails per our precedent in *Barger,* where we attributed the debtor's inconsistent statements to the bankruptcy trustee. *See Barger v. City of Cartersville,* 348 F.3d 1289, 1292–93, 1296–97 (11th Cir.2003). Furthermore, Slater's bankruptcy case was converted to a Chapter 13 case by the time the motion for summary judgment was filed, meaning that she was, in fact, a real party in interest as the debtor in possession. 11 U.S.C. § 1303; Fed. R. Bankr.P. 6009; *Crosby v. Monroe Cty.,* 394 F.3d 1328, 1331 n. 2 (11th Cir.2004).

Additionally, Slater argues that judicial estoppel is inapplicable to a claim for injunctive relief. Because this argument was raised for the first time on appeal, we decline to address it. *See, e.g., Reider v. Philip Morris USA, Inc.,* 793 F.3d 1254, 1258 (11th Cir.2015).

13 The Supreme Court has implied that the doctrine of judicial estoppel applies in the *Burnes* scenario. *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 807, 119 S.Ct. 1597, 1604, 143 L.Ed.2d 966 (1999). In that case, the Fifth Circuit had affirmed the District Court's application of judicial estoppel to bar summary judgment on the plaintiff's claim against her former employer under the Americans with Disabilities Act of 1990 that " 'with ... reasonable accommodation' she could 'perform the essential functions' of her job," *id.* at 797, 119 S.Ct. at 1599–1600, because in an earlier case she had obtained Social Security disability benefits by taking the position that she was unable to perform her job. The Supreme Court granted certiorari, vacated the Fifth Circuit's judgment, and remanded the case for further proceedings because

> [w]hen faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."

Id. at 807, 119 S.Ct. at 1604.

We note that the Supreme Court did not cite *Cleveland* in its *New Hampshire* decision. In *New Hampshire,* the Court recognized that judicial estoppel applies in a variety of contexts and then went on to articulate factors particularly relevant to cases involving the same parties in two proceedings. *New Hampshire,* 532 U.S. at 749–51, 121 S.Ct. at 1814–15. From this, one might infer that the Supreme Court considers the *New Hampshire* scenario and the *Burnes* scenario to involve entirely different settings.

14 We pause here to state that the instant case and *Burnes* differ in one respect. In *Burnes,* the bankruptcy case in which the debtor, Billups, asserted the inconsistent position was no longer pending when the District Court applied judicial estoppel to bar his employment-discrimination claims. In the instant case, by contrast, Slater's bankruptcy case was still pending when the District Court applied the doctrine. As we indicate *infra* Part IV., this difference is not material.

15 Chandler had attended law school and testified that bankruptcy law was one of her favorite classes. *Chandler,* 35 F.Supp.2d at 865.

16 The opinion in *New Hampshire* issued on May 29, 2001. Rehearing was denied on August 6, 2001. *New Hampshire v. Maine,* 533 U.S. 968, 122 S.Ct. 10, 150 L.Ed.2d 793 (2001) (Mem.).

17 *Salomon Smith Barney, Inc.* involved a dispute over the arbitrability of certain claims. Salomon Smith Barney ("Smith Barney"), an investment firm, recommended that Harvey and others purchase limited partnerships that were unsuitable for their investment objectives. 260 F.3d at 1304–05. The case did not present a *Burnes* scenario. Rather, it presented a *New Hampshire* scenario in that the party asserting judicial estoppel, Harvey, was a party in the prior proceeding, which was an appeal taken by Smith Barney to the Florida District Court of Appeal. *Id .* at 1305. Nor did the case before the District Court involve a false statement made under oath in that case or the state-court case on appeal. The allegedly inconsistent statement was in the form of an argument Smith Barney made in that appeal, an argument the panel held

was not inconsistent with the position Smith Barney was taking in the District Court. *Id.* at 1308 ("Smith Barney did not maintain inconsistent positions, but rather it continuously argued that Florida was an inconvenient forum."). The *Salomon* Court therefore rejected Harvey's argument that the District Court should have estopped Smith Barney from pursuing the position it was taking, i.e., that the District Court should exercise jurisdiction over the case it had filed. *Id.*

Although the panel did not estop Smith Barney—because it had not pursued inconsistent positions in the two cases—it described judicial estoppel thusly:

> Judicial estoppel "is applied to the calculated assertion of divergent sworn positions ... [and] is designed to prevent parties from making a mockery of justice by inconsistent pleadings." *McKinnon v. Blue Cross & Blue Shield of Ala.,* 935 F.2d 1187, 1192 (11th Cir.1991) (citation omitted). This circuit's approach contemplates two elements. First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system.

Id. Salomon was decided on August 9, 2001, three days after the Supreme Court denied rehearing in *New Hampshire,* and thus, quite understandably, did not cite the *New Hampshire* decision.

By way of historical background, the quotation attributed to *McKinnon* was taken from *American National Bank v. Federal Deposit Insurance Corporation,* 710 F.2d 1528, 1536 (11th Cir.1983). *American National Bank* cited *Johnson Service Co. v. TransAmerica Insurance Co.,* 485 F.2d 164, 174 (5th Cir.1973), a diversity case based on Texas common law, as the authority for the doctrine. "Judicial estoppel is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings." *Am. Nat'l Bank,* 710 F.2d at 1536 (citing *Johnson Serv.,* 485 F.2d at 174).

The *Salomon* Court relied specifically on two cases in articulating the elements of judicial estoppel. The first case was *Taylor v. Food World, Inc.,* 133 F.3d 1419 (11th Cir.1998). *Taylor* presented a *Burnes* scenario. Gary Taylor's guardian sued Taylor's employer claiming that the employer had terminated Taylor in violation of his rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.,* and seeking reinstatement. *Id.* at 1421. While the suit was pending, the guardian obtained supplemental security income benefits on Taylor's behalf. *Id.* The District Court, applying the doctrine of judicial estoppel, dismissed the ADA claim. On appeal, we described judicial estoppel in the words the court in *McKinnon* used: "Judicial estoppel 'is applied to the calculated assertion of divergent sworn positions ... [and] is designed to prevent parties from making a mockery of justice by inconsistent pleadings.' " *Id.* at 1422 (quoting *McKinnon,* 935 F.2d at 1192). We reversed the dismissal on the ground that "[t]he medical records [Taylor] submitted to the SSA do not clearly contradict his assertion that he is 'qualified' under the ADA." *Id.* at 1423.

The second case was *Johnson Service.* In that case, the former Fifth Circuit applied the doctrine of judicial estoppel as formulated by Texas common law. 485 F.2d at 174. In *Chrysler Credit Corporation v. Rebhan,* which presented a *New Hampshire* scenario, this court cited *Johnson Service* in formulating for the first time in the Eleventh Circuit the doctrine of judicial estoppel as a matter of federal law. *Chrysler Credit Corp. v. Rebhan,* 842 F.2d 1257, 1261 (11th Cir.1988), *abrogated on other grounds by Grogan v. Garner,* 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) ("The policy interests [which gave rise to the doctrine] are simply stated by the doctrine itself. The doctrine of judicial estoppel 'is directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings.' " (quoting *Johnson Serv.,* 485 F.2d at 174)).

18 The Chapter 13 schedule-of-assets form Billups filed with his Chapter 13 petition "specifically asked [him] to report any contingent or unliquidated claims of any kind." *Burnes,* 291 F.3d at 1284. We held that Billups's duty to disclose all of his assets was a "continuing one" that did not end with his submission of the form. *Id.* at 1286. Rather, he was required to amend the form to reveal the lawsuit against Pemco. The Bankruptcy Court reinforced this continuing duty to disclose when, as part of its conversion of his Chapter 13 case to a Chapter 7 case, the court ordered Billups to submit "amended or updated schedules ... [to] reflect [ ] any financial changes" that had occurred since the filing of his Chapter 13 petition. *Id.* at 1284. Billups amended his schedules, but he failed to list his Title VII claim and the pending litigation. We treated the failure as a false statement under oath that he had no Title VII claim.

In *Ajaka v. BrooksAmerica Mortgage Corporation,* 453 F.3d 1339 (11th Cir.2006), we considered the debtor's failure to "amend his Chapter 13 reorganization plan to reflect his contingent [Truth in Lending Act] claim" as taking an "inconsistent position[ ] ... under oath in a prior proceeding." 453 F.3d at 1344 (quoting *Burnes,* 291 F.3d at 1285). "Because ... Ajaka failed to assert his TILA claim as an asset in the bankruptcy proceeding, the first [factor] of our judicial estoppel test is satisfied. *See* [*Burnes,* 291 F.3d] at 1285 (finding similar failure to disclose in bankruptcy proceeding to satisfy the first factor)." *Id.; see also Robinson v. Tyson Foods, Inc.,* 595 F.3d 1269, 1275 (11th Cir.2010) ("By failing to update her bankruptcy schedule to reflect her pending claim, Robinson represented that she had no legal claims to the bankruptcy court while simultaneously pursuing her legal claim against Tyson in the district court. These actions, both taken under oath, are clearly inconsistent. Therefore, in accordance with *Ajaka,* Robinson took inconsistent positions under oath and the issue of judicial estoppel centers on her intent.").

19 Billups argued that he did not have "the requisite intent to mislead the bankruptcy court." *Burnes,* 291 F.3d at 1286. He claimed that an "inadvertent error resulted in the continued omission of his discrimination claim from his bankruptcy schedules." *Id.* But, as we indicate *supra* Part I.B., Billups's failure to inform the Bankruptcy Court of his discrimination claim was not inadvertent. Such failure is "inadvertent only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Id.* at 1287 (quotation marks omitted) (quoting *In re Coastal Plains, Inc.,* 179 F.3d 197, 210 (5th Cir.1999)); *see also Robinson,* 595 F.3d at 1275. In *Burnes,* the "undisputed facts ma[d]e it clear that Billups had knowledge of his claims during the bankruptcy proceedings .... [and] stood to gain an advantage by concealing the claims from the bankruptcy court." *Burnes,* 291 F.3d at 1288.

20 We note in passing that *Parker v. Wendy's International, Inc. .,* 365 F.3d 1268 (11th Cir.2004), is factually on all fours with *Barger,* but reached the opposite result. In that case, the District Court attributed to the trustee of Parker's bankruptcy estate Parker's failure to disclose a Title VII claim of racial discrimination she had brought against Wendy's and then applied the doctrine of judicial estoppel to bar the trustee's prosecution of the claim. *Id.* at 1270–71. The trustee appealed. We reversed, observing that "the claim against Wendy's belong[ed] to the bankruptcy estate and its representative, the trustee [,]" not Parker, the debtor. *Id.* at 1273. "The trustee made no false or inconsistent statement under oath in a prior proceeding and [was] not tainted or burdened by the debtor's misconduct." *Id.*

In contrast, *Barger* held that the trustee was bound by the debtor's failure to disclose in her bankruptcy filings that the claims she was prosecuting were assets of the bankruptcy estate.

Under our prior-panel-precedent rule, *United States v. Puentes–Hurtado,* 794 F.3d 1278, 1287 (11th Cir.2015), we are bound to follow *Barger* and to disregard *Parker's* holding to the contrary.

21 This court has applied the three *New Hampshire* factors in cases presenting the *New Hampshire* scenario. *See, e.g., Tampa Bay Water v. HDR Eng'g, Inc.,* 731 F.3d 1171 (11th Cir.2013); *Riviera Beach v. That Certain Unnamed Gray, Two–Story Vessel Approximately Fifty–Seven Feet in Length,* 649 F.3d 1259 (11th Cir.2011), *rev'd on other grounds sub nom. Lozman v. City of Riviera Beach,* 568 U.S. ––––, 133 S.Ct. 735, 184 L.Ed.2d 604 (2013). Both of these decisions involved straightforward applications of *New Hampshire* and *Zedner v. United States,* 547 U.S. 489, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006), which applied *New Hampshire's* three dispositive factors. Neither Eleventh Circuit decision cites the two judicial-estoppel factors *Burnes* relied on, (1) the party against whom the doctrine is invoked is asserting a position that is inconsistent with a position the party took in a prior proceeding under oath and (2) the party is asserting the inconsistent position with the intent to make a mockery of the judicial system. And neither decision refers to the prior inconsistent position as being under oath. The impression is thus created that the oath requirement applies only in cases presenting the *Burnes* scenario, with its focus on false statements made in the Bankruptcy Court under penalty of perjury.

1 *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir.2002).

2 *Barger v. City of Cartersville,* 348 F.3d 1289 (11th Cir.2003).

3 *See In re Slater,* No. 11–02865 (Bankr.N.D. Ala. June 2, 2011).

4 *See Burnes,* 291 F.3d at 1285 (quotation marks omitted) (quoting *Salomon Smith Barney, Inc. v. Harvey,* 260 F.3d 1302, 1308 (11th Cir.2001), *vacated on other grounds,* 537 U.S. 1085, 123 S.Ct. 718, 154 L.Ed.2d 629 (2002)).

5 Slater amended her petition to reflect her suit against U.S. Steel only after U.S. Steel submitted to the District Court its motion for summary judgment based on judicial estoppel. Per Rule 1009(a) of the Federal Rules of Bankruptcy Procedure, Slater was allowed to amend her petition as a matter of course since the case was still open. *See* Fed. R. Bankr.P. 1009(a). The hearing at which Slater's suit was discovered by the Bankruptcy Court concerned a motion to convert the case from Chapter 7 bankruptcy to Chapter 13 bankruptcy and an application to employ counsel. Both the motion and the application were eventually granted. U.S. Steel had also moved the District Court to bar Slater's claim for lack of standing because the trustee of the bankruptcy estate, not Slater, was the only party who could properly maintain the employment-discrimination suit when it was in Chapter 7 bankruptcy. The District Court ultimately declared the standing question moot because, once she became a Chapter 13 debtor in possession, Slater had standing herself to sue on behalf of the bankruptcy estate.

6 Hr'g on Mot. to Convert to Chapter 13 Bankruptcy and Trustee Appl. to Employ Roderick Graham and Charles Tatum at 8:35–8:38, *In re Slater,* No. 11–02865 (Bankr.N.D.Ala. Sept. 27, 2011). Nondisclosed lawsuits and settlements would normally come to the Bankruptcy Judge's attention on a motion to reopen the case pursuant to 11 U.S.C. § 350. If a case were still open, the debtor would not need to bring the matter to the court's attention because Rule 1009 of the Federal Rules of Bankruptcy Procedure gives the debtor the right to amend his schedules "as a matter of course at any time" while the case is open, without obtaining leave of court. *See infra* note 85. The reason why the Judge commented

on the matter was because the trustee was requesting the court's approval to employ counsel to pursue Slater's claims against U.S. Steel.

7 *Burnes,* 291 F.3d at 1285 (quotation marks omitted) (quoting *Salomon,* 260 F.3d at 1308).

8 Also included in two appendices to this opinion, in order to assist the reader to make out the development of the doctrine of judicial estoppel in the Eleventh Circuit, are a chart and timeline laying out the relevant case law and a compendium of the hundreds of cases invoking *Burnes* and *Barger* in the Eleventh Circuit.

9 *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934).

10 *Id.*

11 *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282, 1286 (11th Cir.2002) (quotation marks omitted).

12 *Id.* (quotation marks omitted).

13 Fed. R. Bankr.P. 1001; *see* Hon. Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time,* 23 Seton Hall L.Rev. 1329, 1336–37 (1993) ("The bankruptcy judge ... has traditionally had other, nonadjudicative duties which are unique to the bankruptcy process." (citing H.R.Rep. No. 95–595, at 88 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6050)).

H.R.Rep. No. 95–595, at 88 (1978), *as reprinted in* 1978 U.S .C.C.A.N. 5963, 6050 provides:

> Bankruptcy is an area where there exists a significant potential for fraud, for self-dealing, and for diversion of funds. In contrast to general civil litigation, where cases affect only two or a few parties at most, bankruptcy cases may affect hundreds of scattered and ill-represented creditors.... In bankruptcy cases, ... active supervision is essential. Bankruptcy affects too many people to allow it to proceed untended by a[n] impartial supervisor.

(footnotes omitted). As a caveat, the above language is in reference to the Bankruptcy Act of 1898, which was superseded by the Bankruptcy Act of 1978, which in turn was held unconstitutional. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 87–88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982) (plurality opinion); *see also Stern v. Marshall,* 564 U.S. ——, 131 S.Ct. 2594, 2620, 180 L.Ed.2d 475 (2011). The sentiment still holds generally true.

14 *United States v. Dennis,* 237 F.3d 1295, 1299 (11th Cir.2001) (quotation marks omitted).

15 11 U.S.C. § 541(a).

16 11 U.S.C. § 362.

17 *Id.* § 362(a)(3).

18 In a Chapter 7 bankruptcy, the trustee and the debtor are two separate individuals, whereas in Chapter 13 proceedings, the debtor may step into the shoes of a trustee, and in this capacity is named the "debtor in possession." *See* 11 U.S.C. § 1303; Fed. R. Bankr.P. 6009. In Chapter 7 proceedings, only the trustee has standing to pursue claims on behalf of the estate, 11 U.S.C. § 323(a); *Barger v. City of Cartersville,* 348 F.3d 1289, 1292 (11th Cir.2003), whereas in Chapter 13 proceedings, when the debtor is acting as the debtor in possession, she retains standing to pursue claims on behalf of the estate. 11 U.S.C. § 1303; Fed. R. Bankr.P. 6009; *Crosby v. Monroe Cty.,* 394 F.3d 1328, 1331 n. 2 (11th Cir.2004).

19 *See* 11 U.S.C. § 323(a).

20 *See Mosser v. Darrow,* 341 U.S. 267, 271, 71 S.Ct. 680, 682, 95 L.Ed. 927 (1951).

21 28 U.S.C. § 1334.

22 *Id.* § 157(a).

23 *Id.* § 158(a).

24 Fed. R. Bankr.P. 7052; Fed. R. Bankr.P. 9014(c); Fed.R.Civ.P. 52; *e.g., In re Herman,* 737 F.3d 449, 452 (7th Cir.2013).

25 28 U.S.C. §§ 158(d)(1), 1254(1), 1291.

26 *United States v. Dennis,* 237 F.3d 1295, 1299 (11th Cir.2001) (quotation marks omitted)

27 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4477 (2d ed.2002) (emphasis added).

28 There are two exceptions: *City of Riviera Beach v. That Certain Unnamed Gray, Two-story Vessel Approximately Fifty-seven Feet in Length,* 649 F.3d 1259 (11th Cir.2011), *rev'd on other grounds sub nom. Lozman v. City of Riviera Beach,* 568 U.S. ——, 133 S.Ct. 735, 184 L.Ed.2d 604 (2013) and *Tampa Bay Water v. HDR Eng'g, Inc.,* 731 F.3d 1171 (11th Cir.2013). *See ante* at 31 n. 21. The party asserting the doctrine in *Riviera Beach* was a party in the earlier proceeding in which its adversary took the allegedly inconsistent position—the *New Hampshire* scenario. *Ante* at 13. *Tampa Bay Water* presented a one-case scenario, in which a party took the allegedly inconsistent positions in the same suit. *See infra* note 129. The doctrine of judicial estoppel the court considered in these two cases resembled a combination of the "narrowest approach" and the "more open approach" Wright, Miller & Cooper describe because in each case, the

court considered whether there was reliance by a party, in accordance with the "narrowest approach," and whether there was reliance by a court, in accordance with the "more open approach." Specifically, the court considered the following factors in each of the two cases:

> (1) whether there is a clear inconsistency between the earlier position and the later position; (2) a party's success in convincing a court of the earlier position, so that judicial acceptance of the inconsistent later position would create the perception that either the earlier or later court was misled; and (3) whether the inconsistent later position would unfairly prejudice the opposing party.

Tampa Bay Water, 731 F.3d at 1182; Riviera Beach, 649 F.3d at 1273.

29 *Burnes* cited both the two-oath and the one-oath requirement. *Burnes,* 291 F.3d at 1285. *Burnes* applied judicial estoppel when only one oath was present thereby making clear that it was modifying the doctrine to only require one oath. *Id.* at 1286. The development in *Burnes* dropping the second-oath requirement likely occurred in recognition that the Federal Rules of Civil Procedure do not require verified pleadings.

30 As mentioned above, a timeline and chart tracking the progress of these cases is included in Appendix I.

31 Eleventh Circuit precedent includes the decisions of the former U.S. Court of Appeals for the Fifth Circuit handed down prior to October 1, 1981, the effective date of the division of the Fifth Judicial Circuit into the current Fifth Judicial Circuit and the Eleventh Judicial Circuit. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir.1981) (en banc).

32 *Livesay Indus., Inc. v. Livesay Window Co.,* 202 F.2d 378 (5th Cir.1953). *Livesay* was a patent infringement action. The District Court held that on the basis of the judgment in *Livesay v. Drolet,* 38 F.Supp. 885 (S.D.Fla.1941), which upheld the validity of the plaintiff's patent, the defendant was barred "on the grounds of res adjudicata and estoppel" from contesting the validity of the plaintiff's patent. The Fifth Circuit affirmed, holding that the judgment in *Livesay v. Drolet* estopped the defendant on the validity issue: "where one in whose favor a judgment is rendered accepts the benefits, he is estopped from questioning the validity, of the judgment in any subsequent litigation." *Livesay Indus.,* 202 F.2d at 382. After so holding, the court added this statement about the doctrine: "[I]t ought to be, we think it is, clear that, upon every principle of judicial estoppel, including the estoppel arising out of inconsistent positions in legal proceedings, defendant may not, as it attempts to do here, so trifle with the judicial process." *Id.* (footnote omitted).

As the late Judge Robert M. Hill subsequently observed in *USLIFE Corp. v. U.S. Life Insurance Co.,*

> The law of the Fifth Circuit ... is scant on the subject of judicial estoppel.... It may be observed that in each of the cases that this Court has discovered where the doctrine was applied, the party to be estopped was, in fact, previously successful in its urging of its inconsistent position. However, in none of these cases did the Fifth Circuit undertake an elaboration of the requisites for the application of judicial estoppel.

560 F.Supp. 1302, 1305–06 (N.D.Tex.1983) (footnote omitted).

33 *Johnson Serv. Co. v. Transamerica Ins. Co.,* 485 F.2d 164 (5th Cir.1973).

34 *See ante* 13–14.

35 *Long v. Knox,* 155 Tex. 581, 291 S.W.2d 292 (Tex.1956).

36 *Johnson Serv.,* 485 F.2d at 174 (quotation marks omitted) (citations omitted) (quoting *Long,* 291 S.W.2d at 295).

37 *Id.* at 175, 291 S.W.2d 292 (emphasis added). The *Johnson Service* Court ultimately held the doctrine inapplicable. *See id.* at 175.

38 *Ante* at 13.

39 *Am. Nat'l Bank of Jacksonville v. Fed. Deposit Ins. Corp.,* 710 F.2d 1528 (11th Cir.1983).

40 This court's opinion does not indicate the state-law source of the doctrine the court applied. The opinion cites *Johnson Service's* formulation of judicial estoppel, so I assume that the parties' briefs cited *Johnson Service* for the state-law source of the doctrine. As it turned out, the court held the doctrine inapplicable.

41 *See Am. Nat'l Bank,* 485 F.2d at 1536 (citing *Johnson Serv.,* 485 F.2d at 174).

42 *Id. American National Bank* was this court's initial use of the phrase "mockery of justice" and "making a mockery of justice by inconsistent pleadings." *Id.* Webster's defines "mockery" variously as "insulting or contemptuous action or speech: derision"; "a subject of laughter, derision, or sport"; "a counterfeit appearance: imitation"; "something ridiculously or imprudently unsuitable"; and "an insincere, contemptible, or impertinent imitation." *Mockery,* Webster's Third New International Dictionary (3d ed.1993). Under this last definition, the usage "arbitrary methods that made a mockery of justice" is given as an example. *Id.*

The former Fifth Circuit had used the phrase "mockery of justice" but only in habeas cases. *Williams v. Beto,* the seminal case for the phrase, expressed it in these words:

> It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, *or a mockery of justice,* or was shocking to the conscience of the reviewing

court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.

354 F.2d 698, 704–05 (5th Cir.1965) (emphasis added) (citations omitted).

43 *Chrysler Credit Corp. v. Rebhan,* 842 F.2d 1257 (11th Cir.1988), *abrogated on other grounds by Grogan v. Garner,* 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

44 The issue was whether a debt was dischargeable under 11 U.S.C. §§ 523(a)(4) and (6). *See Chrysler Credit,* 842 F.2d at 1258.

45 For consistency, brevity, and clarity, I use the terms "debtor," "trustee," and "defendant" to the extent practicable. The "debtor" is, of course, the debtor in bankruptcy. The "trustee" is the appointed trustee in the bankruptcy proceeding. The "defendant" is the party against which the debtor or trustee is asserting a claim in District Court. This claim is typically the claim that has not been listed as an asset in the bankruptcy proceeding.

46 Chrysler Credit sued Rebhan in a North Carolina court, and Rebhan counterclaimed, asserting a position contrary to the position he was advancing in the Bankruptcy Court. Unlike the situation in *New Hampshire,* where New Hampshire *prevailed* against Maine in the prior proceeding and Maine pled judicial estoppel as a defense in the second proceeding, Rebhan *did not prevail* in the prior proceeding on his counterclaim against Chrysler Credit. The Bankruptcy Court applied the doctrine merely because Rebhan made inconsistent statements under oath in each of the two proceedings. *In re Rebhan,* 45 B.R. 609, 612 (Bankr.S.D.Fla.1985). In doing so, the Bankruptcy Court, and this court on appeal, effectively reiterated what the *Johnson Service* Court, referring to Texas common law, had said: "[Judicial estoppel] is to be distinguished from equitable estoppel based on inconsistency in judicial proceedings because the elements of reliance and injury essential to equitable estoppel need not be present." *Johnson Serv.,* 485 F.2d at 174. In brief, Rebhan was estopped solely because the position he was asserting under oath in the Bankruptcy Court was contrary to the position he had previously asserted before the North Carolina court.

47 *Chrysler Credit,* 842 F.2d at 1261.

48 *Id.* (quoting *Johnson Serv.,* 485 F.2d at 174 (quotation marks omitted)). The same language the court took from *Johnson Service* appears in the *American National Bank* opinion, which the *Chrysler Credit* opinion does not cite.

49 The *Chrysler Credit* opinion does not mention the *Johnson Service* opinion's statement that "[b]ecause [judicial estoppel] looks toward cold manipulation and not an unthinking or confused blunder, it has never been applied where plaintiff's assertions were based on fraud, inadvertence, or mistake." *See Johnson Serv.,* 485 F.2d at 175. A statement by this court to the effect that judicial estoppel does not apply where the plaintiff's position in the prior proceeding was inadvertent or mistaken next appeared in *Burnes,* 291 F.3d at 1286–87.

50 *McKinnon v. Blue Cross & Blue Shield of Ala.,* 935 F.2d 1187 (11th Cir.1999). The lawsuit was a private cause of action brought under 29 U.S.C. § 1132 for an alleged violation of 29 U.S.C. § 1140, the anti-retaliation provision of the Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq. McKinnon,* 935 F.2d at 1189–90.

51 *Id.* at 1192 (quotation marks omitted) (quoting *Am. Nat'l Bank,* 710 F.2d at 1536). The *McKinnon* opinion does not cite *Chrysler Credit,* which had adopted judicial estoppel as federal law and constituted precedent that bound the *McKinnon* Court. But *McKinnon,* in citing *American National Bank,* repeated the *Chrysler Credit* expression that judicial estoppel is applied to "the calculated assertion of divergent sworn positions." *Id. McKinnon* added a gloss to that *Chrysler Credit* expression, a gloss that, in my view, *Chrysler Credit* precedent did not foreclose: "The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings." *Id.* (quotation marks omitted) (quoting *Am. Nat'l Bank,*710 F.2d at 1536). This "gloss" came from the state-law decision *American National Bank,* and *McKinnon* adopted it into federal law.

52 The doctrine of judicial estoppel had no bearing on the *McKinnon* decision because McKinnon failed to establish that the position Blue Cross and Blue Shield of Alabama was asserting was inconsistent with a position it had asserted in a prior proceeding. *Id.* at 1192–93.

53 *Talavera v. Sch. Bd. of Palm Beach Cty.,* 129 F.3d 1214 (11th Cir.1997). Talavera presented a *Burnes* scenario. Talavera, a secretary working for the School Board of Palm Beach County, became unable to perform her job, and her one-year renewable contract was not renewed. *Id.* at 1215. Claiming that she was totally disabled, she applied for and received disability benefits from the Social Security Administration ("SSA"), then sued the School Board under the Americans with Disability Act ("ADA"), alleging that the Board had violated her rights under the ADA by failing to accommodate her disability and refusing to renew her contract because of it. *Id.* at 1216.

The District Court granted the School Board summary judgment on the ground that Talavera was "judicially estopped from claiming she was a 'qualified' individual with a disability under the ADA, having certified to the SSA that she was totally disabled." *Id.* Applying the divergent-sworn-positions-and-mockery-of-justice rule, we reversed the District Court's judgment and remanded the case for further proceedings because the statements Talavera made in support of her SSA application "d[id] not rule out the possibility that she could perform the essential functions of her job with reasonable accommodation." *Id.* at 1221.

We said, in the words of *McKinnon,* "Judicial estoppel 'is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings.' " *Talavera,* 129 F.3d at 1217 (quoting *McKinnon,* 935 F.2d at 1192).

54 *Taylor v. Food World, Inc.,* 133 F.3d 1419 (11th Cir.1998). *Taylor* presented a *Burnes* scenario with facts similar to those in *Talavera.* The case involved statements by Gary Taylor's guardian, Patricia Taylor, made in an ADA lawsuit that were allegedly inconsistent with statements she had previously made in the application she submitted on Gary's behalf to the SSA for disability benefits. *Id.* at 1421. After referring to the *Talavera* decision, in which "this court addressed the issue of whether a plaintiff who applies for and receives disability benefits is *per se* judicially estopped from later bringing a claim under the ADA," *id.* at 1423 (citing *Talavera,* 129 F.3d at 1214), we said:

> [T]his court determined that a certification of total disability on a disability benefits application is not inherently inconsistent with being 'qualified' under the ADA. This court reasoned that the SSA, in determining whether an individual is entitled to disability benefits, does not take account of the effect of reasonable accommodation on an individual's ability to work. Accordingly, the determination of whether an individual who has certified total disability to the SSA is judicially estopped from later bringing a claim under the ADA will depend upon the specific statements made in the application and other relevant evidence in the record.

Id. (citations omitted). On the record before us, we found that the statements Gary Taylor made in the application to the SSA did not rule out the possibility that he was a " 'qualified' individual ... who can perform [his] job 'with or without accommodation.' " *Id.* at 1425.

The court quoted *McKinnon* in describing the doctrine: "Judicial estoppel 'is applied to the calculated assertion of divergent sworn positions ... [and] is designed to prevent parties from making a mockery of justice by inconsistent pleadings.' " *Id.* at 1422 (alteration in original) (quoting *McKinnon,* 935 F.2d at 1192).

55 *Salomon Smith Barney, Inc. v. Harvey,* 260 F.3d 1302 (11th Cir.2001), *vacated on other grounds,* 537 U.S. 1085, 123 S.Ct. 718, 154 L.Ed.2d 629 (2002). *Salomon,* like *Chrysler Credit* and *McKinnon,* presented a *New Hampshire* scenario.

56 In diversity cases, judicial estoppel is governed by state law under the *Erie* doctrine. *See, e.g., Original Appalachian Artworks, Inc. v. S. Diamond Assocs., Inc.,* 44 F.3d 925, 930 (11th Cir.1995) (per curiam) (citing *Chrysler Credit,* 842 F.2d at 1261). The *Salomon* Court therefore erred by looking to the federal divergent-sworn-positions-and-mockery-of-justice rule rather than the relevant judicial-estoppel rule under the applicable state law.

57 *Salomon,* 260 F.3d at 1308. (emphasis added). The *Salomon* opinion cites three cases in support of the quoted statement. *See id.* (citing *McKinnon,* 935 F.2d at 1192; *Taylor,* 133 F.3d at 1422; *Johnson Serv.,* 485 F.2d at 174–75). *McKinnon* includes a statement—judicial estoppel is "designed to prevent parties from making a mockery of justice by inconsistent pleadings," *McKinnon,* 935 F.2d at 1192—relating to the second element espoused by the *Salomon* Court, without affirmatively requiring proof that the inconsistencies be calculated to make a mockery of the judicial system. As to the second element, *McKinnon* contains a statement mandating an assertion of "divergent sworn positions," rather than inconsistent positions made under oath in a prior proceeding. *Id. Taylor* contains no statement resembling the quoted statement. The *Johnson Service* citation refers to the requirement that the first of the divergent positions must be made under oath in a prior proceeding, but does not mention the second element:

> *Long v. Knox* specifically applies the estoppel only in the event that *pleadings* have been made *under oath* in a prior proceeding. The December 16 letter [which contained the prior inconsistent statement], however, was not included in plaintiff's pleadings in the state court suit. Moreover, the original petition filed in state court was not made under oath, nor was it required to be by the Texas Rules of Civil Procedure.

Johnson Serv., 485 F.2d at 175 (footnote omitted). *Johnson Service* also says that there must be "divergent sworn positions." *Id.* It does not describe the second of the divergent sworn positions, which is the statement that triggers application of judicial estoppel. *See id.*

58 *Salomon* is the first of the then-newly established Eleventh Circuit's judicial-estoppel decisions to use the term "a prior proceeding" in articulating the burden of proof a party asserting judicial estoppel assumes. The party invoking the doctrine, Harvey, argued that the position Salomon Smith Barney had taken in the Florida District Court of Appeal during an earlier proceeding was inconsistent with the position it was asserting in the District Court and therefore should be estopped. *Salomon,* 260 F.3d at 1308; *ante* at 21, n. 17. *Salomon* presumably cites the former Fifth Circuit's opinion in *Johnson Service* for the "prior proceeding" language. *Id. Johnson Service* also used an apparently equivalent term, "a former

proceeding," in explaining that "[u]nder the doctrine of judicial estoppel ... a party is estopped merely by the fact of having alleged or admitted in his pleadings in *a former proceeding* under oath the contrary to the assertion sought to be made." *Johnson Serv.,* 485 F.2d at 174 (emphasis added) (quotation marks omitted).

59 In *Burnes* and *Barger,* the "prior proceeding" is the proceeding in which the debtor made the false statement under oath that triggered the application of judicial estoppel (after the debtor was caught). As indicated in the following text, that proceeding could be a proceeding that, despite its label, occurs later in time. My use of the term "a prior proceeding" throughout this special concurrence should be read as incorporating this use of the term and as referring to another proceeding.

60 For example, in *Barger,* the debtor brought the District Court action first, then filed a Chapter 7 petition in the Bankruptcy Court. *Barger,* 348 F.3d at 1291. The proceeding in which the debtor made the false sworn statement that triggered the application of judicial estoppel, that is, her failure to amend her schedules to disclose the District Court litigation, was the Chapter 7 case, the so-called "prior proceeding." *See id.* In *Burnes,* the debtor petitioned the Bankruptcy Court for Chapter 13 relief first, then brought suit in the District Court. *Burnes,* 291 F.3d at 1284. The proceeding in which the debtor made the false sworn statement that triggered the application of judicial estoppel—that is, his failure to list the District Court litigation in amending his schedules pursuant to an order the Bankruptcy Court issued when it converted his Chapter 13 case to a Chapter 7 case—was the Chapter 7 case. *See id.* In this case, Slater brought suit in the District Court first, then 21 months later filed a Chapter 7 petition in the Bankruptcy Court. The false statement that triggered the application of judicial estoppel occurred in the Bankruptcy Court, in the "prior proceeding," when she failed to list the lawsuit at the time she filed her Chapter 7 petition.

Under *Burnes* and *Barger,* it is always the case that judicial estoppel is triggered in a situation where the debtor files for bankruptcy, omits to list an actionable claim as an asset either in his initial bankruptcy filings (if the claim is then cognizable) or in an amendment to the filings (when the claim becomes cognizable or he sues on the claim in the District Court), *and* his adversary discovers the omission. If, as is the situation here, the debtor pursues the claim in the District Court before filing for bankruptcy, the application of judicial estoppel depends on when he lists the lawsuit in his bankruptcy filings. If he lists the lawsuit in conjunction with the filing of his petition, the doctrine does not apply. If he lists the lawsuit after his adversary discovers that it has not been listed, the doctrine applies.

In *United States v. Campa,* 459 F.3d 1121 (11th Cir.2006) (en banc), a criminal prosecution, one of the defendants' arguments was that "the government's *subsequent* legal position in the *Ramirez* case constituted prosecutorial misconduct that warrant[ed] a new trial." *Id.* at 1152 (emphasis added). We thought the argument was essentially a claim of judicial estoppel and said this, citing *Burnes:*

> Judicial estoppel bars a party from asserting a position in a legal proceeding that is inconsistent with its position in *a previous,* related *proceeding.* It "is designed to prevent parties from making a mockery of justice by inconsistent pleadings." Courts consider two factors in determining whether to apply the doctrine: whether the "allegedly inconsistent positions were made under oath in *a prior proceeding* " and whether such inconsistencies were "calculated to make a mockery of the judicial system."

Campa, 459 F.3d at 1152 (footnotes omitted) (quoting Burnes, 291 F.3d at 1285). We then held that judicial estoppel was inapplicable

> because *Ramirez* was not a related proceeding, but rather an employment discrimination lawsuit. Moreover, the position that the government took in *Ramirez* occurred *subsequent to—not before*—its position in this case. The government filed its motion for change of venue in *Ramirez* on June 25, 2002, more than one year after the defendants were convicted. Therefore, the defendants' argument that the government should have been estopped from opposing its change of venue motions in a prior proceeding is chronologically unsound, and the court did not abuse its discretion in denying the defendants' motion for new trial based on newly discovered evidence.

Id. (emphasis added) (footnotes omitted). The fact that *Burnes* and *Barger,* which the court did not cite, treated a subsequent proceeding as "a prior proceeding"—because the subsequent proceeding was the only proceeding in which a position was taken under oath—was not mentioned. Given the court's silence on the point and the Supreme Court's statements in *New Hampshire* that "Courts have observed that '[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle,' " and that it was "not establish[ing] inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel," *New Hampshire,* 532 U.S. at 750–51, 121 S.Ct. at 1815 (alteration in original) (quoting *Allen v. Zurich Ins. Co.,* 667 F.2d 1162, 1166 (4th Cir.1982)), I do not view *Campa* as having overruled by implication any aspect of the holdings of *Burnes* or *Barger.* Rather *Campa* confirms that the *Burnes–Barger* formulation of judicial estoppel extends beyond the bankruptcy context.

61 In fact, the *Burnes* and *Barger* opinions contain not a word about the inconsistent position stated by the debtor under oath in the District Court.

62 In effectively eliminating the divergent-sworn-positions-and-mockery-of-justice rule's requirement of "divergent sworn positions," *Burnes* expanded judicial estoppel's reach far beyond that contemplated by this court when, in *Chrysler Credit* and *McKinnon,* it incorporated the doctrine (as articulated in *American National Bank*) into the law of the Eleventh Circuit for application in cases presenting the *New Hampshire* scenario and then, in *Talavera* and *Taylor,* for application in cases presenting the *Burnes* scenario. Absent the divergent-sworn-positions requirement endorsed in those decisions, a plaintiff could file suit in the District Court and litigate the case to final judgment on a claim the existence of which the plaintiff denied under oath in a "prior proceeding." The District Court's entertainment of such a claim would not result in a mockery of justice for two reasons. First, Rule 8(d)(3) of the Federal Rules of Civil Procedure permits the pleading of inconsistent claims (and defenses). Second, the plaintiff's adversary would impeach him with his prior inconsistent sworn statement. *See infra* notes 161–163 and accompanying text.

63 *New Hampshire v. Maine,* 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

64 *See id.* at 750–51, 121 S.Ct. at 1815.

65 *Id.* at 751, 121 S.Ct. at 1815.

66 *See Burnes,* 291 F.3d at 1285.

67 *Id.* (citation omitted) (quoting *Salomon,* 260 F.3d at 1308).

68 *Id.* at 1285–86.

69 The court made no mention of the position the debtor took under oath in the District Court. The fact that the debtor brought suit on a claim he did not disclose to the Bankruptcy Court apparently constituted a "position" that rendered inconsistent the "position" the debtor took under oath in the Bankruptcy Court and thus established the first element of the two-element statement. *Id.* at 1286.

70 *Id.* Implicit in the court's statement was the notion that the debtor's failure to disclose the lawsuit against his employer in amending the schedules in his Chapter 7 case was the functional equivalent of a false statement under oath that the claim did not exist. *See ante* at 23 & n. 18.

71 *Burnes,* 291 F.3d at 1287.

72 *Id.* The *Burnes* Court cited, among other cases, *PaylessWholesale Distribs. Inc. v. Alberto Culver (P.R.), Inc.,* 989 F.2d 570 (1st Cir.1993), which the court characterized as "holding that judicial estoppel barred a former debtor from asserting racketeering, antitrust and fraud claims because the debtor intentionally failed to disclose the claims in a prior bankruptcy proceeding, even though [the debtor] knew about the claims and had the motive to conceal them." *Burnes,* 291 F.3d at 1287. The *Burnes* Court also turned its focus to *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 417–18 (3d Cir.1988), in which the Third Circuit held, "Oneida had knowledge of its claim *when it completed the schedule of assets* in the bankruptcy, and ... it also had the motive to conceal the claims because creditors may have voted against the reorganization had they known about the potential offset." *Burnes,* 291 F.3d at 1287.

> Judicial estoppel is triggered when the debtor breaches the duty of disclosure (and his adversary in the district-court action discovers the breach). The time of the breach is critical. *See ante* at 23 & n. 18; *see also Love v. Tyson Foods, Inc.,* 677 F.3d 258, 262 (5th Cir.2012) (observing that "whether Love had a financial motive to conceal his claims against Tyson *at the time Love failed to meet his disclosure obligations* ... is the relevant time frame for the judicial estoppel analysis."); *Robinson v. Tyson Foods, Inc.,* 595 F.3d 1269, 1276 (11th Cir.2010) ("When reviewing potential motive, the relevant inquiry is intent at the *time of non-disclosure.*" (emphasis added)).

73 *Burnes,* 291 F.3d at 1287 (" '[T]he debtor's failure to satisfy its statutory disclosure duty is "inadvertent" only when, in general, the debtor either lacks knowledge or the undisclosed claims or has no motive for their concealment.' " (quoting *In re Coastal Plains, Inc.,* 179 F.3d 197, 210 (5th Cir.1999))).

74 *Id.* The court does not identify the "judicial system"—whether the Bankruptcy Court or the District Court—the debtor intended to manipulate. *See infra* note 153. I suggest that it was the Bankruptcy Court's because the intent to manipulate occurred at the moment the debtor amended his bankruptcy schedules but omitted to disclose his Title VII claim and the litigation against his employer.

75 *Burnes,* 291 F.3d at 1288.

76 *Id.*

77 *Barger v. City of Cartersville,* 348 F.3d 1289 (11th Cir.2003).

78 *Id.* at 1297 (quoting *Burnes,* 291 F.3d at 1288).

79 *Id.* at 1291.

80 *Id.*

81 *Id.*

82 *Id.* In *Burnes,* the court held that the debtor's "undisclosed claim for *injunctive relief* offered nothing of value to the estate and was of no consequence to the trustee or the creditors." *Burnes,* 291 F.3d at 1289 (emphasis added). Thus, the debtor's failure to schedule that claim did not constitute a breach of the disclosure requirements of 11 U.S.C. § 521(a)(1)(B)(i) and (iii), and Rule 1007 of the Federal Rules of Bankruptcy Procedure. *See infra* notes 171–175 and accompanying text. Relying on *Burnes,* the *Barger* Court came to the same conclusion regarding "Barger's claim for injunctive relief (*i.e.* her request for reinstatement)." *See Barger,* 348 F.3d at 1297.

83 Without elaboration, this court attributed to the trustee the debtor's conduct in concealing her claims against the City and the pending District Court litigation even though "it seem[ed] clear that Barger [had] deceived the trustee." *Barger,* 348 F.3d at 1296.

> Barger did not tell the trustee that she was ... seeking ... liquidated damages, compensatory damages, and punitive damages. She did not inform the trustee about these additional damages even though she added them to her prayer for relief [in the District Court litigation] a mere two days before the creditors meeting [conducted by the trustee].

Id.

84 There appears to be an additional wrinkle not dealt with by the courts in the *Barger* litigation that is worth mentioning. It relates to the automatic stay created by 11 U.S.C. § 362. Section 362 provides, in pertinent part, that the filing of a voluntary petition for bankruptcy relief "operates as a stay ... of any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," 11 U.S.C. § 362(a)(3), and that "the stay of an act against property of the estate ... continues until such property is no longer property of the estate," *id.* § 362(c)(1).

When the City opposed the debtor's, Barger's, motion to reopen her Chapter 7 case on the ground that the trustee would be estopped to pursue the claims that she had been litigating in the District Court, the City was engaging in an "act to obtain possession of property of the estate." That act was a nullity. *See United States v. White,* 466 F.3d 1241, 1244 (11th Cir.2006) ("It is the law of this Circuit that '[a]ctions taken in violation of the automatic stay are void and without effect.' " (quoting *Borg–Warner Acceptance Corp. v. Hall,* 685 F.2d 1306, 1308 (11th Cir.1982)). In the same vein, if the City initiated an adversary proceeding in the Chapter 7 case to obtain a declaration that the claims at issue belonged to the City via the operation of judicial estoppel, that proceeding would be a nullity as well.

85 *In re Barger,* 279 B.R. 900, 901 (Bankr.N.D.Ga.2002). Rule 5010 of the Federal Rules of Bankruptcy Procedure, which governs reopenings, provides:

> A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

Fed. R. Bankr.P. 5010.

The Bankruptcy Court "has broad discretion to reopen to permit administration of assets." 9 Collier on Bankruptcy, ¶ 5010.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.); *In re Faden,* 96 F.3d 792, 796 (5th Cir.1996); *In re Bianucci,* 4 F.3d 526, 528 (7th Cir.1993); *see also In re Upshur,* 317 B.R. 446, 451 (Bankr.N.D.Ga.2004) ("Although a motion to reopen is addressed to the sound discretion of the bankruptcy court, the court in fact has a duty to reopen the estate whenever there is proof that it has not been fully administered. The proper focus is on the benefit to the creditors, so that if the action has any value, the case should be reopened.").

If the Bankruptcy Court granted the debtor's motion to reopen, the debtor could amend her schedules as a matter of right under Rule 1009 of the Federal Rules of Bankruptcy Procedure, "Amendments of Voluntary Petitions, Lists, Schedules and Statements." Rule 1009, "General Right to Amend," states, in pertinent part: "A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby." Fed. R. Bankr.P. 1009(a).

86 The City had standing to object to the debtor's motion to reopen. *In re Lewis,* 273 B.R. 739, 749 (Bankr.N.D.Ga.2001).

87 *In re Barger,* 279 B.R. at 909.

88 *Id.*

89 11 U.S.C. § 350(b).

90 *In re Barger,* 279 B.R. at 905. "Abandonment of property of the estate," 11 U.S.C. § 554, states, in pertinent part:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> ....

(c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

11 U.S.C. § 554. "*[P]roperly scheduled assets* that are not administered at the time the case is closed are deemed abandoned." 3 Collier on Bankruptcy, ¶ 350.03 (emphasis added). While the Chapter 7 case was ongoing, the trustee was unaware of the claims against the City and, thus, could not have abandoned them.

91 *In re Barger,* 279 at 904. The court added that "[w]hether that administration would also benefit [the debtor] remains to be seen.... Unless [the debtor] is entitled to exempt the claim, creditors will receive the benefit of any recovery, after payment of fees and expenses [of the litigation], under the distributive provisions of 11 U.S.C. § 726." *Id.*

92 *Id.* at 908.

93 *Id.*

94 If a debtor were to make a false statement in his schedule of assets, Rule 9011 of the Federal Rules of Bankruptcy Procedure provides authority for the Bankruptcy Court to sanction him. Fed. R. Bankr.P. 9011. Rule 9011(b) provides that "[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief" that "the allegations and other factual contentions have evidentiary support" and that "the denials of factual contentions are warranted on the evidence or, if so identified, are reasonably based on a lack of information or belief." Fed. R. Bankr.P. 9011(b). If a party violates Rule 9011(b) by filing a schedule denying that he has any claims when he does, in fact, have claims such that that statement is a "denial ... [not] warranted on the evidence," then "the court may ... impose an appropriate sanction" on the debtor. Fed. R. Bankr.P. 9011(c).

95 Under 11 U.S.C. § 727, "Discharge," the Bankruptcy Court may deny a debtor a discharge for concealing property of the estate or the trustee or a creditor may request the revocation of a discharge obtained through fraud. Section 727 states, in pertinent part:

(a) The court shall grant the debtor a discharge, unless—

....

(2) the debtor, with intent to hinder, delay, or defraud a creditor ... has ... concealed-

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

...

(c) (1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

....

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

the date the case is closed.

11 U.S.C. § 727.

96 *In re Barger,* 279 B.R. at 908 (citing *In re Lewis,* 273 B.R. 739, 748 (Bankr.N.D.Ga.2001)).

97 The Bankruptcy Appellant Panel of the Ninth Circuit, in reversing the Bankruptcy Court's denial of a motion to reopen filed by a debtor, who, like Barger, had failed to schedule a lawsuit she had filed against her employer, stated that there are methods other than judicial estoppel for punishing a contumacious debtor:

> [A]ny legitimate concerns about a former debtor's misconduct can be addressed by other methods, rather than refusing to reopen a bankruptcy case. In appropriate situations a debtor can be subject to prosecution and penalties. *See, e.g.,* 18 U.S.C. §§ 152 and 3571. If a debtor shows bad faith, or if third parties are prejudiced by nondisclosure of an asset, then the bankruptcy court can exercise its discretion to disallow any claimed exemption in the asset, in whole or in part. In the circumstances of this appeal, where all creditors might get paid in full, Lopez still might receive a substantial portion of any recovery in the Action (11 U.S.C. § 726(a)(6)), but presumably that recovery would be because the Action had merit, not because Lopez gained any advantage by failing to list the Action.

In re Lopez, 283 B.R. 22, 30 (B.A.P. 9th Cir.2002) (citation omitted).

98 *In re Barger,* 279 B.R. at 908.

99 *Id.* at 909.

100 *Id.* (quoting *In re Daniel,* 205 B.R. at 349).

101 *Id.*

102 *See Barger,* 348 F.3d at 1292. Before it entered its final judgment in the case, the District Court was aware that the debtor's claims were assets of her bankruptcy estate and that the trustee could succeed to her position pursuant to Rule 25(c) of the Federal Rules of Civil Procedure. *Id.* The District Court did not order the substitution, but this court did on appeal: "Since the district court never directed the Trustee to substitute for Barger or join in her in this suit, the Trustee simply takes Barger's place from hereon." *Id.* at 1293.

103 In substituting its own findings and conclusions for the Bankruptcy Court's, the District Court was not exercising its role as an appellate court reviewing an interlocutory order of the Bankruptcy Court pursuant to 28 U.S.C. § 158(a)(3). *See In re F.D .R. Hickory House, Inc.,* 60 F.3d 724, 725 (11th Cir.1995) ("[A] district court, at its discretion, may review interlocutory judgments and orders of a bankruptcy court...."). Rather, the District Court was ruling on the question of whether to grant the City summary judgment based on its affirmative judicial estoppel defense. *See Barger,* 348 F.3d at 1292.

104 At this point, the trustee had intervened, as this court recognized that the debtor lacked standing. *Id.* Without elaboration, this court attributed to the trustee the debtor's conduct in concealing her claims against the City and the pending District Court litigation even though "it seem[ed] clear that Barger [had] deceived the trustee," *id.* at 1296:

> [She] did not tell the trustee that she was ... seeking ... liquidated damages, compensatory damages, and punitive damages. She did not inform the trustee about these additional damages even though she added them to her prayer for relief [in the District Court litigation] a mere two days before the creditors meeting [conducted by the trustee].

Id.

105 *Id.* at 1293–94 (citation omitted) (quoting *Salomon,* 260 F.3d at 1308).

106 *See supra* note 70.

107 *Barger,* 348 F.3d at 1294 (quoting *Burnes,* 291 F.3d at 1287).

108 *Id.* at 1294–97.

109 *Id.* The intent to manipulate the bankruptcy system occurred at the moment Barger was under a duty to disclose her pending claims but did not do so. *See supra* note 60.

110 *Id.* at 1296 (citing *Burnes,* 291 F.3d at 1287).

111 Under this court's prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc.*" *In re Lambrix,* 776 F.3d 789, 794 (11th Cir.2015) (per curiam) (quoting *United States v. Archer,* 531 F.3d 1347, 1352 (11th Cir.2008)).

112 *Parker v. Wendy's Int'l, Inc.,* 365 F.3d 1268 (11th Cir.2004).

113 I must confess that I sat on the panel that decided *Parker,* whose decision inadvertently violated this circuit's prior-panel-precedent rule and reached a result opposite to the one compelled by *Burnes* and *Barger,* as well as the panel that decided *Salomon,* which actually turned on an unspecified state-law source of the doctrine but relied on the Eleventh Circuit's formulation then in effect. Therefore, I bear part of the responsibility for allowing the current state of judicial estoppel to persist unresolved for as long as it has. Mea culpa, mea maxima culpa. "Under these circumstances, except for any personal humiliation involved in admitting that I do not always understand the opinions of this Court, I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday." *See Massachusetts v. United States,* 333 U.S. 611, 639–40, 68 S.Ct. 747, 763, 92 L.Ed. 968 (1948) (Jackson, J., dissenting).

114 *Parker,* 365 F.3d at 1272.

115 *Id.* at 1271–73.

116 Disagreement with the reasoning of prior precedent is not alone a basis for disregarding that precedent. *See In re Lambrix,* 776 F.3d at 794. The *Parker* Court did question whether the debtor in *Burnes* lacked standing but said nothing as to the propriety of the controlling *Barger* decision. *See Parker,* 365 F.3d at 1272.

117 *See, e.g., Stephenson v. Malloy,* 700 F.3d 265, 271 (6th Cir.2012); *Reed v. City of Arlington,* 650 F.3d 571, 578 (5th Cir.2011) (en banc); *Perry v. Blum,* 629 F.3d 1, 9 (1st Cir.2010); George Klidonas & Regina L. Griffin, *Estoppel Does Not Extend to Innocent Trustees,* 30 Am. Bankr.Inst. J. 44, 44 n.6 (Nov.2011).

118 *See Reed,* 650 F.3d at 578–79.

119 As then—Lord Chancellor John Scott, who later became the first Earl of Eldon, admonished,

> The doctrines of this Court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case.... Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.

Gee v. Pritchard, (1818) 2 Swans. 402, 414.

120 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4477 (2d ed.2002). As far as I can tell, this is so with the exception of *Riviera Beach* and *Tampa Bay Water. See supra* note 28.

121 The exceptions are again *Riviera Beach* and *Tampa Bay Water. See also infra* note 129.

122 *Chrysler Credit,* 842 F.2d at 1261 (quoting *Johnson Serv .,* 585 F.2d at 174). In that case, Rebhan was actually attempting to manipulate the system in the Bankruptcy Court by asserting under oath a position directly contrary to the position he had taken in a North Carolina court also under oath. *See id.*

123 *Id.*

124 *McKinnon,* 935 F.2d at 1192 (quoting *Am. Nat'l Bank,* 710 F.2d at 1536).

125 *See* 28 U.S.C. § 1332.

126 *Salomon,* 260 F.3d at 1308.

127 *See Burnes,* 291 F.3d at 1285–86 (adopting the two-element statement).

128 *Chrysler Credit,* 842 F.2d at 1261 ("Because this is a bankruptcy case, involving ... issues of dischargeability, we are ... free to apply a formulation of the judicial estoppel doctrine as we think proper.").

129 "We conclude that the two factors applied in the Eleventh Circuit are consistent with the Supreme Court's instructions [in *New Hampshire*], and provide courts with sufficient flexibility in determining the applicability of the doctrine of judicial estoppel based on the facts of a particular case." *Burnes,* 291 F.3d at 1285–86.

I posit that this is what this court did first in *City of Riviera Beach v. That Certain Unnamed Gray, Two–Story Vessel Approximately Fifty–Seven Feet in Length,* 649 F.3d 1259 (11th Cir.2011), *rev'd on other grounds sub nom. Lozman v. City of Riviera Beach,* 568 U.S. ——, 133 S.Ct. 735, 184 L.Ed.2d 604 (2013), and then in *Tampa Bay Water v. HDR Eng'g, Inc.,* 731 F.3d 1171 (11th Cir.2013); it formulated a version of judicial estoppel appropriate for the circumstances at hand, although in neither case did it invoke doctrine. *Riviera Beach* was an *in rem* proceeding in admiralty. *Riviera Beach,* 649 F.3d at 1262. The appellant, Lozman, argued that Riviera Beach was judicially estopped from bringing a maritime claim against the defendant vessel because its position was allegedly inconsistent with its position (neither of which was under oath) in *an earlier lawsuit between the same parties. Id.* at 1265. In rejecting the estoppel argument, the court cited *McKinnon,* with the exception of the "divergent sworn positions" element of the divergent-sworn-positions-and-mockery-of-justice rule, *id.* at 1275, and *Zedner v. United States,* 547 U.S. 489, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006), which adhered to the elements of the doctrine *New Hampshire* invoked:

> Judicial estoppel is "designed to prevent parties from making a mockery of justice by inconsistent pleadings." *McKinnon* [, 935 F.3d at 1192]. While judicial estoppel "cannot be reduced to a precise formula or test," *Zedner* [, 547 U.S. at 504, 126 S.Ct. at 1976], three factors typically inform the inquiry: (1) whether there is a clear inconsistency between the earlier position and the later position; (2) a party's success in convincing a court of the earlier position, so that judicial acceptance of the inconsistent later position would create the perception that either the earlier or later court was misled; and (3) whether the inconsistent later position would unfairly prejudice the opposing party if not estopped.

Riviera Beach, 649 F.3d at 1273. In Tampa Bay Water, Tampa Bay argued that HDR Engineering was estopped because of an inconsistent position it had taken in an earlier phase of *the same case* (not under oath). 731 F.3d at 1177. The court did not apply the doctrine because the positions were not inconsistent. *Id.* at 1182. Though it did not cite *Riviera Beach* for the version of the doctrine it considered, the court repeated *Riviera Beach's* version verbatim. The *Tampa Bay Water* Court also cited this Circuit's earlier recitation of the three *New Hampshire* elements (which *Zedner* reiterated) in *Robinson v. Tyson Foods, Inc.,* 595 F.3d 1269, 1273 (11th Cir.2010), but not the *Burnes* formulation, which the *Robinson* Court actually applied in these words:

> The seminal case in the Eleventh Circuit on the theory of judicial estoppel is *Burnes* .... Incorporating the standards enumerated by the Supreme Court, *Burnes* outlined two primary factors for establishing the bar of judicial estoppel. "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes* recognized that these factors are not exhaustive; rather, courts must always give due consideration to the circumstances of the particular case.

See id. at 1273 (citation omitted) (quoting *Burnes,* 291 F.3d at 1285). Neither *Riviera Beach* nor *Tampa Bay Water* has been cited in any of our reported opinions in cases presenting the *Burnes–Barger* context and the situation here.

130 *Burnes,* 291 F.3d at 1285 (quoting *New Hampshire,* 532 U.S. at 750, 121 S.Ct. at

131 Like the *Burnes* opinion, the *Barger* opinion does not identify the position the debtor took under oath in the District Court.

132 This is the scenario the instant case presents, except that, at the time the District Court granted U.S. Steel summary judgment, Slater was proceeding as the debtor in possession of her Chapter 13 bankruptcy estate and not as the trustee of the estate.

133 The court would consider the evidence in the light most favorable to the trustee.

134 *See supra* Part II.C.2.

135 This is essentially what the Fifth Circuit observed in *Love v. Tyson Foods, Inc.*: As one court has stated, "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 potential financial benefit resulting from the nondisclosure." Similarly, this court has found that debtors had a motivation to conceal where they stood to "reap a windfall had they been able to recover on the undisclosed claim without having disclosed it to the creditors."

677 F.3d 258, 262 (5th Cir.2012) (citations omitted).

136 *See Barger,* 348 F.3d at 1295–96; *supra* notes 71–76 and accompanying text.

137 *See* 28 U.S.C. § 1291.

138 *Id.* § 158(a)(3).

139 *Id.* § 158(d).

140 Section 554, "Abandonment of property of the estate," states, in pertinent part: (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

> ....
>
> (c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

11 U.S.C. § 554. After the District Court issued an order dismissing the debtor's claim for lack of standing, the trustee would inform the District Court that he was opting not to intervene, in which event the court would enter a final judgment dismissing the case without prejudice. At this point, the claim would be sitting in the bankruptcy estate subject to administration by the trustee.

141 The debtor could file the lawsuit because the District Court would have dismissed the earlier suit without prejudice for the debtor's lack of standing.

142 *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir.2002).

143 *Barger v. City of Cartersville,* 348 F.3d 1289 (11th Cir.2003).

144 *Burnes,* 291 F.3d at 1286.

145 *Id.* at 1285 (quoting *New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001)).

146 *Id.* (quoting *Salomon Smith Barney, Inc. v. Harvey,* 260 F.3d 1302, 1308 (11th Cir.2001), *cert. granted and vacated on other grounds,* 537 U.S. 1085, 123 S.Ct. 718, 154 L.Ed.2d 629 (2002)).

147 *Id.* (quoting *Am. Nat'l Bank of Jacksonville v. Fed. Deposit Ins. Corp.,* 710 F.2d 1528, 1536 (11th Cir.1983)).

148 *Id.*

149 *Id.* (quoting *Salomon,* 260 F.3d at 1308).

150 I do not include the habeas cases decided by the former Fifth Circuit that are discussed in note 42 *supra.*

151 During the debtor's prosecution of his claim in the District Court, his position in the Bankruptcy Court is essentially a statement that he is not prosecuting the claim in the District Court—that he possesses no such claim. That he is prosecuting the claim proves that such statement is false.

152 The opposite conclusion was reached in *Chrysler Credit Corp. v. Rebhan,* 842 F.2d 1257 (11th Cir.1988), *abrogated on other grounds by Grogan v. Garner,* 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). There, the debtor made inconsistent statements under oath in a North Carolina court and subsequently in the Bankruptcy Court. *Id.* at 1261. In applying the doctrine, the Bankruptcy Court considered the first statement as true and the later statement as false. *Id.* at 1260.

153 The doctrine of judicial estoppel appears to have been originally understood by this court as protecting a unitary "judicial system" against calculating litigants who would take different positions under oath in different courts, causing harm to the system as a whole. *See, e.g., Johnson Serv. Co. v. Transamerica Ins. Co.,* 485 F.2d 164, 175 (5th Cir.1973) (describing judicial estoppel as protecting against "those who would attempt to manipulate *the court system* through the calculated assertion of divergent sworn positions in judicial proceedings" (emphasis added)). But this understanding has given way as the doctrine has been extended so that Article III courts may now invoke judicial estoppel to vindicate the interests of bankruptcy and state courts as well. *See, e.g., Burnes,* 291 F.3d at 1282 (applying judicial estoppel to a prior inconsistent position taken in bankruptcy court); *Chrysler Credit,* 842 F.2d at 1257 (same for a prior inconsistent position taken in state court). For purposes of this opinion, I refer to the Bankruptcy Court and the District Court, which serve discrete interests, as separate "judicial systems."

154 The same is of course true about the instant case and the *Burnes* and *Barger* progeny.

155 The Fifth Circuit agreed in *Reed v. City of Arlington,* 650 F.3d 571 (5th Cir.2011) (en banc), a case on all fours with *Barger* in that the debtors' lawsuit was filed prior to the filing of the debtors' Chapter 7 petition and the debtors failed to schedule the judgment as an asset of the bankruptcy estate. *Id.* at 573; *Barger,* 348 F.3d at 1291. In refusing to invoke the doctrine of judicial estoppel against the bankruptcy trustee, who had intervened in the case after the nondisclosure of the judgment, the court stated: "This result upholds the purpose of judicial estoppel, which in this context is to *protect the integrity of the bankruptcy process,* by adhering to basic tenets of bankruptcy law and by preserving the assets of the bankruptcy estate for equitable distribution to the estate's innocent creditors." *Reed,* 650 F.3d at 572–73 (emphasis added).

156 Although bankruptcy courts are not Article III courts, it is not surprising, given their overlapping but distinct spheres of authority, that the district courts would be especially solicitous of the bankruptcy courts' interests. *See Stern v. Marshall,* 564 U.S. ––––, ––––, 131 S.Ct. 2594, 2609–11, 180 L.Ed.2d 475 (2011) (explaining the constitutional limits of bankruptcy courts' decisionmaking authority); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 60–76, 102 S.Ct. 2858, 2866–74, 73 L.Ed.2d 598 (1982) (plurality opinion).

157 *Burnes,* 291 F.3d at 1286 (quotations marks and citations omitted).

158 *See Barger,* 348 F.3d at 1292; *Burnes,* 291 F.3d at 1284.

159 *Barger,* 348 F.3d at 1294–97; *Burnes,* 291 F.3d at 1286.

160 *See Barger,* 348 F.3d at 1293–94; *Burnes,* 291 F.3d at 1286.

161 Fed.R.Civ.P. 8(d)(3); *see also United Techs. Corp. v. Mazer,* 556 F.3d 1260, 1273 (11th Cir.2009) ("Rule 8(d) of the Federal Rules of Civil Procedure expressly permits the pleading of both alternative and inconsistent claims."); *Allstate Ins. Co. v. James,* 779 F.2d 1536, 1540–41 (11th Cir.1986) ("Litigants in federal court may pursue alternative theories of recovery, regardless of their consistency.").

The substance of Rule 8(d)(3) has been in effect since the adoption of the Federal Rules of Civil Procedure in 1937, when the then-current version provided that "[a] party may ... state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11." Fed.R.Civ.P. 8(e)(2) (1937).

162 *See* Fed.R.Evid. 801(d)(2).

163 Throughout this special concurrence, I am assuming that the claims that are estopped are at least potentially meritorious, in that they have withstood, or are capable of withstanding, a motion to dismiss. *See* Fed.R.Civ.P. 12(b)(6). I am also assuming that the bankruptcy trustee (who has replaced the debtor, who lacks standing) is not subject to sanction under Rule 11 of the Federal Rules of Civil Procedure. After all, in order for the District Court to treat the debtor's position in the Bankruptcy Court as false, it must assume that debtor's position in the District Court litigation, which the trustee has endorsed, is true.

164 *Barger,* 348 F.3d at 1296; *see supra* note 104. The court said this in response to the Bankruptcy Court's statement that the debtor "truthfully and voluntarily disclosed the existence of the Litigation to the Trustee, the person responsible for pursuing it, whether or not it had been scheduled," *In re Barger,* 279 B.R. 900, 908 (Bankr.N.D.Ga.2002):

> The Court is not persuaded by the bankruptcy court's reasoning. The foremost responsibility in this matter was for Barger to fully disclose her assets. She did not satisfy her duty. Instead, she dissembled to the trustee and indicated that her discrimination claim had no monetary value. As such, the trustee can hardly be faulted for not further investigating Barger's discrimination suit.

Barger, 348 F.3d at 1296.

165 *Id.* at 1297 (quoting *Burnes,* 291 F.3d at 1288).

166 *In re Barger,* 279 B.R. at 908 (emphasis added) (citing *In re Lewis,* 273 B.R. 739, 748 (Bankr.N.D.Ga.2001)).

167 The debtors in *Burnes* and *Barger* would, in fact, be penalized if their claims were sufficiently valuable to pay off their creditors with additional funds left over. Future creditors might engage in a sort of cost-benefit analysis in deciding whether to conceal actionable claims for damages.

168 Full disclosure is “crucial to the effective functioning of the federal bankruptcy system.” *Burnes,* 291 F.3d at 1286 (quotation marks omitted). “[T]he importance of full and honest disclosure cannot be overstated.” *Id.* (quotation marks omitted). Consider another highly technical area of the law in which voluntary compliance is critical: the federal income-tax regime. It would be quite strange indeed if the Internal Revenue Code provided for the “punishment” of taxpayers who fail to report the proceeds of meritorious lawsuits by doing nothing more than return the taxable portion of any recovery to the defendants in those suits. Such a rule would impose no deterrent on future tax evaders, do nothing to encourage reporting, fail to raise any revenue for the Government, and inappropriately lump together inadvertent or negligent taxpayers with the consciously recalcitrant despite the general policy of tolerance toward nonintentional noncompliance. *Cf. Ratzlaf v. United States,* 510 U.S. 135, 144–47, 114 S.Ct. 655, 660–62, 126 L.Ed.2d 615 (1994); *Cheek v. United States,* 498 U.S. 192, 201–04, 111 S.Ct. 604, 610–12, 112 L.Ed.2d 617 (1991). That an analogous equitable doctrine would be considered necessary in the context of bankruptcy law is at least an equally dubious proposition.

169 I omit reference to *Burnes* in this discussion because, in *Burnes,* the appellant was the debtor, not the bankruptcy trustee. *Burnes,* 291 F.3d at 1284. The court was not faced with the question of whether the trustee's, i.e., the creditors' interests, should be taken into account determining whether, as a matter of equitable discretion, judicial estoppel should be invoked. In *Barger,* the trustee's interests were at stake and dealt with. *Barger,* 348 F.3d at 1292–93.

170 Fed. R. Bankr.P. 1001.

171 *See* 11 U.S.C. § 521(a)(1)(B)(i), (iii); Fed. R. Bankr.P. 1007(b)(1)(A), (D).

172 *Burnes,* 291 F.3d at 1284.

173 *See* 28 U.S.C. § 2075.

174 Fed. R. Bankr.P. 1009(a); *see supra* note 85.

175 *Burnes,* 291 F.3d at 1285. The Supreme Court and Congress obviously had cases like *Burnes* in mind in providing without qualification that a debtor may amend his bankruptcy filings “as a matter of course at any time before the case is closed.” Fed. R. Bankr.P. 1009(a). The *Burnes* opinion does not mention Rule 1009 at all. Nonetheless, I assume that *Burnes* would not preclude a debtor from amending his filings to list a cognizable claim for damages before his nondisclosure has been discovered. It would appear, though, that if the party potentially liable on the claim discovers that the claim has not been scheduled and brings the matter to the bankruptcy trustee's attention, he thereby sets the stage for the application of judicial estoppel should the debtor amend his schedules and the trustee thereafter takes steps to recover on the claim.

176 *See* 11 U.S.C. § 541. Section 541, “Property of the estate,” provides, in pertinent part, that the filing of a voluntary petition for bankruptcy relief “creates an estate ... comprised of ... all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a). “Even after the case is closed, the estate continues to retain its interest in unscheduled property.” 5 Collier on Bankruptcy, ¶ 554.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Moreover, where the debtor fails to notify either the trustee or the creditors of a claim, the doctrine of abandonment does not apply. *First Nat'l Bank of Jacksboro v. Lasater,* 196 U.S. 115, 119, 25 S.Ct. 206, 208 49 L.Ed. 408 (1905). As the court put it in *In re Upshur,* 317 B.R. 446, 451–52 (Bankr.N.D.Ga.2004):

> Property that is not correctly scheduled remains property of the estate forever, until administered or formally abandoned by the trustee. Thus, in the case of an omitted cause of action, the trustee is the real party in interest and the correct defense is one of standing, i.e., the action is not being prosecuted by the real party in interest which is the trustee, not the debtor. Cases like this must be reopened to permit the trustee to deal with the property of the estate.

177 Fed. R. Bankr.P. 5010.

178 *See* 11 U.S.C. § 350(b) (providing that “[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.”) The Supreme Court and Congress surely contemplated that if the debtor were attempting to manipulate the Bankruptcy Court, the court, at some point after reopening the case, would sanction the debtor, as the *In re Barger* Court suggested. *In re Barger,* 279 B.R. 900, 908 (Bankr.N.D.Ga.2002).

179 *See In re Barger,* 279 B.R. at 901; 3 Collier on Bankruptcy, ¶ 350.03[1] ("[T]he discovery of unadministered assets ... continues to be a sufficient reason for the court to exercise its power [to reopen a case].... [I]t is clear that assets that are not properly disclosed on the schedules are not abandoned and remain property of the estate that can be administered if the case is reopened.").

180 *In re Barger,* 279 B.R. at 901.

181 *See id.*

182 *See* 11 U.S.C. § 362(a)(3) (providing that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of ... any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."). "One of the principal purposes of the automatic stay is to preserve the property of the debtor's estate for the benefit of all the creditors." *In re Prudential Lines Inc. .,* 928 F.2d 565, 573–74 (2d Cir.1991). The court in *In re Barger* was obviously aware of this purpose of the stay and that sustaining the City's objection would remove property from the bankruptcy estate and injure the creditors. *See In re Barger,* 279 B.R. at 908–09.

183 *In re Barger,* 279 B.R. at 908–09.

184 *See id.* at 904.

185 As the court in *In re Upshur* put it, "the court ... has a duty to reopen the estate whenever there is proof that it has not been fully administered. The proper focus is on the benefit to the creditors, so that if the action has any value, the case should be reopened." 317 B.R. at 451.

186 *In re Barger,* 279 B.R. at 909.

187 *Id.*

188 The Bankruptcy Court's finding that Barger, in failing to amend her schedules, had not "operat[ed] with an intentional or manipulative disregard of the legal system or the bankruptcy processes in this Court," *id.* at 908, implies the conclusion that sanctions under the Bankruptcy Code were not called for.

189 *See supra* note 94.

190 The "supervisory power" refers to this court's inherent authority to oversee the procedures followed by the district courts and to "fashion[ ] procedures and remedies that ensure the judicial process remains a fair one." *Reynolds v. Roberts,* 207 F.3d 1288, 1301 n. 25 (11th Cir.2000) (quoting *Piambino v. Bailey,* 757 F.2d 1112, 1145–46 (11th Cir.1985)). Relevant here, we have previously invoked the supervisory power to prevent "substantial prejudice" to innocent third parties whose interests were harmed by a debtor's failure to disclose contested property during bankruptcy proceedings. *See In re Furlong,* 885 F.2d 815, 818–19 (11th Cir.1989); *id.* at 819 (Brown, J., concurring) (highlighting the "extreme importance" of protecting third parties and not allowing a debtor to "bargain away their rights" in bankruptcy proceedings).

I note in passing that *In re Barger* was referred to the Bankruptcy Court under the umbrella of 28 U.S.C. § 157(a). Section 157(d), gives the District Court the authority to "withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." *Id.* § 157(d). In light of *Reynolds, Piambino,* and in particular, *In re Furlong,* one might posit that the relationship between this court and the district and bankruptcy courts could provide for the exercise of supervisory power with respect to a bankruptcy court's practices.

191 Barger's failure to amend her schedules to reflect the pending litigation was undisputed. The Bankruptcy Court found that the failure was excusable, and moreover, that the schedules didn't need to be amended because the trustee knew about the lawsuit and the claims for damages. The District Court, in granting summary judgment, found that Barger's conduct was inexcusable because it was neither inadvertent nor a mistake. Thus the District Court effectively substituted its view of the evidence for the Bankruptcy Court's.

192 I assume that the Bankruptcy Court complied with Rule 52(a) in anticipation of the possibility that the City might appeal to the District Court its decision to reopen. This court, in effect, reviewed the Bankruptcy Court's Rule 52(a) findings and conclusions, which were issued after the District Court issued its order granting summary judgment to the City, in reaching its decision. *See Barger,* 348 F.3d at 1292, 1294–97.

193 I describe these secondary tools below. *See infra* notes 210–212 and accompanying text.

194 I would be remiss if I did not mention again an issue that was neither raised nor briefed in this appeal, which is whether the automatic stay, 11 U.S.C. § 362(c)(1), bars the District Court from granting the defendant summary judgment on a set of facts like those in *Barger. See supra* note 84. Judicial estoppel is not a true affirmative defense. The facts supporting the defense are provided by the debtor's post-petition behavior, not prepetition behavior relating to his claim and the defendant's defense to that claim. It is as if the defendant were asking the District Court to bar the trustee's claim because the debtor robbed a bank. The defense operates like a permissive counterclaim, and in the language of § 362(c)(1), it constitutes "an act against property of the estate."

195 *See* 11 U.S.C. § 362(a)(3).

196 The Bankruptcy Court's order denying reopening could not be construed as the court's abandonment of the claim because it is generally the trustee's decision whether to abandon an asset of the bankruptcy estate. *See* 11 U.S.C. § 554, *supra* note 140.

197 *See In re Dunning Bros. Co.,* 410 B.R. 877, 879, 887–88 (E . D.Cal.2009) (citation and quotation marks omitted) ("In the context of unscheduled property, the question of whether the case should be reopened requires only a decision whether there may be unscheduled property that could be administered by a trustee. It is not an appropriate occasion to consider or decide whether defenses could be established against the trustee. So, for example, the equitable defense of laches is not relevant to the decision whether to reopen a case, even though it may later be raised as a defense in the litigation that may follow.").

198 11 U.S.C. § 362(c)(1) states, in pertinent part: "the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate." I suggest that, in a case like *In re Barger,* the stay would have the effect of tolling the statute of limitations on the claim in issue.

199 *See Barger,* 348 F.3d at 1293 ("Judicial estoppel is an equitable doctrine that precludes a party from 'asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.' The doctrine exists 'to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.' " (citations omitted) (quoting *Burnes,* 291 F.3d at 1285).

200 At common law, using a process for which it was not designed is called "abuse of process." "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Restatement (Second) of Torts § 682 (Am. Law Inst.1977). "The gravamen of the misconduct ... is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." *Id.* § 682 cmt. a. For example, an abuse of the criminal process would occur if a merchant had a person arrested for writing a bad check but dropped the charge the moment the person made good on his debt. The purpose of judicial estoppel, the doctrine of inconsistent pleadings, is to preserve the integrity of the judicial system, not to punish someone for lying under oath. Using judicial estoppel to punish oath-breaking, in line with *Burnes* and *Barger,* is therefore analogous to abuse of process.

201 Fed. R. Bankr.P. 1001.

202 *McKinnon v. Blue Cross & Blue Shield of Ala.,* 935 F.2d 1187 (11th Cir.1999).

203 *New Hampshire v. Maine,* 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

204 *See id.* at 750, 121 S.Ct. at 1814 (providing that "judicial estoppel prevents parties from playing fast and loose with the courts." (quotation marks omitted) (quoting *Scarano v. Cent. R.R. Co. of N.J.,* 203 F.2d 510, 513 (3d Cir.1953))); *see also Burnes,* 291 F.3d at 1285 ("The purpose of the doctrine is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the courts to suit the exigencies of self interest." (alteration omitted) (quoting *In re Coastal Plains, Inc.,* 179 F.3d 197, 205 (11th Cir.1999))).

205 The question is whether the claim was capable of being tried in the District Court.

206 I refer generally to the bankruptcy courts because the *Burnes–Barger* doctrine applies in all cases, regardless of the particular presiding judge.

207 The following list includes many of the major traditional maxims of equity: (1) Equity does not suffer a wrong to go without a remedy. (2) Equity regards substance rather than form. (3) Equity regards as done that which ought to be done. (4) Equality is equity .(5) Where the equities are equal, the first in time will prevail. (6) Where the equities are equal, the law will prevail. (7) Equity follows the law. (8) One who comes into equity must come with clean hands. (9) One who seeks equity must do equity. (10) Equity aids the vigilant not those who sleep on their rights. (11) Delay defeats equity. (12) Equitable remedies are given as a matter of grace or discretion, not of right. (13) Equity acts in personam, not in rem.

1 Dan B. Dobbs, *Law of Remedies* § 2.3(4) n.7 (2d ed.1993).

208 *See* Fed.R.Civ.P. 52(a)(1) (providing that, "In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.").

209 Section 3057 provides, in relevant part,

> *Any judge,* receiver, or trustee *having reasonable grounds for believing that any* violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, *shall report to the appropriate United States attorney all the facts and circumstances of the case,* the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.

11 U.S.C. § 3057(a) (emphasis added).

210 Nor did the Bankruptcy Court see any basis for finding that the debtor had violated Rule 9011 of the Federal Rules of Bankruptcy Procedure, which mimics Rule 11 of the Federal Rules of Civil Procedure. *Compare* Fed. R. Bankr.P. 9011 *with* Fed.R.Civ.P. 11. The District Court and this court did not mention Rule 9011, so I assume that they saw no reason to invoke it.

211 A debtor who files false bankruptcy schedules pursuant to 11 U.S.C. §§ 521(a)(1)(B)(i) and (iii) and Rule 1007 of the Federal Rules of Bankruptcy Procedure under penalty of perjury, *see* 28 U .S.C. § 1746, may have committed perjury in violation of 18 U.S.C. § 1621.

212 *See* 18 U.S.C. § 401; Fed.R.Crim.P. 42.

† This visual aid should be read as follows. The arrows show that the language in the case at the tail of the arrow was adopted in the case at the head of the arrow. For example, *Johnson Service's* "calculated assertion of divergent sworn positions" language was adopted in *Chrysler Credit,* indicating that two oaths were required for the application of judicial estoppel. Similarly, *Johnson Service's* "made under oath in a prior proceeding" language was adopted in *Salomon,* and *McKinnon's* inheritance of the "calculated assertion of divergent sworn positions" language was adopted in *Salomon,* making it unclear whether one or two oaths were required. The cases proceed in roughly chronological order from the top-left corner to the bottom-right corner. The text inside each case box indicates whether there was federal-question or diversity jurisdiction in the case, whether it cited the language for one oath or for two oaths, and whether the case presented either a *Burnes* or a *New Hampshire* scenario. *See* note 1 of the Timeline of Judicial Estoppel Cases in the Eleventh Circuit for a brief explanation of these scenarios.

† This column indicates whether the case presented a *Burnes* scenario, in which the party that is asserting judicial estoppel was not a party in the prior proceeding, or a *New Hampshire* scenario, in which the party that is asserting judicial estoppel was a party in the prior proceeding. As indicated in Part II.B. of the Special Concurrence, "prior proceeding" does not necessarily mean the lawsuit first filed. It has instead come to mean "another proceeding" where the violation of the oath occurs.

‡ This column indicates whether the case cites the language requiring one statement under oath or the language requiring two statements under oath for the doctrine of judicial estoppel to apply. In some instances, the case cites both the language requiring one oath and two oaths, which is indicated by "Either."

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