THE ELEVENTH CIRCUIT ESTABLISHES NEW STANDARD FOR JUDICIAL ESTOPPEL IN BANKRUPTCY CASES

*Brenton Thompson**

INTRODUCTION

On September 18, 2017, the Eleventh Circuit Court of Appeals, sitting en banc, held that before precluding a debtor's claim on judicial estoppel grounds, district court judges are required to consider all facts and circumstances to determine whether omitting a pending civil claim from a bankruptcy filing evinces a debtor's intent to make a mockery of the judicial system.[1] This standard—intent to make a mockery of the judicial system—serves as the second prong in a two-part analytical framework employed by the Eleventh Circuit to evaluate the appropriateness of judicial estoppel.[2] The full court remanded the case to the three-judge panel[3] to decide the case under the new standard.[4]

Before *Slater v. U.S. Steel Corporation*, this standard operated as a sort of strict liability on debtors who failed to disclose a civil claim, turning on two considerations: (1) whether the debtor knew about the claim and (2) whether the debtor had a motive to conceal the claim.[5] After *Slater*, a debtor's intent turns on a fact-intensive analysis.[6]

BANKRUPTCY LAW

Bankruptcy filings take several forms; each of them imposing different, nuanced requirements on debtors.[7] Generally, when a debtor files for bankruptcy, she is required to list all of her "assets, including contingent and unliquidated claims."[8] The listed assets then become part of the

---

* Candidate for Juris Doctor, Cumberland School of Law, Class of 2019. Junior Editor, Cumberland Law Review. Bachelor of Science, Auburn University, Class of 2016.

[1] Slater v. U.S. Steel Corp., No. 12-15548, 2017 WL 4110047, at *1 (11th Cir. Sept. 18, 2017) (*Slater II*).

[2] *Id.* at *5.

[3] The three judge panel consists of Eleventh Circuit Judges Gerald Bard Tjoflat and William H. Pryor, and Southern District of Florida Judge Robert N. Scola. Slater v. U.S. Steel Corp., 820 F.3d 1193, 1195 (11th Cir. 2016) (*Slater I*).

[4] *Slater II*, 2017 WL 4110047, at *12.

[5] *See* Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1287-88 (11th Cir. 2002).

[6] *Slater II*, 2017 WL 4110047, at *8.

[7] *See* Douglas Jacobs, *The True Differences Between 7s and 13s*, BANKRUPTCY LAW NETWORK (Apr. 11, 2017), http://www.bankruptcylawnetwork.com/the-true-difference-between-7s-and-13s/.

[8] *Slater II*, 2017 WL 4110047, at *9 (citing 11 U.S.C. § 521(a)(1)(B)(i) (2014) (requiring the debtor to file a schedule of assets and liabilities)).

bankruptcy estate.[9] The estate, under the legal control of a trustee, is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case," i.e. when the debtor files her bankruptcy petition.[10] Failure to identify potential lawsuits on her bankruptcy schedule can have serious consequences for a debtor: she may be deprived of standing[11] to pursue an otherwise meritorious claim or may be judicially estopped from pursuing the claim.[12]

JUDICIAL ESTOPPEL

Judicial Estoppel is an equitable doctrine designed to prevent a party from misleading the courts by taking a contrary position in a later case.[13] The doctrine was first articulated by the Supreme Court in *New Hampshire v. Maine*, in which the Court determined that the main function of judicial estoppel is "to protect the integrity of the judicial process."[14] The Court in *New Hampshire*, a non-bankruptcy case,[15] declined to establish a hard and fast rule, opting for a three-factor test to guide the analysis.[16] Bankruptcy

[9] 11 U.S.C. § 541(a)(1) (2016).

[10] *Id.*

[11] Under Chapter 7, a debtor forfeits her pre-petition assets to the estate, and only the trustee has standing to pursue an un-abandoned civil claim. Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004). In a Chapter 13 case, however, the debtor normally retains possession of the property contained in the estate, allowing the debtor to maintain standing to pursue civil claims. *See* Crosby v. Monroe County, 394 F.3d 1328, 1331 (11th Cir. 2004); Looney v. Hyundai Motor Mfg. Ala., L.L.C., 330 F. Supp. 2d 1289, 1298-99 (M.D. Ala. 2004) (stating that a Chapter 13 debtor has standing to litigate employment discrimination action which was part of the bankruptcy estate).

[12] *See* New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (holding that the doctrine of judicial estoppel may prevent a party from asserting a claim in a legal preceding that is inconsistent with a claim taken by that party in a prior preceding).

[13] *Id.* at 749.

[14] *Id.* (citations and internal quotations omitted).

[15] *New Hampshire* involved a boundary dispute between Maine and New Hampshire. *Id.* at 745. New Hampshire asked the Supreme Court to declare that the boundary between the two states was low water mark on a river that divided the two states. *Id.* at 745. Maine filed a motion to dismiss, arguing that New Hampshire should be judicially estopped from brining the claim because in a previous lawsuit New Hampshire agreed that the boundary between the two states was the middle of the same river's navigation channel. *Id.* at 748. Ultimately, the Supreme Court barred New Hampshire's claim under the auspices of judicial estoppel. *Id.* at 749.

[16] *Id.* at 750-51. The first factor is whether a party's earlier position is "clearly inconsistent" with its later position. *Id.* at 750. Second, whether the "party has succeeded in persuading a court to accept that . . . position, so that judicial acceptance of an inconsistent position . . . would create 'the perception that either the first or second court was misled.'" *Id.* at 750 (quoting Edwards v. Atena Life Ins., 690 F.2d 595, 599 (6th Cir. 1982)). Third, whether "the party seeking to assert an inconsistent position would derive an unfair advantage." *Id.* at 751.

courts, in particular, use a debtor's representations to determine whether "she has claims or interests arising out of matters before the court."[17] If the debtor uses the bankruptcy court for relief and subsequently uses "the judicial system to pursue claims . . . she had previously misrepresented or failed to reveal, the debtor commits a fraud upon the court and will be estopped."[18]

The Eleventh Circuit Court of Appeals, by contrast, favors a two-part test for analyzing judicial estoppel cases.[19] First, "the allegedly inconsistent positions [must be] made under oath in a prior preceding."[20] In the context of bankruptcy, the debtor is presumed to have asserted an inconsistent position under oath by signing her bankruptcy petition.[21] Second, the "inconsistencies must . . . have been calculated to make a mockery of the judicial system."[22] The Eleventh Circuit has defined this standard as: "a purposeful contradiction—not simple error or inadvertence."[23] Before *Slater*, purpose could be inferred from the debtor's (1) knowledge about the undisclosed claims and (2) motive to conceal them.[24] Further, the Eleventh Circuit makes no distinction between Chapter 7 and Chapter 13 filings as it relates to the second prong, i.e., the question of intent.[25]

Before *Slater*, Eleventh Circuit precedent regarding the second analytical prong was predicated largely on two cases: *Burnes v. Pemco Aeroplex, Inc.*, and *Barger v. City of Cartersville*.[26] Essentially, under the *Burnes-Barger* regime, a plaintiff was held to have intended to make a mockery of the judicial system simply by virtue of omitting a civil claim in a bankruptcy filing.[27] For example, in *Burnes*, the Eleventh Circuit held

---

[17] Brassfield v. Jack McLendon Furniture, Inc., 953 F. Supp. 1424, 1432 (M.D. Ala. 1996).

[18] *Id.* (citing Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570 (1st Cir. 1993); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419-20 (3rd Cir. 1988)).

[19] *See, e.g., Burnes*, 291 F.3d at 1285 (citing Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1308 (11th Cir. 2001)).

[20] *Id.* (quoting *Salomon*, 260 F.3d at1308).

[21] *See id.* at 1286; Barger v. City of Cartersville, 348 F.3d 1289, 1294 (11th Cir. 2003) ("There is no debate that Barger submitted her Statement of Financial Affairs under oath to the bankruptcy court. Therefore, the issue here is intent.").

[22] *Burnes*, 291 F.3d at 1285 (quoting *Salomon*, 260 F.3d at 1308).

[23] *Barger*, 348 F.3d at 1294 (citing *Burnes*, 291 F.3d at 1286).

[24] *Burnes*, 291 F.3d at 1287.

[25] De Leon v. Comcar Indus., Inc., 321 F.3d 1289, 1291 (11th Cir. 2003).

[26] *Slater II*, 2017 WL 4110047, at *6.

[27] *See id.*, at *6 (focusing on the "mockery" aspect of the judicial estoppel analysis; "In *Burnes* and *Barger*, we endorsed an inference that a plaintiff who failed to disclose a lawsuit in a Chapter 7 bankruptcy intended to manipulate the judicial system because the omission was not inadvertent.").

that a district court did not abuse its discretion[28] when it used judicial estoppel to bar a plaintiff's claim when he failed to include the lawsuit as an asset in his bankruptcy filings.[29] The plaintiff-debtor filed for Chapter 13 bankruptcy, and then later sued his employer for discrimination.[30] The plaintiff did not, however, amend his bankruptcy schedules to include the lawsuit.[31] Subsequently, the plaintiff filed to convert his Chapter 13 petition to a Chapter 7.[32] Eventually, the plaintiff received a no-asset discharge of his debt under Chapter 7 and the defendant employer moved for summary judgment.[33] The district court granted the motion on judicial estoppel grounds, and the Eleventh Circuit affirmed.[34] In affirming, the Eleventh Circuit applied its two-part test.[35] The court held that the plaintiff "had knowledge of his claims" and had motive to conceal the lawsuit because "[i]t [was] unlikely he would have received . . . a no asset, complete discharge" if he had disclosed his multi-million-dollar claim.[36]

Slater v. U.S. Steel Corporation

In *Slater*, the Eleventh Circuit overruled portions[37] of *Burnes* and *Barger*, holding that a court should look to all the facts and circumstances of the particular case to determine whether the debtor intended to make a mockery of the judicial system.[38] In *Slater*, Sandra Slater, the plaintiff, was a former employee of the United States Steel Corporation, the defendant.[39] Slater filed suit against her former employer, alleging race and sex

---

[28] The Eleventh Circuit employs an abuse of discretion standard when reviewing a grant of summary judgment based on judicial estoppel. Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1273 (11th Cir. 2010) (citing Talavera v. School Bd. of Palm Beach Cty., 129 F.3d 1215, 1216 (11th Cir. 1997)).

[29] *Burnes*, 291 F.3d at 1287-88.

[30] *Id.* at 1284.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1283.

[35] *Burnes*, 291 F.3d at 1285-86.

[36] *Id.* at 1288. The court also rejected the plaintiff's argument that judicial estoppel should not apply because he could reopen and amend his bankruptcy filings to disclose the lawsuit. *Id*. According to the court, allowing the plaintiff to re-open and amend his filing after defendant moved for summary judgment would "suggest[] that a debtor should consider disclosing potential assets only if he is caught concealing them." *Id.*

[37] *Slater II*, 2017 WL 4110047, at *1. "We do not overrule these cases entirely. Specifically, our decision today has no effect on the portion of *Burnes* holding that judicial estoppel did not apply to bar the debtor's injunctive relief claims, or the portions of *Barger* addressing standing, estoppel, and the application of judicial estoppel to the debtor's claim for injunctive relief." *Id.* at *8 n.10 (internal citations omitted).

[38] *Id.* at *1.

[39] *Id.*

discrimination under Title VII.[40] Subsequently, Slater filed for bankruptcy relief in the form of a Chapter 7 petition; however, she did not list the action as an "unliquidated or contingent" claim in her bankruptcy schedule, and once the Chapter 7 trustee determined there was no more property to be distributed, the case became presumptively administered under Federal Rule of Bankruptcy Procedure 5009(a).[41]

As a result, the defendant corporation filed for summary judgment arguing that Slater's claim was barred by the doctrine of judicial estoppel.[42] Essentially, the defendant argued that Slater could not file a Chapter 7 bankruptcy claim—one that requires the claimant to forfeit all potential assets—and also pursue claims against the defendants.[43] The two positions taken by the plaintiff—her financial status and continued pursuit of the Title VII claim—were diametrically opposed, and made a mockery of the judicial system, the established standard in the Eleventh Circuit.[44] Slater argued that she believed the bankruptcy code only required her to disclose suits filed against her.[45] She amended her bankruptcy schedules to disclose the Title VII claim, and the Bankruptcy Court converted her case to Chapter 13.[46] The District Court for the Northern District of Alabama agreed with the defendant's position, dismissing the Title VII case under the auspices of judicial estoppel.[47] The court concluded that Slater knew of the undisclosed claim and had a motive to omit it from her bankruptcy disclosures.[48]

A three-judge panel of the Eleventh Circuit affirmed.[49] Relying on past Circuit precedent, the court concluded that Slater's knowledge of the undisclosed claim and her financial motive to conceal the claim established an inference that Slater intended to make a mockery of the judicial system.[50] Despite the court's decision, Judge Gerald Tjoflat, concurring in the judgment, urged en banc review of the appeal.[51] Judge Tjoflat felt the time was right to revisit Eleventh Circuit precedent regarding judicial estoppel, stating that the *Barger-Burnes* regime "guarantees the very mockery of

---

[40] *Slater II*, 2017 WL 4110047, at *2.
[41] *Id.*
[42] *Id.*
[43] *See Slater II*, 2017 WL 411047, at *2-3.
[44] *See id.* at *3.
[45] *Id.* at *2.
[46] *Id.*
[47] *Id.*
[48] *Id.* at *3.
[49] Slater v. U.S. Steel Corp., 820 F.3d 1193, 1195 (11th Cir. 2016) (*Slater I*).
[50] *Slater II*, 2017 WL 4110047, at *3.
[51] *Id.*

justice the doctrine of judicial estoppel was designed to avoid."[52] The Eleventh Circuit agreed to rehear the case before the entire court.[53]

On rehearing, the court held that a district court must consider all the facts to determine whether the claimant intended to make a mockery of the judicial system by omitting a civil claim on a bankruptcy filing.[54] Judge Jill Pryor, writing for the majority, stated that the purpose of judicial estoppel was to prohibit "parties from deliberately changing positions according to the exigencies of the moment."[55] Relying on the Supreme Court's guidance, the majority gave three reasons to overrule the intent inference allowed by *Barger* and *Burnes*.[56]

First, according to the court, intent to mislead the court should be answered separately from voluntary action leading to omission of a claim.[57] In doing so, the court criticized *Barger* and *Burnes* for conflating inadvertent omission—i.e., whether the action itself was intentional—with the debtor's intent to deceive the judiciary.[58] In support of this conclusion, the court presented a hypothetical debtor who is confused by disclosure obligations under the Bankruptcy Code.[59] Specifically, the court noted that many debtors are pro se and that a debtor's sophistication is a factor the district court must consider in determining that debtor's intent to manipulate the court.[60]

Second, a totality of the circumstances inquiry provides the district court the requisite flexibility to consider any developments in the bankruptcy court following the discovery of the omission.[61] Judge Pryor began by noting that traditionally the Eleventh Circuit justified judicial estoppel in bankruptcy cases as "necessary to ensure full and honest disclosure . . . and [to] protect 'the effective functioning of the federal bankruptcy system.'"[62] This justification, however, ignores certain realities of the bankruptcy courts and the Bankruptcy Code and Rules.[63] For instance, Bankruptcy Rule 1009 allows a debtor to amend a schedule "as a

---

[52] *Slater II*, 2017 WL 4110047, at *3 (quoting *Slater I*, 820 F.3d at 1235 (Tjoflat, J., concurring)).
[53] *Id.*
[54] *Id.* at *1.
[55] *Id.* at *4 (quoting *New Hampshire*, 532 U.S. at 749-50).
[56] *Slater II*, 2017 WL 4110047, at *8.
[57] *Id.* at *9.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Slater II*, 2017 WL 4110047, at *9 (quoting *Burnes*, 291 F.3d at 1286).
[63] *Id.*

matter of course at any time before the case is closed."[64] According to the majority, inferring intent to make a mockery of the court based on omission alone is "inconsistent with [bankruptcy court] principles," especially in light of the bankruptcy court's own procedures to punish purposefully deceitful debtors.[65]

Third, the court noted that judicial estoppel is an equitable doctrine.[66] Accordingly, an inquiry that takes into account all the relevant facts and circumstances comports with the doctrine's equitable foundations.[67] Equity, according to the majority, is a function of fairness to an innocent creditor and a confused debtor.[68] "Judicial estoppel should not be applied when the inconsistent positions were the result of 'inadvertence[ ]or mistake.'"[69] Nor should judicial estoppel provide a mechanism to "give the civil defendant a windfall at the expense of innocent creditors."[70] Equity, the court noted, demands a flexible approach, and only an inquiry that takes into account all relevant facts and circumstances comports with this mandate.[71] Ultimately, judicial estoppel should only apply when the debtor has the requisite mental state—the intent to make a mockery of the judicial system.[72] As Judge Pryor stated: "Just as equity frowns upon a plaintiff's pursuit of a claim that he intentionally concealed in bankruptcy proceedings, equity cannot condone a defendant's avoidance of liability through a doctrine premised upon intentional misconduct without establishing such misconduct."[73]

In a concurring opinion, Chief Judge Ed Carnes emphasized that district court judges are not required to blindly accept a debtor's testimony regarding her own intent, even if the testimony is undisputed.[74] According to Chief Judge Carnes, someone willing to intentionally mislead in bankruptcy court—an act that amounts to perjury—would have no issue doing the same at the district court level.[75] Requiring the district court to

---

[64] *Slater II*, 2017 WL 4110047, at *9 (quoting Fed. R. Bankr. R. P. 1009(a)). *See also* 11 U.S.C. § 350(b).

[65] *Slater II*, 2017 WL 4110047, at *9. For example, the bankruptcy court may fine or imprison a debtor for contempt. *Id.* (citing 18 U.S.C. §§ 401, 1621).

[66] *Id.* at *10.

[67] *Id.*

[68] *Id.*

[69] *Id.* at *5 (citing Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 175 (5th Cir. 1973)).

[70] *Id.* at *8.

[71] *Slater II*, 2017 WL 4110047, at *10.

[72] *Id.*

[73] *Id.* (citing Coral Springs St. Sys. Inc. v. City of Sunrise, 371 F.3d 1320, 1340-1341 (11th Cir. 2004)).

[74] *Slater II*, 2017 WL 4110047, at *12 (Carnes, C.J., concurring).

[75] *Id.*

accept a debtor's position wholesale would render the doctrine moot.[76] In Chief Judge Carnes' view, the doctrine's end would be at the expense of honest creditors and the judicial system as a whole.[77] Ultimately, the concurring opinion can be boiled down to one sentence from footnote 12 in the majority opinion: "Of course, the district court may determine that a plaintiff's testimony that he misunderstood the disclosure obligations is not credible."[78]

CONCLUSION

The court's decision in *Slater* does not change the broad framework of judicial estoppel analysis. In fact, the majority reaffirmed the Eleventh Circuit's traditional two-part test which requires findings that a debtor took inconsistent positions and that the debtor intended to make a mockery of the judicial system.[79] It is only the standard by which a debtor's intent is evaluated, the second analytical prong, that has changed.[80] The effects of this decision, however, could have far-reaching consequences for discharged employees. After *Slater*, discharged employees who also file for bankruptcy, and who may, like Sandra Slater, be uneducated, unsophisticated, and underrepresented, will not lose their meritorious claims simply because they did not understand a complicated scheme of bankruptcy rules and regulations.

---

[76] *Slater II*, 2017 WL 4110047, at *13.
[77] *Id.*
[78] *Slater II*, 2017 WL 411047, at *9 n.12.
[79] *Id.* at *4.
[80] *See id.* at *8.