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Robert F. Dugas

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Honing a Blunt Instrument: Refining the Use of Judicial Estoppel in Bankruptcy Nondisclosure Cases

I. INTRODUCTION

For individuals and organizations facing financial distress, modern bankruptcy law provides a statutory respite from creditors and mounting debt. When a debtor's liabilities irretrievably exceed its available assets, the law provides a forum for interested parties to efficiently assess and equitably divide or restructure a maximized pie of debtor value. What happens, however, when an individual or corporate debtor, either through fraud or mistake, "hides" a piece of the pie?

Debtors Mr. and Mrs. Hudspeath, facing significant financial hardship, decided to contemplate their dire economic situation aboard a chartered boat.[1] As Mr. Hudspeath boarded the vessel, however, he sustained physical injury due to the boat operator's allegedly negligent maintenance of a slippery gangplank. Seeking to prevent this potentially valuable lawsuit from falling into creditors' hands, the Hudspeaths filed for bankruptcy but cagily omitted to disclose as an asset their potential negligence suit against the boat operators. During the ensuing bankruptcy proceedings, the Hudspeaths falsely represented that any such negligence action would be barred by the statute of limitations. This induced the bankruptcy trustee to formally abandon any interest in the cause of action. As a result, under personal bankruptcy law as it existed at the time, the Hudspeaths received a no asset discharge from debt and emerged from bankruptcy with a clean slate.

Upon receiving their discharge, the Hudspeaths promptly proceeded to initiate their unbarred negligence lawsuit against the

1. These facts are based upon the recent Fifth Circuit case of *Superior Crewboats, Inc., v. Primary P & I Underwriters, (In re Superior Crewboats, Inc.)*, 374 F.3d 330 (5th Cir. 2004).

boat operator, much to the dismay of the bankruptcy trustee who moved to reopen the bankruptcy case and substitute as plaintiff in the action. Amid this tussling, the defendant boat operator learned of the Hudspeaths' omission of the lawsuit in their earlier bankruptcy and consequently moved for dismissal under the doctrine of judicial estoppel.[2] Seeing what it perceived to be the Hudspeaths' fraudulent conduct, the court agreed with the defendant and dismissed the Hudspeaths' negligence claim entirely. Thus, justice was served and the Hudspeaths were prevented from manipulating judicial machinery for their own private gain. The court punished the Hudspeaths for hiding a piece of the pie by simply throwing the piece away.

Significant questions arise, however, about which interests such a decision truly serves. Because the tort claim was dismissed, the Hudspeaths' creditors remain unpaid and unable to benefit from this legitimate cause of action that should have entered the bankruptcy estate. In addition, the negligent boat operator escapes unscathed and continues operating to the potential injury of future customers. Simple dismissal of the claim in accordance with the purportedly equitable doctrine of judicial estoppel has prevented these third parties from seeking or receiving justice they potentially deserve.

In modern litigation, disputes often arise that affect not merely two directly adversarial parties, but also countless other parties with varying degrees of interest. Perhaps nowhere is this trend more clearly seen than in the bankruptcy law setting where multiple parties' claims create an interconnected web in which a loss or recovery by one reverberates throughout. In such a setting, applying the doctrine of judicial estoppel presents unique challenges to parties and to the court.

Courts frequently invoke judicial estoppel under the auspices of protecting the machinery of justice and preventing perversion of the judicial system. Yet applying the doctrine in a complex, multi-party scenario may ultimately result in further dysfunction of the system and inequity to the parties. Recent bankruptcy court decisions invoking the doctrine represent prime examples of this predicament.[3]

Bankruptcy proceedings of all varieties require, and indeed are predicated upon, a full disclosure of all the debtor's assets.[4] This disclosure encompasses all assets a party may possess, including

2. Broadly, judicial estoppel serves to prevent a party that has asserted a position before a tribunal from asserting the contrary before a subsequent tribunal.

3. *See, e.g.*, Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314 (3d Cir. 2003) (discussed *infra* Part IV.A.2).

4. *See* 11 U.S.C. § 521 (2006) (discussed *infra* Part III).

potential causes of action.[5] In disclosing an asset schedule, a debtor implicitly represents to the court that no other assets exist. Occasionally, however, after filing its bankruptcy petition, the debtor will initiate causes of action about which it knew prior to filing but simply omitted to schedule as assets. In doing so, the debtor adopts a position inconsistent with its earlier implicit representation in bankruptcy that no such claim existed.

When the astute post-bankruptcy defendant realizes that the plaintiff has previously represented that its cause of action did not exist, frequently the defendant will attempt to achieve dismissal of the action by asserting judicial estoppel. Courts have generally been receptive to this argument and have often granted dismissal on that basis.[6] In a bankruptcy nondisclosure setting, however, estopping a debtor from proceeding with an undisclosed claim may be an inequitable and inefficient remedy. In particular, this approach deprives the bankruptcy creditors of any proceeds resulting from the undisclosed cause of action, and the potentially culpable third party defendant evades liability merely because of the fortuitous actions of the plaintiff in an unrelated proceeding.

While others have commented on the application of judicial estoppel in the bankruptcy nondisclosure setting,[7] this Note presents a comprehensive analysis of the competing motivations and provides a unified framework for balancing them. This Note begins by exploring the motivations, practice, and implications of the doctrine of judicial estoppel based on prior omissions in bankruptcy proceedings. Part II provides background and reviews the underpinnings and broad goals of bankruptcy law as well as the application of judicial estoppel in the federal courts. Part III presents the prototypical pathological scenario courts often confront that places the bankruptcy and judicial estoppel at ideological odds; and Part IV describes various approaches that courts have taken to resolve the conflicts. Part V analyzes the competing goals and interests at stake in various bankruptcy scenarios and critiques the manner in which courts have addressed them. Part VI presents a generalized framework for resolving doctrinal tensions in a manner most consistent with the goals of the

5. *Id.*

6. *See, e.g.*, Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3d Cir. 1988) (discussed *infra* Part IV.A.2).

7. *See, e.g.*, Louis M. Phillips & Brandon A. Brown, *Continuing Ruminations on Judicial Estoppel: Barging into the Consumer Field*, 2 NORTON BANKR. L. ADVISER 4 (2004) (proposing a method of analyzing standing in personal bankruptcy nondisclosure cases); Donna T. Snow, *Eleventh Circuit takes Another Look at Judicial Estoppel and Gets it Right*, 7 NORTON BANKR. L. ADVISER 3 (2004) (discussing Parker v. Wendy's Int'l., Inc., 365 F.3d 1268 (11th Cir. 2004)).

competing interests at work in the corporate and personal bankruptcy settings. Finally, Part VII summarizes these concepts and draws conclusions about future application.

II. BACKGROUND

A. History and Goals of Judicial Estoppel

As courts have aptly noted, the doctrine of judicial estoppel stands for different principles in different jurisdictions. In a recent case, the Ninth Circuit Bankruptcy Court of Appeals explained, "Modern judicial estoppel doctrine is still amorphous and has been described . . . as 'not so much a single doctrine as a set of doctrines that have not emerged into fully coherent theory.'"[8] To present as coherent an image of judicial estoppel as possible, this Note first develops the general principle of judicial estoppel as contrasted with various other forms of preclusion. Next, the history and branching development of the doctrine are examined to provide insight into the goals motivating the varied approaches that courts apply to judicial estoppel. Thus, this analysis reductively clarifies what judicial estoppel is not; then, it pieces together what courts have created under the umbrella term judicial estoppel.

1. Judicial Estoppel in Contrast to Other Forms of Preclusion

Irrespective of the specific requirements and policies guiding its implementation, the term "judicial estoppel" broadly refers to judicially-imposed limitations on litigants who would assert two irreconcilable positions in successive litigations.[9] As such, the doctrine typically focuses on the parties' assertions in relation to the courts rather than in relation to other litigants. Further, judicial estoppel is an equitable doctrine. As one court explained, the term equitable in this context refers not to the technical distinction between law and equity, but rather to concerns of "fairness" and "preventing injustice."[10] This broad description serves to distinguish the doctrine at least in principle from other forms of preclusion raised in litigation.

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8. An-Tze Cheng v. K & S Diversified Invs. (*In re* An-Tze Cheng), 308 B.R. 448, 453 (B.A.P. 9th Cir. 2004) (quoting 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4477 (2002) [hereinafter WRIGHT, MILLER & COOPER]).

9. WRIGHT, MILLER & COOPER, *supra* note 8, § 4477.

10. *An-Tze Cheng*, 308 B.R. at 459.

In contrast to judicial estoppel, the doctrine of equitable estoppel generally requires that a party to a prior proceeding has detrimentally relied on the prior inconsistent position of his adversary.[11] Equitable estoppel thus focuses primarily on a litigant's prior positions with respect to other litigants rather than with respect to the courts. Judicial estoppel's focus on judicial reliance serves to distinguish it from equitable estoppel which focuses on reliance by an opposing party.[12]

The doctrine of res judicata differs from judicial estoppel in that it prohibits relitigation as between the original parties of "all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."[13] The doctrine of res judicata applies primarily to ensure the finality of litigation in which the court has rendered an ultimate judgment. As such, res judicata forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit."[14] Although res judicata and judicial estoppel share this process-based focus, res judicata is readily distinguishable in that it applies only to successive litigation of the same claim by the same parties and requires a final judgment of the court on the matter.

Finally, the doctrine of collateral estoppel enables a party to avoid relitigating issues that 1) the party had litigated in a prior proceeding and 2) which were decided on as part of the final judgment.[15] By invoking this doctrine, litigants in subsequent—even unrelated—litigation can import the previous adjudication of the issue. Though closely related to judicial estoppel, collateral estoppel differs in significant ways. First, whereas collateral estoppel requires that a party actually litigated an issue on which the court rendered a final decision, judicial estoppel generally requires only some lesser form of judicial adoption or reliance.[16] Further, unlike judicial estoppel, collateral estoppel applies only to issues on which a decision was necessary in order to determine the outcome of the prior litigation.

11. *See id.* at 453 (discussing the approaches to equitable estoppel, which generally requires either the court or a party to a prior proceeding to rely on the prior position).

12. BLACK'S LAW DICTIONARY 590 (8th ed. 2004).

13. Douglas W. Henkin, *Judicial Estoppel—Beating Swords Into Shields and Back Again*, 139 U. PA. L. REV. 1711, 1718 (1991) (quoting Brown v. Felsen, 442 U.S. 127, 131 (1979)).

14. New Hampshire v. Maine, 532 U.S. 742, 748 (2001).

15. WRIGHT, MILLER, & COOPER, *supra* note 8, § 4416.

16. Lowery v. Stovall, 92 F.3d 219, 223 n.3 (4th Cir. 1996) (explaining that, unlike collateral estoppel, judicial estoppel does not require that the parties actually litigated the issue to be precluded).

2. Historical Development of Judicial Estoppel

The origin of judicial estoppel in American law can be traced back to 1857 in the Tennessee Supreme Court case of *Hamilton v. Zimmerman*.[17] In that case, the plaintiff had testified in prior litigation that he was a clerk for a business concern rather than a partner, but then sought to testify in *Hamilton* that he was, in fact, a full partner. In its ruling the court placed great emphasis on protecting the sanctity of the judicial oath. This initial ruling thus presented a strict version of the doctrine of judicial estoppel. The Tennessee court outlined its priorities by concluding, "[t]he chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath."[18]

Significantly, this formulation of the doctrine requires not that the litigant succeed or that the court adopt the averred position, but rather only that the statement be sworn under oath. By protecting the sanctity of statements sworn under judicial oath absolutely and without regard for mitigating concerns, Tennessee created a doctrine that protected the judiciary process against perceived ills, but potentially at the expense of other equitable concerns. Today, only Tennessee continues to apply the doctrine in its strictest form, as enunciated in *Hamilton*, wherein a party is forever barred from contradicting a position averred under oath.[19]

As the doctrine has grown in application, other jurisdictions have attached various conditions mitigating the absolute ruling in *Hamilton*.[20] Forty years after *Hamilton*, the United States Supreme Court recognized judicial estoppel but embraced it on terms different from those in *Hamilton*. In *Davis v. Wakelee*, the plaintiff, Davis, had obtained dismissal of a bankruptcy objection in a prior proceeding by asserting one position, but then sought to assert the contrary to serve

17. Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39 (1857).

18. *Id.* at 48.

19. Randy G. Boyers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 N.W. U. L. REV. 1244, 1251 (1986). In continuing to apply the doctrine, however, even Tennessee appellate courts have hinted at softening its application, stating for example: "Although some policy concerns may have changed since *Hamilton* was decided just prior to the Civil War, the goal of promoting truth in sworn testimony is as viable today as it was 150 years ago." Chandler v. D. Canale & Co., No. W2000-02067-COA-R3-CV, 2001 WL 568027, at *5 (Tenn. Ct. App. May 25, 2001).

20. *See infra* notes 33-36 and accompanying text (discussing an alternate formulation of judicial estoppel which focuses on intent and good faith in addition to reliance).

his interests in the matter before the court.[21] In finding against Davis, the Court ruled that

> [i]t may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not, thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken.[22]

This holding represented a more limited prohibition than the Tennessee court adopted in *Hamilton*. Rather than enforcing absolute sanctity of positions taken under oath, the Court in *Davis* asserted more narrowly that where a court accepts a party's position, the party may not assert the contrary position in subsequent litigation to suit the party's changing interests.

Following this pronouncement, the Supreme Court did not specifically address the doctrine of judicial estoppel again for over 100 years until two cases in 1999 and 2001. During the interim, state and federal circuit courts developed diverse applications of the doctrine that ranged from strict application to outright refusal to apply the doctrine at all.[23] The Supreme Court's two modern judicial estoppel cases have clarified certain tenets of the doctrine, but leave open many of the details of its application. The Court's 1999 ruling settled only a minor issue of judicial estoppel law not relevant to this analysis.[24] In 2001, however, the Court more broadly articulated the modern doctrine.

In 2001, the Court reexamined the broad issue of judicial estoppel in *New Hampshire v. Maine*.[25] In that case, the state of Maine sought to judicially estop the state of New Hampshire from asserting a position contrary to one which it had asserted in prior

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21. Davis v. Wakelee, 156 U.S. 680, 685 (1895).

22. *Id.* at 689. It is worth noting that in outlining this estoppel principle, neither the Tennessee Supreme Court in *Hamilton*, nor the U.S. Supreme Court in *Davis* employed the term "judicial estoppel." Courts and commentators, however, have properly viewed these early estoppel applications as laying the framework for doctrine now widely recognized in state and federal courts as judicial estoppel. *See, e.g.*, Whitacre Partnership v. Biosignia, Inc., 591 S.E.2d 870, 884-86 (N.C. 2004) (tracing the history of the modern judicial estoppel doctrine).

23. *See infra* notes 41-42 and accompanying text (discussing the D.C. Circuit's reluctance to apply judicial estoppel in *Kostantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980)).

24. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 796 (1999) (narrowly holding that judicial estoppel applied to plaintiffs bringing clams under the Americans with Disabilities Act). In confining its ruling strictly to the parties' legal positions concerning the ADA dispute, the court recognized the broader ambiguities in circuit courts' application of judicial estoppel but chose to "leave[] the law related to the former, purely factual, kind of conflict where we found it." *Id.* at 802. Thus, no generally applicable rules were drawn out.

25. New Hampshire v. Maine, 532 U.S. 742 (2001).

litigation concerning the states' geographical boundaries.[26] The Court first noted the uniform conclusion reached by other courts that the purpose of judicial estoppel is to "protect the integrity of the judicial process."[27] The Court then laid out several guidelines that "typically inform the decision whether to apply the doctrine" including (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) whether a party succeeded in persuading a court to accept the earlier position; and (3) "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."[28] In addition to this enumeration, the Court noted that, in the case at bar, the inconsistency did not result from inadvertence.[29] Finally, the Court concluded, "In short, considerations of equity persuade us that the application of judicial estoppel is appropriate in this case."[30]

The Court in *New Hampshire* stopped well short of definitively sculpting the doctrine, however, emphasizing that "[i]n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional concerns may inform the doctrine's application . . . ."[31] Indeed, the Court prefaced its remarks with the observation that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle."[32] Thus, *New Hampshire v. Maine* clarified the general motivation of the doctrine and provided guidance to the circuit courts in applying it but eschewed providing a strict definition. Consequently, several issues remain open.

In addition to Tennessee's strict judicial estoppel application in *Hamilton* and the Supreme Court's multi-factor approach in *New Hampshire*, this Note identifies a third broad approach to judicial

26. The underlying dispute in the case centered on whether the border between New Hampshire and Maine ran along the Maine shoreline of the Piscataqua river, thereby granting New Hampshire the entire river and Portsmouth Harbor, or along the middle of the river, effectively splitting disputed territory between the two states. *Id.* at 1812. In unrelated litigation from 1977, New Hampshire had settled on terms interpreting a 1740 decree of King George II to indicate that the border, in fact, ran along the middle of the river. *Id.* at 1813. The Court approved that 1977 settlement as a viable interpretation of the 1740 decree. *Id.* The court held that the position asserted by New Hampshire in 1977 judicially estopped New Hampshire from making the inconsistent assertion in 2001 that the border actually ran along the Maine shoreline. *See id.* at 751-55.

27. *Id.* at 749-50 (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982)).

28. *Id.* at 750-51 (citations omitted).

29. *Id.* at 753.

30. *Id.* at 755.

31. *Id.* at 751.

32. *Id.* at 750 (quoting Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982)).

estoppel adopted by several circuit courts. Both before and after *New Hampshire*, some courts have relied primarily on a "fast and loose" formulation of judicial estoppel that primarily seeks to prevent litigants from "playing fast and loose with the courts" through deliberate manipulation.[33] Courts applying the "fast and loose" formulation still examine the first two *New Hampshire* elements that require assertion of contradictory positions, and judicial adoption of the initial position asserted.[34] The "fast and loose" construction, however, additionally focuses on whether the change in position is tainted by bad faith.[35] Although the Supreme Court touched on "inadvertence" in *New Hampshire*, the Court did not specifically include intent in its multi-factor analysis; by contrast, the "fast and loose" approach centers on an intent or bad faith inquiry.[36] Although the third *New Hampshire* element concerning whether a party has gained an unfair advantage often informs this intent inquiry, the "fast and loose" formulation focuses on a party's knowledge and the motives underlying its contradictory assertions.[37] Thus, while introducing an additional intent-based element, this version of the doctrine shares

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33. Scarano v. Central R. R. Co. 203 F.2d 510, 513 (3d Cir. 1953).

34. *See* Hon. William Houston Brown et al., *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197, 202-03 (2001) (describing contradictory assertions as the central tenet of the doctrine as applied by all courts). Initially, some "fast and loose" formulations were seen as omitting any requirement that a party must have succeeded in persuading a court to adopt its initial position. *See Scarano*, 203 F.2d at 513 (stating that the "use of inconsistent positions . . . has been emphasized as an evil the courts should not tolerate"); Patriot Cinemas, Inc. v. Gen. Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987) (applying the *Scarano* principle of judicial estoppel); *see also* Stevens Technical Services, Inc. v. S.S. Brooklyn 885 F.2d 584, 589-90 (9th Cir. 1989) (describing *Scarano* and *Patriot Cinemas* as standing for the "minority view" that judicial estoppel applies to a party playing "fast and loose" "notwithstanding that [the] party was not successful" in asserting its first position). Among jurisdictions articulating the "fast and loose" approach, however, some form of judicial reliance appears to remain a requirement. Since *Patriot Cinemas*, for example, the First Circuit has expressly clarified that some form of judicial adoption is required to invoke judicial estoppel. Gens v. Resolution Trust Corp., 112 F.3d 569, 572-73 (1st Cir. 1997). Similarly, since *Scarano*, the Third Circuit has expressly joined "the consensus view among [its] sister circuits" that judicial adoption of the earlier position is required. Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 773, 780, 782 & nn.4, 6 (3d Cir. 2001) (collecting cases from tbe First, Second, Fourth, Fifth, Sixth, Seventh and Eleventh Circuits adopting the same requirement).

35. *See Scarano*, 203 F.2d at 513 (examining contradictory assertions for evidence of intent to play "fast and loose" with the courts); *Patriot Cinemas*, 834 F.2d at 212 (same).

36. *See supra* Part II.A.2 (explaining the Supreme Court's attention to inadvertence in judicial estoppel analysis).

37. *See, e.g.*, Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996) ("Whether the party sought to be estopped benefited from its earlier position or was motivated to seek such a henefit may be relevant insofar as it evidences an intent to play fast and loose with the courts."). The Third Circuit recently reaffirmed this view in *Krystal*, a post-*New Hampshire* case discussed in Part IV, *infra*. Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 319 (3d Cir. 2003) (quoting *Ryan Operations*, 81 F.3d at 361).

the goal of guarding the public image of the judiciary that the Supreme Court alluded to in *New Hampshire v. Maine*.[38] Several circuits, including the First, Third, and Fifth, have cited this "fast and loose" construct when focusing on a party's intent in the determining whether judicial estoppel is warranted, particularly in the bankruptcy nondisclosure setting.[39]

In contrast to the First, Third, and Fifth Circuits, both the District of Columbia Circuit and, until only recently, the Tenth Circuit have refused to apply judicial estoppel at all.[40] In declining to apply the doctrine, the D.C. Circuit adopted the Tenth Circuit's reasoning, characterizing judicial estoppel as "out of harmony with (the modern rules of pleading) and [warning that it] would discourage the determination of cases on the basis of the true facts as they might be established ultimately."[41] Although, at the time the D.C. Circuit noted that judicial estoppel had not been adopted in "anything approaching" a majority of jurisdictions, [42] a clear majority has since adopted the doctrine.[43]

Although other details of the doctrine's application vary across jurisdictions, these variations do not directly affect the analysis of the conflicting judicial goals presented here. Such details include whether state or federal judicial estoppel law applies in certain circumstances, and whether the contradictory assertion element encompasses both factually as well as legally inconsistent positions. This analysis focuses on the policy goals served by the three primary versions of judicial estoppel discussed: the Tennessee strict application in *Hamilton*, the Supreme Court's multifactor approach in *New Hampshire* emphasizing judicial reliance, and the "fast and loose"

38. 532 U.S. 742, 755 (2001) (explaining that "[w]e 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").

39. *See Gens*, 112 F.3d at 572-73 (concluding that estoppel is appropriate where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice"); *Montrose*, 243 F.3d at 782 n.6 (focusing on a party's intention to play fast and loose with the courts); Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 203, 205-06, 210-11 (5th Cir. 1999) (adopting a knowledge and motive standard for applying judicial estoppel in the bankruptcy non-disclosure context).

40. *See* Parkinson v. California Co., 233 F.2d 432 (10th Cir. 1956) (refusing to adopt the doctrine of judicial estoppel); Kostantinidis v. Chen, 626 F.2d 933 (D.C. Cir. 1980) (applying the reasoning of the Tenth Circuit in *Parkinson*). *But see* Johnson v. Lindon City Corp., 405 F.3d 1065, 1068-69 (10th Cir. 2005) (acknowledging the Tenth Circuit's repeated refusal to recognize judicial estoppel, but nevertheless applying the doctrine in light of *New Hampshire*).

41. *Kostantinidis*, 626 F.2d at 938 (quoting *Parkinson*, 233 F.2d at 438).

42. *Id.*

43. *See supra* note 34 and accompanying text (discussing cases from seven circuits applying the doctrine of judicial estoppel).

intent analysis that has evolved in jurisdictions including the First, Third, and Fifth Circuits.

B. Policy Goals Underlying the Tenets of Bankruptcy Law

Bankruptcy law provides the means for an insolvent debtor to obtain financial relief by undertaking a judicially supervised liquidation or plan of payment for the benefit of creditors.[44] Academics have long debated the most fundamental aspects of modern bankruptcy law including the relative merits of its very existence.[45] For purposes of analysis, however, this Note forgoes that normative debate and focuses instead on policy goals that current bankruptcy law endeavors to further. Here, some common ground can be found among many courts and scholars in the notion that bankruptcy law serves several important goals by creating a mechanism to deal with financially distressed debtors. First, though many individuals and entities will never undergo bankruptcy, the structure of bankruptcy law is meant to facilitate optimal choices for business entities ex ante.[46] In addition, where an entity does enter bankruptcy, the law facilitates ex post optimization of the value of the entity.[47] Finally, economic analysis of bankruptcy law exhorts accomplishing the first two goals as efficiently as possible.[48]

Within the ex post bankruptcy realm, various doctrines have emerged that are often cited as additional sub-goals of bankruptcy law. Some policies, such as requiring full disclosure of a debtor's assets[49] and protecting the debtor from outside claims while in bankruptcy,[50] follow directly from the overarching goal of economic efficiency. As a result, these policies will not be assessed as ends justifiable in their own right; rather they will be discussed within the context of economic efficiency.

Beneath the general bankruptcy banner, significant differences emerge in the policy goals that motivate bankruptcy law in the

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44. BLACK'S LAW DICTIONARY 156 (8th ed. 2004).

45. *See, e.g.*, Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 775-77 (1987) (discussing opposing views on the purpose served by bankruptcy law).

46. *See, e.g.*, Unsecured Creditors Comm. of Robert L. Helms Constr. & Dev. Co. v. Southmark Corp. (*In re* Robert L. Helms Constr. & Dev. Co., Inc.), 139 F.3d 702, 706 (9th Cir. 1998) (discussing the debtor's obligations with respect to option contracts entered into prior to filing for bankruptcy).

47. *See id.* (stating that "maximizing the estate's value" serves the goals of bankruptcy law).

48. Robert K. Rasmussen & David A. Skeel, Jr., *The Economic Analysis of Corporate Bankruptcy Law*, 3 AM. BANKR. INST. L. REV. 85, 86 (1995).

49. Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 207-08 (5th Cir. 1999).

50. Bronson v. U.S., 46 F.3d 1573, 1578 (Fed. Cir. 1995).

personal and corporate arenas. Social policy goals color many interpretations of personal bankruptcy law. The Supreme Court, for example, has repeatedly articulated the dual aims of satisfying debts owed to creditors and providing a fresh start for "honest" debtors through bankruptcy proceedings.[51] Recent changes in personal bankruptcy law, however, have shifted this emphasis toward requiring a modicum of debt payment where practicable for at least five years, as well as mandatory personal credit counseling to spur greater consumer responsibility.[52]

Distinct from the personal bankruptcy setting, there is no "fresh start" for a corporate debtor. In the case of a corporation, bankruptcy focuses on maximizing value among competing interests including secured creditors, unsecured creditors, and equity holders. Corporate bankruptcy provides a forum for interested parties to create a plan that maximizes returns either through total or partial liquidation of the organization; or, a bankruptcy plan requires reorganization and continuation of the firm's operation to capture the going concern value by restructuring the firm's debt and equity.[53] In addition, bankruptcy law establishes priority rules to ensure that distribution aligns with ex-ante expectations.[54] In the case of reorganization, bankruptcy law facilitates collective creditor action to restructure firm management as well as debt obligations to best exploit firm value.[55]

Various other bankruptcy principles and policies have been proposed regarding corporate reorganizations including the preservation of jobs, concern for surrounding communities, and equitable distribution among competing creditors.[56] Apart from the broad economic goals stated at the outset, however, such policies tend to describe the desired effects of bankruptcy law rather than ends economically justifiable in their own right.[57] Such concerns do not tend to color the primary goals at stake in the issue presented. As a result, these concerns which divert the focus from economic maximization are subordinated for purposes of the following analysis.

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51. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (quoting Williams v. U.S. Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915)).

52. 11 U.S.C. § 1328(g)(1) (2006).

53. DOUGLAS G. BAIRD ET AL., BANKRUPTCY: CASES, PROBLEMS, AND MATERIALS 38-39 (3d ed. rev. 2001).

54. *Id.* at 453-54.

55. *Id.* at 38-39.

56. *See* Warren, *supra* note 45, at 787-88 (1987).

57. Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV. 1, 5 (1994).

III. LAYING OUT THE PROBLEM OF NONDISCLOSURE

This Part lays the statutory groundwork for disclosure in bankruptcy and presents the prototypical scenario of a debtor's nondisclosure of potentially valuable causes of action in bankruptcy. First, statutory bankruptcy disclosure obligations are outlined, and the intersection with the judicial estoppel doctrine is presented. Next, a debtor's potential motives to conceal a claim are explored and the various common nondisclosure scenarios are explained. Finally, the rules governing when a debtor has standing to bring undisclosed bankruptcy claims are set forth.

A. Disclosure Obligations and Judicial Estoppel: the Prototypical Scenario

Though the doctrine of judicial estoppel has no intrinsic relationship to the law of bankruptcy; the two bodies of law often collide in ways that force courts to balance opposing goals and motivations. In a typical case, a debtor unable to meet its obligations files for protection under bankruptcy law. In the course of the ensuing proceedings, the Bankruptcy Code imposes strict disclosure obligations on the debtor, principally through two sections.[58] First, as to all debtors in bankruptcy, 11 U.S.C. § 521(1) requires that a debtor file a "schedule of assets and liabilities . . . and a statement of the debtor's financial affairs."[59] Second, under 11 U.S.C. § 1125(b), organizational debtors filing under Chapter 11 must submit a specific disclosure statement containing "adequate information."[60] Pursuant to 11 U.S.C. § 541, property of the estate in bankruptcy specifically includes "all legal or equitable interests of the debtor in property as of

58. Benjamin J. Vernia, Annotation, *Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding*, 85 A.L.R. 5TH 353 (2001).

59. 11 U.S.C. § 521(1) (2000), *amended by* 11 U.S.C. § 521(a)(1)(B)(i), (iii) (Supp. 2005). The 2005 amendments retain this language under amended 11 U.S.C. §§ 521(a)(1)(B)(i) and 521(a)(1)(B)(iii). In addition, the amended statute further requires debtors to file "a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition." 11 U.S.C. § 521(a)(1)(B)(vi) (2006). As amended, 11 U.S.C. § 521 imposes even greater and more specific disclosure obligations.

60. 11 U.S.C. § 1125 (b) (2006). Section 1125(a) defines adequate information as:

> [I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan.

11 U.S.C. § 1125(a) (2006).

the commencement of the case."[61] This language broadly encompasses a duty to schedule all existing contingent or unliquidated claims or causes of action.[62]

An intersection between judicial estoppel and bankruptcy law often arises when a debtor files and the court accepts these required disclosures. The first prong of the judicial estoppel doctrine enunciated by the Court in *New Hampshire v. Maine* queries whether the positions taken in the different proceedings are truly contradictory; the second prong requires that a party succeed in persuading a court to accept a position.[63] Where a debtor in bankruptcy files the required disclosures and the court proceeds on the basis thereof, subsequent courts generally find the judicial acceptance requirement satisfied.[64] Thus, should a defendant to a subsequent claim raise a judicial estoppel defense where the debtor has asserted a position contrary to that represented in earlier bankruptcy disclosures, most courts will find both the first and second prong of the *New Hampshire* test satisfied.[65] As a result, much of the analysis in such cases centers on the third prong that inquires whether the party gains an advantage (or whether the defendant suffers an unfair detriment) through nondisclosure.

61. 11 U.S.C. § 541(a)(1) (2006).

62. Brown et al., *supra* note 34, 202-03; *see also* Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 207-08 (5th Cir. 1999) (citing precedent to support the principle that "the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims*" and that "the importance of this disclosure duty cannot be overemphasized"). In addition, recent amendments to the bankruptcy code now provide for strict punishment in certain cases where a debtor fails to meet the disclosure obligations. For example, amended section 521(j) provides that where:

> an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

11 U.S.C. § 521(j). Since this amendment has only recently taken effect, it is unclear whether courts will apply it to a nondisclosure scenario in which the plaintiff has filed the forms required under § 521(a)(1) but omitted to include a cause of action as an asset. This provision likely would not apply to the bulk of the cases addressed in this Note as they pertain to closed Chapter 7 and post-confirmation Chapter 11 and 13 cases. Where a failure to disclose is detected during the pendency of a Chapter 13 case, however, this provision could be interpreted strictly to effect an automatic dismissal.

63. 532 U.S. 742, 750-51 (2001).

64. *See, e.g.*, *In re Coastal Plains, Inc.*, 179 F.3d at 210.

65. *See, e.g.*, Superior Crewboats, Inc., v. Primary P & I Underwriters, (*In re* Superior Crewboats, Inc.), 374 F.3d 330, 335 (discussed *supra* Part I); Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 321 (3d Cir. 2003) (discussed *infra* Part III.A.2). Where the bankruptcy case is later dismissed, the effect on judicial estoppel application is unclear, especially with regard to courts emphasizing the "judicial adoption" element or requiring success on the merits. Such a scenario falls outside the scope of this analysis, however, which focuses on bankruptcy cases in which third party rights are at stake.

This interaction between judicial estoppel and bankruptcy arises under a wide variety of disclosure and subsequent contradiction scenarios. Disclosures or other positions that a debtor adopts in bankruptcy proceedings relating to the secured status of debts; the priority of debts; and the personal, partnership, or corporate nature of the debt may all serve as fodder for a later judicial estoppel claim if contradicted in subsequent litigation.[66] An issue consistently disputed in subsequent litigation, however, arises when a debtor omits to schedule a legal cause of action, and then subsequently asserts the cause of action after discharging debts through bankruptcy.

B. Motives for Nondisclosure: Individual vs. Corporate Debtors

Under the bankruptcy statutes, a corporate or individual debtor's potential motivation to improperly omit fixed assets or contingent legal claims from the required bankruptcy disclosures is clear. Once disclosed, a legal claim becomes part of the estate in bankruptcy like all other disclosed assets to be distributed by the bankruptcy trustee or debtor-in-possession to creditors.[67] Further, contingent assets such as legal claims may be especially easy for a debtor to successfully conceal from the purview of bankruptcy proceedings. By effectively discharging all outstanding debt through bankruptcy, the debtor paves the way to retain as windfall any recovery subsequently gained through pursuit of the undisclosed claims. Such a strategy essentially enables debtors to "[c]onceal [their] claims; get rid of [their] creditors on the cheap, and start over with a bundle of rights."[68]

In either the corporate or individual case, this intentional nondisclosure scenario clearly breaks down into basic fraud. Seen most obviously in the context of Chapter 7 individual bankruptcy, a nondisclosing debtor improperly attempts to retain the full benefit of a claim properly belonging to the estate and thus deprives unpaid creditors of distributions through false representations. Recent bankruptcy reform legislation aimed at consumers, however, employs a means test to force the majority of individual debtors into a Chapter 13 repayment plan rather than providing for a discharge of payments through Chapter 7.[69] This push toward repayment may limit the

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66. *See* Vernia, *supra* note 58, §§ 6, 16, 18 (discussing cases related to these issues).

67. 11 U.S.C. § 521(1) (2000), *amended by* 11 U.S.C.S. § 521(a)(1) (2005).

68. Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir. 1993).

69. *See* 11 U.S.C. § 707 (2006) (describing when a court may dismiss a case or convert a Chapter 7 case to a Chapter 11 or 13 case).

incentive to conceal claims as any judgment obtained on a concealed prepetition claim would likely accrue during the pendency of the Chapter 13 case.[70] At least one court, however, has highlighted the potential motive of a Chapter 13 debtor to conceal claims so as to minimize the debtor's accounted assets and maximize the ultimate planned discharge.[71] Regardless, such undisclosed claims in the Chapter 13 context provide additional examples of the need to balance the creditors' interests in fashioning a remedy for nondisclosure.

In the context of corporate debtors, a distinct set of concerns arises. For corporate debtors reorganizing under Chapter 11, the motivation to conceal causes of action depends upon the nature of the corporate bankruptcy. Similar to individual bankruptcy, nondisclosure of a cause of action by a corporate entity works to the detriment of those seeking payment from the debtor. In the corporate context, however, that group includes various stakeholders such as secured creditors, unsecured creditors, and equity holders. Where a Chapter 11 reorganization retains the same management and equity holders as it held prior to bankruptcy, the existing management of the firm has a clear motive to conceal causes of action because that group would stand in the position to most fully benefit from the windfall of concealing causes of action from bankruptcy creditors.

Increasingly, however, in modern Chapter 11 cases, secured creditors position themselves to be able to take over management of an ailing corporation and to hold equity in the reorganized corporation.[72] In many instances, secured creditors may have already installed their own management prior to petitioning or may use Chapter 11 to implement a prearranged deal.[73] As a result, in such scenarios it is the secured creditors that not only receive preferential distributions in bankruptcy but also then position themselves, through nondisclosure of potential causes of action, to monopolize the benefit of recovery in the undisclosed action.

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70. Unlike a Chapter 7 bankruptcy tbat closes upon liquidation, a Chapter 13 bankruptcy remains open until the established repayment plan is complete.

71. *See* De Leon v. Comcar Indus. Inc., 321 F.3d 1289, 1291 (11th Cir. 2003) (noting that "financial motive to secret assets exists under Chapter 13 as well as under Chapter 7 because the hiding of assets affects the amount to be discounted and repaid").

72. Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 675, 682-85 (2003) (asserting that "[c]orporate reorganizations today are the legal vehicles by which creditors in control decide which course of action—sale, prearranged deal, or a conversion of debt to a controlling equity stake—will maximize their return"); *see also* Elizabeth Warren & Jay L. Westbrook, *Secured Party in Possession*, 22 AM. BANKR. INST. J. 12 (2003) (highlighting the increasing influence of secured creditors on the outcome of Chapter 11 proceedings).

73. Baird & Rasmussen, *supra* note 72, at 678.

A third scenario exemplifies an additional motive for nondisclosure in corporate cases. Often in Chapter 11 corporate bankruptcies, residual claims such as recovery actions for fraudulent transfers are placed into a liquidating trust that may be administered for the benefit of creditors.[74] In Chapter 7 cases, those residual claims, including potential causes of action, may be sold at auction as "intangibles" for the benefit of the estate.[75] In a recent Fifth Circuit case, the debtor corporation failed to disclose a potential cause of action in its initial Chapter 11 petition but ultimately converted the bankruptcy to a Chapter 7 liquidation.[76] Management of the defunct firm, however, proceeded to create a new corporate entity and indirectly repurchased the remnants of the old firm; only this time, it specifically included the previously undisclosed cause of action in the purchase.[77] The new company then filed the previously undisclosed suit.[78] As this scenario demonstrates, firm management may be motivated to conceal claims both in a Chapter 7 liquidation scenario as well as in a Chapter 11 reorganization.

Though many nondisclosure cases involve at least the appearance of fraud, in some cases, a corporate or individual debtor may fail to disclose a potential legal claim through simple inadvertence or lack of knowledge. Lack of specific knowledge of a claim, however, is insufficient to justify omission from disclosure.[79] The disclosure requirements are a fundamental principle of bankruptcy law, and courts broadly interpret the duty to report whenever a debtor has information that may merely suggest a cause of action.[80] When a debtor's omission truly results from inadvertence, however—as opposed to simply an asserted lack of knowledge—courts have indicated that the motivations informing a decision to allow

74. *See* WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE § 129:31 (2d ed., 1994) ("[O]ften assets are transferred to a liquidating trust and a trustee is appointed who is responsible for disposing of the assets; recovering preferential, fraudulent or other transfers; and using the proceeds to pay creditors.").

75. *See* Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 203 (5th Cir. 1999) (addressing the sale of undisclosed causes of action through a Chapter 7 liquidation).

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.* ("If the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed.") (citation omitted).

80. *See id.* at 210-13 (discussing and analyzing several nondisclosure cases and ultimately concluding that "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").

pursuit of the claim weigh differently. This distinction is highlighted in the case law analysis of a debtor's motive to conceal a claim.[81]

C. Debtor Standing to Assert Undisclosed Claims

Regardless of whether a court determines that judicial estoppel bars an undisclosed claim, the debtor may not have legal standing to pursue the claim based on procedural rules and bankruptcy law principles. As a result, the analysis of standing becomes inextricably intertwined with the application of judicial estoppel in bankruptcy nondisclosure cases. Whereas earlier cases tended to ignore standing in the application of judicial estoppel, modern cases focus more carefully on the issue of standing.[82] Since distinct standing issues arise with respect to the various bankruptcy chapters, this Note addresses each chapter in turn as background for the subsequent case law analysis.

1. Chapter 7 Debtors

Assets scheduled pursuant to § 521, including legal claims, become property of the estate as of the time the debtor files for bankruptcy.[83] Scheduled legal claims thus become property of the estate as specifically provided under § 541.[84] In Chapter 7 and other cases in which a trustee is appointed to administer the estate, only the trustee of the estate retains standing to pursue the scheduled claims and succeeds to all transferable causes of action previously held by the debtor.[85] The trustee thus becomes the real party in interest to the scheduled claims and may pursue them on behalf of the debtor under

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81. *See infra* Part IV.A (discussing judicial analysis of intent in bankruptcy nondisclosure scenarios).

82. *Compare In re Coastal Plains*, 179 F.3d at 207-08 (omitting to address standing) *with* Parker v. Wendy's Int'l., Inc., 365 F.3d 1268, 1272 (11th Cir. 2004) (analyzing judicial estoppel specifically with regard to standing).

83. 11 U.S.C. § 521 (2006).

84. *Id.* § 541(a)(1) (requiring "all legal or equitable interests of the debtor in property as of the commencement of the case" to be included in the estate).

85. *See Parker*, 365 F.3d at 1272; *see* Barger v. City of Cartersville, 348 F.3d 1289, 1292 (11th Cir. 2003) (holding that other claims properly belonged to the bankruptcy estate because they were filed before the bankruptcy petition); *see also* Snow, *supra* note 7, at 3 (discussing and praising the 11th Circuit's refusal to apply judicial estoppel in *Parker*). Significantly, not all causes of action may be transferable to the trustee in bankruptcy. *See* Morlan v. Universal Guar. Life Ins. Co., 298 F.3d 609, 616 (7th Cir. 2002) (discussing whether or not an ERISA claim is assignable and thus transfers to the bankruptcy trustee, or whether the debtor remains entitled to pursue it).

11 U.S.C. § 323.[86] At the close of the hankruptcy proceedings, however, any assets of the estate scheduled under § 521 "not otherwise administered" are effectively abandoned by the estate under 11 U.S.C. § 554(c) and such assets revert back to the debtor.[87] As a result, scheduled claims that the estate abandons may transfer back and again be pursued by the debtor post-bankruptcy.

When a debtor fails to schedule a claim at all, however, courts have struggled with the application of standing and judicial estoppel upon the debtor's subsequent assertion of the unscheduled claim. Most courts that have examined the issue have taken the position that an unscheduled claim cannot be implicitly abandoned by the estate, so only the trustee retains standing to pursue it.[88] A plaintiff seeking to pursue such a cause of action may seek to reopen the prior bankruptcy case and join or substitute the trustee. Pursuant to 11 U.S.C. § 350, the bankruptcy court may, at its discretion, reopen a closed case in order to "administer assets, to accord relief to the debtor, or for some other cause."[89] As addressed below, this power has also produced disagreement as to under what circumstances plaintiffs may successfully reopen bankruptcy cases to schedule previously undisclosed causes of action as scheduled assets.[90]

2. Chapter 11 Debtors

Unlike the Chapter 7 scenario outlined above, a Chapter 11 debtor often acts simultaneously as a trustee for the estate and can thus administer estate assets. Pursuant to 11 U.S.C. § 1107(a), a so-called debtor-in-possession performs "all the functions and duties . . . of a trustee." As a result, prior to confirmation of a Chapter 11 plan, a debtor-in-possession retains authority to add causes of action as assets to the estate and to prosecute causes of action on behalf of the estate pursuant to the debtor's trustee-like role.

Courts have diverged, however, on the issue of standing following confirmation of a plan under Chapter 11 when a debtor

86. *See* 11 U.S.C. § 323(a) (2006) (explaining that the trustee is the representative of the estate); 11 U.S.C. § 323(b) (2006) (specifying that, as a "representative of the estate", the trustee has the "capacity to sue and be sued").

87. 11 U.S.C. § 554(c) (2006).

88. *E.g.*, *Parker*, 365 F.3d at 1272 ("[A] pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it."); *see also infra* Part IV (presenting an in-depth analysis of courts' application of judicial estoppel in the bankruptcy non-disclosure context).

89. 11 U.S.C. § 350(b) (2006).

90. *See infra* Part IV.B.4 (citing cases in which bankruptcy courts have allowed or refused to reopen cases to administer an undisclosed cause of action).

directly asserts claims it failed to disclose in bankruptcy. As a general matter, courts have agreed that unscheduled assets cannot be abandoned by the estate at the close of bankruptcy and thus remain with the estate under 11 U.S.C. § 554.[91] Yet in Chapter 11 cases, in particular, the Bankruptcy Code provides that "confirmation of a plan vests all of the property of the estate in the debtor."[92] The resolution of this apparent conflict as to debtor standing in post-confirmation Chapter 11 actions is described in detail in the case law analysis Part below.

3. Chapter 13 Debtors

For purposes of a standing analysis, an individual Chapter 13 debtor is more analogous to a debtor-in-possession under Chapter 11 than to a debtor filing under Chapter 7. Unlike a Chapter 7 case in which a trustee administers property of the estate in bankruptcy for the benefit of creditors, under Chapter 13 the debtor himself is vested with certain trustee powers under 11 U.S.C. § 1303. Further analogous to the Chapter 11 framework, confirmation of a Chapter 13 plan "vests all of the property of the estate in the debtor."[93] The courts' interpretations of this directive in the context of a debtor's failure to disclose a cause of action is addressed below in the case law analysis of Chapter 13 debtor standing.

IV. ANALYZING THE COURTS' APPLICATION OF JUDICIAL ESTOPPEL IN THE BANKRUPTCY NONDISCLOSURE CONTEXT

This section presents an analysis of the manner in which courts have dealt with bankruptcy nondisclosures and estoppel issues in subsequent litigation. The analysis is intended to lay out the broad themes that courts have adopted in analyzing such claims and for that reason, is limited primarily to federal law. Many state courts, too, have tackled bankruptcy nondisclosure cases, coming down on various sides of the case law herein presented.[94] Therefore, this case law

91. *See, e.g.*, Jeffrey v. Desmond 70 F.3d 183, 186 & n.3 (1st Cir. 1995) (citing Vreugdenhill v. Navistar Int'l Transportation Corp., 950 F.2d 524, 526 (8th Cir.1991) (concluding that claims undisclosed under § 554 remain property of the estate)).

92. 11 U.S.C § 1141(b) (2006).

93. 11 U.S.C. § 1327(b) (2006).

94. *See, e.g.*, Vincent v. First Alabama Bank, 883 So. 2d 1236, 1245-46 (Ala. 2003) (applying judicial estoppel to causes of action a debtor failed to disclose in previous Chapter 7 bankruptcy proceedings); Ramsey v. Jonassen, 737 So. 2d 1114, 1116 (Fla. Dist. Ct. App. 1999) (reversing a district court's application of judicial estoppel in a bankruptcy non-disclosure setting where the defendant in the previously undisclosed action was not prejudiced by the omission in

analysis is not presented as an exhaustive survey, but rather as an outline of the approaches courts have taken in balancing the motivations of the underlying doctrines.

Whether a debtor fails to disclose a potential legal claim through a calculated strategy of deceit or through mere inadvertence, courts must balance the competing interests in the subsequent litigation. The interests of the bankruptcy creditors, the debtor, the defendants in the undisclosed post-bankruptcy cause of action, and the judicial system all must be taken into account. Courts have adopted a variety of approaches in balancing those interests. An examination of recent circuit court decisions reveals that, while no comprehensive framework has developed to resolve the tensions between competing interests, two interrelated factors have been primary in determining the outcome of nondisclosed claim cases. First, when a bankruptcy debtor is found to have omitted a claim, many courts focus their analysis on the debtor's intent or motive to conceal the claim. Second, courts increasingly examine standing in cases where a trustee has been appointed to administer the estate in bankruptcy.

A. *The Debtor's Intent: Punishing Bad Faith Omissions*

The primary element of any judicial estoppel application requires that a party assert one position before a tribunal and then later assert a contradictory position.[95] In its most basic sense, intent in judicial estoppel cases refers to the party's purposeful assertion of contradictory arguments.[96] In a non-bankruptcy case, the Supreme Court applied judicial estoppel and announced generally applicable principles without including intent as a primary consideration.[97] In that case, however, the Court specifically noted that the contradictory position in question was "not inadvertent" and emphasized that the specific factors presented were not a comprehensive list. As noted earlier,[98] many circuit courts adopting a "fast and loose" construction

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bankruptcy); Period Homes, Ltd. v. Wallick, 569 S.E.2d 502, 504 (Ga. 2002) (declining to apply judicial estoppel where the debtor possessed no motive to conceal claims because all creditors were paid in full); WinMark Ltd. P'ship v. Miles & Stockbridge, 693 A.2d 824, 831 (Md. 1997) (declining to apply judicial estoppel where a Chapter 11 debtor asserts a previously undisclosed cause of action post-petition).

95. New Hampshire v. Maine, 532 U.S. 742, 750 (2001).

96. *See, e.g.*, Superior Crewboats, Inc., v. Primary P & I Underwriters, (*In re* Superior Crewboats, Inc.), 374 F.3d 330, 335-36 (discussed *supra* Part I).

97. New Hampshire, 532 U.S. at 750; *see supra* Part II.A.2 (presenting a thorough discussion of *New Hampshire*).

98. *See supra* Part II.A.2 (discussing disagreements among the circuits as to specific elements of judicial estoppel).

now employ an intent inquiry before applying judicial estoppel, particularly in the bankruptcy nondisclosure setting.[99] Various courts however, have drawn different conclusions regarding the requisite level of intent.

1. The First Circuit: An Implicit Intent Requirement

The First Circuit has taken perhaps the most unforgiving approach in requiring only a minimal showing of intent to impose judicial estoppel. Even early bankruptcy nondisclosure cases in the First Circuit, however, appear to require some identifiable level of intent. In *Payless Wholesale Dist., Inc. v. Alberto Culver (P.R.) Inc.*, Plaintiff Payless had opened a wholesale distributorship but suffered numerous setbacks and filed for Chapter 11 bankruptcy after just two years of operation.[100] Some. time after filing for bankruptcy, Payless filed a 110 page complaint outlining twenty distinct causes of action alleging unlawful business transactions against former creditor Alberto Culver (P.R) Inc. ("Culver"), which purportedly drove Payless to bankruptcy.[101] The court emphasized that at no point during the bankruptcy process or filings "did Payless even vaguely refer to the present claims, or distinguish [Culver] from its other creditors."[102]

The court found Payless's silence as to its claims during the bankruptcy proceedings "deafening," implying a finding of motive to conceal.[103] Additionally, the court emphasized the importance of full disclosure in bankruptcy proceedings in order to protect not only the subsequent defendants but also the court and other creditors.[104] Although acknowledging the fact that imposing judicial estoppel could result in a windfall to defendants, the court nonetheless found judicial estoppel necessary to prevent Payless's "unacceptable abuse of judicial

99. *See* Brown et al., *supra* note 34, at 223, 225-26 (explaining the various approaches taken to analyzing the intent element in applying judicial estoppel).

100. 989 F.2d 570, 571 (1st Cir. 1993). The court did not address the details of the bankruptcy proceeding, such as whether creditors were paid in full or even whether a final plan was approved, but the bankruptcy case had been filed in 1988 and so had presumably concluded by the time of the appeal in 1993. *Id.*

101. *Id.* at 570-71. The court also noted that the complaint was "quite properly" criticized below for failing to conform to the Fed. R. Civ. P. 8(a)(2) "short and plain statement" criterion. *Id.* at 570. The court further suggested that "even more justly" the complaint could have warranted Fed. R. Civ. P. 11 sanctions for failing to be "well grounded in fact." *Id.* at 570 n.1. It seems clear from the court's comments in this regard that it did not hold Payless's case in high regard even apart from the issue of judicial estoppel.

102. *Id.* at 571.

103. *Id.* (quoting Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988)).

104. *Id.* (citing *Oneida*, 848 F.2d at 417).

proceedings."[105] Finally, admonishing the district court's finding that Payless's omission did not constitute a position that was "intentionally inconsistent with its claims in this case," the appeals court again emphasized the "long accepted nature of Payless's obligations in the Chapter 11 proceeding."[106] The court seemed quite willing to read in motive, and saw Payless as attempting to "get rid of [its] creditors on the cheap."[107]

The First Circuit further elaborated on the level of intent required in *Jeffrey v. Desmond.*[108] In this case, plaintiffs filed for personal bankruptcy under Chapter 7 of the Bankruptcy Code but failed to schedule as an asset a pending state court action against Brooks Drug, Inc. ("Brooks").[109] The bankruptcy court issued a no asset discharge and closed the case.[110] On the eve of trial, Brooks discovered that the Jeffreys had failed to schedule their claim as an asset.[111] Brooks moved for dismissal on the grounds of judicial estoppel and the state court stayed the action. Subsequently, the bankruptcy court granted the trustee's motion to reopen the Jeffreys' Chapter 7 case so that trustee Desmond could administer the undisclosed state action. Upon reopening the bankruptcy case, Desmond settled the state action for $10,000. The Jeffreys, believing that the trustee had obtained an inadequate sum for the claim, appealed the bankruptcy court's approval of the settlement to the district court, which affirmed, and then to the First Circuit.[112]

In evaluating the lower court's approval of the claim compromise, the First Circuit found no abuse of discretion, but went on to specifically respond to the Jeffreys' arguments as to the impropriety of the compromise.[113] Most importantly, the Jeffreys argued that their claim was valuable because it would not have been judicially estopped under *Payless,* as their omission was inadvertent.[114] To support this argument, the Jeffreys alleged that they orally disclosed the claim to trustee Desmond prior to receiving the bankruptcy discharge but that Desmond determined the claim had

105. *Id.*
106. *Id.* at 572.
107. *Id.* at 571.
108. 70 F.3d 183, 187 (1st Cir. 1995).
109. *Id.* at 184.
110. *Id.*
111. *Id.*
112. *Id.* at 185.
113. *Id.* at 185-86.
114. *Id.* at 186.

no value.[115] The court responded that "whether or not appellants' initial failure to schedule the state court asset was intentional" the "glaring" fact is that the omission would never have come to light unless Brooks had discovered it.[116] The court again characterized the scheduling "silence" as "deafening."[117]

Although the First Circuit court stated that inadvertence might still invoke *Payless*, the court certainly appeared to imply some minimal finding of motive in this instance. The court went on to state, however, that even if judicial estoppel under *Payless* did not apply, there was a sufficiently "serious question" regarding the substantive viability of the Jeffereys' unscheduled claim as to justify approving the compromise of it.[118]

2. Other Circuits: Expressly Requiring Intent

Other circuits have almost uniformly expressed a requirement of malicious intent to apply judicial estoppel in a bankruptcy nondisclosure setting, though their definitions of intent vary. The Third Circuit dealt with the issue of undisclosed post-bankruptcy claims in *Oneida Motor Freight, Inc. v. United Jersey Bank*.[119] *Oneida* provided the basis for the First Circuit's later ruling in *Payless*, and introduced the "deafening silence" language and concept later adopted by *Payless*.[120] Like *Payless*, *Oneida* involved a Chapter 11 debtor failing to schedule a claim against a creditor in bankruptcy, then pursuing the claim following confirmation of the Chapter 11 plan.[121] In *Oneida*, however, the court rested its decision on the joint rationales of equitable estoppel and judicial estoppel, focusing on the latter only secondarily.[122]

Eight years later, the Third Circuit refined its view on the significance of intent in *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*[123] In that case, plaintiff home builder Ryan had purchased building materials from defendants Santiam-Midwest

115. *Id.*

116. *Id.* at 187.

117. *Id.* The court also took note that throughout the bankruptcy and the state action the Jeffreys were represented by the same counsel. *Id.* at 186 n.4.

118. *Id.* at 187.

119. 848 F.2d 414 (3d Cir. 1988).

120. *See* Payless Wholesale Distribs, Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir. 1993) (discussed *supra* Part IV.A.1).

121. *Oneida*, 848 F.2d at 415-16.

122. *Id.* at 419.

123. 81 F.3d 355 (3d Cir. 1996).

Lumber Co. ("Santiam").[124] After installing the material in numerous homes, reports from homeowners revealed that the building materials were defective.[125] As a result, Ryan was forced to institute a costly replacement program for affected customers.[126] Ryan subsequently filed voluntarily for Chapter 11 bankruptcy but did not specifically list as assets its potential claims against the manufacturers of the defective products nor did it list as liabilities any potential claims against it by customers.[127] Defendant Santiam was not a party to the bankruptcy proceedings, but during those proceedings the bankruptcy court authorized Ryan to pursue or defend claims arising as a result of the manufacturing defect. Ryan thus filed suit against defendant Santiam in district court.[128] With that suit pending, the bankruptcy court approved Ryan's reorganization plan and Ryan emerged from bankruptcy.[129] Subsequently, Santiam and other defendants to Ryan's district court action moved for summary judgment on estoppel grounds because Ryan had failed to schedule the claim as an asset in bankruptcy.[130] The district court granted summary judgment to defendants on judicial estoppel grounds.[131]

On appeal, the Third Circuit analyzed Ryan's intent as part of its two-pronged analysis of whether Ryan's failure to disclose actually created inconsistent positions.[132] First, the court analyzed whether the positions taken were, in fact, inconsistent; and second, the court inquired whether either or both of the inconsistent positions were taken "in bad faith—i.e. with intent to play fast and loose with the court."[133] The court ruled that the second prong, the bad faith inquiry, settled the matter in this case, concluding that since Ryan adopted neither position in bad faith, application of judicial estoppel was unwarranted.[134] The court ruled that "[a]n inconsistent argument

124. *Id.* at 357.

125. *Id.*

126. *Id.*

127. *Id.* at 357.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 361. Ryan first argued that because he derived no benefit from failing to disclose the claim in bankruptcy, application of judicial estoppel was inappropriate. *Id.* The court rejected the argument, stating that, though a party receiving a benefit makes application of judicial estoppel "particularly appropriate," receiving a benefit is not a "precondition" to application of the doctrine. *Id.* The court noted, however, that a benefit is significant to the extent that it demonstrates an "intent to play fast and loose with the courts." *Id.*

133. *Id.*

134. *Id.* at 363.

sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing."[135]

The court in *Ryan Operations* also explained its earlier decision in *Oneida* as not adopting a per se inference of bad faith based on nondisclosure, but, instead, as deriving a bad faith inference from the specific record in that case.[136] By contrast, the court distinguished Ryan's failure to disclose by pointing to several factual indications that Ryan actually had nothing to gain by omitting to schedule the claims.[137] The court explicitly held that a per se rule inferring intent to deceive based solely on nondisclosure would "unduly expand judicial estoppel" and instead found that inadvertent nondisclosures should be treated differently than deliberate nondisclosures.

Recently, the Third Circuit further explained its intent inquiry in *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*[138] In that case, plaintiff Krystal operated a GM automobile franchise which had experienced financial difficulty.[139] Due to Krystal's financial trouble, defendant GM notified Krystal that it intended to terminate the franchise agreement.[140] The day before termination was to become effective, however, Krystal filed an action challenging the franchise termination as improper (*Krystal I*).[141] After negative initial results in that litigation, Krystal filed for Chapter 11 bankruptcy while continuing to press its claims regarding the

135. *Id.* at 362.

136. *Id.*

137. *Id.* First, the court pointed out that although Ryan failed to schedule the claim as an asset, he also proportionately failed to disclose associated liabilities stemming from defective installations so there was no net misrepresentation. *Id.* Presumably, the court did not intend to formulate a general rule that concealed claims can be offset by concealed liabilities, but rather attempted to show no motive existed to conceal the claim, and at least one commentator has found this aspect of the court's reasoning troublesome. *See* Louis M. Phillips, *Judicial Estoppel: Is it* Krystal *Clear Now?*, 12 NORTON BANKR L. ADVISER 1 (2003) (criticizing the court as implying that "it is acceptable to fail to disclose assets just as long as there is a counterbalancing failure to disclose debts").

As a second factor, the court pointed to the reorganization plan that specified creditors would receive 91% of proceeds and suffer 91% of losses associated with the defective installation litigation of which the unscheduled claim at issue was a part. *Ryan*, 81 F.3d at 363. Finally, the court noted that Ryan's actions subsequent to filing his incomplete asset schedule did not support a finding of intent because Ryan requested and received permission from the bankruptcy court to pursue the omitted claim, and even submitted records of his attorneys' fees that detailed work on the claim at issue. *Id.* at 364. As a result, the court found that Ryan had not deliberately concealed the claim to obtain an unfair advantage, and ruled that judicial estoppel was inapplicable under such a scenario. *Id.* at 364-65.

138. 337 F.3d 314 (3d Cir. 2003).

139. *Id.* at 317.

140. *Id.*

141. *Id.*

franchise termination.[142] Part of Krystal's proposed bankruptcy reorganization plan called for selling the disputed franchise to pay off creditors but including in the sales contract a disclaimer that the status of the franchise was "now in litigation."[143] GM opposed this plan.[144] After losing in bankruptcy court and district court, Krystal prevailed on its franchise claim in the Third Circuit on the grounds that GM's revocation violated the automatic stay provision of the bankruptcy code.[145]

After prevailing, Krystal attempted to build on its success by filing claims for violation of the automatic stay, conspiracy, tortious interference with contractual relations, and other violations arising out of GM's attempted franchise revocation (*Krystal II*).[146] The lower court dismissed Krystal's claims on the basis of judicial estoppel because Krystal had failed to previously schedule these new claims as assets in bankruptcy.[147] Krystal appealed to the Third Circuit.[148]

To determine whether judicial estoppel should apply against Krystal's claims, the Third Circuit first reviewed the requirements for imposing the doctrine. The court cited three elements: first, the party must have taken two irreconcilably inconsistent positions; second, the party must have changed its position in bad faith (i.e. with intent to play fast and loose with the courts); and third, judicial estoppel cannot apply unless it is "tailored to address the harm identified" and "no lesser sanction would adequately remedy the damage done by the litigant's misconduct."[149] After outlining the criteria, the court found that all were met in this case and judicial estoppel was warranted.[150] In finding that Krystal possessed the requisite intent, the court applied a two-pronged test inquiring whether Krystal had "both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose."[151] The court found financial motive and, while acknowledging that Krystal's instant claims may not have been obviously viable at all times prior to *Krystal I*, the court nonetheless reiterated the importance of disclosure and excused nondisclosure only of "hypothetical claims that are so tenuous as to be

142. *Id.* at 317-18.
143. *Id* at 318.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 319.
148. *Id.*
149. *Id.*
150. *Id.* at 320-25.
151. *Id.* at 321.

fanciful."[152] As to whether estoppel would be tailored narrowly to address the harm, the court found that no lesser sanction would punish Krystal sufficiently to serve the goal of promoting disclosure.[153] The court stated that a lesser sanction, such as requiring Krystal to pay unsecured creditors the balance of their claims out of any damages recovered, would "reward Krystal for what appears to be duplicitous conduct."[154]

The Fifth Circuit applied a similar two-pronged knowledge and motive intent examination in *In re Coastal Plains*, a case that aptly illustrates the potential complications arising from corporate bankruptcy nondisclosures.[155] In *Coastal Plains*, debtor Coastal did not disclose an outside lawsuit that it had filed against Browning, its largest unsecured creditor, one week after Coastal filed for bankruptcy.[156] While the outside suit lay dormant, Coastal's former management created a new entity called Industrial Clearinghouse ("IC") and indirectly repurchased all of Coastal's former assets pursuant to a lift-stay.[157] In this transaction, the previously undisclosed claim suspiciously reappeared as a listed asset.[158] Subsequently, Coastal's bankruptcy was converted from Chapter 11 to Chapter 7, and the bankruptcy court permitted IC and the estate to go forward with the outside action.[159] Ultimately, the suit yielded a multimillion dollar verdict against Browning.[160] Browning appealed to the Fifth Circuit, arguing that judicial estoppel based on nondisclosure barred the action.[161] The Fifth Circuit agreed and rendered judgment for Browning, holding that Coastal's knowledge of the action and pecuniary motive to conceal it precluded any inadvertence defense to judicial estoppel.[162] The Fifth Circuit later

152. *Id.* at 322-23. Commentators have persuasively argued that such a requirement imposes too strict and inclusive a disclosure burden on debtors to be workable. *See* Phillips, *supra* note 137 (arguing that the Third Circuit set too broad a disclosure requirement in this case).

153. *Krystal*, 337 F.3d at 325.

154. *Id.*

155. 179 F.3d 197, 207-08 (5th Cir. 1999).

156. *Id.* at 202-03.

157. *Id.* at 203.

158. *Id.* Coastal again omitted to disclose the action in the lift-stay petition, but IC specifically included the claim in the consignment agreement through which it acquired Coastal's former assets. *Id.*

159. *Id.*

160. *Id.* at 204.

161. *Id.* at 204-05.

162. *Id.* at 213.

affirmed this intent-focused nondisclosure analysis pattern in *In re Superior Crewboats*, discussed in the introduction to this Note.[163]

The Sixth Circuit has adopted reasoning similar to the pattern reflected in the Third and Fifth Circuit cases reviewed here.[164] These courts' applications of judicial estoppel against debtors seeking to assert claims unscheduled in prior bankruptcy proceedings generally turn on a finding of intent. In nearly all cases, the courts first ruled that by omitting the claim and then later asserting it, the primary judicial estoppel elements were met: 1) a contrary position had been asserted and 2) a tribunal had adopted that position. The courts then generally turned to the particular circumstances of each case to determine whether failing to disclose the claim was intentional or inadvertent.

B. Standing: Examining Who Owns the Cause of Action and Whose Intent Matters

Rather than focusing solely on the intent of the debtor and viewing undisclosed post-bankruptcy actions as primarily a two-party dispute, some courts have more closely examined technical issues associated with standing and ownership of the cause of action. Courts thus analyze not simply whether to estop the debtor from bringing suit, but also whether the bankruptcy estate has effectively abandoned the claim.

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163. 374 F.3d 330, 335 (5th Cir. 2004).

164. Initially, in *Reynolds v. Commissioner*, the Sixth Circuit appeared to adopt a rather strict interpretation of judicial estoppel. *See* 861 F.2d 469, 474 (6th Cir. 1988) (concluding that judicial estoppel should prevent the Internal Revenue Service from arguing that a husband was liable for taxes on a capital gain after convincing another court in an earlier bankruptcy proceeding that the wife was liable for the tax); *see also* Browning v. Levy, 283 F.3d 761, 775 (6th Cir. 2002) (explaining that certain dicta in *Reynolds* could support the proposition that an "omission by a debtor can support a finding of judicial estoppel"). Later, however, the court adopted an intent inquiry similar to that adopted by the Third and Fifth Circuits. In *Browning*, the court inquired whether the debtor omitting a claim had knowledge of the claim as well as a motive to conceal it in order to determine whether judicial estoppel should apply. 283 F.3d at 775-76. Later, the Sixth Circuit declined to apply judicial estoppel to bar an unscheduled claim where no motive to conceal was found. Eubanks v. CBSK Fin. Group, Inc. 385 F.3d 894, 898-99 (6th Cir. 2004). The majority held that although the debtor possessed knowledge of the unscheduled claim he undertook "constant affirmative actions . . . to appraise the court of the pending claim" that disproved the requisite motive to conceal. *Id.* at 899 n.2. Most recently, the Sixth Circuit again upheld this stance. Lewis v. Weyerhaeuser Co., 141 Fed.Appx. 420, 421 (6th Cir. 2005) (applying judicial estoppel to bar a cause of action undisclosed by a Chapter 13 debtor).

1. Chapter 7 Standing: The Eleventh Circuit's About-Face

The evolution of the Eleventh Circuit's position on the standing of Chapter 7 debtors to bring undisclosed bankruptcy claims serves to represent the spectrum of views courts have taken in evaluating the issue. Initially, the Eleventh Circuit took the position that a nondisclosing Chapter 7 debtor does, in fact, have standing to bring a previously undisclosed claim, but that judicial estoppel may apply to bar the claim. Subsequent cases, however, repudiate that reasoning and instead recognize the bankruptcy trustee as the exclusive party with standing to pursue the claim. Further, the court most recently held that judicial estoppel is inapplicable to the trustee in such a context, and thus the trustee may pursue the claim on behalf of the estate.

Initially, in *Burnes v. Pemco Aeroplex, Inc.*, the Eleventh Circuit adopted the view that a Chapter 7 debtor has standing to bring a cause of action undisclosed in bankruptcy and that judicial estoppel applies to bar the claim where a motive to conceal is found.[165] In *Burnes*, debtor Billups filed for Chapter 13 bankruptcy protection at which time he was not engaged in any outside causes of action.[166] Six months later, Billups, together with 35 other plaintiffs filed a multimillion dollar discrimination lawsuit against his employer Pemco, but never amended his Chapter 13 asset schedule to include the new lawsuit.[167] Subsequently, Billups converted his Chapter 13 petition to a Chapter 7 case and filed updated schedules but again omitted to disclose his ongoing cause of action.[168] After the bankruptcy court had granted a no-asset discharge, Pemco discovered the omission and moved for summary judgment on judicial estoppel grounds.[169] The district court granted summary judgment and Billups appealed to the Eleventh Circuit.[170]

Rather than addressing standing, the Eleventh Circuit implicitly assumed proper standing and analyzed *Burnes* under a bankruptcy nondisclosure judicial estoppel framework similar to that established by the Third, Fifth, and Sixth Circuits. The court principally examined whether Billups possessed the requisite intent under the two-part knowledge and motive inquiry.[171] The court

165. Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1288 (11th Cir. 2002).
166. *Id.* at 1284.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 1286-87.

concluded that Billups clearly possessed knowledge of the claim as evidenced by his filing of it during the bankruptcy proceedings.[172] Further, the court ruled as to motive that "it is unlikely [Billups] would have received the benefit of a conversion to Chapter 7 followed by a no asset, complete discharge" if creditors had known of the multimillion dollar lawsuit.[173] Significantly, the court went on to address Billups's argument that he should be permitted to reopen his bankruptcy case and amend the asset schedule to include his undisclosed claim.[174] The court held that this "so-called remedy" would suggest "that a debtor should consider disclosing potential assets only if he is caught concealing them."[175] The court thus appeared primarily concerned with protecting the judicial process and enforcing the bankruptcy disclosure requirement.

In the next Eleventh Circuit case, *Barger v. City of Cartersville*, the court shifted its analysis and ruled that, in fact, the Chapter 7 trustee, not the debtor, is the exclusive party in interest to a cause of action undisclosed in bankruptcy.[176] The court further held, however, that the trustee steps into the shoes of the debtor and thus remains subject to judicial estoppel.[177] *Barger* presented facts similar to *Burnes* except that in *Barger*, debtor Barger filed her employment discrimination cause of action before filing for bankruptcy, and she filed under Chapter 7 from the outset.[178] Barger first omitted the discrimination claim in her asset schedule and then later incorrectly disclosed that her cause of action sought reinstatement of employment only, neglecting to mention the compensatory and punitive damages that she also sought.[179] She subsequently received a discharge of over $58,000 in debt, with no assets being distributed to the trustee.[180] Upon learning of the discharge, defendant Cartersville moved to dismiss on judicial estoppel grounds, a move Barger tried to "thwart" by reopening her bankruptcy petition.[181] The district court granted Cartersville's motion to dismiss and refused to reconsider despite the reopening; Barger appealed.[182]

172. *Id.* at 1287-88.
173. *Id.* at 1289.
174. *Id.* at 1288.
175. *Id.*
176.348 F.3d 1289, 1292 (11th Cir. 2003).
177. *Id.* at 1297.
178. *Id.* at 1291.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 1292.

The Eleventh Circuit first addressed the issue of Barger's standing to bring her claim.[183] The court found that Barger met the constitutional standing requirements and then turned to Federal Rule of Civil Procedure 17(a) to determine whether Barger or the trustee administering Barger's bankruptcy was the real party in interest.[184] The court held that because Barger filed her discrimination claim after her bankruptcy petition, by operation of 11 U.S.C. § 541(a), her claims became property of the bankruptcy estate at the time of filing, and the trustee was the real party in interest.[185] The court further determined, however, that the transfer of interest invoked Federal Rule 25(c), and since the district court never substituted or joined the trustee, Rule 25(c) operates so that "the [t]rustee simply takes Barger's place from hereon."[186] The court then proceeded to its judicial estoppel analysis following the precedent of *Burnes*. Ultimately, the court determined that the debtor's position was contrary to the position adopted by a court previously and that it was taken in bad faith. As a result, the court affirmed the district court's dismissal of the monetary damages portion of the discrimination claim on judicial estoppel grounds.

Following *Burnes* and *Barger*, the Eleventh Circuit again shifted its approach in *Parker v. Wendy's International, Inc.* by reaffirming that the trustee has exclusive standing to bring undisclosed causes of action but further holding that judicial estoppel is thus inapplicable because the debtor's failure to disclose is not attributable to the trustee.[187] *Parker* presented facts analogous to *Barger*: plaintiff Parker filed an employment discrimination case, later filed for Chapter 7 bankruptcy but in her bankruptcy schedule failed to disclose the pending discrimination claim as an asset.[188] The defendant employer sought to judicially estop Parker due to the omission.[189] Upon learning of the undisclosed claim, however, bankruptcy trustee Reynolds successfully sought to reopen the bankruptcy proceeding and intervene in the discrimination case.[190]

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183. *Id.*

184. *Id.*

185. *Id.*; *see also supra* Part III (discussing the interaction of the bankruptcy statutes with regard to ownership of undisclosed claims).

186. *Barger*, 348 F.3d at 1292-93.

187. 365 F.3d 1268 (11th Cir. 2004).

188. *Id.* at 1269-70.

189. *Id.* at 1270.

190. *Id.*

Unlike its analysis in *Burnes*, the court in *Parker* analyzed the issue of standing in conjunction with the judicial estoppel issue.[191] This time, citing to *Barger*, the court concluded that "[g]enerally speaking, a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it."[192] Based on this, the court went on to concede that "it is questionable as to whether judicial estoppel was correctly applied in *Burnes*."[193] Instead, the court held that since only Parker and not trustee Reynolds had made a contradictory assertion as to the existence of the cause of action, judicial estoppel was inapplicable to either party.[194] It was inapplicable to Reynolds because Reynolds had made no prior representation regarding the claim and it was inapplicable to Parker because Parker lacked standing.[195]

2. Chapter 11 Standing

Chapter 11 standing builds on the statutory framework presented for Chapter 7 cases, but differs in significant ways. First, as more often than not the debtor itself acts as the trustee of the Chapter 11 estate, the Chapter 7 analysis differentiating between debtor and trustee does not directly apply.[196] Adding to the complication, 11 U.S.C. § 1141(b) provides that, in the Chapter 11 context, "confirmation of a plan vests all of the property of the estate in the debtor."[197] Courts have noted the "tension" between this provision and the commonly accepted rule that undisclosed, unadministered assets remain property of the estate at the close of bankruptcy proceedings.[198] For clarification, courts have looked to neighboring § 1141(c), which provides that "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor."[199] At least one court has interpreted this clause to divest a

191. *Id* at 1271.

192. *Id.* at 1272.

193. *Id.*

194. *Id.*

195. *Id.*

196. Although this analysis does not specifically address the minority of Chapter 11 cases in which a trustee is appointed, the same standing issues that arise for Chapter 7 trustees would likely apply in such rare instances.

197. 11 U.S.C. § 1141(b) (2006).

198. *See, e.g.*, Rosenshein v. Kleban, 918 F. Supp. 98, 104 (S.D.N.Y. 1996) (noting that there is some tension between section 1141(b) and some courts' holdings that property not formally disclosed remains part of the estate).

199. 11 U.S.C. § 1141(c) (2006).

debtor of standing to pursue undisclosed claims by reasoning that only property "dealt with" under the plan becomes "free and clear" of claims, whereas other property (including unscheduled estate assets) remains property of the estate.[200]

Alternatively, several courts which have examined the issue of standing in Chapter 11 nondisclosure cases have interpreted the broad language of § 1141(b) to vest the debtor with ownership and standing to pursue undisclosed causes of action but with a "hitch." These courts have applied the language of § 1141(c) to require that undisclosed causes of action are *not*, in fact, "free and clear of all claims and interests of creditors" but rather, remain subject to such claims.[201] To ensure that the cause of action remains subject to creditor and other third party claims, these courts have ordered a stay of proceedings to enable the plaintiff to reopen the bankruptcy estate and add the cause of action to the disclosure schedule.

3. Chapter 13 Standing

Courts have generally concluded that a Chapter 13 debtor retains standing to prosecute disclosed causes of action belonging to the estate under 11 U.S.C. § 1303. Although § 1303 does not explicitly provide Chapter 13 debtors with the power to prosecute causes of action, the Second Circuit in *Olick v. Parker & Parsley Petroleum Co.* concluded that the power to do so was implied.[202] The court based its reasoning on a review of the legislative history of § 1303 as well as the nature of Chapter 13 bankruptcy in which "the creditors' recovery is drawn from the debtor's earnings, not from the assets of the bankruptcy estate."[203] In the time since the Second Circuit's decision, the Third and Seventh Circuits as well as numerous bankruptcy courts have similarly concluded that the trustee powers permit a

200. *Rosenshein*, 918 F. Supp. at 102-03.

201. 11 U.S.C. § 1141(c) (2006). *See, e.g.*, Phoenix Petroleum Co. v. U.S., No. 98-5124, 1999 WL 521189, at *6 (Fed. Cir. July 23, 1999) (finding that section 1141(c) is better given effect by letting the plaintiff proceed with the claim only if steps are taken to protect the creditors); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 422 (3d Cir. 1988) (Stapleton, J., dissenting) (asserting that creditors should be safeguarded, not prejudiced, in the case of nondisclosure); Greenhart Durawoods, Inc. v. PHF Int'l. Corp., No. 91 Civ. 3731, 1994 WL 652434 (S.D.N.Y Nov. 18, 1994) (holding that a debtor's undisclosed litigation claims are subject to creditors' claims); Winmark Ltd. P'ship v. Miles & Stockbridge, 693 A.2d 824, 829-30 (Md. 1997) ("Property that has not been 'dealt with by the plan' remains with the debtor-in-possession, but subject to the claims of creditors.").

202. 145 F.3d 513, 516 (2d Cir. 1998).

203. *Id.*

Chapter 13 debtor to assert and prosecute causes of action owned by the estate.[204]

Where a Chapter 13 debtor seeks to prosecute an undisclosed cause of action, courts have generally forgone any question of standing and proceeded directly to the question of judicial estoppel. This may be due in part to the fact that a Chapter 13 case, unlike a Chapter 7 discharge or Chapter 11 reorganization, remains open until the completion of the confirmed plan. Consequently, a nondisclosing Chapter 13 debtor need not petition the bankruptcy court to amend its schedule but may instead directly file a schedule amendment with the court. In addition, under 11 U.S.C. § 1327, confirmation of a Chapter 13 plan vests all property of the estate in the debtor.[205] Two recent cases in the Sixth and Eleventh Circuits apply judicial estoppel in the Chapter 13 nondisclosure context without suggesting any standing or party in interest concerns.[206]

4. Curing a Standing Defect and the Cooperation of Bankruptcy Courts

In cases where plaintiffs anticipate the court carefully examining the issue of debtor standing to bring causes of action undisclosed in bankruptcy, litigants may attempt to head off this argument themselves. Such plaintiffs attempting to prosecute causes of action initially undisclosed in bankruptcy have begun to request the reopening of their prior bankruptcy proceedings to join or substitute the bankruptcy trustee.

Pursuant to 11 U.S.C. § 350, the bankruptcy court may exercise its discretion to reopen a case for the purpose of administering assets or for other cause.[207] Depending largely on whether the circuit in which a given bankruptcy court sits permits trustee standing to bring claims otherwise subject to judicial estoppel, the court may be more or less receptive to such a proposal. Some bankruptcy courts, taking a cue from their respective circuit courts,

204. *See* Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1210 n.2 (3d Cir. 1992); Cable v. Ivy Tech State Coll., 200 F.3d 467, 472-74 (7th Cir. 1999); *see also* Donato v. Metro. Life Ins. Co., 230 B.R. 418, 425 (N.D. Cal. 1999) (finding that *Olick* and *Maritime* were persuasive and therefore the debtor had standing to litigate the causes of action); *In re* Wirmel, 134 B.R. 258, 260 (Bankr. S.D. Ohio 1991) (explaining that a debtor has a concurrent power with the bankruptcy trustee to sue and be sued).

205. 11 U.S.C. § 1327(b) (2006).

206. *See* Lewis v. Weyerhaeuser Co., No. 04-5675, 2005 WL 1579713, at *4 (6th Cir. July 06, 2005) (applying a judicial estoppel remedy to a Chapter 13 plaintiff that failed to disclose its cause of action in bankruptcy); De Leon v. Comcar Indus., Inc., 321 F.3d 1289 (11th Cir. 2003) (same).

207. 11 U.S.C. § 350(b) (2006).

may refuse to reopen a case for the purpose of administering an undisclosed cause of action.[208] Other bankruptcy courts, however, have proven more receptive to reopening such cases.[209]

V. ANALYZING THE COMPETING MOTIVATIONS

Bankruptcy nondisclosure cases highlight the conflict between the motivations driving the development of bankruptcy law and those behind the imposition of judicial estoppel. Analyzing the historical versions of judicial estoppel[210] demonstrates that otherwise strong policy motivations behind judicial estoppel become attenuated in a bankruptcy setting. The original, strict version of judicial estoppel developed in *Hamilton* generally applies to protect the sanctity of a judicial oath.[211] Early First Circuit opinions such as *Payless* that do not explicitly require motivation or excuse inadvertence are most akin to such an application.[212] The purpose of such a rule is served, however, only to the extent that application of judicial estoppel punishes the original person averring a statement. When judicial estoppel serves to punish outside parties such as the bankruptcy trustee or individual creditors by preventing recovery, those parties inequitably suffer the consequences of the debtor's action.

The modern version of judicial estoppel articulated by the Supreme Court in *New Hampshire* applies more generally to protect the integrity of the courts.[213] Courts applying this doctrine to the bankruptcy nondisclosure setting often indicate that judicial estoppel protects the bankruptcy system by emphasizing and enforcing the disclosure requirements. The majority analysis applied in the Third, Fifth, and Sixth Circuits, however, essentially applies judicial estoppel to trump other potential concerns and externalities arising in the litigation, particularly with regard to bankruptcy creditors. As applied in a non-bankruptcy setting such as *New Hampshire*, judicial estoppel generally affects only the rights of the immediate parties. In a bankruptcy setting, however, an adjudication of the debtor's rights inevitably affects interests of unpaid creditors. Furthermore, applying judicial estoppel in a bankruptcy nondisclosure scenario actually

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208. *In re* Walker, 323 B.R. 188, 198-99 (Bankr. S.D. Tex. 2005).

209. *See, e.g.*, *In re* Lewis 273 B.R. 739 (Bankr. N.D. Ga. 2001).

210. *See supra* Part II.A.2 (discussing the historical development of American judicial estoppel law).

211. *See id.* (discussing the strict version of judicial estoppel adopted in *Hamilton*).

212. *See supra* Part IV.A.1 (discussing the analysis in *Payless*).

213. *See supra* Part II.A.2 (analyzing the Supreme Court's judicial estoppel guidelines in *New Hampshire*).

undermines the integrity of the bankruptcy court in a significant way: it leaves in place the original fraud committed by the failure to disclose assets. Courts applying judicial estoppel in a bankruptcy nondisclosure context bend the doctrine to impose a punitive sanction on the immediate interested parties—both the culpable debtor as well as innocent creditors—and to deter potential future nondisclosure.

For each element of the judicial estoppel analysis the Third, Fifth, and Sixth Circuits invoke, countervailing concerns arise. The first element queries whether a debtor is asserting a claim contradictory to one it has asserted in a prior proceeding. Under the majority view, a debtor who fails to disclose a claim in bankruptcy and later asserts the claim in a subsequent proceeding has adopted a contradictory position sufficient to satisfy this element.[214] This analysis ignores, however, the principle of statutory law emphasized in *Parker* that all Chapter 7 debtor assets transfer to the estate upon filing the bankruptcy petition.[215] Furthermore, the standing analysis in *Parker* highlights a troubling aspect of applying judicial estoppel to bankruptcy cases: it often fails to account for the rights of creditors.[216] It is the debtor who took the position that no suit existed by failing to schedule a claim. To the extent that the undisclosed claim remains in the possession of the estate, the debtor's previous position should be irrelevant for purposes of judicial estoppel.

The second element of the majority approach to judicial estoppel inquires whether judicial adoption of or reliance on the position has occurred. As the Supreme Court stated in *New Hampshire*, this element primarily serves to prevent the risk of inconsistent court determinations and thus protects justice, as well as the integrity of the courts.[217] When one court has already adopted a litigant's position and the litigant subsequently asserts the opposite, by adopting a contradictory position the later court risks creating "the perception that either the first or the second court was misled."[218] In non-bankruptcy scenarios, prior courts cannot easily go back and fix what has occurred, and furthermore it may not always be clear which position was in fact true or correct. In the bankruptcy nondisclosure setting, however, these concerns abate significantly due to the ability

214. *See, e.g.*, Superior Crewboats, Inc., v. Primary P & I Underwriters, (*In re* Superior Crewboats, Inc.), 374 F.3d 330, 336 (discussed *supra* Part I); Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314 (3d Cir. 2003) (discussed *supra* Part IV.A.2).

215. *See supra* Part IV.B.1 (examining the development of Eleventh Circuit precedent on judicial estoppel in bankruptcy proceedings).

216. *Id.*

217. New Hampshire v. Maine, 532 U.S. 742, 750 (2001).

218. *Id.* (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982)).

of the bankruptcy court to reopen and admit the new cause of action to the estate at any time. Thus, in the bankruptcy setting, rather than essentially leaving the nondisclosure fraud in place by applying judicial estoppel to the outside cause of action, instead forcing a debtor to go back to the bankruptcy court to correct the fraud actually better safeguards the court's integrity. Finally, in applying judicial estoppel to guard the integrity of the courts, courts may inadvertently diminish judicial integrity by letting culpable defendants in the outside cause of action off the hook by dismissing otherwise meritorious claims.

The final element in the majority judicial estoppel analysis is whether the debtor intentionally omitted the claim or whether the omission was inadvertent (i.e., in good faith). This inquiry ensures that the court does not apply an equitable doctrine to produce inequity and also provides a disincentive for debtors to scheme and connive. In this sense, the inquiry addresses the motivation behind the "fast and loose" version of judicial estoppel that seeks to discourage litigants from manipulating the system. Yet, the very two-part test most commonly applied to determine whether a debtor possesses the requisite intent actually illustrates the inequity that can arise by imposing judicial estoppel. When a debtor possesses both knowledge of a claim and motivation to conceal it, courts will often impose judicial estoppel.[219] The first knowledge element is arguably superfluous: if the debtor lacked knowledge, or at least some minimal constructive knowledge that a claim existed, he could not be required to report it under 11 U.S.C. § 521 and consequently no contradictory position would exist. Courts typically determine the second element, motive to conceal the claim, by seeking evidence that the debtor could have stood to gain from concealing the claim. This, in turn, often reduces to whether unpaid creditors would otherwise have benefited had the debtor scheduled the claim. This very point, however, serves to illustrate the fact that dismissing the claim would likely inequitably disadvantage innocent creditors who might otherwise share proceeds of the newly revealed claim.

The general motivations behind bankruptcy law further serve to guide the application of judicial estoppel in nondisclosure cases. The basic goals of bankruptcy law concern optimizing business choices ex-ante, ex-post maximization of the value of the estate, and an overarching goal of economic efficiency. As nondisclosure scenarios arise only once bankruptcy has occurred, ex-ante optimization is largely inapplicable. Ex-post maximization of estate value, however,

219. *See, e.g., In re Superior Crewboats*, 374 F.3d at 332 (discussed *supra* Part I); *Krystal*, 337 F.3d at 317-18 (discussed *supra* Part IV.A.2).

is intimately related to the imposition of judicial estoppel in a bankruptcy scenario. Full disclosure of all assets is necessary to assure that the estate represents its maximum possible value. Many courts applying the majority analysis implicitly or explicitly indicate that upholding such bankruptcy disclosure requirements takes precedence over potential externalities and justifies imposition of judicial estoppel.[220] In achieving its goals, however, bankruptcy law also seeks to maintain efficiency and minimize such externalities and transaction costs.[221]

In the case of a corporate bankruptcy in particular, where the stakes are high and either unsecured creditors or equity holders are almost certain to remain unpaid, the goal of maximizing estate value militates against a strict application of judicial estoppel. Further, where corporate debt and management structure may likely shift significantly and a debtor corporation's causes of action may be bought and sold, a searching analysis of which entity may assert standing for the cause of action and which entity may be estopped based on prior acts becomes all the more significant. Rarely is the mechanism of judicial estoppel best suited to preserve the integrity of the court while achieving these ends.

Choosing to myopically focus only on the systemic protections sought by judicial estoppel or only on the economic maximization sought by bankruptcy law fails to adequately account for all interests at stake. An ideal solution balances the competing legal motivations as well as the interests of the parties and outside creditors. Such a solution seeks to maximize the value of the estate efficiently while maintaining the protection of the sanctity of the oath and the integrity of the courts.

VI. A PROPOSED FRAMEWORK

As the foregoing analysis indicates, a judicial estoppel-centered focus on the debtor's motive or culpability for nondisclosure is often misplaced and may lead to inefficient outcomes in many cases. Although concern for debtor culpability and preservation of the disclosure system may be well-grounded, the proposed framework

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220. *See, e.g.*, *Krystal*, 337 F.3d at 325 (rejecting the application of a lesser sanction that would permit creditors to recover discharged debt under the rationale that such a remedy may permit the culpable nondiscloser to profit and "the integrity of both the bankruptcy process and the judicial process would suffer").

221. *See* Rasmussen & Skeel, *supra* note 48 (discussing the economic goals of bankruptcy law); *see also* An-Tze Cheng v. K & S Diversified Invs. (*In re* An-Tze Cheng), 308 B.R. 448, 460 (B.A.P. 9th Cir. 2004) (arguing that "[t]he equitable balance compels consideration of whether the economic consequences of a judicial estoppel are borne by third parties").

suggests that in many cases, the analysis can be refined so as to minimize external effects on third parties while still promoting the goals advanced by judicial estoppel. Without ignoring debtor culpability, the proposed framework rejects debtor intent as the touchstone of judicial estoppel application in bankruptcy nondisclosure cases and instead heeds the direction of the Eleventh Circuit, focusing on preserving creditor rights and punishing only culpable nondisclosing parties.[222] This framework primarily seeks to promote the rights of creditors and other interested third parties while also holding nondisclosing debtors accountable.

Ideally, bankrupt debtors would consistently and honestly disclose all assets and thereby eliminate the need to consider nondisclosure remedies. The debtor clearly stands in the best position to know or gain knowledge of potential causes of action that may benefit the bankruptcy estate. Consequently, a sound framework of analysis should create incentives to disclose or disincentives to withhold scheduling causes of action. Perhaps most significantly, however, as the framework punishes culpable withholding debtors, it should also serve the interests of third parties as equitably and efficiently as possible. Finally, in order to promote fair outcomes, the framework should differentiate between culpable debtors seeking a windfall from intentionally omitting claims and innocent debtors inadvertently omitting claims. Due to the distinct sets of concerns arising under various bankruptcy scenarios, the framework offered is divided to illustrate outcomes under Chapter 7, Chapter 11, and Chapter 13 scenarios.

A. Chapter 7 Nondisclosures

To best serve the interest of creditors as well as debtors and defendants, the parties under Chapter 7 must be considered in their distinct legal capacities rather than lumping the debtor in with the trustee and the creditors. To this extent, and because without a party in proper standing no remedy can be applied, courts should first fully examine issues of standing in a bankruptcy nondisclosure case.[223] Nearly all courts recognize that the consequence of 11 U.S.C. § 521 is that undisclosed claims become property of the trustee upon filing of the bankruptcy petition. From that point on, unless otherwise agreed, the trustee retains sole standing and authority to pursue or abandon

222. *See* Parker v. Wendy's Int'l., Inc., 365 F.3d 1268, 1271-73 (11th Cir. 2004).

223. *But see In re Superior Crewboats*, 374 F.3d at 334-35 (announcing that the remedy of judicial estoppel eliminated the need to examine standing).

claims that entered the estate. Upon closing the bankruptcy action, only assets of the estate scheduled under § 521 "not otherwise administered" are effectively abandoned by the estate. Even explicit abandonment of undisclosed causes of action based on a debtor's false representations should be viewed critically when a trustee later seeks to pursue the action, as to do otherwise would tend to unfairly prejudice the rights of creditors.[224] From this general statutory scheme, specific corporate and individual Chapter 7 issues are further explored.

1. The Individual Scenario

In the individual bankruptcy scenario, the Eleventh Circuit's approach in *Parker* exemplifies the benefits of distinguishing the debtor from the trustee for purposes of standing and judicial estoppel.[225] As a preliminary matter, for procedural purposes but not in relation to substantive outcomes, it becomes significant whether the debtor files the omitted claim before or after filing bankruptcy.[226] If the party files its outside action before filing bankruptcy, Federal Rule of Civil Procedure 17(a) is satisfied because the proper party in interest was named in filing the suit.[227] In such a claim-first, bankruptcy-second scenario, however, Federal Rule 25(c) governing transfer of interest will apply to require substitution of the trustee.[228] If the omitted cause of action is filed post-bankruptcy, Rule 17(a)

224. This scenario arose in *Superior Crewboats* when the debtor induced the bankruptcy trustee to abandon an otherwise undisclosed and unscheduled cause of action through false oral representations that rendered the cause valueless and barred by the statute of limitations. *Id.* at 333-35. Although abandonment is typically irrevocable, circumstances such as fraud combined with insufficient notice and lack of knowledge may justify finding abandonment ineffective. *See* Killebrew v. Brewer (*In re* Killebrew), 888 F.2d 1516, 1520 n.10 (5th Cir. 1989) (discussing limited exceptions to allowing revocation based on concealed property or the trustee's lack of knowledge or means of knowledge). To bind creditors based on a trustee's fraudulently induced abandonment overlooks the inherent externalities of bankruptcy proceedings.

225. The framework presented here for individual Chapter 7 nondisclosures builds upon the criticism presented in other discussions of *Barger v. City of Cartersville*, 348 F.3d 1289, 1292 (11th Cir. 2003). Phillips & Brown, *supra* note 7 (proposing a method of analyzing standing in personal bankruptcy nondisclosure cases); *see also Parker*, 365 F.3d 1271-73 (analyzing standing in conjunction with judicial estoppel in a Chapter 7 bankruptcy nondisclosure scenario). In addition, it is worth again noting that recent changes in the Bankruptcy Code force more individual debtors from Chapter 7 into Chapter 13; however, this does not affect the substance of the analysis.

226. *See* Phillips & Brown, *supra* note 7 (explaining the interaction between Fed. R. Civ. P. 17(a) and 25(c) and criticizing the court's analysis in *Barger*).

227. *See id.*; Fed. R. Civ. P. 17(a).

228. Fed. R. Civ. P. 25(c).

becomes an issue because the proper party has not been named in the suit if the trustee is not included.[229]

In either case, the proper action for the courts is to facilitate substitution or joinder of the trustee, including reopening the bankruptcy claim if necessary. As noted previously, it is within the bankruptcy court's jurisdiction to reopen a case under 11 U.S.C. § 350. Based on the foregoing analysis, bankruptcy courts should favor reopening, except in cases of frivolous causes of action. The reason for the preference for reopening is clear: when the bankruptcy court refuses to reopen the case, the undisclosed claim must be dismissed due to lack of standing or failure to join a necessary party. This result would merely propagate the inefficiencies and injustice sought to be corrected.

Once the trustee becomes available, two scenarios may arise. First, the trustee may determine that it is not in the interest of the estate to pursue the claim and may agree to abandon it under 11 U.S.C. § 554. At that point, the interests of the outside creditors will have been protected and the abandoned claim will revert back to the debtor. If the debtor continues to pursue the cause of action, the court should only then proceed to analyze whether it should judicially estop the action under the majority bad faith inquiry. If the court finds that judicial estoppel does not bar the debtor from proceeding, it can then reach the merits of the underlying claim. In considering judicial estoppel, however, the court should also bear in mind other remedies such as the traditional bankruptcy law sanctions for failing to disclose assets or a finding of fraud upon the court under Procedural Rule 60(b).[230]

Alternatively, the trustee may determine that it is in the best interest of the estate to proceed with the claim. In that event, the court should permit joinder or substitution of the trustee pursuant to Rules 17(a) or 25(c) without regard to the debtor's intent; the debtor's bad acts or intent should not bar the trustee from recovering on assets of the estate. Judicial estoppel analysis should come into play, however, if the trustee seeks or gains an amount greater than what is owed to the creditors in bankruptcy.[231] Rather than simply allowing a

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229. Fed. R. Civ. P. 17(a).

230. Fed. R. Civ. P. 60(b); *see* An-Tze Cheng v. K & S Diversified Invs. (*In re* An-Tze Cheng), 308 B.R. 448, 462 (B.A.P. 9th Cir. 2004) (suggesting alternative remedies apart from judicial estoppel for parties manipulating the system in bankruptcy actions).

231. *See Parker*, 365 F.3d at 1272 (11th Cir. 2004) (suggesting that perhaps in future cases judicial estoppel could bar recovery beyond the amount owed to creditors); *see also* Phillips & Brown, *supra* note 7 (referring to such amounts beyond the estate's maximum recovery as a debtor's "reversionary" interest in the claim).

culpable debtor to profit from nondisclosure, the court should apply the standard intent-focused majority judicial estoppel inquiry to determine whether he may be allowed to exercise a reversionary interest in such a recovery beyond the debt owed.[232]

Although this framework promotes more equitable and economically efficient outcomes, critics might charge that the process of administering undisclosed causes of action is inherently wasteful. Especially in the individual or consumer case, most such causes of action, even if disclosed in bankruptcy, may be assessed as sufficiently speculative or costly as to be valued at zero and abandoned by the estate. [233] Two significant points arise in response. First, existing cases demonstrate that there are numerous instances in which a Chapter 7 trustee values an initially undisclosed cause of action so much that the trustee independently petitions the court for joinder or substitution in the subsequent action. Second, regardless of efficiency concerns, the court cannot impose any remedy including judicial estoppel where there is no plaintiff with standing to bring the action. As a result, under the proposed framework, the bankruptcy judge performs a gatekeeping function by determining whether to reopen the case to administer the cause of action or whether to revoke discharge entirely or dismiss the petition in cases of clear abuse. Rather than applying the heavy-handed remedy of judicial estoppel to the outside claim, the approach outlined above provides the bankruptcy court with the opportunity to protect its own interests where necessary.

2. The Corporate Scenario

In general, there is less concern regarding a corporation bringing an undisclosed cause of action in the context of a Chapter 7 bankruptcy because, unlike the individual, Chapter 7 does not discharge the debts of a corporation.[234] Rather, under Chapter 7, all assets are distributed, leaving only a shell with the corporate debts. Cases such as *Coastal Plains*,[235] however, illustrate the judicial

232. *See* Phillips & Brown, *supra* note 7.

233. Cannon-Stokes v. Potter, No. 03C1942, 2004 WL 407014 (N.D. Ill. Mar. 4, 2004) (noting that a trustee might choose to abandon a debtor's employment discrimination cause of action as a contingent asset of inconsequential value).

234. In re Goodman, 873 F.2d 598, 602 (2d Cir. 1989) (explaining that the Bankruptcy Code "makes it quite clear that while individuals may be discharged of their debts pursuant to Chapter 7, corporations may not"), overruled on other grounds, Germain v. Connecticut Nat'l Bank, 926 F.2d 191 (2d Cir.1991).

235. Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 207-08 (5th Cir. 1999) (discussed *supra* Part IV.A.2).

estoppel issues that can arise when undisclosed and unspecified corporate causes of action are sold as intangibles in a Chapter 7 liquidation and then repurchased by the original corporate owners through a new organizational entity.

By operation of statute, under Chapter 7, the estate retains all claims, disclosed or otherwise. Following an estate sale of general intangibles including causes of action, however, the language of the relevant disclosures and instruments of sale factor into determining whether and to what extent the sale transfers assets which the corporation failed to disclose. If a sale did not effectively transfer the cause of action out of the estate due to fraud or other factors, any party other than the estate would lack standing to assert the cause of action as outlined above.

Where a proper sale does effectively transfer undisclosed causes of action to a third party, standing is no longer an issue and judicial estoppel may again come into play. As a preliminary matter, the burden would lie with the defendant to establish that the corporate entity sought to be estopped is the same as or sufficiently similar to the entity within the requirements of judicial estoppel. In the event that this can be established, the standard intent-focused judicial estoppel analysis would apply. In such a scenario, however, the creditors' interest would be protected as the original proceeds garnered from the proper sale of the cause of action would have been distributed to the creditors by the Chapter 7 trustee.

B. Chapter 11 Nondisclosures

When the debtor-in-possession seeks to pursue an unscheduled claim prior to confirmation *on behalf of the bankruptcy estate* there is no discernable intent to conceal the claim and thus no cause to invoke judicial estoppel. As the debtor-in-possession is acting in place of the trustee and the bankruptcy case remains pending, the court should merely ensure that the bankruptcy schedule is supplemented to reflect the undisclosed claim. No case law presents the rather implausible scenario in which a Chapter 11 debtor-in-possession would somehow seek to improperly pursue an undisclosed cause of action exclusively for its own benefit prior to confirmation of a plan. As a result, a debtor-in-possession's pursuit of an undisclosed cause of action prior to confirmation is almost by definition without culpable motive, since no debt will have yet been discharged. Consequently, no bankruptcy policy goals are contravened and a judicial estoppel remedy is inappropriate.

When the debtor-in-possession emerges from Chapter 11 post-confirmation as a newly reorganized entity and seeks to pursue a cause of action undisclosed in bankruptcy, however, a culpable motive may be evident. At the outset, the court must determine whether the Chapter 11 debtor has standing to prosecute such a cause of action post-confirmation. Based on the statutory text that vests "all of the property of the estate in the debtor"[236] at confirmation as well as the case law emphasizing that provision, a court should hold that a Chapter 11 debtor has standing to pursue an undisclosed claim.[237] The court should, however, heed the implications of 11 U.S.C. § 1141(c) which has been interpreted to indicate that, even though property rights may vest in the debtor upon confirmation, unadministered and undisclosed assets, such as unscheduled causes of action, remain subject to claims by creditors and other interested parties.[238] To ensure that the cause of action is administered fairly and efficiently, the court should order a stay to permit the debtor to petition the bankruptcy court to reopen the case and add the cause of action.

The bankruptcy court again, as in the Chapter 7 scenario, serves a gatekeeper function of eliminating frivolous or harassing causes of action. It is also positioned to protect its own integrity and guard against litigant manipulation by ordering dismissal, revocation of discharge, or other remedies. Again, however, the bankruptcy court should tend to favor reopening such cases to best serve the interests of unpaid creditors. Upon reopening the case, the court will have several options for directing the administration of the cause of action. In the event that creditors yet remain to benefit from the undisclosed cause of action, the court may require simply that the asset be added to an existing liquidating trust to be administered for the creditors' benefit. Alternatively, the court may appoint a trustee to administer the claim on behalf of the estate. Finally, the court may permit the debtor to

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236. 11 U.S.C. § 1141(b) (2006).

237. *See* Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 422 (Stapleton, J., dissenting) (finding that allowing the suit to proceed would be in the best interest of all creditors); Phoenix Petroleum Co. v. United States, No. 98-5124, 1999 WL 521189, at *6 (Fed. Cir. July 23, 1999) (opining that "[i]n our view, such an assurance would ensue most efficiently by ordering a stay of the proceedings so as to allow plaintiff to petition the bankruptcy court"); Greenhart Durawoods, Inc. v. PHF Int'l. Corp., No. 91 Civ. 3731, 1994 WL 652434, at *2-5 (S.D.N.Y. Nov. 18, 1994) (allowing debtor to pursue an undisclosed claim); Winmark Ltd. v. Miles & Stockbridge, 693 A.2d 824, 829-30 (Md. 1997) (finding that a case allowing a defense of lack of standing did not consider the interests of creditors).

238. *Phoenix Petroleum*, 1999 WL 521189, at *6 ("[T]he 'free and clear' provision of section 1141(c) may more appropriately be given effect by allowing the plaintiff to proceed with the claim so long as steps are taken to ensure that the claim does not remain free and clear of all claims and interests of the creditors.").

prosecute the cause of action himself for the benefit of the remaining creditors. In such a scenario, the reorganization plan would need to be amended to reflect proper distribution of the contingent asset. As in *Coastal Plains*, when the defendant in the outside action is also the primary unpaid creditor, the bankruptcy court must facilitate a determination of whether it is in the estate's interest to pursue the claim or to abandon it.[239]

Whether and to what extent the debtor may be permitted to profit from an undisclosed cause of action, however, should be governed by the principles examined in the judicial estoppel inquiry. In analyzing the issue, the court should apply the general two-pronged intent inquiry to determine whether the company had both knowledge of the claim and a motive to conceal it. As courts have demonstrated a willingness to apply the knowledge requirement broadly, it will be difficult for a debtor to demonstrate lack of intent, especially if the plan calls for some amount of discharge of indebtedness. In the rare instance that all creditors are fully paid, however, sanctions are unwarranted. The interests of creditors and company equity holders are likely best served by allowing the case to go forward without burdening the bankruptcy mechanism. Again, in such an instance when the debtor would not have benefited or possessed motive to conceal the cause of action, permitting the debtor to proceed with the action does not undermine the disclosure requirement.

More likely, the court will determine that the Chapter 11 debtor improperly concealed its cause of action. In such an instance, the court should fashion a remedy that punishes the debtor but does not strip away the rights of creditors. As courts have announced, but not adequately applied, judicial estoppel should not be employed unless it is "tailored to address the harm identified" and "no lesser sanction would adequately remedy the damage done by the litigant's misconduct."[240] As one court suggested, 18 U.S.C. § 152 exists specifically as an alternative means to punish debtors who conceal assets in Chapter 11 cases.[241] In addition, other remedies such as revoking discharge for "fraud on the court" Fed. R. Civ. P. 60(b) can be applied, eliminating the need to "bend[] judicial estoppel theory to the purpose."[242]

239. *In re Coastal Plains, Inc.*, 179 F.3d at 202-03.

240. Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 319 (3d Cir. 2003) (quoting Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 772, 779-80 (3d Cir. 2001)).

241. *Greenhart Durawoods*, 1994 WL 652434, at *5.

242. An-Tze Cheng v. K & S Diversified Invs. (*In re* An-Tze Cheng), 308 B.R. 448, 462 (B.A.P. 9th Cir. 2004); Fed. R. Civ. P. 60(b).

When accounting for the creditors' interest and allowing the claim to proceed, it is important to fashion a penalty that preserves the integrity of the judicial system and provides incentives for full disclosure in bankruptcy. In economic terms, this means imposing a penalty that pushes the defendant beyond the point of indifference between disclosing assets to be administered for the benefit of creditors and improperly concealing these assets. While not always easily reducible to concrete numbers, this point can be expressed formulaically as:

$$C - D = (1 - p) * C + p * (C - X)$$

C represents the value of the claim, *D* is any outstanding debt payable, *p* is the probability of getting "caught" omitting the claim, and *X* is the penalty that creates indifference as to disclosing or not disclosing.[243] The left side of the equation represents a debtor's expected gain from properly disclosing and prosecuting the claim, and the right side represents the expected value of not disclosing the claim. Clearly, penalizing a nondisclosing debtor merely by directing that proceeds of the action go to debt repayment, by setting X equal to D, is insufficient as the debtor will prefer the chance to retain all proceeds. Depriving the debtor of all benefit of the claim, however, by setting *X* equal to *C*—as would occur by applying judicial estoppel—may tend to over-deter or, in some scenarios, may even inadequately deter nondisclosure. Additionally, applying judicial estoppel produces negative externalities including lost potential value to unpaid creditors and windfalls accruing to potentially culpable third party defendants, neither of which are accounted for in this representation.

While preserving the rights of creditors and not letting a third party defendant off the hook, the court must punish the nondisclosing debtor sufficiently to signal to others that the disclosure obligations are worth following. There is no reason, however, that this punishment need extinguish a viable cause of action. While this argument supports the view espoused by the Third Circuit that judicial estoppel should only apply when "tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's misconduct," it indicates that the bankruptcy nondisclosure setting virtually never presents such conditions.[244]

243. For cases in which indebtedness exceeds the claim value, C and D are set equal.

244. *Krystal*, 337 F.3d at 319.

C. Chapter 13 Nondisclosures

Much like the debtor-in-possession in a Chapter 11 case, the Chapter 13 individual debtor retains standing to pursue causes of actions possessed by the estate.[245] As outlined, courts have generally concluded, at least implicitly, that this also includes causes of action undisclosed by the debtor in his Chapter 13 petition.[246] At the outset, it is significant to note that recent bankruptcy reform legislation increases the standard Chapter 13 payment period from three to five years.[247] As a Chapter 13 case remains open during this payment period, it is exceedingly likely that the debtor would assert any undisclosed cause of action during the pendency of the Chapter 13 case. As a result, much of the Chapter 11 framework applies equally here, and judicial estoppel will generally be inappropriate in the Chapter 13 context as well. Instead, when creditors and the bankruptcy case remain available, it is likely most efficient to permit a nondisclosing Chapter 13 debtor to merely amend the schedules and plan, if necessary, to reflect the undisclosed cause of action.

As in the Chapter 11 scenario, in addition to amending the debtor's asset schedule to avoid contradictory assertions, the newly scheduled asset must also be accounted for in the debtor's Chapter 13 payment plan to satisfy potential creditors' interest. Had the debtor's case been filed or converted to a Chapter 7 filing, the analysis in that scenario advocates permitting the trustee to pursue the cause of action on behalf of the estate. By statute, a court cannot approve a Chapter 13 plan that would pay unsecured creditors less than what they would otherwise receive in the case of a liquidation under Chapter 7.[248] Consequently, when the debtor collects on his outside cause of action prior to confirmation of the Chapter 13 plan, the plan must be amended so that creditors receive at least the distribution to which they would otherwise be entitled under a Chapter 7 scenario in which the trustee pursued the outside cause of action. Similarly, where the

245. *See, e.g.*, Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513, 516-17 (2d Cir. 1998) ("Although some courts of appeals have held that Chapter 7 debtors have no standing to pursue causes of actions that belong to the estate . . . we reach the contrary holding with respect to Chapter 13 debtors who pursue such causes of action.").

246. *See* Lewis v. Weyerhaeuser Co., 141 F. App'x 420, 425-28 (6th Cir. 2005) (applying a judicial estoppel remedy to a Chapter 13 plaintiff that failed to disclose a cause of action in bankruptcy); De Leon v. Comcar Indus., Inc., 321 F.3d 1289, 1291 (11th Cir. 2003) (same).

247. 11 U.S.C. § 1322(a) (2006).

248. *See* 11 U.S.C. § 1325(a) (2006) (providing that "the court shall approve a plan if [inter alia]—the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date").

Chapter 13 plan is to terminate prior to the resolution of the outside cause of action, the plan again should be adjusted to provide for proper distribution of the contingent asset.

As posited in the Chapter 11 debtor-in-possession scenario, to encourage full disclosure from Chapter 13 debtors, courts should impose some alternative sanction tailored to address the fraud where a debtor is found to have intentionally omitted disclosure under the standard two-pronged analysis. As outlined in *In re An-Tze Cheng*, possible remedies include revoking discharge for fraud on the court under Federal Rule 60(b) or levying other fines and sanctions against the debtor at the court's discretion.[249] Such remedies would serve the interests of creditors while simultaneously upholding the importance of the disclosure requirements and keeping the culpable third party defendant on the hook in the subsequent proceeding.

249. *See* An-Tze Cheng v. K & S Diversified Invs. (*In re* An-Tze Cheng), 308 B.R. 448, 462 (B.A.P. 9th Cir. 2004) (discussing alternatives to judicial estoppel).

VI. CONCLUSION

The foregoing analysis illustrates the inefficiencies and shortcomings of broadly applying the heavy-handed remedy of judicial estoppel in the complex, multi-party bankruptcy nondisclosure setting. The proposed framework provides a comprehensive balance, tailored to address the interests advanced by both bankruptcy law and judicial estoppel. Under the proposed framework, debtors have a disincentive to conceal claims because debtors are guaranteed to recover less, and in some cases nothing, by attempting to withhold causes of action from the bankruptcy estate. This mechanism protects bankruptcy creditors from the harms of debtor nondisclosure and provides them with the additional opportunity to benefit from any withheld claim. Finally, the potentially culpable defendant in the outside action is held accountable, and the judicial machinery is protected from reaching incompatible results in separate proceedings. This framework provides equitable and efficient outcomes for all interests concerned and enables courts to balance the competing legal objectives in a principled manner.

Robert F. Dugas[*]

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