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Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts

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Articles

Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts

THERESA M. BEINER* & ROBERT B. CHAPMAN**

> Mullroy: What's your purpose in Port Royal, Mr. Smith?
> Murtogg: Yeah, and no lies.
> Jack Sparrow: Well, then, I confess, it is my intention to commandeer one of these ships, pick up a crew in Tortuga, raid, pillage, plunder and otherwise pilfer my weasely black guts out.
> Murtogg: I said no lies.
> Mullroy: I think he's telling the truth.
> Murtogg: If he were telling the truth, he wouldn't have told us.
> Jack Sparrow: Unless, of course, he knew you wouldn't believe the truth even if he told it to you.[1]

I. INTRODUCTION

At first glance, piracy and bankruptcy do not appear to have much in common. Except, of course, what might be considered the obvious. Depending on one's tendency to accept either the "myth of the immoral

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1. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003) [hereinafter PIRATES].

debtor"[2] or the myth of the "debtor as victim,"[3] one might say that consumer bankruptcy permits individuals to engage in a bit of piracy. It allows individuals to acquire Gucci purses and Prada shoes,[4] to "eat at the pizza parlor on Friday night,"[5] to commit sexual assault,[6] and to receive necessary medical treatment,[7] all without paying the full price or even paying anything at all. In short, bankruptcy allows debtors to "raid, pillage, plunder and otherwise pilfer [their] weasely black guts out."[8]

There is, however, another form of piracy occurring as a result of bankruptcy. Some debtors' employers are using judicial estoppel to deprive debtors of their employment related claims and deprive creditors of possible recovery. Judicial estoppel, an old and arguably outdated court-created procedural tool, relegates parts of the Federal Rules of Civil Procedure and Bankruptcy Code to the status of guidelines rather than actual rules. Because of judicial estoppel, employers are getting away with acts of discrimination, creditors are missing out on opportunities to be repaid, and employment discrimination victims are losing their day in court.

While occasionally a debtor loses a tort or contract claim as a result of bankruptcy-related judicial estoppel, often the claims they lose are employment discrimination claims. In addition to experiencing what some describe as the general judicial hostility toward employment discrimination plaintiffs,[9] bankruptcy debtors, who are also employment

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2. ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 71-95 (2003).

3. F.H. Buckley, *The Debtor as Victim*, 87 CORNELL L. REV. 1078 (2002).

4. Daniel McGinn, *Maxed Out*, NEWSWEEK, Aug. 27, 2001, at 34, 37. *But see* Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 47 (2002) (questioning the stereotype that frivolous spending on designer brands is one of the factors leading to bankruptcy).

5. Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461, 464 (1997).

6. *See* Solomon v. Cosby (*In re* Solomon), 67 F.3d 1128, 1130 (4th Cir. 1995).

7. *See, e.g.*, Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 235-38 (2001).

8. PIRATES, *supra* note 1.

9. Recent scholarly debate has focused on judicial hostility toward employment discrimination claims and civil rights claims generally. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, J. EMPIR. L. STUD. 429 (2004); Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989).

However, very little scholarly attention has been paid to the use of judicial estoppel in relation to bankruptcy cases in particular. Nevertheless, these cases have not escaped the attention of commentators on bankruptcy. *See, e.g.*, James D. Walker, Jr. & Amber Nickell, *Judicial Estoppel and the Eleventh Circuit Consumer Bankruptcy Debtor*, 56 MERCER L. REV. 1115 discrimination plaintiffs, are living under circumstances that make them even more vulnerable in many ways than the average employment discrimination plaintiff. And like employment discrimination plaintiffs, bankruptcy debtors are disproportionately women and minorities. For example, African Americans make up a disproportionate percentage of debtors,[10] households with children are more likely to experience bankruptcy than childless households,[11] and most individuals filing bankruptcy are women who depend on their jobs to climb their way out of financial distress.[12] Indeed, more than one million women file for bankruptcy each year.[13] Furthermore, as evidenced by their bankruptcies, most debtors are strapped financially, which creates a strain on both themselves and their families. If they, like ordinary employment discrimination plaintiffs, are also falling prey to this anti-plaintiff bias, it is likely to hurt them – and their creditors – in ways that are different from other employment discrimination plaintiffs.

Some commentators have criticized statistical studies purporting to find such anti-plaintiff bias. For example, in response to such studies, two commentators have stated that an accusation of judicial bias against plaintiffs "involves a substantive assessment[, which] cannot be made without first looking at what litigants have presented to the courts and then looking at what the courts have relied upon in rendering their decisions."[14]

(2005); Lisa Chang, *Defending Employment Discrimination Claims When the Plaintiff Has Filed for Bankruptcy*, 30 EMP. REL. LAW J. 75 (2005); James D. Walker, Jr. & Amber Nickell, *Bankruptcy*, 55 MERCER L. REV. 1101, 1104-08 (2004); Louis M. Phillips & Brandon A. Brown, *Continuing Ruminations on Judicial Estoppel: Barging into the Consumer Field*, 2 NORTON BANKR. L. ADVISER 4 (2004); Donna T. Snow, *The Eleventh Circuit Takes Another Look at Judicial Estoppel and Gets it Right*, 7 NORTON BANKR. L. ADVISER 3 (2004); James D. Walker, Jr. & Amber Nickell, *Bankruptcy*, 54 MERCER L. REV. 1351, 1353-57 (2003); Robert F. Hershner, Jr., *Eleventh Circuit Review*, 3 NORTON BANK. L. ADVISER 11 (2003); Recent Development, *Disclosure of Causes of Action in Bankruptcy Proceedings after* Ex Parte First Alabama Bank, 27 AM. J. TRIAL ADVOC. 197 (2003); Robert B. Chapman, *Bankruptcy*, 53 MERCER L. REV. 1199, 1205-19 (2002).

Nor has the development been completely lost on commentators in labor and employment law. *See, e.g.*, Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 55 MERCER L. REV. 1175, 1185-86 (2004); Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 54 MERCER L. REV. 1435, 1445-46 (2003); Benjamin A. Hardy, *The Bankrupt's Employment Claim - List it or Lose it*, 18 LAB. LAW. 193, 194-99 (2002).

10. Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347, 385 (2002).

11. Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 1 (2004).

12. Elizabeth Warren, *Bankruptcy: The New Women's Issue*, AROUND THE KITCHEN TABLE, Mar. 2005, at 2, 2, http://www.demos-usa.org/pubs/kitchentable_issue4.pdf.

13. *Id.*

14. Harry T. Edwards & Linda Elliott, *Beware of Numbers (And Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723, 723 (2002) (responding to Kevin M. Clermont & Theodore

This article is an attempt to provide, at least in part, such an assessment. It examines employment discrimination cases, brought by individuals who have also filed for bankruptcy, in which district courts have accepted or declined the defendant's invitation to dismiss or to grant summary judgment based on omission of that action in a previous bankruptcy filing. Many courts have accepted this invitation and have disposed of cases before reaching the merits. This article explores the rationales of some trial and appellate courts in reaching their formal outcomes. Although invoking judicial estoppel in such cases may be supported by precedents, doing so requires the district court to disregard many fundamental rules of bankruptcy law and federal civil procedure. Because we undertake no quantitative analysis, the most we can suggest is that some federal judges reach an anti-plaintiff outcome that does not square with well-settled substantive and procedural rules.

A methodological and conceptual disclaimer as to empirical claims and formalist analysis is perhaps in order. Eisenberg and Clermont, along with other empiricists, offer what may be characterized as an empirical hypothesis purporting to show bias as a *cause* of outcomes in discrimination cases. Edwards and Elliott suggest that the outcome of discrimination actions can be explained by *reasons*.[15] We must acknowledge the vexed relationship between a hypothesis of cause and a statement of reasons, which is the source of not inconsiderable confu-

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Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125 (2001), and Clermont & Eisenberg, *supra* note 9).

15. A few examples illustrate. Note that Edwards and Elliott seek to determine whether the bias is "unprincipled." Edwards & Elliott, *supra* note 14. They criticize Eisenberg's and Clermont's method because "the data upon which [they] rely include absolutely nothing about the issues raised by the parties before the appellate courts (nor the issues that were raised in trial and then dropped or waived on appeal); the quality of advocacy on appeal; or the appellate courts' bases for the decisions rendered in the cases that are included in the study." *Id.* at 726. They focus on the rules of the game: That defendants generally appeal law and plaintiffs usually appeal facts, which involves different standards of review. *Id.* at 728. And they argue that the anti-plaintiff hypothesis should have included consideration of data on the following question: "Do defendant/appellants more often rely on viable legal claims than plaintiff/appellants when seeking appellate review?" *Id.* at 730. A strict legal realist, who accepts that law is only a prediction of what the courts will do, would insist that a verified study of win-rates conclusively answers that question.

sion in jurisprudence,[16] philosophy,[17] and psychology.[18]

Whether a hypothesis as to a cause is a good one is shown by whether the hypothesis allows accurate prediction. A reason is a good reason, on the other hand, if it corresponds to a general standard for what constitutes a good reason.[19] Accepting the premise that a hypothesis of causes and a justifying reason are of two different orders (are, in a manner of speaking, two separate language games), Edwards' and Elliott's invocation of reasons does not refute (and may not even directly address) Eisenberg's and Clermont's hypothesis. Although there may be good reasons, efficient causes, and understandable motives for introducing reasons, a reason for a judicial outcome does not contradict a hypothesis as to its cause; however, there is something to Edwards' and Elliott's point that an empirical examination of judicial outcomes is *unsatisfying* if it does not take account of the rule-following and reason-giving nature of the judicial process.[20]

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16. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 135-37 (1961).

17. *See, e.g.*, Wilfrid Sellars, *Actions and Events*, 7 NOÛS 179, 189-90 (1973). *Compare, e.g.*, Donald Davidson, *Actions, Reasons, and Causes*, 60 J. PHIL. 685, 693 (1963) ("A primary reason for an action is its cause.") *with* GILBERT RYLE, THE CONCEPT OF MIND 115 (1949) ("[W]e should not swallow the traditional stories about the occult antecedents of either deliberative or impulsive actions."). *See generally* Abraham Roth, *Reasons Explanations of Actions: Causal, Singular, and Situational*, 59 PHIL. & PHENOMENOLOGICAL RES. 839 (1999); Daniel Hutto, *A Cause for Concern: Reasons, Causes and Explanations*, 59 PHIL. & PHENOMENOLOGICAL RES. 381 (1999).

18. *See, e.g.*, JACQUES BOUVERESSE, WITTGENSTEIN READS FREUD: THE MYTH OF THE UNCONSCIOUS 69-82 (Carol Cosman trans., 1995).

19. This is not the place to elaborate, with purported exactness, on the relationship between the two. We must suffice with what *should* be the uncontroversial distinction drawn by Wittgenstein:

> There are two senses of "reason": reason for, and cause. These are two different orders of things. One needs to decide on a criterion for something's being a reason before reason and cause can be distinguished. Reasoning is the calculation actually done, and a reason goes back one step in the calculus. A reason is a reason only inside the game. To give a reason is to go through a process of calculation, and to ask for a reason is to ask how one arrived at the result.

ALICE AMBROSE & MARGARET MACDONALD, WITTGENSTEIN'S LECTURES: CAMBRIDGE 1932-1935 4 (Alice Ambrose ed., 1979); *accord id.* at 28; LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 325 (G. E. M. Anscombe trans., 2d ed. 1958); LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 15 (1969). A reason is verified through "possible recognition . . . by the interested party." BOUVERESSE, *supra* note 18, at 72.

20. Consider a short parable, in the form of a variation on § 630 of the *Philosophical Investigations*: Imagine that we are watching a gymnastics class, in a waiting room from which we can see the instructor and pupils but not hear anything that is said. There is an instructor near the pupils and his mouth is moving. The pupils move in certain ways, generally making very similar movements more or less simultaneously. We derive a non-falsified hypothesis that accurately predicts what moves the pupils will make. Assuming the pupils have mastered the technique of rule-following and the gymnastics techniques in which they are being instructed, and are employing that mastery, our hypothesis will equally predict what instructions the instructor calls out as what bodily motions the pupils will make. If we state our hypothesis in terms of bias (e.g., "the pupils show a systematic bias in favor of the fouetté") a pupil may very well *justify* her

This article attempts neither to prove nor disprove the hypothesis of bias. Rather, it has the more modest aim of examining the justifications offered for the outcomes in a sliver of employment discrimination actions; it concludes that the rule-following and reason-giving functions in these cases do not measure up to the conventional standard for rule-following or reason-giving. Whether or not a hypothesis can be refuted non-empirically, by a recitation of good reasons, *these* bankruptcy-based judicial estoppel cases by and large lack good reasons and leave the hypothesis unaffected as a hypothesis.[21]

Whatever the merits or demerits of bankruptcy-based judicial estoppel as the reasons behind judicial decisions, the beauty of judicial estoppel from an employer's perspective is that it allows the employer to win an employment discrimination case before the court reaches the merits of the claim. Generally used to protect the integrity of the courts, judicial estoppel prevents parties from taking contradictory positions before two different courts. In the context of bankruptcy, judicial estoppel normally arises when a debtor fails to list on his or her bankruptcy schedules a potential employment discrimination claim against a current or former employer. Sometimes that "claim" is only a pending charge with the Equal Employment Opportunity Commission ("EEOC"). Other times, the debtor has already filed a lawsuit. In still other cases, the debtor files a claim after the bankruptcy discharge. Whatever the factual circumstances, savvy employment lawyers have realized that a failure to list such a potential or actual claim on a schedule in a bankruptcy case gives rise to an argument that the debtor cannot now assert such a claim in a subsequent lawsuit. Lawyers for defendant employers therefore argue that because the debtor has failed to include the claim on a list of assets the debtor swore to be complete, the debtor must not "own" any such claim. Thus, the debtor is judicially estopped from making such a claim, and there is one less case on the court's docket.

While one can see the potential benefits of judicial estoppel for

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movements with reference to the instructions. The justification does not falsify the hypothesis. It could be objected, however, that the hypothesis proceeds on ignorance of misunderstanding of the "game" the instructors and pupils were playing; or that, assuming the pupils had mastered the technique of rule-following and the gymnastic techniques demanded by their instructor, the hypothesis would be equally correct whether it attributes bias to the pupils, the instructor, or the rules of their game. This objection is another way of saying the hypothesis, even if it always predicts the pupils' movements, is *unsatisfying as an interpretation*. Indeed, when one of the authors presented this problem to his seven-year-old niece (Elizabeth Chapman) after her gymnastics class, she dismissed the hypothesizing but helpfully suggested that an account of the instructions would assist in interpreting the activity: "I could tell you afterward."

21. If the pupils in the preceding footnote systematically failed to follow the instructions, and assuming (still) that they were competent gymnasts and rule-followers, the instructions could not be said to provide reasons for their moving as they did and a hypothesis as to why they moved as they did – and what caused the failure within the game – would become especially interesting.

defendant employers and for the courts, there is more than one resulting loser, and often the alleged "wrongdoing" was nothing more than an unwitting mistake. Most bankruptcy debtors who fall into this trap are not sophisticated litigants. They rely heavily on the advice of their bankruptcy counsel or the paralegal that assisted in preparing the schedules. However, some courts have inferred an intent to deceive in cases in which a debtor failed to list a potential claim, even if the debtor's bankruptcy attorney advised against disclosing it. Even if a more legally sophisticated and culpable plaintiff might be estopped rightfully in certain cases from proceeding inconsistently, this still leaves creditors with unpaid debts. However, the concerns of the creditors are not even mentioned in many of the cases. Additionally, successful invocation of judicial estoppel creates a windfall for the defendant employer, further undermining the remedial policies underlying Title VII of the Civil Rights Act and related anti-discrimination laws. Finally, the courts that dismiss these cases have a limited economic view of the litigation. They assume that employment discrimination cases are only about money. However, the plaintiff often has suffered dignitary harm and simply wants her day in court to tell her story. Therefore, it may be erroneous to invoke judicial estoppel even if the debtor is a "really bad egg" with the worst of motives. By using judicial estoppel to end these cases, courts and employers are acting in a rather pirate-like manner, robbing creditors of their assets and employment discrimination plaintiffs of their claims with a resulting windfall for alleged wrongdoers.

Part II of this Article provides a brief overview of Chapter 7 and Chapter 13 bankruptcy under the United States Bankruptcy Code. Next, Part III of this Article looks at how employers have successfully used judicial estoppel to stop bankruptcy debtors from pursuing employment discrimination claims against them. In contrast, this part also describes cases in which the courts have concluded that the debtor is not estopped. In addition, this part looks at two related procedural tools—standing and the real party in interest rules—that defendants have likewise used, although with less success, to prevent debtors from pursuing their employment discrimination claims. Part IV of this Article discusses how the use of judicial estoppel is contrary to several rules and policies that are considered fundamental to bankruptcy law. For example, this part discusses how bankruptcy law already has its own procedures that adequately deal with debtors who fail to disclose all their claims on their bankruptcy schedules. Next, Part V of this Article looks beyond bankruptcy law to explain that there are still other procedures, such as joinder of the trustee, that render the use of judicial estoppel unnecessary. Finally, Part VI of this Article explains how the prevalent use of judicial estoppel may be yet another example of the general trend of judicial hostility towards employment discrimination claims, and Part VII of this article provides concluding remarks.

II. Background on Bankruptcy

This article is concerned with two types of bankruptcy under the United States Bankruptcy Code: Chapters 7 and 13.[22] Chapter 7 bankruptcy is designed to collect all of the debtor's assets as of the date the petition is filed so that they can be liquidated and the money distributed to creditors.[23] Once the petition is filed, the debtor's assets, including pending and accrued causes of action, become property of the estate, and the trustee is the real party in interest with respect to those assets.[24] The debtor has an affirmative duty to disclose all such assets on his or her bankruptcy schedules, which are filed with or shortly after the petition.[25]

A few months after the case is commenced, the court usually enters a discharge. Objections to the discharge must be filed within sixty days after the first date scheduled for the meeting of creditors.[26] If there is neither an objection to the discharge, nor a motion to dismiss the case, nor a pending request to extend the deadlines for either, an individual debtor who has paid the required fees is entitled to a discharge.[27] The debtor may request that the entry of discharge be postponed for up to thirty days.[28]

Because causes of action are property of the estate, only the Chapter 7 trustee in bankruptcy has standing to pursue them. The asset becomes part of the estate unless the trustee abandons the asset, at which point it returns to the debtor.[29] Thus, if a trustee abandons a cause of action because he does not believe it is meritorious or worth the cost of

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22. *See generally* 11 U.S.C. §§ 701-84 (2000) (discussing Chapter 7 bankruptcy); *id.* §§ 1301-1330 (discussing Chapter 13 bankruptcy).

23. *See id.* §§ 704(1), 726.

24. *See id.* § 541(a)(1).

25. *Id.* § 521(1). Because pirate booty was shared in a common pool, disclosure was also central to the various semi-fictional pirates' codes recited by Daniel Defoe. For example, in the code of Captain John Phillips:

> If any Man shall offer to run away, or keep any Secret from the Company, he shall be marroon'd with one Bottle of Powder, one Bottle of Water, one small Arm and Shot.
>
> If any Many shall steal any Thing in the Company, or game, to the Value of a Piece of Eight, he shall be marroon'd or shot.

Daniel Defoe, A General History of the Pyrates 342 (Manuel Schonhorn ed., J.M. Dent & Sons 1999) (1724).

26. Fed. R. Bankr. P. 4004(a). The meeting of creditors must be held between twenty and forty days after the order for relief. Fed. R. Bankr. P. 2003(a).

27. Fed. R. Bankr. P. 4004(c)(1).

28. Fed. R. Bankr. P. 4004(c)(2).

29. 11 U.S.C. § 554 (a)-(c).

litigation, the debtor is once again free to pursue that claim in his or her own right. However, if a debtor fails to list an asset on his or her bankruptcy schedule, that asset still belongs to the estate.[30] At the close of the bankruptcy estate, an asset that a debtor fails to schedule cannot be abandoned (and, of course, was not administered by the trustee, who did not know about it), and therefore remains property of the estate.[31]

Chapter 13 functions differently. Under this chapter, a plan is confirmed to repay the debts, and the debtor is obligated to make payments pursuant to the plan.[32] When those payments are completed, the debtor is discharged and is no longer under any obligation to pay any additional amounts that might be owed on those debts.[33] Unlike Chapter 7 debtors, Chapter 13 debtors are under a continuing obligation to disclose assets during the pendency of their petition,[34] and they remain in possession of their assets before and after confirmation.[35] Thus, some courts have held that "chapter 13 debtors have concurrent jurisdiction with the chapter 13 trustee to litigate claims."[36]

Bankruptcy courts can reopen a bankruptcy post-discharge under certain circumstances. Section 350(b) of the Bankruptcy Code permits a court to reopen bankruptcy cases, including those under Chapters 7 and 13,[37] "to administer assets, to accord relief to the debtor, or for other cause."[38] The courts have held that such a decision falls "within the sound discretion" of the bankruptcy court.[39] The determination of cause to reopen a bankruptcy case is necessarily a fact-specific determination based on the particular circumstances of the individual case.[40] Some courts have held that the lower court's failure to reopen a bankruptcy case to administer newly discovered assets can amount to an abuse of discretion.[41] However, if the chances of recovery are remote or not worth the risk, the court need not reopen a bankruptcy case.[42] In considering whether to reopen a bankruptcy case, courts consider three inter-

30. Mobility Sys. & Equip. Co. v. United States, 51 Fed. Cl. 233, 236 (Fed. Cl. 2001).

31. *Id.*; *see* 11 U.S.C. § 554(d).

32. *See* 11 U.S.C. §§ 1325-26.

33. *Id.* § 1328(a).

34. *Id.* § 1306.

35. *Id.* § 1327(b).

36. Travelers Indem. Co. of Ill., Inc. v. Griner (*In re* Griner), 240 B.R. 432, 435 (Bankr. S.D. Ala. 1999).

37. 11 U.S.C. § 103(a).

38. *Id.* § 350(b).

39. Rockland Trust Co. v. Sheerin (*In re* Sheerin), 21 B.R. 438, 439 (B.A.P. 1st Cir. 1982).

40. *In re* Koch, 229 B.R. 78, 88 (Bankr. E.D.N.Y. 1999); *In re* Winebrenner, 170 B.R. 878, 881 (Bankr. E.D. Va. 1994).

41. *E.g.*, Lopez v. Specialty Rests. Corp. (*In re* Lopez), 283 B.R. 22, 27 (B.A.P. 9th Cir. 2002); *see* Mullendore v. United States (*In re* Mullendore), 741 F.2d 306, 308 (10th Cir. 1984).

42. *Lopez*, 283 B.R. at 27.

ests: "1) the benefit to the debtor; 2) the prejudice or detriment to the defendant in the pending litigation; and 3) the benefit to the debtor's creditors."[43] Some courts have concluded that the third factor, benefit to the creditors, is the most important one in the analysis.[44]

III. JUDICIAL ESTOPPEL AND BANKRUPTCY

> Jack Sparrow: Me? I'm dishonest, and a dishonest man you can always trust to be dishonest. Honestly. It's the honest ones you want to watch out for, because you can never predict when they're going to do something incredibly . . . stupid.[45]
>
> Will Turner: You didn't beat me. You ignored the rules of engagement. In a fair fight, I'd kill you.
> Jack Sparrow: Then that's not much incentive for me to fight fair, then, is it?[46]
>
> Will Turner: You cheated.
> Jack Sparrow: [shrugs] Pirate.[47]

The courts developed judicial estoppel "'to protect the integrity of the judicial process' by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'"[48] As the Fifth Circuit has explained, the doctrine protects the courts "by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self-interest.'"[49] Bankruptcy courts, in particular, "rel[y] on the representations of the debtor with respect to whether he or she has claims or interests arising out of the matters before the court."[50] If the debtor uses

43. *In re* Rochester, 308 B.R. 596, 601 (Bankr. N.D. Ga. 2004) (citing *In re* Koch, 229 B.R. at 85-86; *In re* Maloy, 195 B.R. 517, 518 (Bankr. M.D. Ga. 1996)).

44. *See, e.g., id.* at 600.

45. PIRATES, *supra* note 1.

46. *Id.*

47. *Id.*

48. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001) (citations omitted).

49. Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 205 (5th Cir. 1999) (quoting Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988)). The phrase "fast and loose" recurs in opinions about judicial estoppel. The phrase has nothing to do with the plaintiff being racy or promiscuous. *See* Tamara R. Piety, *Something Fishy: Or Why I Make My Students Read* Fast-Fish and Loose-Fish, 29 VT. L. REV. 33, 37-38 (2004) (explaining the many definitions of the word "fast"). Rather, the phrase, which dates to the sixteenth century, referred originally to a "cheating game" associated with gypsies. 5 OXFORD ENGLISH DICTIONARY 750 (2d ed. 1989). The game was "played with a stick and a belt or string, so arranged that the spectator would think he could make the latter fast by placing a stick through its intricate folds, whereas the operator could detach it at once." *Id.* (quoting JAMES O. HALLIWELL, A DICTIONARY OF ARCHAIC AND PROVINCIAL WORDS, OBSOLETE PHRASES, PROVERBS AND ANCIENT CUSTOMS, FROM THE FOURTEENTH CENTURY (1847)). From this literal meaning, "fast and loose" obtained the figurative meaning of inconstancy, shiftiness, or slipperiness.

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

the bankruptcy courts to receive bankruptcy relief and then "utilizes the judicial system to pursue claims he or she had previously misrepresented or failed to reveal, the debtor commits a fraud upon the courts and will be estopped."[51]

In *New Hampshire v. Maine*, the United States Supreme Court set out the general circumstances under which judicial estoppel is appropriate in federal cases:

> "[W]here 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 by him."[52]

While the Court explained that there was no general formula for applying judicial estoppel, there are "several factors [that] typically inform the decision," including:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is 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.[53]

The Court acknowledged that judicial estoppel is a flexible doctrine, and "[a]dditional considerations may inform the doctrine's application in specific factual contexts."[54] Other courts have added a note of caution: "[j]udicial estoppel is strong medicine . . . and it should not be used where it would 'work an injustice, such as where the former position was the product of inadvertence or mistake.'"[55]

In the context of bankruptcy schedules, some courts have developed a slightly different set of judicial estoppel factors. In particular, they have effectively eliminated the third element of *New Hampshire v. Maine* – whether the plaintiff would derive an unfair advantage or impose an unfair detriment on the defendant. The Fifth Circuit uses

51. *Id.*

52. *New Hampshire*, 532 U.S. at 749 (quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895)).

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

54. *Id.* at 751.

55. Fairchild v. Touchtunes Music Corp., No. 01-C9699, 2002 WL 31833768, at *2 (N.D. Ill. Dec. 12, 2002) (quoting *In re* Cassidy, 892 F.2d 637, 642 (7th Cir. 1990)).

three factors: (1) "the position of the party to be estopped is clearly inconsistent with its previous one"; (2) "the party convinced the court to accept the previous position"; and (3) "the party to be estopped must have acted intentionally rather than inadvertently."[56] The Eleventh Circuit boils it down to two factors: "'[f]irst, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system.'"[57]

While these elements do not appear impossible for a truly unwitting debtor to overcome, some courts in practice have been unsympathetic to what appear to be honest mistakes by debtors. This may well be the result of a rather hard-line position taken by the Fifth Circuit in *In re Coastal Plains*,[58] a case that has become very influential in this area. In *Coastal Plains*, the court elaborated on the difference between "intentional" and "inadvertent" in this context, explaining 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."[59] An analysis under *Coastal Plains* inevitably leads to the conclusion that all debtors have a motive for concealment. After all, if a debtor conceals a claim, she can pursue it for herself without sharing the proceeds with creditors. Thus, all debtors who omit a claim from their schedules will satisfy this element. In addition, the *Coastal Plains* court held that the reliance of the defendant on the nondisclosure was irrelevant to the court's analysis of whether to apply judicial estoppel; it mattered not for the court's application of judicial estoppel whether the defendant in the subsequent action was in any way prejudiced by the earlier position taken by the plaintiff/debtor.[60]

Because the rationale behind judicial estoppel is protection of the integrity of the court system, judicial estoppel differs from equitable and collateral estoppel.[61] Equitable estoppel applies when a debtor sues a creditor after discharge when the claim could have been brought during

56. *See* Wakefield v. SWS Sec., Inc. (*In re* Wakefield), 293 B.R. 372, 378 (Bankr. N.D. Tex. 2003).

57. Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002) (quoting Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1308 (11th Cir. 2001)).

58. 179 F.3d 197 (5th Cir. 1999).

59. *Id.* at 210 (emphasis omitted). A Westlaw head note search for references to this aspect of this case revealed that thirty-five cases have cited *Coastal Plains* positively on this point. Interestingly, some courts disagree on this point, with two declining to extend this rationale and two distinguishing the case.

60. *Id.*

61. *See id.*

the bankruptcy proceeding.[62] Unlike equitable estoppel, for judicial estoppel to apply, "it is not necessary that the two proceedings in which the inconsistent statements were made be related, or that the party against whom the inconsistent pleading is being used be specifically prejudiced by the inconsistency."[63] Judicial estoppel applies where the defendant in the subsequent action is not a creditor in the bankruptcy, but is an entity or person against whom the debtor may have a claim. Nor does judicial estoppel require privity, which is generally required for collateral estoppel, or any type of detrimental reliance or prejudice to any party.[64] Instead, as long as the positions are inconsistent and "the inconsistency would allow a party to benefit from deliberate manipulation of the courts," judicial estoppel may apply.[65]

Because of the manner in which many courts have developed the doctrine of judicial estoppel, it is not difficult for a defendant to show deliberate manipulation of the court system. As one court has explained, "many courts have found that the combination of a party's knowledge of the claim and motive for concealment in the face of an affirmative duty to disclose the claim provides sufficient evidence of intent to manipulate the judicial system."[66] Indeed, some courts have been willing to infer intent in cases in which the plaintiff knew of the claim and had a theoretical motive to conceal it even if there is little to no evidence of active concealment.[67] Thus, some courts will infer intent if the debtor knew he or she had a potential claim (regardless of whether they truly understood that the schedule required its disclosure) and did not list it, as just about every debtor will have a theoretical motive to conceal potential assets.

What follows is a description of cases involving various ways in which courts have approached the judicial estoppel issue. While some courts appear to stretch in order to apply judicial estoppel to dismiss plaintiffs' claims, others have understood that debtors are often unsophisticated litigants who rely heavily on their counsel. Rather than permitting a windfall to alleged discriminators, the latter group of courts either permits the plaintiff to proceed on his or her claim or allows the trustee to do so for the benefit of the creditors.

62. *See, e.g.*, Brassfield v. Jack McLendon Furniture, Inc., 953 F. Supp. 1424, 1432 (M.D. Ala. 1996).

63. Lott v. Sally Beauty Co., No. 3:00CV1216J20TJC, 2002 WL 533651, at * 3 (M.D. Fla. Mar. 5, 2002).

64. Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1286 (11th Cir. 2002).

65. Chandler v. Samford Univ., 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999).

66. *Id.* at 864.

67. *See, e.g., Burnes*, 291 F.3d at 1287.

A. *Judicial Estoppel as a Tool to Stop Debtors' Employment Discrimination Cases*

In case after case, bankruptcy debtors have lost employment discrimination claims because they failed to disclose a pending claim, or an accrued but unfiled claim, on their schedule of bankruptcy assets. The timing surrounding these failures to disclose varies. In some cases, the plaintiffs have filed a charge with the EEOC either before, during, or after discharge. In others, they have already filed a lawsuit prior to petitioning for bankruptcy, although in other cases the lawsuit was filed after discharge. Whatever the fact pattern, courts have found ways, usually using summary judgment, to dismiss employment discrimination lawsuits due to the failure to list the claim, despite the debtor's provision of seemingly good reasons for this failure.

Barger v. City of Cartersville, Georgia[68] exemplifies the types of arguments that plaintiffs make in an effort to avoid judicial estoppel, and which courts routinely reject. In this case, Donna Barger was demoted after returning to work from back surgery; consequently, she filed a discrimination charge with the EEOC, received a right to sue letter, and filed a lawsuit against her employer for reinstatement to her former position.[69] Barger later added claims for compensatory and punitive damages.[70]

About one month after Barger filed her employment discrimination suit, she filed for Chapter 7 bankruptcy, as her demotion and lower pay made it difficult for her to make ends meet.[71] However, Barger failed to list her pending employment discrimination claim on her schedule.[72] She later told her bankruptcy attorney and the trustee about the pending suit, but she told the trustee that the suit merely sought reinstatement, and neglected to mention the claims for compensatory and punitive damages.[73] Two months later, the bankruptcy court granted her a "no asset discharge," which meant that no assets were distributed and the trustee was relieved of all further duties.[74]

A little less than a month later, Barger's employer discovered that she had failed to disclose the discrimination claim on her bankruptcy schedule, and consequently moved for summary judgment based on judicial estoppel.[75] In response, Barger went back to the bankruptcy

68. 348 F.3d 1289 (11th Cir. 2003).
69. *Id.* at 1290-91.
70. *Id.* at 1291.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

court and successfully reopened the bankruptcy case in an attempt to list the claim as an asset.[76] However, the district court, unimpressed with Barger's attempt to fix the situation, granted summary judgment in favor of her employer, reasoning that Barger was estopped to bring suit or, alternatively, lacked standing to sue.[77] Several days later, the bankruptcy court ruled that her failure to list the claim was inadvertent.[78] Based on the bankruptcy court's ruling, Barger moved the district court to reconsider its grant of summary judgment for the employer, but the district court refused to reconsider, and Barger appealed to the Eleventh Circuit.[79]

The Eleventh Circuit used a two prong test in evaluating the application of judicial estoppel to Barger's case: (1) whether the inconsistent position had been "'made under oath in a prior proceeding'"; and (2) whether the inconsistencies were "'calculated to make a mockery of the judicial system.'"[80] Finding that the first prong was clearly met, the court focused on the second prong and analyzed Barger's intent. Barger argued that she had no intent to manipulate the process, as evidenced by her telling her bankruptcy attorney and the trustee about the employment discrimination suit, and by her reopening the bankruptcy case to list the claim.[81] However, the court was unimpressed. First, the court explained that even though Barger's lawyer failed to list the claim for her, Barger's recourse was a malpractice action against her lawyer, and the court refused to "'[visit] the sins of plaintiff's lawyer upon the defendant."[82]

The court went a step further, noting that even if Barger's failure to

76. *Id.* at 1291-92.

77. *Id.* at 1292.

78. *Id.*

79. *Id.*

80. *Id.* at 1293-94 (quoting Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1308 (11th Cir. 2001)).

81. *Id.* at 1295.

82. *Id.* (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 634, n.10 (1962)). *Link* involved dismissal of a diversity case because of long delays and plaintiff counsel's failure to attend the pretrial conference. The case was filed in 1954, but the pretrial conference was not scheduled until six years later in 1960, and plaintiff's counsel failed to attend it because "he was doing some work on some papers." *Link*, 370 U.S. at 627. Given the delay and plaintiff's counsel's inadequate excuse for not appearing at the pretrial conference, it is not surprising that the trial court dismissed the lawsuit for failure to appear at the conference and failure to prosecute. Indeed, several courts have distinguished the fact patterns they faced from the facts in *Link* to avoid the harsh result of dismissal. *See, e.g.*, U.S. v. $184,505.01 in U.S. Currency, 72 F.3d 1160, 1164 (3d Cir. 1995); Alexander v. Local 496, Laborers' Int'l Union of N. Am., 177 F.3d 394, 404 (6th Cir. 1999).

Like *Barger*, the plaintiff in *Casey v. Peco Foods, Inc.* argued that she was not intentionally trying to manipulate the process when she failed to list her EEOC charge on her bankruptcy schedules. 297 B.R. 73 (S.D. Miss. 2003). Relying on *Coastal Plains*, the court rejected her argument, concluding that "inadvertence resulting from ignorance of bankruptcy disclosure requirements and consequent reliance on one's bankruptcy attorney for guidance and advice 'is disclose was her attorney's fault, the nondisclosure could, nevertheless, not be characterized as inadvertent.[83] Under *Coastal Plains*, a party's failure to disclose could only be characterized as inadvertent if she either lacked knowledge of the claim or had no motive to conceal it.[84] Applying the *Coastal Plains* standard, the *Barger* court concluded that Barger failed to meet either requirement. Barger obviously knew about the claim, having filed it and told her bankruptcy attorney and the trustee about it. Further, the court reasoned that she benefited from the omission as "she could keep any proceeds for herself and not have them become part of the bankruptcy estate."[85] Thus, there was "sufficient evidence from which to infer her intentional manipulation."[86]

The court found Barger's discussion with the trustee regarding the lawsuit particularly indicative of intentional manipulation.[87] Significantly, when asked for the monetary value of the lawsuit, Barger only mentioned that she was seeking reinstatement and failed to disclose her recent amendment requesting backpay and damages.[88] Whereas the bankruptcy court concluded that it was the trustee's responsibility to investigate any claims, the court here concluded that the "foremost responsibility in this matter was for Barger to fully disclose her assets."[89] As such, the court did not fault the trustee in accepting Barger's representations about the lawsuit.[90]

The court was likewise unimpressed with Barger's attempt to reopen the bankruptcy estate to list her discrimination claim on the schedule. Because she moved to reopen the estate only after the defendant's motion for summary judgment, the court reasoned that "'[a]llowing [a debtor] to back up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that the debtor should consider disclosing potential assets only if he is caught concealing them.'"[91] According to the court, such a standard would lessen the incentive for debtors to submit honest disclosures.[92] Therefore, the court found that "Barger's disclosure upon re-

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not the type that precludes judicial estoppel against plaintiff . . . .'" *Id.* (quoting Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 212 (5th Cir. 1999)).

83. *Barger*, 348 F.3d at 1295.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1297.

92. *Id.*

opening the bankruptcy estate deserves no favor."[93]

Notwithstanding the court's dismissal of her claims for monetary damages, the court was more receptive to Barger's request for reinstatement. The court explained that, in contrast to monetary damages, injunctive relief adds no monetary value to the bankruptcy estate.[94] Accordingly, Barger's claim for reinstatement, even if she had disclosed it, would have brought no money to her bankruptcy estate.[95] As such, the court concluded that judicial estoppel did not prevent her from pursuing this part of her claim.[96]

Other plaintiffs have likewise fared poorly, even with claims that do not involve monetary damages. In *Schertz-Nelson v. AT&T Corp.*,[97] for example, an Arizona district court refused to permit the plaintiff to pursue reinstatement in her employment discrimination case.[98] Specifically, the court distinguished between equitable relief that would not bring monetary value, such as stopping the defendant from engaging in illegal practices, and equitable relief that would bring monetary value, such as reinstatement to a more lucrative position.[99] Because reinstatement might have had an affect on her bankruptcy case, the court invoked judicial estoppel to block Schertz-Nelson from pursuing her employment discrimination case.[100]

Like Barger, Schertz-Nelson moved to reopen her bankruptcy case once she realized her omission of the claim against her employer.[101] Unlike Barger however, Schertz-Nelson claimed that she failed to disclose the potential claim at the time she filed for bankruptcy because she thought it was time-barred.[102] Schertz-Nelson had filed a charge of discrimination with the EEOC and the Arizona Civil Rights Division ("ACRD") against her employer in May 1997.[103] One month later, she received a letter from the ACRD indicating that she had ninety days during which to file a lawsuit under the Arizona Civil Rights Act ("ACRA"), but no later than one year from the date of her EEOC

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* Interestingly, this essentially places plaintiffs back in the position they occupied prior to the Civil Rights Act of 1991, which finally provided compensatory and punitive damages for victims of employment discrimination. *See* 42 U.S.C. §1981a (2000). Indeed, in this context it is unclear how the courts should conceptualize employment discrimination relief that has traditionally been considered equitable (e.g., backpay, which is in the form of a monetary award).
97. No. CIV 99-555-PHX-SMM, 2003 WL 22047646 (D. Ariz. July 8, 2003).
98. *Id.* at *6.
99. *Id.*
100. *Id.*
101. *See id.* at *5.
102. *Id.* at *6.
103. *Id.* at *1.

charge.[104] Almost one year later, in May 1998, she filed for bankruptcy under Chapter 7, without having pursued her ACRA claim.[105] While Schertz-Nelson received a discharge from the bankruptcy court in August 1998, she did not receive a notice of right to sue from the EEOC until December 1998.[106] Thus, one could see why she might have thought her claim was time-barred. The court, however, was not persuaded, and found her contention "disingenuous."[107] Specifically, the court noted that even assuming Schertz-Nelson believed that the ACRD instructions applied to her EEOC claim, the one-year limitations period had not yet expired at the time she filed for bankruptcy.[108] Also, because she did not pursue a lawsuit under the ACRA, the ACRD instructions did not apply to her.[109] Finally, Schertz-Nelson's failure to clarify her status with counsel, the EEOC, or the ACRD, despite access to all three, further evidenced the falsity of her timing representations.[110]

Other debtors have argued that cases arising under Chapter 13 should be treated differently than cases arising under Chapter 7, as the plaintiff argued in *De Leon v. Comcar Industries, Inc.*[111] The plaintiff in that case had filed for bankruptcy under Chapter 13, but had failed to disclose an employment discrimination suit.[112] In an attempt to avoid application of judicial estoppel to bar his claim, De Leon maintained that Chapter 13 was different than Chapter 7 because debts are completely discharged under Chapter 7, whereas debts are discounted and ultimately repaid under a Chapter 13 filing.[113] The court was not persuaded, concluding that a financial motive not to disclose such claims exists in both Chapter 7 and Chapter 13 cases, because in Chapter 13 cases, the claims could affect the amount of the discount and repayment.[114] In other words, money from the employment discrimination case might be factored in as a source of funds to repay outstanding debts as well as the amount by which those debts would be discounted. As such, the court found no reason for distinguishing between Chapter 7 and Chapter 13 cases, noting "the need for complete and honest disclosure" regardless of the type of bankruptcy proceeding.[115]

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104. *Id.*
105. *Id.*
106. *Id.* at *1-2.
107. *Id.* at *6.
108. *Id.*
109. *Id.*
110. *Id.*
111. 321 F.3d 1289, 1291 (11th Cir. 2003).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

On the other hand, at least one court has distinguished Chapter 7 debtors from Chapter 13 debtors. In *Chandler v. Samford University*,[116] for example, the court concluded that Chapter 7 debtors have no duty to disclose property acquired after the filing of the bankruptcy case.[117] In contrast, Chapter 13 debtors have a continuing obligation to disclose assets acquired during the pendency of the bankruptcy case.[118] Therefore, in the context of employment discrimination claims arising during the pendency of a bankruptcy case, a Chapter 7 debtor retains possession of the claim, whereas a Chapter 13 debtor is obligated to disclose this after-acquired property.[119]

The Chapter 7 cases described herein do not discuss the time at which the plaintiff's employment discrimination claim arises, instead assuming that the claim arose prior to the bankruptcy petition. However, for the purpose of determining whether the plaintiff must disclose the claim, it may not be obvious when the claim arises. Does it arise at the time of the wrongdoing complained of, or when the plaintiff receives her right to sue letter and therefore can legally pursue her action?

Regardless of when the claim arises and when the duty to disclose attaches, exercising the continuing duty to disclose has not saved Chapter 13 debtors from judicial estoppel. While the cases described above involved situations in which the plaintiff/debtor had already been discharged in bankruptcy, other courts have held that even if discharge has not yet occurred, the debtor cannot avoid judicial estoppel by correcting his schedule to include the discrimination claim. In *Walker v. Delta Air Lines, Inc.*,[120] for example, the plaintiff, a Chapter 13 debtor, failed to disclose his pending race discrimination case against his employer.[121] After the employer moved for summary judgment based on judicial estoppel, Walker amended his then-pending bankruptcy schedule to include the lawsuit as one of his assets.[122] Even though Walker amended the schedule prior to discharge of his bankruptcy claim, the court, in essence, concluded that he had waited too long to do so.[123] Indeed, Walker had not sought to amend the schedule to include the

116. 35 F. Supp. 2d 861 (N.D. Ala. 1999).

117. *Id.* at 864 n.3.

118. *Id.* This argument did not save the debtor in this case from the effects of judicial estoppel. The debtor had converted her Chapter 13 case to a Chapter 7, but had not done so until a month after she filed her EEOC charge. Thus, she knew of the charge during the pendency of her Chapter 13 case, and had a duty to disclose during that one month period, even though the cause of action arguably arose post-petition. *Id.* at 864-65.

119. *Id.* at 864 n.3.

120. No. Civ.A. 100CV0558-TWT, 2002 WL 32136202 (N.D. Ga. Aug. 1, 2002)

121. *Id.*

122. *Id.*

123. *See id.* at *4.

discrimination claim until the employer moved for summary judgment.[124] It was of no great moment to the court that there was no evidence that the bankruptcy court relied on the purported misrepresentation.[125] Reasoning that assets acquired after filing for bankruptcy could affect the Chapter 13 payment plan, the court estopped Walker from pursuing either damages or reinstatement.[126]

B. *Debtors Who Avoid Judicial Estoppel*

Not all courts addressing judicial estoppel in the context of bankruptcy have reacted with such skepticism to debtors' motives for failing to list an employment discrimination claim or charge on his or her bankruptcy schedule. For instance, some courts have refused to estop a debtor because the failure to disclose was due to mistake or inadvertence. Other courts have permitted the trustees to pursue the discrimination claim, reasoning that while judicial estoppel may stop the debtor from pursuing his or her claim, the doctrine should not stop the trustee from pursuing assets of the estate. Still others have distinguished between the types of bankruptcy cases, allowing Chapter 13 debtors to pursue their claims post-confirmation.

In addition, some debtors have benefited from a more plaintiff-friendly standard for judicial estoppel. Specifically, in determining whether to apply the doctrine of judicial estoppel, the Seventh Circuit in *Cannon-Stokes v. Potter*[127] considered 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.'"[128] The *Cannon-Stokes* court applied this standard in determining whether the plaintiff should be barred from pursuing her employment discrimination claim, which she failed to disclose in her bankruptcy schedules. While noting that many of the elements for judicial estoppel were present, the court found it "difficult to see how Cannon-Stokes ha[d] received an unfair advantage from her inconsistent positions."[129] Responding to the employer's claim that had the bankruptcy court known of the plaintiff's claim, it would not have entered a no-asset finding and would not have discharged Cannon-Stokes' debts, the court pointed out that "[t]his assertion was not substantiated with an affidavit from the bankruptcy trustee and, in reality, the trustee might rather have abandoned this contingent claim on the basis that it was 'of inconse-

124. *Id.*
125. *Id.* at *5.
126. *Id.* at *5-6.
127. No. 03C1942, 2004 WL 407014 (N.D. Ill. Mar. 4, 2004).
128. *Id.* at *2 (quoting United States v. Christian, 342 F.3d 744, 747 (7th Cir. 2003)).
129. *Id.* at *3.

quential value and benefit to the estate.' "[130]

Additionally, the court determined that Cannon-Stokes' actions lacked the requisite intent or bad faith which would justify application of judicial estoppel.[131] The court explained that judicial estoppel should only be applied to serve the interest of justice, and here, the application of the doctrine would not advance that interest.[132] In reaching this conclusion, the court was persuaded by Cannon-Stokes' asking her bankruptcy attorney about including the claim and his telling her that she did not have to list it while it was being investigated.[133] Moreover, as her employment discrimination case was pending in the same courthouse as her bankruptcy action, "for Cannon-Stokes to have thought that she could hide this asset would have been naive in the extreme."[134] "[U]nable to find the intentional misconduct that would invoke a penalty foreclosing her claims," the court denied the employer's motion to dismiss, allowing Cannon-Stokes to proceed with her discrimination claim.[135]

Courts also have been more understanding towards pro se debtors, those justifiably relying on the legal advice of counsel, and those otherwise lacking legal sophistication. In *Fairchild v. Touchtunes Music Corp.*,[136] for example, the court refused to invoke judicial estoppel against the plaintiff for failing to disclose a sex discrimination claim on his pro se Chapter 7 petition.[137] Concluding that there was insufficient evidence that Fairchild acted in bad faith in failing to include the sex discrimination claim, the court stated: "We do not assume that a *pro se* bankruptcy petitioner would know that Question 4A was designed to elicit information about a lawsuit or claim that the petitioner may have as an asset."[138] Question 4A was "captioned 'Suits And Administrative Proceedings, Execution, Garnishments And Attachments' and ask[ed] for 'all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding bankruptcy case.' "[139] The court explained that this question appeared "in the midst of questions focused on payments to creditors and attached or repossessed property of the debtor."[140] As such, the court determined that it

130. *Id.* (quoting 11 U.S.C. § 554 (2000)).
131. *Id.* at *4-5.
132. *Id.*
133. *Id.* at *4.
134. *Id.*
135. *Id.* at *5.
136. No. 01-C9699, 2002 WL 31833768 (N.D. Ill. Dec. 12, 2002).
137. *Id.* at *2.
138. *Id.* (footnote omitted).
139. *Id.*
140. *Id.*

was unclear to a pro se litigant that disclosure of all lawsuits and administrative proceedings was required.[141]

A similar conclusion was reached in *Pealo v. AAF McQuay, Inc.*[142] In *Pealo,* the court noted that the plaintiff had revealed the sex discrimination claim to bankruptcy counsel and had relied on counsel's advice in not listing it on the bankruptcy schedule.[143] Furthermore, once the plaintiff learned of his error, he successfully attempted to reopen the bankruptcy proceeding.[144] Based on these facts, the court concluded that the failure to schedule his sex discrimination case was unintentional and, therefore, not barred by estoppel.[145]

Finally, debtors have avoided judicial estoppel where the trustee intervenes as the real party in interest. In *Parker v. Wendy's International, Inc.,*[146] the plaintiff failed to disclose on her Chapter 7 schedule her pending employment discrimination suit.[147] The bankruptcy court granted a no-asset discharge for Parker.[148] When the trustee subsequently discovered Parker's failure to disclose the employment discrimination case, the trustee moved to reopen the bankruptcy case and to intervene in the employment discrimination suit.[149] Both of the trustee's motions were granted.[150] The employer then filed a motion to dismiss the employment discrimination case, alleging that Parker's claims were barred by judicial estoppel.[151] The district court granted the employer's motion to dismiss, ruling that both Parker *and* the trustee were judicially estopped from pursuing Parker's employment discrimination case.[152]

However, the Eleventh Circuit reversed,[153] explaining that because

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141. *Id.* at *3.
142. 140 F. Supp. 2d 233 (N.D.N.Y. 2001).
143. *Id.* at 237.
144. *Id.*
145. *Id.*
146. 365 F.3d 1268 (11th Cir. 2004).
147. *Id.* at 1269.
148. *Id.* at 1270.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 1270-71.
153. The Eleventh Circuit actually issued two opinions, one on March 31, 2004 and the second on April 15, 2004. The April 15th opinion vacated and replaced the March 31st decision. Both opinions ultimately reversed the district court and held in favor of the trustee. However, it is interesting to note that the March 31st opinion contains perhaps the most aggressive statement of bankruptcy-based judicial estoppel to date. In its March 31st opinion, the Eleventh Circuit reasoned that had the plaintiff *intentionally* tried to deprive the bankruptcy estate of a valuable asset, the trustee would have suffered the penalty of being precluded from realizing the value of the asset, thus preserving the harm the debtor would have intended. However, the Eleventh Circuit, finding that the plaintiff's omission was inadvertent, refused to apply judicial estoppel to either the plaintiff or the trustee. Parker v. Wendy's Int'l, Inc., No. 02-16185, at 8-10 (11th Cir. Mar. 31, 2004), *available at* http://www.ca11.uscourts.gov/opinions/ops/200216185.pdf.

Parker failed to list the employment discrimination claim on her schedules, the claim became an asset of the bankruptcy estate, and the trustee therefore had standing to pursue the claim as the real party in interest.[154] The court held that the trustee could not be judicially estopped to pursue the claim, as the trustee "never abandoned [the plaintiff's] discrimination claim" and "never took an inconsistent position under oath with regard to this claim."[155] The court therefore refused to taint or burden the trustee with Parker's misconduct.[156] Moreover, the court reasoned, in the unlikely event that the trustee recovered more money damages than was owed to creditors, judicial estoppel might prevent Parker from personally collecting any of the remaining proceeds of the judgment.[157]

Likewise, in *Taylor v. Comcast Cablevision of Arkansas, Inc.*,[158] the court allowed the plaintiff's undisclosed disability discrimination suit to proceed due, in part, to the trustee's intervention.[159] After the employer filed its motion for summary judgment based on judicial estoppel, Taylor successfully moved to reopen his bankruptcy case.[160] At the same time, the trustee successfully filed a motion to intervene in the action.[161] In denying the employer's motion for summary judgment, the court explained that, "'the best interest of creditors should be a paramount consideration before dismissing the cause of action under the doctrine of judicial estoppel [and t]he trustee should be substituted as the real-party-in-interest to protect the assets of the estate.'"[162] The court further noted than "[a]n overly strict application of judicial estoppel has been criticized as providing a windfall to the alleged wrongdoer and

154. *Parker*, 365 F.3d at 1272.

155. *Id.*

156. *Id.* at 1273.

157. *Id.* at 1273 n.4. Thus, the court acknowledged a well-established rule: The trustee in bankruptcy stands not only in the shoes of the debtor but also in the shoes of the debtor's creditors. When exercising the avoidance power as a representative of the estate, the trustee is vested with the rights of creditors and is not limited to the rights of the debtor. *Id.* Accordingly, even if the creditor, whose interest the trustee seeks to avoid, has a valid defense against the debtor, it does not follow that an action taken by the trustee acting as a representative of the debtor's creditors must similarly fail. *Id.* When a trustee seeks "to enhance the value of estate property, the party seeking to prevent avoidance of its interest may not raise any misconduct or malfeasance by the debtor as a defense," because "'[t]he trustee, in his capacity as trustee, is not estopped by the debtor's misconduct.'" Cook v. United States (*In re* Earl Roggenbuck Farms, Inc.), 51 B.R. 913, 917 (Bankr. E.D. Mich. 1985); *see also* Buffalo Metro. Fed. Credit Union v. Mogavero (*In re* Cooley), No. 00-CV-0345E(M), 2001 WL 135822, at *3 (W.D.N.Y. 2001); CEPA Consulting, Ltd. v. King Main Hurdman (*In re* Wedtech Sec. Litig.), 138 B.R. 5, 8 (Bankr. S.D.N.Y. 1992).

158. 252 F. Supp. 2d 793 (E.D. Ark. 2003).

159. *Id.* at 795.

160. *Id.*

161. *Id.*

162. *Id.* at 799 (quoting Thomas E. Ray, *Judicial Estoppel in Chapters 7 and 13*, 21 AM. BANKR. INST. J. 14, 21 (2002)).

possibly depriving creditors, who are not parties to the nonbankruptcy action, of a potential bankruptcy asset."[163] Based on the facts presented, Taylor was able to proceed with his employment discrimination claim.[164]

Occasionally, a court has distinguished between Chapter 13 debtors and Chapter 7 debtors with respect to whether a trustee may pursue a debtor's claim as the real party in interest. In *Murray v. Board of Education of New York*,[165] a case involving a Chapter 13 debtor, the court explained that Chapter 7 debtors lose standing to pursue civil suits, and therefore their trustees must bring their suits.[166] On the other hand, Chapter 13 debtors like Murray are not subject to this restriction and instead retain standing in any pending civil suits.[167] After rejecting the defendant's standing argument, the court addressed its argument for judicial estoppel, concluding that there was no evidence of bad faith or intent to mislead, and that even if Murray's failure to schedule the claim had been intentional, the nondisclosure had nevertheless been cured by the trustee's reopening of her bankruptcy.[168] The court noted that the rationale for estopping her—that she would profit at the expense of her creditors—no longer applied, as her creditors would be entitled to any monetary recovery from the discrimination suit.[169]

C. *Reopening Bankruptcies and Judicial Estoppel*

In several of the cases discussed above, the debtor argued that judicial estoppel should not apply because he or she had moved, or would move, to reopen the bankruptcy and amend his or her schedule to include the undisclosed lawsuit. A debtor's attempts or success in reopening a bankruptcy case has a variable influence on the courts' determinations of whether judicial estoppel should apply. On one hand, some courts essentially consider the debtor's attempts to reopen the bankruptcy case irrelevant or even indicative of the debtor's malfeasance. On the other hand, other courts have looked favorably on the debtor's attempts, considering them evidence of the debtor's inadvertence or mistake. Still other courts have found a debtor's efforts to reopen determinative. Courts subscribing to this latter approach maintain

163. *Id.* at 798.
164. *Id.* at 799.
165. 248 B.R 484 (S.D.N.Y. 2000).
166. *Id.* at 486.
167. *Id.*
168. *Id.* at 487.
169. *Id.*; *see also* Richardson v. United Parcel Serv., 195 B.R. 737, 739 (E.D. Mo. 1996) (refusing to apply judicial estoppel in the context of still pending Chapter 13 petition, reasoning that "creditors would be penalized if the court were to dismiss the claim on the ground of judicial estoppel").

that if the bankruptcy case were reopened and the lawsuit scheduled, judicial estoppel could no longer be applied because there no longer would be an inconsistent statement upon which to base its operation.

This rationale is illustrated by *In re Rochester.*[170] In *Rochester*, the bankruptcy court granted the debtor's motion to reopen his Chapter 7 case to schedule his products liability claim, which he previously failed to disclose.[171] Unlike many of the federal district courts in the employment discrimination cases described above, the bankruptcy court here was concerned for the creditors and assets that might be available to satisfy some of the debtor's unpaid debt of $120,000.[172] With this in mind, the court reasoned: "'Reopening may be detrimental to [the defendant] by depriving it of a judicial estoppel argument[,] but this court cannot countenance depriving Debtor's creditors of the opportunity to share in damages to which Debtor is entitled in order to preserve [the defendant's] judicial estoppel argument.'"[173] The court further explained, "it is counterintuitive that a debtor's previous failure to disclose an asset should bar the bankruptcy court from reopening the case or prevent a trustee from administering property of the estate for the benefit of the innocent creditors."[174] Finally, the bankruptcy court explained that because it allowed the Chapter 7 case to be reopened, the state court in which Rochester's products liability claim was pending should not invoke judicial estoppel to dismiss the products liability claim.[175]

In *In re Haskett*,[176] another bankruptcy case involving a motion to reopen, the court noted that it was a rather new phenomenon for district and appellate courts to apply judicial estoppel despite the debtor's reopening of the bankruptcy case.[177] Canvassing former cases, the court explained that "[b]efore *Burnes* and *De Leon*, even the [Eleventh] Circuit agreed that reopening to schedule a previously undisclosed asset may be justified if in the best interests of the estate and creditors and regardless of the reasons for the nondisclosure."[178] "Whereas tradition

170. 308 B.R. 596 (Bankr. N.D. Ga. 2004).

171. *Id.* at 599, 613.

172. *Id.* at 601-02.

173. *Id.* (quoting *In re* Daniel, 205 B.R. 346, 349 (Bankr. N.D. Ga. 1997)).

174. *Id.* at 602. The court in *In re Upshur* advanced a similar rationale in reopening a bankruptcy case to allow the trustee to administer a previously undisclosed employment discrimination claim. 317 B.R. 446 (Bankr. N.D. Ga. 2004). As in *Rochester*, the court's emphasis in *Upshur* was on the creditors, noting that "when the purpose of the motion to reopen is to add an undisclosed asset, the most important consideration is the benefit to the creditors." *Id.* at 450.

175. *In re Rochester*, 308 B.R. at 612.

176. 297 B.R. 637 (Bankr. N.D. Ala. 2003).

177. *Id.* at 641-43.

178. *Id.* at 641.

seemed to inure an innocent-until-proven-guilty approach by allowing reopen and amendment unless proof of bad faith, *Burnes* seemed to rather nonchalantly turn the rule topsy-turvy," resulting in what amounts to an assumption of guilt on the part of the debtor unless proven innocent.[179] Granting the debtor's motion to reopen her bankruptcy case to account for the undisclosed discrimination claim, the court concluded that "[t]hough her failure to schedule the asset did certainly have an effect on the administration of the estate, the real harm would be in not allowing her creditors to benefit now."[180]

As the cases discussed demonstrate, not all courts consider the potential harm to creditors in deciding whether or not to apply judicial estoppel to unscheduled claims of debtors. Indeed, while creditors are central to such a determination in cases such as *In re Rochester* and *In re Haskett*, other courts have adopted a different approach, either giving less weight to or not factoring creditors into their assessment at all.

D. *Other Related Arguments Used to Bar Debtors' Employment Discrimination Claims*

Defendants in employment discrimination suits have used two other arguments in an effort to have a plaintiff/debtor's case dismissed. First, defendants have argued that a plaintiff lacks standing to pursue the claim, as the trustee in a Chapter 7 case is the only person who can pursue assets of the estate. Second, defendants have argued that the debtor cannot pursue the claim because the trustee is the real party in interest under Federal Rule of Civil Procedure 17(a). Defendants appear to make the real party in interest argument less frequently, perhaps because doing so may lead to another lawsuit or the pursuit of the same lawsuit by the trustee.

Harvey v. Southern Minnesota Beet Sugar Cooperative[181] illustrates a situation in which the employer successfully used the standing argument to bar the plaintiff's employment discrimination suit.[182] This case involved a former Chapter 7 debtor who brought a sexual harassment case under Title VII.[183] The court granted the employer's motion for summary judgment, explaining that "'the property of the bankruptcy estate includes all causes of action that the debtor *could have brought* at the time of the bankruptcy petition.'"[184] Such an asset becomes the

179. *Id.* at 642.
180. *Id.* at 644.
181. No. Civ. 02-4934, 2004 WL 368471 (D. Minn. Feb. 26, 2004).
182. *Id.* at *2.
183. *Id.* at *1.
184. *Id.* at *2 (quoting United States *ex rel.* Gebert v. Transp. Admin. Servs., 260 F.3d 909, 913 (8th Cir. 2001)) (emphasis added).

property of the bankruptcy estate, and the trustee, not the debtor, has standing to pursue the claim.[185] Applying these principles to the case at bar, the court determined that the plaintiff's claims accrued prior to her filing the bankruptcy petition, at the time she was allegedly harassed.[186] Upon filing, the claim became property of the bankruptcy estate, depriving the plaintiff of standing with respect to the claim.[187]

Harvey demonstrates that the time at which the discrimination claim accrues is central to a standing determination. In *Anderson v. Acme Markets, Inc.*,[188] the employment discrimination plaintiff, also a Chapter 7 debtor, attempted to use accrual to thwart the employer's argument that he lacked standing.[189] Specifically, Anderson argued that his cause of action did not accrue until after the bankruptcy discharge because he did not receive his right to sue letter until three months after the discharge.[190] The court was unimpressed, reasoning that the cause of action accrued on Anderson's last day of work, which occurred prior to his discharge.[191] Because Anderson never scheduled the potential claim, it was still part of the bankruptcy estate, and "only the Trustee in Bankruptcy, as the sole representative of the estate, has standing to pursue the claims."[192] As Anderson lacked standing to bring the employment discrimination claim, the court dismissed the case.[193]

While both these cases arose under Chapter 7, courts are split as to whether a Chapter 13 debtor's failure to schedule an accrued employment discrimination claim deprives him or her of standing to pursue the claim in his or her own right. A number of courts have held that Chapter 13 debtors are indistinguishable from Chapter 7 debtors in this respect, as both lose standing to pursue an undisclosed claim.[194] In contrast, some courts have treated Chapter 13 debtors differently, explaining that Chapter 13 debtors do not lose standing to pursue their claims in their own right, because they remain in possession of the property of the estate.[195] Finally, other courts have maintained that Chapter 13 debtors

185. *Id.*

186. *Id.*

187. *Id.*

188. 287 B.R. 624 (E.D. Pa. 2002).

189. *Id.*

190. *Id.* at 629.

191. *Id.* at 631.

192. *Id.*

193. *Id.*; *see also* Byrd v. Potter, 306 B.R. 559, 562-63 (N.D. Miss. 2002) (dismissing employment discrimination suit for lack of standing, as plaintiff/debtor's causes of actions accrued prior to filing of bankruptcy and, as such, became property of the bankruptcy estate).

194. *See, e.g.*, Richardson v. United Parcel Servs., 195 B.R. 737, 739 (E.D. Mo. 1996); Taylor v. Comcast Cablevision of Ark., Inc., 252 F. Supp. 2d 793, 795 (E.D. Ark. 2003).

195. *See, e.g.*, Murray v. Bd. of Educ. of N.Y., 248 B.R. 484, 486 (S.D.N.Y. 2000).

retain concurrent authority to pursue claims with the trustee.[196]

IV. Wrong as a Matter of Bankruptcy Law

> Captain Barbossa: First, your return to shore was not part of our negotiations nor our agreement, so I must do nothin'. And secondly, you must be a pirate for the Pirates' Code to apply, and you're not. And thirdly, the Code is more what you'd call "guidelines" than actual rules. Welcome aboard the Black Pearl, Miss Turner.[197]

> Captain Barbossa: For too long I've been parched with thirst and unable to quench it. Too long I've been starving to death and haven't died. I feel nothing. Not the wind on my face nor the spray of the sea, nor the warmth of a woman's flesh. You best start believing in ghost stories Miss Turner. You're in one.[198]

A. *The Curse and the Gold*

Central to the plot of *Pirates of the Caribbean: The Curse of the Black Pearl* is the curse. The Black Pearl is "crewed by the damned," or more accurately, by the accursed.[199] According to Captain Barbossa, there were 882 identical pieces of Aztec gold delivered in a stone chest to Cortez as "[b]lood money paid to stem the slaughter he wreaked upon them with his armies. But the greed of Cortez was insatiable. So the heathen gods placed upon the gold a terrible curse. Any mortal that removes but a piece from that stone chest shall be punished for eternity."[200] The gold rested at the Isla de Muerta, an island that could be found only by those who already know where it is.[201] Captain Jack Sparrow somehow discovered the location of the island and proceeded with the Black Pearl and its pirate crew toward the island.[202] His first mate, Barbossa, suggested that if the crew shared everything equally,

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196. *See, e.g.*, The Travelers Indem. Co. of Ill., Inc. v. Griner (*In re* Griner), 240 B.R. 432, 435 (Bankr. S.D. Ala. 1999) (noting split and holding that Chapter 13 debtor and trustee have concurrent authority to pursue claims).

197. PIRATES, *supra* note 1.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

they should share the location of the gold.[203] Jack disclosed the location of the gold, whereupon Barbossa committed mutiny and marooned Jack on an island.[204] Barbossa and his crew took the gold and incurred the curse.[205] They then spent the gold all over the Caribbean.[206]

As a result of the curse, the pirates were neither living nor dead.[207] Not being alive, they could not enjoy the fruits the gold bought them.[208] Not being dead, they could not be killed.[209] They could not become either alive or dead until the curse was lifted, which required that all of the gold be recovered and "the blood repaid."[210]

A bankruptcy estate with an unadministered asset is somewhat like the unfortunate pirates. Although the estate has been closed, it is not dead. And although the estate continues to exist, it is not alive. And it cannot be either dead or alive until the unadministered asset is recovered.

Under § 541(a) of the Bankruptcy Code, the commencement of a case creates an estate that consists of all the debtor's legal and equitable interests in property.[211] Under the generally accepted theory of the creation of the bankruptcy estate, the trustee succeeds to the debtor's rights, whatever they may be, as of the petition date.[212] Under this view, which

203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. 11 U.S.C. § 541(a)(1) (2000). This article assumes that a chose-in-action is property, therefore becoming part of the estate. *See also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 750-51 (1998) ("These interests, which legally are sometimes called choses in action, are obviously regarded as property."). The 1936 Restatement of Property used the term "property" as follows: "to denote legal relations between persons with respect to a thing. The thing may be an object having physical existence or it may be any kind of an intangible such as a patent right or a chose in action." RESTATEMENT (FIRST) OF PROP. ch. 1 introductory note (1936).
212. Professor David Gray Carlson has referred to this view as the "orthodox" theory, and suggests an alternate theory. *See* David Gray Carlson, *Bankruptcy's Organizing Principle*, 26 FLA. ST. U. L. REV. 549 (1999). Carlson's alternative theory is that § 541(a)(1) is a mere epiphenomenon of the trustee's rights and powers under section 544(a). *Id.* at 573. Professor Carlson's theory has considerable merit but he acknowledges that it has limitations in including certain property within the estate. *Id.* at 616-17.

Choses-in-action for personal harms could arguably fall outside the estate based on state law limitations on creditors' remedies. *See, e.g.*, ALA. CODE § 6-9-40(2) (1987); GA. CODE ANN. § 9-13-57 (1993 & Supp. 2005); Phillips & Jacobs, Inc. v. Color-Art, Inc., 553 F. Supp. 14, 16 (N.D. Ga. 1982); *In re* Head, 204 B.R. 1022, 1025 (Bankr. N.D. Ala. 1997); Jankowski v. Dixie Power Sys. (*In re* Rose Marine, Inc.), 203 B.R. 511, 514 (Bankr. S.D. Ga. 1996); Kilgore v. Buice, 192 S.E.2d 256, 258 (Ga. 1972); Mickler v. Aaron, 490 So. 2d 1343, 1344 (Fla. Dist. Ct. App. 1986). *But see, e.g.*, Arbie Mineral Feed Co. v. Farm Bureau Mut. Ins. Co., 462 N.W.2d 677, 680 (Iowa is virtually uniformly accepted by bankruptcy courts[213] and commentators,[214] it is "axiomatic" that a pre-petition claim or cause of action is property of the estate.[215]

B. *What Should Be Done about Dishonesty? Judicial Estoppel: Wrong on Its Own Terms*

Another fundamental theme in bankruptcy law is honesty. Bankruptcy, it is said, is for the "honest but unfortunate."[216] Bankruptcy

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1990) (explaining that Iowa "has adopted the broad form of statutory execution authorizing levy on choses in action").

And under the law of some states, even an execution creditor, whose writ has been returned unsatisfied, may not be able to reach the chose-in-action that is not reduced to judgment. *See, e.g.*, Washington v. Fireman's Fund Ins. Co., 459 So. 2d 1148, 1149 (Fla. Dist. Ct. App. 1984); *Mickler*, 490 So. 2d at 1344; Chaachou v. Kulhanjian, 104 So. 2d 23, 25 (Fla. 1958); Cobb v. Walker, 198 So. 2d 324, 326 (Fla. 1940).

Because the heterodox theory raises problems that are beyond the scope of this paper, we assume the correctness of the orthodox theory.

213. *See, e.g.*, Looney v. Hyundai Motor Mfg. Ala. LLC, 330 F. Supp. 2d 1289 (M.D. Ala. 2004); Dionne v. Colvin (*In re* Moore), 312 B.R. 902 (Bankr. N.D. Ala. 2004); James v. Trustmark Nat. Bank, 298 B.R. 270 (N.D. Miss. 2003); *In re* Lopez, 283 B.R. 22 (B.A.P. 9th Cir. 2002); Anderson v. Acme Mkts., Inc., 287 B.R. 624 (E.D. Pa. 2002); Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc., 296 F.3d 164, 169 n.5 (3d Cir. 2002); Stevenson v. J.C. Bradford & Co. (*In re* Cannon), 277 F.3d 838, 853-54 (6th Cir. 2002); *In re* Key, 255 B.R. 217 (Bankr. D. Neb. 2000); *In re* Zaleha, 162 B.R. 309 (Bankr. D. Idaho 1993); Sender v. Simon, 84 F.3d 1299, 1304-05 (10th Cir. 1996); Wischan v. Adler (*In re* Wischan), 77 F.3d 875, 877 (5th Cir. 1996); The Gainesville Venture, Ltd. v. C & R Trust (*In re* Gainesville Venture, Ltd.), 159 B.R. 810 (Bankr. S.D. Ohio 1993); Mar. Elec. Co. v. United Jersey Bank, 959 F.2d 1194 (3d Cir. 1991); *In re* Smith, 640 F.2d 888 (7th Cir. 1981).

214. *See* COLLIER ON BANKRUPTCY 15TH (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2005) (1979). For the remainder of this article, it is assumed that a debtor's pre-petition employment discrimination action is property of the estate under the orthodox theory. If there is an applicable exemption the debtor may claim it. *See* Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). Such an exemption might arise under federal or state law. In states that have not "opted-out" of the federal exemption scheme, § 522(d)(11)(E) would exempt "front pay" awards "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." In "opt-out" states, exemptions must be provided by state law. 11 U.S.C. § 522(b)(1). Some states have exemptions that may cover the proceeds of discrimination actions. *See, e.g.*, King v. Webb (*In re* Webb), 214 B.R. 553 (E.D. Va. 1997). Other states may lack specific exemptions but consider the property to be beyond the reach of creditors. *See* COLLIER, *supra*, ¶ 522.10[4]. An analysis of exemptions is beyond the scope of this paper. If there is no timely objection or the court overrules such an objection, the claim is exempt. *Taylor*, 503 U.S. at 641-42. For purposes of this article, it is assumed there are no applicable exemptions.

215. Chapman, *supra* note 9, at 1215.

216. *See, e.g.*, Margaret Howard, *A Theory of Discharge in Bankruptcy*, 48 OHIO ST. L.J. 1047, 1049 (1987) ("A second goal of bankruptcy is to reward only the honest debtor with a fresh start. Policymakers have long been concerned that bankruptcy not be a haven for the dishonest."); Richard E. Coulson, *Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge*, 62 ALB. L. REV. 467, 516-18 (1998) (on the provenance of "honest but unfortunate"); Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 193 n.194 (1990).

It is important to distinguish between pre-bankruptcy honesty (honesty in incurring debts and courts maintain, with some frequency, that "the veracity of the debtor's statements is essential to the successful administration of the Bankruptcy Act";[217] "[f]ull and comprehensive disclosure is critical to the integrity of the bankruptcy process";[218] "veracity of the debtor's [s]tatement is absolutely essential to the successful administration of the Bankruptcy Code";[219] and "[t]he proper 'operation of the bankruptcy system depends on honest reporting.'"[220] Similar statements abound, and are often made in judicial estoppel cases. As honesty is a recurrent theme, the judicial estoppel cases address the following important question: What should be done when a debtor is dishonest about the assets of the estate?

There are two reasons why it is incorrect to use judicial estoppel to deal with a debtor's dishonest act of omitting a civil action. First, assuming that the proper use of judicial estoppel requires a court to have accepted the party's earlier position,[221] the common argument that the bankruptcy court's order of a no-asset discharge constitutes such acceptance is quite simply wrong. Second, the entry of discharge has nothing to do with the content of the debtor's schedules, and therefore it can hardly be argued that the court accepts the debtor's position *vis-à-vis* the omitted asset.

1. CHAPTER 7 CASES

a. The Court Need Not and Does Not Accept the Debtor's Position

Bankruptcy petitions are strange. In any other kind of judicial action, the pleadings or commencing papers usually require some statement of entitlement to relief. Not so in bankruptcy. There are no elements to plead in a bankruptcy petition. There is no required "short and plain statement of the claim showing that the pleader is entitled to

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in the conduct of trade) and in-bankruptcy honesty (what under the Statute of 4 Anne was called "conformity"). *See* 4 Ann., c. 17 (1705) (Eng.); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 337 (1991). We are concerned solely with the latter.

217. Chalik v. Moorefield (*In re* Chalik), 748 F.2d 616, 618 (11th Cir. 1984).

218. *In re* Rolland, 317 B.R. 402, 413 (Bankr. C.D. Cal. 2004).

219. Heidkamp v. Whitehead (*In re* Whitehead), 278 B.R. 589, 594 (Bankr. M.D. Fla. 2002).

220. *In re* Mohring, 142 B.R. 389, 393 (Bankr. E.D. Ca. 1992) (quoting Payne v. Wood, 775 F.2d 202, 205 (7th Cir. 1985)).

221. *See, e.g.*, New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) ("[C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.") (internal quotations omitted); United States v. Newell, 239 F.3d 917, 921 (7th Cir. 2001); *cf.* Hossaini v. W. Mo. Med. Ctr., 140 F.3d 1140, 1143 (8th Cir. 1998) (observing the minority view that judicial estoppel does not require acceptance of a position).

relief."[222] Official Form 1, the voluntary bankruptcy petition, calls only for an individual consumer debtor's name, social security number and address.[223] It requires the debtor to sign and to check boxes pertaining to venue, choice of chapter, and the like.[224] The only substantive requirements in the Bankruptcy Code for the eligibility of an individual debtor for bankruptcy relief are trifling jurisdictional requirements that the debtor have some minimal connection with the United States.[225]

As an artifact of the historical development of bankruptcy law,[226] it is the simple act of filing, not the content of the filing that entitles a debtor to bankruptcy relief. The Bankruptcy Code acknowledges, realizes, or mandates this by also eliminating the need for a separate adjudication:

> A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.[227]

The filing of the petition, therefore, *is* the order for relief. It is an essentially performative speech act, the import of which is not its content but the mere fact of its being made.[228] The filing of the bankruptcy petition is not unlike a confession of judgment with the simultaneous entry of the

222. FED. R. CIV. P. 8(a).

223. Official Bankr. Form 1 (1991).

224. *Id.*

225. 11 U.S.C. § 109(a) (2000).

226. In the 19th century, bankruptcy cases were initiated by a creditor, who would be entitled to have a debtor adjudicated as a bankrupt if the debtor committed an act of bankruptcy. The creditor would plead and prove the act of bankruptcy occurred, whereupon the court would enter the judgment adjudicating the debtor a bankrupt.

Courts fit voluntary bankruptcy cases under the 1898 Act into this same framework. Even under the 1898 Act, however, there were truth-value propositions required in the voluntary petition:

> [T]he petition must state that "petitioner owes debts which he is unable to pay in full," and "that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law." This establishes those facts so far as a decree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition. These are not issuable facts. . . .

Hanover Nat. Bank v. Moyses, 186 U.S. 181, 190-91 (1902). There were, therefore, both pleading and proof requirements in voluntary bankruptcy cases, albeit minimal ones. Thus, the order of relief was "usually entered as a matter of course, in chambers and without any formal presentation or hearing." CHARLES E. NADLER, THE LAW OF BANKRUPTCY § 146 (1948). The entry of the discharge, therefore, may have seemed automatic; however, many courts "zealously reiterated that the granting of an order of adjudication is not a ministerial but a judicial act." *Id.* The insolvency requirement was eliminated in 1938 for voluntary individual cases.

227. 11 U.S.C. § 301.

228. *See* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 6-7 (J. O. Urmson & Marina Sbisa eds., 2d ed. 1975).

judgment on behalf of all creditors collectively in the name of the trustee.

When a petition is filed, an estate is created, but the content of the estate does not depend on the scheduling of assets. The schedules do not contain allegations, but merely serve the function of informing the trustee of the property in which he or she has acquired an interest, somewhat like discovery in aid of execution. Likewise, the schedules do not allege the debtor's entitlement to discharge. In a Chapter 7 case, the discharge follows, not from any facts alleged or asserted by the debtor, but, as 11 U.S.C. § 727 and Rule 4004 of the Federal Rules of Bankruptcy Procedure suggest, from no one's objecting or seeking dismissal of the case.[229] Therefore, in the absence of a complaint commencing an adversary proceeding to deny the debtor a discharge, the entitlement to a discharge is merely a function of time. As such, courts have described the entry of the order of discharge as ministerial.[230]

In short, the content of schedules has nothing to do with discharge. Therefore, it is difficult to see how a court "accepts" a debtor's position through discharge for purposes of invoking judicial estoppel.

b. There Is No Such Thing as a No-Asset Discharge

The filing of a bankruptcy petition invokes the elaborate Federal Rules of Bankruptcy Procedure. One of the most significant is Rule 2002, which regulates most of the required notices in bankruptcy cases.[231] Creditors are entitled to notice that there is a bankruptcy case, so that they may determine when they must file their proofs of claims. Generally, creditors must file a proof of claim to receive a distribution, and must do so within the statutory "bar date" to receive a distribution that is of the same priority as other creditors.[232] The bar date for ordinary creditors is ninety days after the first date set for the meeting of creditors.[233] The notice of the bankruptcy case, therefore, must include

229. The debtor's entitlement is not put into question – that is, it does not become issuable – unless there is a complaint filed and served that alleges some conduct listed in § 727. If a party with standing to do so were to file such a complaint, alleging that the debtor concealed assets, then the entitlement to discharge would be put at issue. And if the debtor responded that she listed all of her assets, then there would be something the court could accept or not.

Section 727(c)(1) specifies that the trustee, a creditor, or the United States trustee may file such a complaint. A non-creditor employer is not listed, although such a party may request that the court order the trustee to investigate. 11 U.S.C. § 727(c)(2). In addition, the court might conceivably enter an order *sua sponte* denying discharge. *See, e.g., In re* Burrell, 148 B.R. 820, 824 (Bankr. E.D. Va. 1992) (court entered order providing that no order of discharge would be entered in Chapter 7 case).

230. *In re* Hicks, 184 B.R. 954, 959 (Bankr. C.D. Cal. 1995).

231. *See* FED. R. BANKR. P. 2002.

232. *See* FED. R. BANKR. P. 3002.

233. FED. R. BANKR. P. 3002(c).

the date set for the meeting of creditors, and generally includes the bar date.[234]

Where there are no assets, the filing and allowance of claims becomes largely irrelevant. Rule 2002(e) addresses this possibility and provides:

> In a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims.[235]

The purpose of the no-asset notice of Rule 2002(e) is not substantive, as it has no effect on whether there actually is a distribution in a given case. Rather, it "is merely a rule of administrative convenience to enable clerks of court to reduce unnecessary paperwork."[236] It is appropriate that Rule 2002(e) is not substantive, as it contains an "inherently fuzzy" standard.[237] It is difficult for "administrative personnel not trained in the law"[238] to determine whether it really "appears from the schedules that there are no assets.[239]

Furthermore, the only legal effect of a no-asset notice is procedural, in that as a result of the notice, the claims allowance process is suspended because there is no bar date. Rule 3002(c)(5) provides an exception to the 90-day bar date:

> If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.[240]

Therefore, when and if the trustee notifies the clerk that there may be assets for a distribution, the clerk sends an additional notice and the claims allowance process begins. Since the only legal effect of a no-asset notice is procedural,[241] and does not relate to the discharge, there is

234. FED. R. BANKR. P. 2002(a).

235. FED. R. BANKR. P. 2002(e).

236. Costa v. Welch (*In re* Costa), 172 B.R. 954, 960 n.8 (Bankr. E.D. Cal. 1994).

237. *Id.*

238. *Id.*

239. FED. R. BANKR. P. 2002(e).

240. FED. R. BANKR. P. 3002(c)(5).

241. There is one instance, however, in which a no-asset notice may have substantive effect. The clerk's decision to send the no-asset notice, and the suspension of the claims allowance process, may have some effect on the dischargeability of unscheduled *debts* under § 523(a)(3)(A). *See* Lauren A. Helbling & Christopher M. Klein, *The Emerging Harmless Innocent Omission Defense to Nondischargeability under Bankruptcy Code § 523(a)(3)(A): Making Sense of the*

no such thing as a no-asset discharge.[242]

2. CHAPTER 13 CASES

Chapter 13 cases differ from Chapter 7 cases in a number of ways. The timing and conditions of the discharge differ, as does the analysis of whether, for purposes of judicial estoppel, the court "accepts" the debtor's position as to an omitted asset.[243] A Chapter 13 debtor is generally entitled to a discharge only on completion of all of the payments called for by a confirmed plan.[244] The Chapter 13 discharge, therefore, has positive conditions, unlike the Chapter 7 discharge. If a Chapter 13 debtor omits an asset from his or her schedules, the position that the debtor does not own any such asset might very well be accepted by the court.

To obtain confirmation of a payment plan, the Chapter 13 debtor must establish that the present value of the payments to holders of allowed unsecured claims equals or exceeds the amounts that they would receive in a Chapter 7 case.[245] In a Chapter 7 case, the amounts that are distributed by the trustee are not necessarily dependent on whether the debtor has scheduled all of her assets; the trustee might discover and liquidate unscheduled assets. On the other hand, in deciding whether to confirm a Chapter 13 plan, the court performs a hypothetical liquidation analysis, which is necessarily dependent on the full disclosure of available assets. If the court enters a confirmation order based on the debtor's false statement, there is a judgment that reflects the court's acceptance of the debtor's position.

Confusion over Reopening Cases and Amending Schedules to Add Omitted Debts, 69 AM. BANKR. L.J. 33, 42 (1995).

Thus, the debtor gains something from the no-asset notice only where the creditor does have knowledge and sits idle. This is not exactly an abuse of the system. If it were, the creditors' due process arguments would be more successful than they are. *See, e.g.*, *In re* Medaglia, 52 F.3d at 455-57.

The no-asset notice makes no difference under § 523(a)(3)(B) because the notice has no effect on the § 523(c) deadline to file a dischargeability complaint.

Despite this one substantive effect of a no-asset notice, the judicial estoppel cases do not depend on whether the employer is a creditor who is affected by § 523(a)(3)(A). Indeed, the judicial estoppel decisions do not even depend on whether there is, or might be, such a creditor.

242. Even if it did mean anything to speak of a "no-asset discharge," the existence such a thing should make no difference to the proper application of judicial estoppel. Once the defendant knows of the existence of both the bankruptcy case and the unscheduled claim, the defendant would just have to notify the trustee to reopen the bankruptcy case and have the asset administered. Consequently, the bankruptcy case would likely no longer be a no-asset case.

243. Another important difference between Chapter 7 and Chapter 13 is that a Chapter 13 case remains open much longer. The bankruptcy court therefore has a longer period of time to correct the consequences of omissions from the debtor's schedules.

244. *See* 11 U.S.C. § 1328 (2000).

245. *Id.* § 1325(a)(4).

If a chose in action or its proceeds were exempt under state or federal law, the bottom line of the liquidation analysis would be unaffected by the debtor's omission. In those cases, it could perhaps be argued that it does not matter whether the debtor played fast and loose with the court (or that the debtor could not have done so) because the result is the same. However, if the trustee or the holder of an allowed unsecured claim objects to plan confirmation, there is a second major requirement before the court may approve the plan. The disposable-income test requires the debtor, on objection by the trustee or the holder of an allowed unsecured claim, to demonstrate that all of her "projected disposable income" is being devoted to payments under the plan.[246] The disposable-income test does not differentiate between income that would, when received, be exempt or not be exempt.[247] Although there is considerable confusion among the courts as to the definition of income in Chapter 13,[248] most courts have held that the proceeds of a pre-petition judgment are income.[249] Therefore, if the debtor fails to disclose the lawsuit, the court would be unable to determine whether or to what extent the potential damages should be included in the disposable-income calculation. A court might be inclined to consider such damages income, and perhaps require that they be paid under the plan when and if received, or decline to confirm a plan that failed to include a provision to that effect. In the absence of disclosure, it could be said that the court accepts the debtor's position in deciding whether the disposable-income test is met.[250]

246. *Id.* § 1325(b)(1)(B).

247. *See id.* § 1325(b)(2).

248. Robert B. Chapman, *The Bankruptcy of Haig-Simons? The Inequity of Equity and the Definition of Income in Consumer Bankruptcy Cases*, 10 AM. BANKR. INST. L. REV. 765, 796-815 (2002).

249. *E.g.*, *In re* Pendleton, 225 B.R. 425, 427 (Bankr. E.D. Ark. 1998) (holding that recovery on a pre-petition personal injury claim is income); *In re* Studer, 237 B.R. 189, 193 (Bankr. M.D. Fla. 1998); Gaertner v. Claude (*In re* Claude), 206 B.R. 374, 380-81 (Bankr. W.D. Pa. 1997); Watters v. McRoberts (*In re* McRoberts) 167 B.R. 146, 147 (S.D. Ill. 1994); *see also In re* Tolliver, 257 B.R. 98, 101 (Bankr. M.D. Fla. 2000) (treating as income the proceeds of a pre-petition workers compensation claim); *In re* Lush, 213 B.R. 152, 156 (Bankr. C.D. Ill. 1997).

Some courts, however, while not addressing damages, have advanced the naive rule that "[t]he test is whether the asset in question is an anticipated stream of payments. If it is a stream of payment, the payments must be included in projected income." McDonald v. Burgie (*In re* Burgie), 239 B.R. 406, 410 (B.A.P. 9th Cir. 1999); *accord In re* Baker, 194 B.R. 881, 885 (Bankr. S.D. Cal. 1996). Under this rule, if the debtor receives a lump-sum satisfaction of the judgment, the amount would not be income; if, however, the debtor received a series of payments, the amount would be income. Of course, it is difficult to project, as of the confirmation hearing, how the defendant is going to satisfy a possible judgment or how, in the event of settlement, the payment will be structured. Suffice it to say that in the Ninth Circuit, whether the future proceeds would or could be considered in calculating "projected disposable income" is a crap shoot.

250. Or not, if we are to take seriously the proposition that what to include or exclude from the

C. *What Should Be Done about Dishonesty? Judicial Estoppel and Bankruptcy Policy*

The arguments for the common use of bankruptcy-based judicial estoppel, including that a debtor obtains a Chapter 7 no-asset discharge as a result of omitting an asset from her schedules, generally result from an incorrect understanding of bankruptcy law. This section lays out a better statement of bankruptcy law, arguing that judicial estoppel is inconsistent with fundamental bankruptcy policy as well as with bankruptcy procedures. It also argues that because judicial estoppel is so inconsistent, it can be undone by available bankruptcy procedures to vindicate bankruptcy policy.

1. BANKRUPTCY POLICY

Any attempt to ground an argument in "bankruptcy policy" must take into account the different opinions regarding the extent to which bankruptcy should serve the needs and wishes of third parties, such as communities, employees, or employer-defendants. Most contemporary conceptions of a just bankruptcy law address two goals: one, the payment of creditors through a common pool; and two, the provision to the debtor of some sort of fresh start.[251] There is considerable division, however, over whether bankruptcy policy should be limited to these two goals and if not, what other goals to pursue.[252] Bankruptcy scholars generally fall into one of two categories: proceduralists or traditionalists.[253] According to one description, "[t]he proceduralists view the sole goal of bankruptcy as generating the highest return for creditors, while traditionalists see a role in bankruptcy for protecting groups harmed by

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calculation of disposable income is a matter of judicial discretion. *See, e.g., In re* Linden, 174 B.R. 769, 772 (C.D. Ill. 1994).

251. Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 483 (1997) ("By the second week of a basic course in bankruptcy, almost any law student can recite in his or her sleep the two competing goals of consumer bankruptcy: a 'fresh start' for debtors and equality of distribution for creditors. The two phrases are the twin stars of consumer bankruptcy, reflecting the need for relief and the need for fairness, the balanced objectives of the system."); Thomas H. Jackson, *Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules*, 60 AM. BANKR. L.J. 399, 399 (1986) ("Apart from giving human beings a financial fresh start, the recognized goal of bankruptcy law is ensuring that creditors do not make a bad situation (insolvency) worse by engaging in a destructive race to the debtor's assets."); *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, 188-97 (1980).

252. Professor John Finnis observes that English bankruptcy law employs a variety of different principles of distributional justice. FINNIS, *supra* note 251. The same can be said of American bankruptcy law. Debates over the proper purpose and goals of bankruptcy law may be little more than disagreements about whether a given principle is appropriate in a given context.

253. *See generally* Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 576-80 (1998). *Compare* Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987), *with* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987).

failure, such as employees, tort victims, retirees, and even the surrounding community."[254] Accepting this division between proceduralists and traditionalists,[255] it may be worthwhile to consider whether bankruptcy policy, as articulated by the traditionalist approach or proceduralist approach, would justify the application of judicial estoppel.

Among non-proceduralists, there is some variety of opinion as to what purposes should be served by bankruptcy law. Very generally, those who take a broader view want bankruptcy law to respect the commutatively just demands against the debtor that are neither "claims" nor "interests" for purposes of the Bankruptcy Code.[256] A few scholars have

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254. Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 566 (2001). Professor Karen Gross, for example, maintains that "[b]ankruptcy can and should further predetermined national social policy issues." KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 243 (1997).

255. There are other axes and other ways of describing what might be the traditionalist-proceduralist axis. One might say there is a more-free-market and less-free-market axis. Scholars with varying degrees of faith in or commitment to free markets differ, for example, on the question of whether corporate bankruptcy law should pursue the goal of protecting the jobs of employees.

Some say that corporate bankruptcy law should take account of the interests of stakeholders who are not creditors. *See, e.g.*, Lawrence Ponoroff, *Enlarging the Bargaining Table: Some Implications of the Corporate Stakeholder Model for Federal Bankruptcy Proceedings*, 23 CAP. U. L. REV. 441 (1994); Karen Gross, *Taking Community Interests Into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031 (1994). Others say it should not. *See, e.g.*, Robert K. Rasmussen, *The Efficiency of Chapter 11*, 8 BANKR. DEV. J. 319, 324 (1991). *See generally* Donald R. Korobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75, 103-04 (1996) ("Traditional scholars generally affirm the critical claim that bankruptcy law should pursue the jobs purpose as one of its purposes" but "freemarket critics argue that corporate bankruptcy law (to the extent that it should exist at all) should not pursue the jobs purpose."). The free-market axis is of dubious analytical value, given the ease with which scholars with opposing viewpoints of what bankruptcy law should be can situate their preferred view as "free market." *Compare* Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 TEX. REV. L. & POL. 393, 417 (2001), *with* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 420 (2000). *See generally* Chapman, *supra* note 10, at 354-55. For purposes of this article, the taxonomy of the axes is not crucial.

256. *See, e.g.*, Warren, *supra* note 253, at 787-88. There are also broader "societal" goals advanced as appropriate for the bankruptcy system. One example is the goal of cultivating a debtor's shame. *See, e.g.*, A. Mechele Dickerson, *Can Shame, Guilt, or Stigma Be Taught? Why Credit-Focused Debtor Education May Not Work*, 32 LOY. L.A. L. REV. 945, 950-51 (1999) (describing the attached stigma as a benefit of mandatory debtor education); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 B.Y.U. L. REV. 177, 219 (1999) (discussing with disapproval the minimization of shame). *But see* Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 110 (1986) (discussing with approval the minimization of shame); LOPUCKI, *supra* note 5, at 473 (stating that ending "the vicious cycle of low self-esteem" should be a main goal of any bankruptcy system).

Also discussed is how much emphasis should be given to the goal of debtors' economic self-reliance. *See generally* Chapman, *supra* note 10, at 357; A. Mechele Dickerson, *America's Uneasy Relationship With the Working Poor*, 51 HASTINGS L.J. 17, 67 (1999); Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start"*, 45 HASTINGS L.J. 175, 203 n.91 (1994).

addressed specifically the sorts of demands that should be considered.[257] Each suggests some form of dependence on the debtor and some form of vulnerability to a proposal being considered by the bankruptcy court.[258] However, no extant substantive proposal suggests any benefit, or redress of harm, should be afforded the debtor's employer or former employer. A debtor's employer or former employer, especially one who is a defendant in an action brought by the debtor, does not make demands on the debtor that the bankruptcy will unjustly deny.

Differences also can be found as to the relation between bankruptcy law and family values. *See, e.g.*, A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 70 (1998) (stating that "[e]ncouraging, supporting, and protecting marriage is not one of the goals of federal bankruptcy laws"); *cf.* Warren, *supra* note 11, at 40 (arguing that bankruptcy law and policy should strengthen—or at least not weaken—the economic viability of the family unit).

Other differences can be found as to the relation between bankruptcy law and moral values, and whether bankruptcy law should be molded to help restore a commitment to individual responsibility. *Compare* Zywicki, *supra* note 255, at 428 ("[M]eans testing . . . strongly vindicates the principle of personal responsibility by requiring debtors to live up to their obligations to creditors to the extent that they can."), *with* Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANK. DEV. J. 425, 450 (2001) (reviewing SULLIVAN, WARREN & WESTBROOK, *supra* note 255) ("[M]eans testing is nothing more than a disciplinary measure, designed primarily to check and regulate debtor behavior. It is not about 'fairness' to creditors at all, and assurances that it is 'not intended to be punitive' ring hollow. On the contrary, that is exactly what it is intended to be.").

257. *E.g.*, GROSS, *supra* note 254, at 229 (suggesting anyone with a "nexus with the debtor for whom there is substantial injury caused by the bankruptcy filing and . . . an injury redressable through the reorganization process"); Nathalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429 (1998); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717 (1991).

258. Professor Warren's examples, in the context of business bankruptcy, include the interests of "[o]lder employees who could not have retrained for other jobs, customers who would have to resort to less attractive, alternative suppliers of goods and services, suppliers who would have lost current customers, nearby property owners who would have suffered declining property values, and states or municipalities that would have faced shrinking tax bases benefit from the reorganization's success." Warren, *supra* note 253, at 787-88.

Professor Martin also gives a few examples: The debtor is a nursing home and the affected persons are "elderly persons with long-term, below-market contracts with the debtor, under which these persons prepaid (primarily through federal subsidies) for extended life care." Martin, *supra* note 257, at 462. Neighbors of a "local neighborhood bar and grill . . . [l]ocated in an old ethnic neighborhood in a large city" who feel that the plans to convert the bar and grill into a "strip joint" will "corrupt the neighborhood." *Id.* at 463. The debtor is a manufacturer and there are two bids to purchase its assets out of chapter 11, under one of which the employees will lose their jobs. *Id.* at 463-64.

Professor Gross's and Professor Korobkin's examples are similar. Professor Marjorie Girth criticizes Professor Gross's definition of "community" for excluding those affected by consumer bankruptcies. Marjorie L. Girth, *Rethinking Fairness in Bankruptcy Proceedings*, 73 AM. BANKR. L.J. 449, 472 (1999). Gross responds that community interests also arise in consumer bankruptcy. "For example, the interests of a debtor's family is a 'community' worthy of attention; thus, insuring that the debtor has sufficient income with which to support his/her family is a necessary piece of any good bankruptcy legislation." Karen Gross, *On the Merits: A Response to Professors Girth and White*, 73 AM. BANKR. L.J. 485, 486 (1999); *see also* Elizabeth Warren, *Bankrupt Children*, 86 Minn. L. Rev. 1003, 1024 (2002).

Neither the proceduralist nor non-proceduralist approaches support the application of judicial estoppel to omitted causes of action. Under either approach it transgresses the boundaries of desirable bankruptcy policy. Each school of thought recognizes the centrality of the common pool of assets. For example, Professors Douglas Baird and Thomas Jackson maintain that the central principle of bankruptcy law is maximization of the estate for the benefit of creditors.[259] Professor Warren rejects this view in favor of a "loss allocation" view of bankruptcy, which depicts bankruptcy law as "an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors."[260] Professor Warren thus focuses on the distributional justice to other parties besides creditors.[261]

Deciding who is included as a beneficiary of the common pool can affect the definition of the common pool. For example, one of the debtor's valuable rights may be the right to terminate employees. If we like employees enough, we might make them beneficiaries of the common pool, even though they are neither creditors nor equity-holders. Alternatively, if the common pool's beneficiaries are creditors only, we might propose to hold the right to fire employees outside the pool, keeping it from being exercised for the benefit of creditors and allowing, or requiring, it to be exercised only for the benefit of employees. Because there is no special reason to prefer the defendant/employer, there is no reason to keep the chose-in-action out of the common pool for the benefit of the defendant/employer.

Once the appropriate legislature has issued a judgment as to the distributional justice of the scope and beneficiaries of the common pool, the debtor has an obligation (as a matter of commutative justice between debtor and trustee, as representative of the estate) to disclose all assets in order to achieve fair administration of the common pool. When the debtor breaches that obligation, there is a need for corrective justice. That correction may take one or more of a variety of forms, including criminal punishment.[262] On the civil side, there are a variety of methods to ensure that bankruptcy policy is served. Assuming there is no distributional principle that requires protecting the defendant/employer, the

259. Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganization and the Treatment of Diverse Ownership Interest: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 109-10 (1984).

260. Warren, *supra* note 253, at 777.

261. *Id.* at 787-88.

262. It is a crime, for instance, to "knowingly and fraudulently concea[l] from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor." 18 U.S.C. § 152(1) (2000).

question remains what procedures bankruptcy law offers to correct the debtor's omission of employment discrimination claims.

2. BANKRUPTCY AS PROCEDURE

One bankruptcy proceduralist, Professor Charles Mooney, has given an account of bankruptcy law that is quite useful in determining whether and how the judicial estoppel cases fit into bankruptcy policy. Professor Mooney recently argued that bankruptcy law is "a subset of the law of civil procedure."[263] Central to this conception is the stated purpose of bankruptcy law:

> Procedure theory holds that the goal of bankruptcy law as a system is to maximize the recoveries or other benefits for the debtor's rightsholders. A corollary of this principle recognizes the procedural character of procedure theory: Bankruptcy law should take substantive legal entitlements of rightsholders as it finds them, honoring both powers and limitations under nonbankruptcy law.[264]

Under Professor Mooney's conception, "[p]rocedural law, including bankruptcy law, should further, enhance, and vindicate, but not disrupt, policies that nonbankruptcy law creates and seeks to implement."[265] Professor Mooney argues that most of the significant rules of bankruptcy law, even the ones that apparently modify the rights of various rightsholders, are consistent with his proceduralist view of bankruptcy.[266] Thus, for instance, the automatic stay,[267] the definition of the estate,[268] and the trustee's avoiding powers[269] are consistent with the proceduralist view of maximizing creditor recovery but do not substantially modify pre-bankruptcy rights. Aspects of bankruptcy law that cannot be squared with the procedure-based goals, Professor Mooney suggests, should be changed.[270]

If bankruptcy law is procedure, and if its goals are limited to or include maximizing creditor recovery, then bankruptcy law should have procedures to address any action that discomfits that goal. We thus take bankruptcy's "substantive" and "procedural" law as one and consider whether bankruptcy provides procedures for addressing a debtor's omission of assets.

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263. Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 937 (2004).

264. *Id.*

265. *Id.* at 944.

266. *Id.* at 1011-60.

267. *Id.* at 1027-28.

268. *Id.* at 1013-14.

269. *Id.* at 1028-37.

270. *Id.* at 1060-61.

3. IF BANKRUPTCY HAS ITS OWN PROCEDURES, JUDICIAL ESTOPPEL IS UNNECESSARY

Before examining whether bankruptcy law, viewed as a procedural system, has its own means of vindicating the policy that honesty is required in order to maximize creditor recovery, we take a short detour. In this section we explain why judicial estoppel is unnecessary if bankruptcy law does in fact have such means.

One might reasonably expect that if the accuracy of the debtor's schedules is as important to the bankruptcy system as it is to the realization of the normative goal of making the value of the debtor's assets available to creditors, there would be systemic methods of vindicating that interest. Of course, the district courts that invoke judicial estoppel could be said to be invoking an equitable doctrine to prevent a legal strategist (the plaintiff/debtor) from obtaining a "system-unintended result"[271] (obtaining a damages award she will not have to share with the bankruptcy trustee) and thus to vindicate an interest of, or a function necessary to a goal of, the judicial system (honesty or consistency). On the other hand, the bankruptcy system may be separate from the rest of the judicial system. The bankruptcy system may have its own means of preventing a debtor from acting strategically to obtain a system-unintended result. Furthermore, the district courts' application of judicial estoppel may merely substitute one system-unintended result for another. That inconsistency may suggest a malfunction.[272]

a. Judicial Estoppel as Error-Correction

One influential student work describes the absolute form of judicial estoppel as activated by a concern for truth:

> The paramount attribute of this form of judicial estoppel is that it operates to prevent even the taint of untruth from entering the judicial process. One function of judicial proceedings is "to seek truth"; this rule places truth in a preeminent position. It proceeds from the premise that "truth is not a weather vane. It does not veer when the winds of self-interest change. It remains constant." Thus, it follows from the absolute nature of truth that once a party has taken a position under oath, "a court has the right, if not the duty, to hold that party to that position, . . . by assuming in his behalf utter good faith in the first instance, to reproduce such assumption later, even to his hurt." If a party is free in later proceedings to vary his sworn position, then in one instance the judicial oath is violated and a lie is

271. *See* Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 507-08 (1997).

272. *See id.* at 506.

> permitted to enter the judicial process. The absolute rule asserts that there will always be but one "true" position on a given set of facts, and hence no deceit can tarnish the public's perception of the courts as a truthseeking institution.[273]

Bankruptcy-based judicial estoppel, like the absolute form described above, relies on the coherence theory of truth. Unfortunately, that coherence may be inconsistent with the application of the correspondence theory of truth. That is, the position maintained in the second suit—that the second suit exists—is obviously and demonstrably true; the commitment to coherence, however, may require the perpetuation of the obvious, demonstrated falseness of the first position—that the second suit does not exist.

Although the absolute form of judicial estoppel is said to foster confidence in the integrity of the judicial system, consistency of falseness may undermine the "public's perception of the courts as a truthseeking institution."[274] The non-absolute version of judicial estoppel, therefore, precludes a party from taking an inconsistent position only when the first court has accepted it.[275]

Clearly, the existence of the lawsuit the second court is hearing, the fact of the bankruptcy case, and the fact that the discrimination claim was commenced before the bankruptcy must be acknowledged as corresponding to reality. As a matter of correspondence, each debtor in the cases detailed earlier in this article did in fact own an employment discrimination claim as of the commencement of the bankruptcy case, as conclusively evidenced by the fact that an employment discrimination claim was pending at that time. Granting relief in accord with that reality, however, may create an incoherence, viz., that the debtor did not own the cause of action when she appeared in the bankruptcy court and does own the cause of action when she appears before the district court. The judicial system, posited as some kind of totality whose integrity is at stake, has previously assigned the truth-value "false" to the statement that the debtor owns this cause of action; now that the debtor appears as a plaintiff in this cause of action, there is a conflict between experience and the field of truth-values. A reevaluation of the statement regarding the debtor's ownership would entail reevaluation of other statements because of their logical interconnection.[276]

The appropriateness of adhering to a coherence theory of truth by using judicial estoppel in the second case depends on whether the rest of

273. Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244, 1254 (1986) (footnotes omitted).

274. *Id.*

275. *Id.* at 1256.

276. *See* William Van Orman Quine, *Two Dogmas of Empricism*, 60 PHIL. REV. 20, 39 (1951).

the field of propositions can be adjusted to reflect the proposition that we now recognize to be true. In law, the "latitude of choice as to what statements to reevaluate"[277] is governed, in large part, by the rules as to the finality of judgments. Federal Rules of Civil Procedure 59 and 60, for example, provide limits on the extent to which the truth-value assigned by former adjudication can be re-evaluated; where they cannot, the demands of coherence and consistency may be such that the adjustment should be made in the latter adjudication. Where the former adjudication was a bankruptcy case, however, "there is much latitude of choice"[278] as to the procedural means by which to make the appropriate reevaluations that will satisfy both correspondence and coherence. And it is precisely the fact that the bankruptcy court does not accept the original position (and even if it did, it has the ability to undo that acceptance) that makes the non-absolute form of judicial estoppel unnecessary.

b. Judicial Estoppel as an Amorphous Form of Preclusion

When a party can invoke either claim preclusion or issue preclusion, judicial estoppel is unnecessary. The party to be estopped loses because she is being consistent with that which has already been adjudicated as false.[279] Likewise, the party to be estopped loses if her position is inconsistent with that which has already been adjudicated.[280] Judicial estoppel serves a much more important (although questionable) function when other preclusion doctrines are not available. It is a form of preclusion that can be invoked when the claim and issue preclusion do not apply.[281]

An illustration appears in *New Hampshire v. Maine*, in which the Supreme Court faced Maine's assertions that New Hampshire's claims were barred by claim preclusion, issue preclusion, and judicial estoppel.[282] The Court offered black letter and elemental definitions of claim and issue preclusion and concluded "that a discrete doctrine, judicial estoppel, best fits the controversy."[283] Claim preclusion would not have been appropriate because New Hampshire's claim was not identical to the claim in the earlier suit; issue preclusion would not have been appropriate because the former litigation was compromised rather than "actu-

277. *Id.* at 39-40

278. *Id.* at 39.

279. *See* Boyers, *supra* note 273, at 1247.

280. *See id.*

281. *See, e.g.*, Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 HARV. L. REV. 1132, 1134 (1946).

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

283. *Id.* at 749.

ally litigated."[284] To preclude New Hampshire's claim, the Court had to extend beyond the limits of claim preclusion and issue preclusion.

The existence of judicial estoppel makes a certain kind of sense when the other preclusion doctrines are unavailable because no judgment has been entered or because the prior matter was not "actually litigated."[285] Historically, judicial estoppel made sense when the major preclusion doctrines—then called res judicata and collateral estoppel—each contained a relatively strict requirement of mutuality.[286] However, as the requirements of the preclusion doctrines become more relaxed and the reach of those doctrines broadens, judicial estoppel's import narrows.

4. BANKRUPTCY HAS ITS OWN PROCEDURES

When a debtor files inaccurate schedules, thereby compromising the proper functioning of the bankruptcy process, courts focus on the harm done to creditors. "The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the *parties in interest* based on fact rather than fiction."[287] Similarly, the accuracy of the schedules is important because "*[c]reditors* are entitled to judge for themselves what will benefit, and what will prejudice, them."[288] However, it is unnecessary for courts to resort to judicial estoppel to address this issue of dishonest debtors. Bankruptcy law, considered as procedure, *already* provides methods to handle a debtor's dishonesty and to prevent creditors from being deprived of the value of that civil action.[289]

Once the estate acquires an interest in a debtor's civil action (once the claim becomes property of the estate), the civil action can cease being property of the estate only by the means provided in the Bankruptcy Code. For example, the trustee may dispose of the civil action by abandonment. However, the debtor's failure to list the civil action as an asset on the bankruptcy schedules cannot deprive the trustee or the estate of its rights to that asset. To the extent the debtor tries to deprive the

284. *Id.* at 748-49.

285. *See* Boyers, *supra* note 273, at 1247.

286. *See, e.g., The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, *supra* note 281, at 1246-47.

287. Boroff v. Tully (*In re* Tully), 818 F.2d 106, 110 (1st Cir. 1987) (emphasis added); *see also* Hamo v. Wilson (*In re* Hamo), 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999); E. Diversified Distribs., Inc., v. Matus (*In re* Matus), 303 B.R. 660, 675 (Bankr. N.D. Ga. 2004); Posilico v. Bratcher (*In re* Bratcher), 289 B.R. 205, 218 (Bankr. M.D. Fla. 2003); Kavanagh v. Leija (*In re* Leija), 270 B.R. 497, 501 (Bankr. E.D. Cal. 2001).

288. Chalik v. Moorefield (*In re* Chalik), 748 F.2d 616, 618 (11th Cir. 1984) (emphasis added).

289. *See, e.g.*, Walker & Nickell, *supra* note 9, at 1115-16.

estate of the value of the civil action, the bankruptcy system is designed to ensure that one of two things will happen: one, the debtor will fail because his or her efforts will be detected and thwarted; or, two, the debtor will temporarily succeed, in which case her apparent success will be either void or voidable.[290] Either way, the very nature of the bankruptcy system is designed so that, short of burning cash or otherwise destroying assets, the debtor will fail to deprive the estate of the value of the civil action.

a. No Sale or Abandonment

Obviously, the trustee cannot sell a claim of which she has no knowledge. Similarly, there can be no abandonment of estate property if the trustee has no knowledge of the asset. If there is no transfer, the asset remains property of the estate.[291] Although the trustee may abandon property to the debtor after notice and an opportunity for a hearing,[292] and may "technically abandon" scheduled property merely by failing to administer it,[293] unscheduled property which is not administered is not abandoned and remains property of the estate.[294]

Because Chapter 7 cases are routinely closed within a few months of commencement, it is likely that employers in employment discrimination cases will seek summary judgment after the Chapter 7 case is closed. If a Chapter 7 trustee files a final report and final account, and if no party objects within thirty days, "there shall be a presumption that the estate has been fully administered."[295] At this point, the court is to discharge the trustee and close the case.[296] When the estate is closed, scheduled but unadministered property is abandoned.[297] Unscheduled property and unadministered property is not abandoned and remains property of the estate, thereby thwarting dishonest debtors from achieving their goal of depriving the estate of valuable assets.

b. Reopening Chapter 7 Cases

Although the courts' interest in punishing a debtor they perceive to

290. Of course, the omission could go undetected. But if the omission of the claim is not detected by the defendant and remedied through bankruptcy procedure, there will be no motion to dismiss or motion for summary judgment based on judicial estoppel either.

291. *See, e.g.*, Shapiro v. Matouk (*In re* Hayes), 322 B.R. 644 (Bankr. E.D. Mich. 2005).

292. 11 U.S.C. § 554(a) (2000).

293. *Id.* § 554(c); Helms v. Arboleda (*In re* Arboleda), 224 B.R. 640, 645 (Bankr. N.D. Ill. 1998); Cooper v. Walker (*In re* Walker), 151 B.R. 1006, 1008 (Bankr. E.D. Ark. 1993).

294. 11 U.S.C. § 554(d). Unscheduled property remains property of the estate and is not abandoned even if the trustee is aware of it. Jeffrey v. Desmond, 70 F.3d 183, 186 (1st Cir. 1995).

295. FED. R. BANKR. P. 5009.

296. 11 U.S.C. § 350(a).

297. *Id.* § 554(c).

be manipulating the system seems somewhat understandable, one interest at stake is "to vindicate creditors interests" – after they have been deprived of the value of the concealed or unscheduled asset – by reopening the case to allow the trustee to administer the asset.[298] Bankruptcy courts may reopen Chapter 7 cases to allow the debtor to schedule as an asset a chose-in-action that was previously omitted. When it appears to a bankruptcy judge that a valuable asset of an estate has not been administered, the judge has a duty, either on the application of a party or *sua sponte*, to reopen the case for the administration of the asset.[299] Upon reopening the case, a trustee may be appointed if "the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case."[300] It would seem that if the lawsuit has value, the appointment of a trustee would be in the interests of the creditors and of the debtor, and necessary to the efficient administration of the estate.

Once the estate has been reopened and a trustee appointed, the trustee is able to administer the asset. The trustee may either sell the chose-in-action, litigate the case, or abandon it to the debtor. Assuming the action has value but the trustee cannot find a ready market for employment discrimination lawsuits, the trustee would most likely litigate the action. In cases in which the debtor already brought suit on the claim, the possible recovery for the benefit of the estate depends on whether any already-entered summary judgment would have effect on the trustee.

If the chose-in-action is no longer estate property, it is so for one of two reasons: one, the asset has been transferred from the estate; or, two, the asset no longer exists. If it has been transferred by the debtor in a lawsuit, reopening the case would be beneficial because it would permit the trustee to seek to undo what the district court has done; the transfer would have to be avoided for the property to return to the estate.

(i) Judicial Estoppel as "Transfer" in Violation of the Automatic Stay

When a bankruptcy case is commenced, the filing of the petition "operates as a stay, applicable to all entities,"[301] of a number of acts. Section 362(a)(1) prohibits the commencement or continuation of a judicial proceeding against the debtor of an action that was or could have been commenced before the bankruptcy case commenced.[302] Section

298. Hadlock v. Dolliver (*In re* Dolliver), 255 B.R. 251, 258 (Bankr. D. Me. 2000).
299. Mullendore v. United States (*In re* Mullendore), 741 F.2d 306, 308 (10th Cir. 1984).
300. FED. R. BANKR. P. 5010.
301. 11 U.S.C. § 362(a).
302. *Id.* § 362(a)(1).

362(a)(3) prohibits any act to obtain possession or exercise control over property of the estate.[303] The stay continues with respect to acts against the debtor until the earliest of the time the bankruptcy case is closed, the bankruptcy case is dismissed, or a discharge is granted or denied.[304]

In determining whether the use of judicial estoppel violates the automatic stay, the first matter to consider is whether summary judgment during the bankruptcy case would be construed as a continuation of an action against the debtor in violation of the stay. That is certainly the case when the debtor is a defendant.[305] The Eleventh Circuit has gone so far as to hold that the stay "prevents this court from issuing its opinion" in an appeal in which the defendant-appellee filed a chapter 11 petition after oral argument but before the issuing of an opinion.[306] However, many courts hold that § 362(a)(1) applies only when the debtor is the defendant and does not prevent the non-debtor defendant from defending against the plaintiff/debtor's civil action.[307] Similarly, courts hold that a defendant seeking summary judgment in an action by the debtor is not exercising possession or control over the action within the proscription of § 362(a)(3).[308]

Technically, therefore, it might be said that the entry of summary judgment against the debtor in an unscheduled lawsuit is not a violation of the stay.[309] Nonetheless, conceding the "technical" point, the debtor's continued litigation of the unscheduled lawsuit violates one of the primary purposes of the automatic stay:

> "The primary purposes of the automatic stay provisions are to effectively stop all creditor collection efforts, stop all harassment of a debtor seeking relief, and *to maintain the status quo* between the debtor and [his] creditors, thereby affording the parties and the Court an opportunity to appropriately resolve competing economic interests in an orderly and effective way."[310]

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303. *Id.* § 362(a)(3).

304. *Id.* § 362(c).

305. *See, e.g.*, Ellis v. Consol. Diesel Elec. Corp., 894 F.2d 371 (10th Cir. 1990).

306. Ellison v. Nw Eng'g Co., 707 F.2d 1310, 1311 (11th Cir. 1983).

307. *E.g.*, Martin-Trigona v. Champion Fed. Sav. and Loan Ass'n, 892 F.2d 575, 577 (7th Cir. 1989); *cf.* Resorts Int'l, Inc. v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394 (9th Cir. 1995).

308. *E.g., Martin-Trigona*, 892 F.2d at 577.

309. A literal reading of § 362 would also suggest that the debtor violates the stay by presuming to continue litigation. However, a literal interpretation of § 362 is not immune from criticism. Under a literal or "plain meaning" approach to § 362, its application to "all entities" would include the debtor, who would be prohibited from exercising control over estate property. Such an interpretation would, for example, prevent the debtor from exercising enough control over estate property to turn property over to the trustee or from continuing to live in her house during the administration of the chapter 7 case.

310. Taylor v. Slick, 178 F.3d 698, 702 (3d Cir. 1999) (quoting Zeoli v. RIHT Mortg. Corp., 148 B.R. 698, 700 (D.N.H. 1993)); *see also* 40235 Wash. St. Corp. v. Lusardi, 177 F. Supp. 2d 1090, 1103-04 (S.D. Cal. 2001). Similar policies include "to protect creditors by promoting the

As one court has put it, the goal of the automatic stay is to avoid a "free-for-all in which opposing interests maneuver to capture the lion's share of the debtor's assets."[311] Some courts also assert that the stay negates post-petition transfers of the debtor's property.[312] Assuming the desirability of such a policy, the automatic stay could reasonably be held to prohibit a non-debtor, who is a defendant, from seeking dismissal or judgment in a suit brought by the debtor, and to prohibit the debtor from doing the same. Therefore, the case would be stayed until the trustee is afforded the opportunity to intervene or to abandon the chose-in-action to the debtor, at which point the action would no longer be property of the estate and there would be no bar to anyone's attempting to possess, control, or destroy it.

Assuming that entry of summary judgment is not violative of the stay, we might question what exactly entitles the defendant/employer to summary judgment. If the debtor's failure to schedule the lawsuit creates the right to judgment, might not the failure to schedule the lawsuit be violative of the stay? There is authority that a transfer of property by the debtor is void *ab initio* as a violation of the automatic stay;[313] the greater weight of authority, however, holds that the stay does not apply to transfers by the debtor.[314] There is also authority, however, that neither a debtor's bringing of a judicial action,[315] nor the plaintiff/debtor's dismissal of such an action violates the automatic stay.[316] This authority would support the position that the debtor's failure to schedule a lawsuit, inasmuch as it affects a transfer of the debtor's rights to the defendant/employer, is not void as a violation of the automatic stay.[317]

(ii) Judicial Estoppel as an Unauthorized Post-Petition Transfer

The decisions denying that the debtor may violate the stay do not leave the debtor with untrammeled discretion to dispose of estate property. Indeed, "section 549 picks up where the automatic stay leaves off."[318] If the entry of judgment based on bankruptcy-based judicial estoppel is a disposition other than by the debtor, it may be an unauthorized post-petition transfer that is voidable under § 549. Section 549 is

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bankruptcy policy of equality of distribution among claimants" and "to promote the orderly administration of the bankruptcy estate." WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE § 36:4 (2d ed. 2004).

311. Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 114 (1st Cir. 1994).

312. *In re* Soares, 107 F.3d 969, 976 (1st Cir. 1997).

313. *E.g.*, Edwards v. Heartwood 11, Inc. 590 S.E.2d 734 (Ga. Ct. App. 2003).

314. *E.g.*, Schwartz v. United States (*In re* Schwartz), 954 F.2d 569, 574 (9th Cir. 1992).

315. Martin-Trigona v. Champion Fed. Sav. and Loan Ass'n, 892 F.2d 575 (7th Cir. 1989).

316. *In re* Convention Masters, Inc., 46 B.R. 339 (Bankr. D. Md. 1985).

317. *See id.*

318. *In re Schwartz*, 954 F.2d at 574.

one of the sections that detail the trustee's avoidance powers, which are designed to increase the value of the estate by recovering the value of property disposed of after the case is commenced.[319]

The elements of a § 549 action are simple: the trustee must plead and prove that (1) property of the estate (2) was transferred (3) after the filing of a petition and (4) that transfer was not authorized by Bankruptcy Code or by court.[320] Section 550 states generally that the trustee may recover from the transferee the value of the property transferred for the benefit of the estate.[321]

Because it has already been established that a pre-petition chose-in-action is property of the estate, the first element of a § 549 is met.[322] The next issue is whether the debtor's failure to schedule the lawsuit, to the extent that it gives rise to a right of dismissal in the defendant, is a transfer. The Bankruptcy Code defines "transfer" to include "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property."[323] The definition of transfer is broad enough to include acts that might not ordinarily or intuitively be considered transfers. The definition includes, for example, an election to carry net operating losses forward to future taxable years instead of back to prior ones.[324]

Broadly applying the definition of "transfer," courts have held that the elimination of an intangible right or of a chose-in-action is a transfer. For example, courts have found that the satisfaction of mortgage by the debtor/mortgagee,[325] redemption of shares of corporate stock,[326] and a release of claims by the debtor against a third party,[327] are all transfers. Finally, courts have also held that judgments, whether entered against

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319. *E.g.*, Samuel A. Caulfield, *Fraudulent and Preferential Conveyances of the Insolvent Multinational Corporation*, 17 N.Y.L. Sch. J. Int'l & Comp. L. 571, 618 (1997).

320. 11 U.S.C. § 549(a) (2000); Moratzka v. Visa U.S.A. (*In re* Calstar, Inc.), 159 B.R. 247, 252 (Bankr. D. Minn. 1993).

321. 11 U.S.C. § 550 (a).

322. *See supra* note 211 and accompanying text.

323. 11 U.S.C. § 101(54).

324. Towers v. United States (*In re* Feiler), 218 B.R. 957, 962 (Bankr. N.D. Cal. 1998), *aff'd*, 230 B.R. 164 (B.A.P. 9th Cir. 1999), *aff'd*, 218 F.3d 948 (9th Cir. 2000).

325. Dolata v. Dolata (*In re* Dolata), 306 B.R. 97, 118-19 (Bankr. W.D. Pa. 2004).

326. *See, e.g.*, Consove v. Cohen (*In re* Roco Corp.), 701 F.2d 978, 985 (1st Cir. 1983); *cf.*, *e.g.*, PHP Liquidating, LLC v. Robbins, 291 B.R. 592, 600-02 (D. Del. 2003) (holding that trustee could not avoid prepetition stock redemption unless shareholder received less than reasonably equivalent value); Corporate Jet Aviation, Inc. v. Vantress (*In re* Corporate Jet Aviation, Inc.), 57 B.R. 195, 197 (Bankr. N.D. Ga. 1986).

327. Bernstein v. Safe Alternatives Corp. of Am. (*In re* Bernstein), 246 B.R. 742, 743 (Bankr. D. Conn. 2000) (holding that a trustee could avoid, as post-petition transfer, debtor's purported waiver of right to receive salary earned pre-petition); FBN Food Servs., Inc. v. River Bank Am. (*In re* FBN Food Servs., Inc.), 185 B.R. 265, 272 (N.D. Ill. 1995).

the debtor as defendant[328] or against the debtor as plaintiff,[329] constitute transfers for purposes of trustee avoidance.

In judicial estoppel cases, there are two possible unauthorized transfers: one, the district court's entry of summary judgment or dismissal; or, two, the debtor's omission of the action from the schedules. In the first situation, it might be said that the debtor owns the claim until the district court says otherwise; in the second situation, it might be said that the transfer is that which entitles the defendant to judgment. Which event causes the debtor to part with her rights, and which therefore is the transfer, depends on whether the district court's judgment is considered declarative or constitutive of the plaintiff/debtor's right to relief. In either case, however, a valuable interest has been lost and there has been, therefore, a transfer. The second element of a § 549 action is therefore satisfied.

The third element of a § 549 action requires that the transfer occur post-petition. The district court's judgment must necessarily be post-petition. Therefore, the only potential issue, where the debtor's failure to schedule the lawsuit is considered the transfer, is whether such conduct occurred post-petition. Section 521(1) requires the debtor to file a schedule of assets.[330] The timing of the filing, however, is prescribed by the bankruptcy rules, local rules, and local standing orders. Rule 1007 of the Federal Rules of Bankruptcy Procedure permits the debtor to file schedules as late as fifteen days after filing the petition.[331] Indeed, some courts have characterized the debtor's failure to schedule the asset as "post-petition" and, in so doing, stated that "any *post-petition* conduct by [the plaintiff/debtor], including failure to disclose an asset, does not relate to the merits of the discrimination claim," because the claim became property of the estate upon filing of the petition.[332] Therefore, the third element of a § 549 action is met.[333]

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328. Perkins v. Petro Supply Co. (*In re* Rexplore Drilling, Inc.), 971 F.2d 1219, 1225 (6th Cir. 1992). The issue of whether there is a transfer is perhaps inseparable from the issue of standing. One court has held, without reference to § 549, that a debtor's defensive appellate rights were estate property that the debtor could not lawfully transfer. Mozer v. Goldman (*In re* Mozer), 302 B.R. 892, 895-96 (C.D. Cal. 2003).

329. Besing v. Hawthorne (*In re* Besing), 981 F.2d 1488, 1494 (5th Cir. 1993).

330. 11 U.S.C. § 521(1) (2000).

331. Fed. R. Bankr. P. 1007(c).

332. Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 n.80 (11th Cir. 2004).

333. If the transfer discussed above does not occur post-petition, it must occur either pre-petition or during the *Augenblick* at which the petition is filed. In deference to theorists of time from Zeno to Stephen Hawking, I ignore the second possibility. A pre-petition transfer alters very little from the analysis above.

Section 548 allows the trustee to avoid "fraudulent transfers." *See* 11 U.S.C. § 548. There are two kinds of fraudulent transfers – those with actual fraudulent intent and those that are considered constructively fraudulent. A transfer with actual fraudulent intent is any voluntary or

The fourth and final element of a § 549 action requires that the post-petition transfer be unauthorized by the bankruptcy court or the Bankruptcy Code. To the extent that the district court's dismissal is predicated upon the notion that omission of the claim from debtor's schedules violates § 521, and thus potentially works a fraud upon the bankruptcy court,[334] it is to be taken for granted that the transfer is unauthorized by the potentially defrauded court. The fourth element of § 549 is therefore also satisfied.

Therefore, since all elements of a § 549 action are met, a trustee, aware that a court has dismissed a debtor's pre-petition cause of action because the debtor failed to schedule the asset, should have no difficulty in pleading a § 549 action against the defendant/employer in the bankruptcy court. Moreover, the trustee who is able to prove the pleaded facts is likely to recover, from the employer, the value of the lawsuit for the benefit of the estate.[335] In response to a § 549 action, however, the employer may interpose the statute of limitations on the trustee's avoidance action. Section 549(d) provides that a § 549 action may not be commenced after the earlier of two years after the date of the transfer sought to be avoided, or the time the case is closed or dismissed.[336] Given that employers typically seek summary judgment only after the bankruptcy case is closed,[337] the limitation period often expires well before a trustee even knows that there was a transfer in need of avoidance. In these situations, many courts have held that reopening a case in order to administer an asset relieves the trustee of the statute of limitations.[338]

The doctrine of equitable tolling, frequently understood as being

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involuntary transfer of the debtor's interest in property made within two years of the bankruptcy petition and made "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became [indebted], on or after the date that such transfer was made." *Id.* § 548(a)(1)(A). If the "transfer" of the debtor's interest in the lawsuit were not considered transferred post-petition (or at the exact moment of the petition), and if the debtor has the fraudulent intent the courts so frequently infer, § 548 would permit avoidance of the transfer.

The second kind of fraudulent transfer is the constructively fraudulent transfer. This sort covers any voluntary or involuntary transfer of the debtor's interest in property made within two years of the bankruptcy petition, while the debtor was insolvent, and for which the debtor received less than reasonably equivalent value. *Id.* § 548(a)(1)(B). If the "transfer" of the debtor's interest in the lawsuit is not considered transferred post-petition (or at the exact moment of the petition), and if the debtor was insolvent at the time of the transfer, § 548 would permit avoidance of the transfer, because it could not truly be said the plaintiff/debtor received reasonably equivalent (or any) value for the transfer.

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

335. 11 U.S.C. § 550(a).

336. *Id.* § 549(d).

337. *See, e.g.*, Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002); Barger v. City of Cartersville, Ga., 348 F.3d 1289 (11th Cir. 2003).

338. *E.g.*, Gross v. Petty (*In re* Petty), 93 B.R. 208 (B.A.P. 9th Cir. 1988).

applicable to federal statutes of limitation,[339] perhaps sheds some light on the statute of limitations issue. In order to invoke equitable tolling, the trustee must show: (1) wrongful concealment by the defendant of its actions; (2) failure of the trustee to discover, within the limitations period, the operative facts that are the basis of the avoidance action; and (3) trustee's due diligence until such facts are discovered.[340] Interestingly, the requirements for equitable tolling are similar to those for reopening a case: Both require demonstrating a need to administer an asset wrongfully concealed by the debtor and a failure by the trustee to discover that asset after diligent efforts to do so.

It could be argued, however, that equitable tolling requires concealment by the defendant, whereas reopening may be based on concealment by the debtor. It is not necessarily impossible, however, to show concealment by the defendant. In the judicial estoppel cases, the defendant/employer knows of the bankruptcy, understands that the trustee is the real party in interest, and asks the district court for relief, but does not notify the trustee of the pending action. Moreover, the defendant/employer might move for dismissal based on judicial estoppel in an effort to keep the action concealed from the trustee.[341] Even if it were not possible to show concealment by a particular defendant, most bankruptcy courts do not require concealment by the defendant, but rather permit concealment by the debtor to satisfy the first element of equitable estoppel.[342]

c. Chapter 13 Cases

Although reopening a Chapter 7 case to permit the trustee to exercise statutory avoidance powers is an appropriate method of addressing

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339. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002); Young v. United States, 535 U.S. 43, 49-50 (2002); Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946); Veltri v. Bldg. Serv. 32b-J Pension Fund, 393 F.3d 318, 322 (2d Cir. 2004); Williams v. Sims, 390 F.3d 958, 960 (7th Cir. 2004).

340. *E.g.*, Jarrett v. Kassel, 972 F.2d 1415, 1424 n.6 (6th Cir. 1992).

341. It is at least conceivable that a defendant might go to great enough lengths to conceal the action from the trustee that the defendant might commit a bankruptcy crime. It is a crime, for instance, to "knowingly and fraudulently conceal[ ] from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor." 18 U.S.C. § 152(1) (2000). Likewise, it is a crime to "knowingly and fraudulently receiv[e] any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11." *Id.* § 152(5). It is at least conceivable that a defendant might deprive the estate of the value of the chose in action with the requisite intent.

342. Kearns Motor Co. v. Cimino (*In re* Dreiling), 233 B.R. 848, 878 (Bankr. D. Colo. 1999); Ramette v. Range Mental Health Ctr., Inc. (*In re* Russ), 1997 WL 188449, at *3-4 (Bankr. D. Minn. 1997); Moratzka v. Pomaville (*In re* Pomaville), 190 B.R. 632, 637 (Bankr. D. Minn. 1995); Martin v. Butcher (*In re* Butcher), 72 B.R. 247, 251 n.5 (Bankr. E.D. Tenn. 1987). *But see* Mediators, Inc. v. Manney (*In re* Mediators, Inc.), 190 B.R. 515, 525 (S.D.N.Y. 1995).

an unscheduled and dismissed lawsuit, such a remedy would be unsuitable under Chapter 13. The reasons for the inapplicability of this remedial measure are twofold. First, a case filed pursuant to Chapter 13 is not closed while the debtor is completing his or her plan. Precisely because the case is not closed, there is no impediment to the pursuit of an unauthorized post-petition transfer. While courts are divided as to whether a Chapter 13 debtor may exercise the trustee's avoidance powers,[343] someone would have standing to exercise such powers, whether it be the debtor or the Chapter 13 trustee.[344] On the other hand, it is not as clear in Chapter 13 cases as it is in Chapter 7 cases that there would even be an unauthorized post-petition transfer to avoid. Because § 1306 provides that a Chapter 13 debtor "shall remain in possession of all property of the estate"[345] and because § 1303 provides that the debtor has the power to use, sell, and lease estate property,[346] most courts have held that the debtor has standing to commence a pre-petition cause of action.[347] The debtor's right to pursue the action would, thus, largely vitiate any claim that the disposition of the action was unauthorized.

Second, the analysis appropriate to Chapter 7 cases fits poorly in the Chapter 13 context because repayment to creditors is not solely a function of, nor is it limited to, property of the estate. Once the Chapter 13 plan is confirmed, it does not matter whether the lawsuit is included in the estate, as the value to be received by creditors is determined by

343. Some courts hold that the Chapter 13 debtor may exercise the avoidance powers in the same manner and to the same degree as a trustee. *See* Houston v. Eiler (*In re* Cohen), 305 B.R. 886, 900 (B.A.P. 9th Cir. 2004); Thacker v. United Cos. Lending Corp., 256 B.R. 724, 728 (W.D. Ky. 2000); Freeman v. Eli Lilly Fed. Credit Union (*In re* Freeman), 72 B.R. 850, 855 (Bankr. E.D. Va. 1987); *In re* Weaver, 69 B.R. 554, 556 (Bankr. W.D. Ky. 1987); Ottaviano v. Sorokin & Sorokin, P.C. (*In re* Ottaviano), 68 B.R. 238, 240 (Bankr. D. Conn. 1986); Einoder v. Mount Greenwood Bank (*In re* Einoder), 55 B.R. 319, 322-23 (Bankr. N.D. Ill. 1985). Others hold that due to the absence of express statutory authority, Chapter 13 debtors may not exercise those powers. *See* Realty Portfolio, Inc. v. Hamilton (*In re* Hamilton), 125 F.3d 292, 297-98 (5th Cir. 1997); *In re* Binghi, 299 B.R. 300, 303-04 (Bankr. S.D.N.Y. 2003); Kildow v. EMC Mortg. Corp. (*In re* Kildow), 232 B.R. 686, 692-93 (Bankr. S.D. Ohio 1999); LaBarge v. Benda (*In re* Merrifield), 214 B.R. 362, 364-65 (B.A.P. 8th Cir. 1997); Barclays Am./Mortg. Corp. v. Wilkinson (*In re* Wilkinson), 186 B.R. 186, 191-92 (Bankr. D. Md. 1995); *In re* Redditt, 146 B.R. 693, 701 (Bankr. S.D. Miss. 1992); *In re* Perry, 131 B.R. 763, 768-69 (Bankr. D. Mass. 1991); Bruce v. Republic Bank-S. Austin (*In re* Bruce), 96 B.R. 717, 721-22 (Bankr. W.D. Tex. 1989).

344. Ryker v. Current (*In re* Ryker), 315 B.R. 664, 670 (Bankr. D.N.J. 2004) (stating "the ability of the Chapter 13 trustee to employ the avoidance powers" is "clear").

345. 11 U.S.C. § 1306(b) (2000).

346. *Id.* § 1303.

347. *E.g.*, Cable v. Ivy Tech State Coll., 200 F.3d 467, 472-74 (7th Cir. 1999); Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513, 515 (2d Cir. 1998); Mar. Elec. Co., Inc. v. United Jersey Bank, 959 F.2d 1194, 1209 n.2 (3d Cir. 1991); Looney v. Hyundai Motor Mfg. Ala., LLC, 330 F. Supp. 2d 1289 (M.D. Ala. 2004). *But see* Am. Gen. Fin., Inc. v. Tippins (*In re* Tippins), 221 B.R. 11 (Bankr. N.D. Ala. 1998); Davis v. Victor Warren Props., Inc. (*In re* Davis), 216 B.R. 898, 902-03 (Bankr. N.D. Ga. 1997).

the plan and not by the value of the estate.[348] This, however, does not mean that there is no way for the value of the unscheduled asset to be channeled to creditors.

Although bankruptcy-based judicial estoppel is more consistent with Chapter 13 than with Chapter 7, it is actually less necessary in Chapter 13 than in Chapter 7 because of the bankruptcy court's ability to make corrections either before the plan is confirmed or while the confirmed plan is pending. The methods for chastising a Chapter 13 debtor who has omitted an asset, while somewhat more limited than would be the case under Chapter 7, are nevertheless ample: (1) refusal to confirm a plan for failure to comply with the other provisions of Title 11;[349] (2) modification of the plan after which the debtor may dismiss or convert;[350] (3) revocation of a plan procured by fraud;[351] or (4) conversion of the case to Chapter 7 because of failure to file the requisite § 521(1) information, because of revocation of confirmation, because of refusal to confirm, or otherwise "for cause."[352] However, there is no statutory basis to deny a discharge in a Chapter 13 case based on bad behavior. In any case, dismissal or conversion is likely, either by the debtor or at the request of a creditor or United States Trustee.

In addition, bankruptcy courts may modify the Chapter 13 plan in order to police debtor omissions.[353] Where the debtor is permitted to continue an unscheduled lawsuit and recover a judgment, there is authority for the proposition that the trustee and creditors may seek to modify a plan so that any proceeds awarded are devoted to repaying creditors.[354] There is, however, considerable disagreement as to the binding or preclusive effect of an order confirming a Chapter 13 plan and the grounds for its modification.[355] Furthermore, there is disagree-

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348. *See supra* notes 243-250 and accompanying text.

349. 11 U.S.C. § 1325(a).

350. *Id.* § 1329.

351. *Id.* § 1330(a).

352. *Id.* § 1307(c).

353. For a Chapter 13 plan to be confirmed it must satisfy several requirements, the two most important of which are the "liquidation test" and the "disposable income test." Pursuant to the liquidation test, the plan must provide an unsecured creditor with an allowed claim a payment that is at least equal to the present value of the amount that creditor would be entitled to receive in a Chapter 7 case. 11 U.S.C. § 1325(a)(4). Under the "disposable income" test, the debtor must devote the excess of her income over her reasonable and necessary living expenses to the repayment of creditors. *Id.* § 1325(b).

354. *See, e.g.*, *In re* Studer, 237 B.R. 189 (Bankr. M.D. Fla. 1998).

355. Some courts require the trustee or creditor seeking modification to show an unanticipated change of circumstances. *See, e.g.*, Arnold v. Weast (*In re* Arnold), 869 F.2d 240, 243 (4th Cir. 1989). Others require a lesser showing. *See, e.g.*, Barbosa v. Solomon, 235 F.3d 31, 41 (1st Cir. 2000) (determining that a party seeking modification must advance a legitimate reason authorized under § 1329); *In re* Witkowski, 16 F.3d 739, 744 (7th Cir. 1994) (requiring no showing of changed circumstances); Ledford v. Brown (*In re* Brown), 219 B.R. 191, 194 (B.A.P. 6th Cir.

ment as to whether a court, in determining whether to modify a plan, should re-apply the disposable income test[356] even though this limitation would have little effect on the court's ability to capture the value of the damage award for the benefit of creditors.[357] The district court's application of judicial estoppel clearly interferes with this bankruptcy remedy.[358]

Finally, Chapter 13 permits the bankruptcy court to revoke its order of confirmation, if such order was procured by fraud, within 180 days after the order was entered.[359] Once the confirmation is revoked, one of three things must happen: (1) the debtor must modify the plan to include the unscheduled lawsuit, thereby complying with the liquidation test; (2) the court must dismiss the Chapter 13 bankruptcy case; or (3) the court must convert the Chapter 13 case to a Chapter 7 case.[360] Where the court opts to convert the case to Chapter 7, the Chapter 7 estate, although created on the date of conversion, includes all of the property that was previously in the Chapter 13 estate at the time the petition was filed, which includes the lawsuit. Application of judicial estoppel would thus deprive the Chapter 7 trustee of the value of that asset from the very beginning of the Chapter 7 case. Moreover, if the creditors in the Chapter 7 case fail to receive the amount they were entitled to under the hypothetical liquidation that initially made the debtor's confirmation fraudulent, it is futile to revoke that confirmation. Applying judicial estoppel to unscheduled assets in Chapter 13 cases, therefore, interferes with the bankruptcy court's statutorily mandated methods of addressing debtor misconduct.

In one exchange between Captain Jack Sparrow and Will Turner, the latter complains, "You didn't beat me. You ignored the rules of engagement. In a fair fight, I'd kill you."[361] Sparrow replied, "That's

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1998) (holding that an unanticipated change of circumstances is not necessary to plan modification).

356. Some authorities indicate that the debtor's ability to pay should be re-examined for purposes of plan modification. *Barbosa*, 235 F.3d at 40-41; 3 HENRY J. SOMMER, COLLIER BANKRUPTCY MANUAL ¶ 1329.03 (3d ed. rev. 2005). Others state that the disposable income test should not be applied in the context of modification. *See, e.g.*, Forbes v. Forbes (*In re* Forbes), 215 B.R. 183, 191 (B.A.P. 8th Cir. 1997); *In re* Sounakhene, 249 B.R. 801, 804-05 (Bankr. S.D. Cal. 2000). *See generally* 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 6.45 (2d ed. 1994).

357. *See* Chapman, *supra* note 248, at 810. Re-application of the liquidation test is able to capture any difference between the amounts calculated in the hypothetical liquidation analysis as of the original confirmation and modification dates.

358. Even if the precedent that is binding on a given bankruptcy court would prevent modification of the plan, it is curious that courts that apply judicial estoppel against the Chapter 13 debtor-plaintiffs do not consider the issue.

359. 11 U.S.C. § 1330(a) (2000).

360. *Id.* § 1330(b).

361. PIRATES, *supra* note 1.

not much incentive for me to fight fair, then, is it?"[362] Bankruptcy law, on the other hand, clearly provides a number of incentives to fight fairly. The Bankruptcy Code and related laws provide a wide variety of remedies for debtors who break the rules of bankruptcy. Ordinarily, the remedies for failure to disclose assets are denial or revocation of discharge[363] and criminal prosecution,[364] and, most importantly for the estate and creditors, transference of any such assets to the trustee who subsequently learns of them.[365] Another penalty frequently visited upon a debtor who fails to disclose assets is to deny the debtor the right to amend a claim of exemptions,[366] which presupposes that any unscheduled asset is property of the estate and has been ordered turned over to the trustee for administration.

V. WRONG AS A MATTER OF PROCEDURE

> Will Turner: You knew William Turner?
> Pintel: Old Bootstrap, we knew him. It never sat well with Bootstrap what we did to Jack Sparrow, the mutiny and all. That's why he sent off a piece of the treasure to you, as it were. He said we deserved to be cursed . . . and remain cursed.
> Ragetti: Stupid blighter.
> Gibbs: Good man.
> Pintel: But as you can imagine, that didn't sit too well with the captain. So, what the captain did, he strapped a cannon to Bootstrap's bootstraps.
> Ragetti: Bootstrap's bootstraps.
> Pintel: The last we saw of old Bill Turner he was sinking to the crushing black oblivion of Davey Jones' locker. Of course, it was only after that we learned we needed his blood to lift the curse.
> Ragetti: I guess that's what you call ironic.[367]

A. *In General*

The Ninth Circuit case of *Dunmore v. United States*,[368] which involved a tax refund action omitted from a debtor's schedules, demonstrates a procedural alternative to the use of judicial estoppel. In 1993,

362. *Id.*

363. *See, e.g.*, United States v. Cluck, 87 F.3d 138 (5th Cir. 1996).

364. *See, e.g.*, United States v. Levine, 970 F.2d 681 (10th Cir. 1992).

365. *See, e.g.*, *In re* Santaella 298 B.R. 793 (Bankr. S.D. Fla. 2002); Roudebush v. Sharp (*In re* Sharp), 244 B.R. 889 (Bankr. E.D. Mich. 2000).

366. *E.g.*, *In re* Dipzinski, 234 B.R. 746, 748 (Bankr. E.D. Ark. 1999); *see, e.g.*, *In re* Grogan, 300 B.R. 804 (Bankr. D. Utah 2003).

367. PIRATES, *supra* note 1.

368. 358 F.3d 1107 (9th Cir. 2004).

the taxpayer sought refunds of overpayments for the 1989 and 1990 tax years.[369] While this request was pending, the taxpayer filed a Chapter 7 petition in September 1995.[370] He omitted the tax refund request from his schedules, presumably because his tax attorney had told him that it did not matter whether he scheduled the request because the bankruptcy trustee would likely decline, and the taxpayer did not have the resources, to pursue litigation.[371] In October 1995, the IRS disallowed the refund and issued a notice of deficiency for 1991.[372] The taxpayer received his discharge in February 1996 and soon thereafter the IRS issued notices of deficiency for tax years 1987, 1992, and 1993.[373] The IRS also informed the taxpayer that the alleged deficiencies would exceed any refund he might obtain.[374]

In October 1997, the taxpayer commenced a tax refund action in district court; he amended his complaint and demanded a jury trial in May 1998.[375] His amended complaint sought tax refunds for three pre-petition tax years, a determination that the IRS violated the bankruptcy discharge, a judgment quieting title against tax liens, and a permanent injunction against the IRS.[376] Eleven months later, the government sought dismissal of the action on the basis that the unscheduled and unadministered assets remained property of the estate and, therefore, the taxpayer neither owned the claims nor had prudential standing to assert them.[377]

Because the statute of limitations on the refund action had run,[378] a dismissal would have prevented the refiling of the action. The taxpayer asked the district court to exercise its bankruptcy jurisdiction and reopen his bankruptcy case, which would allow him to seek abandonment of the assets.[379] Instead, the district court transferred the tax action to the bankruptcy court.[380] Before the bankruptcy judge, the trustee expressed no interest in pursuing the tax claims; the bankruptcy judge ordered the trustee to abandon the claims and considered the abandonment to have

369. *Id.* at 1109.

370. *Id.*

371. *Id.*

372. *Id.* at 1109-10.

373. *Id.* at 1110.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.* The taxpayer did not assert in the lower courts that the government waived its objection to his prudential standing and the Ninth Circuit held that the taxpayer's objection was itself therefore waived. *Id.* at 1110 n.1.

378. *See* 26 C.F.R. § 301.6532-1(a) (2003) (providing a two-year limitation period).

379. *Dunmore*, 358 F.3d at 1110.

380. *Id.*

"cured Dunmore's lack of standing."[381]

Although the district court judge apparently assumed the tax litigation would be tried in the district court following the bankruptcy trustee's decision to abandon the claims, the litigation continued in the bankruptcy court even after the trustee abandoned the estate's interest.[382] After the debtor missed a status conference and the bankruptcy judge scheduled the case for trial, the debtor sought to have the case returned to the district court on the grounds that the bankruptcy judge lacked jurisdiction over the abandoned claims. The government sought dismissal for failure to prosecute, and when the debtor was unprepared to proceed with trial on the scheduled date, the bankruptcy judge dismissed the refund claims for failure to prosecute.[383]

Much of the Ninth Circuit's opinion addresses the propriety of the dismissal for failure to prosecute and is not directly relevant to the issue of judicial estoppel. The balance of the opinion is useful, however, to illustrate that there are procedures available to address the omission of a cause of action and to ensure that the valuable asset is preserved so that its value can be realized for the benefit of the common pool. Moreover, the Ninth Circuit opinion approves the use of these procedures as a means of avoiding the use of judicial estoppel.[384]

Judicial estoppel is a court-created doctrine of uncertain moorings. The United States Supreme Court only recently applied the doctrine for the first time in *New Hampshire v. Maine*,[385] and noted that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation or principle."[386] As a general matter, it applies when a litigant is successful in maintaining one position in one lawsuit, and then takes an inconsistent position in a second lawsuit.[387] While the doctrine was developed "to protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment,"[388] the Court also noted that it especially applies in situations in which the contrary position is " 'to the prejudice of the party who has acquiesced in

381. *Id.* at 1110-11.

382. *Id.* at 1111.

383. *Id.*

384. *Id.* at 1113 n.3.

385. *See* Kira A. Davis, *Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law*, 89 CORNELL L. REV. 191, 194 (2003) (noting this case as the first official acknowledgment of the doctrine).

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

387. *See id.* at 749; 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4477 (2d ed. 2002).

388. *New Hampshire*, 532 U.S. at 749-50.

the position formerly taken by him.' "[389]

In determining whether to apply judicial estoppel, the Court in *New Hampshire* listed the following three considerations: (1) whether a party's later position was clearly inconsistent with its earlier position; (2) "whether the party ha[d] succeeded in persuading a court to accept that party's earlier position, [such] that judicial acceptance of an inconsistent position in a later proceeding [created] the perception that either the first or the second court was misled;" 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.[390] In the context of bankruptcy proceedings, courts invoking judicial estoppel to dismiss a subsequent claim by a plaintiff/debtor have effectively eliminated the third requirement. However, there does not appear to be any obvious justification for that elimination. Indeed, in an employment discrimination action, the courts' refusals to invoke the third consideration results in a windfall to potentially discriminatory employers.

Furthermore, a straightforward *New Hampshire* analysis reveals that many of the cases described above may in fact not be appropriate candidates for judicial estoppel. Beginning with the first element, it is unclear how an omission of the type at issue in these cases is "clearly inconsistent" with an affirmative position taken in the employment discrimination case. Assuming that the debtor is making an affirmative statement about existing potential claims, and that the court relies on such statement, it is unclear whether the debtor understands this to include their pending EEOC charge or potential employment discrimination claim. For example, the debtor's bankruptcy counsel may advise the debtor not to list the claim. While it may be more difficult to argue around application of judicial estoppel in situations in which the debtor has already filed an employment discrimination lawsuit, even these cases are not exactly like taking an affirmative inconsistent position, such as that taken by the state of New Hampshire during its litigation with Maine.[391] In that case, New Hampshire entered into a consent judgment whereby it agreed that the border between New Hampshire and Maine would be split down the main navigational channel of the river that divided the two states.[392] Having agreed to that, New Hampshire was estopped to argue later that it owned all the way to the Maine side of the river.[393] Thus, unlike debtors engaged in bankruptcy pro-

389. *Id.* at 749 (quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895)).
390. *Id.* at 750-51.
391. *See id.* at 749.
392. *Id.* at 750.
393. *Id.* at 751.

ceedings, New Hampshire made affirmative statements about its position.

Indeed, the second consideration suggests that the Court is looking for affirmative statements of positions by the party against whom estoppel is asserted. As was explained in *New Hampshire*, "courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'"[394] The Court further explained that "[a]bsent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations' and thus poses little threat to judicial integrity."[395] One might ask whether there can be any "persuasion" afoot when the debtor has in fact asserted nothing. What does "success" mean in this context? If the trustee never would have pursued the claim (i.e., would have abandoned it), in what practical way has the bankruptcy court been misled?[396]

However, courts have not taken such a plaintiff/debtor friendly view. Indeed, in *Hamilton v. State Farm Fire & Casualty Co.*,[397] the court invoked judicial estoppel even though the bankruptcy court ultimately did not enter a discharge in bankruptcy, but instead dismissed the bankruptcy petition.[398] The court still held the plaintiff/debtor responsible for his failure to disclose his potential claim against his insurance company, in spite of Hamilton's argument that, without the discharge, the bankruptcy court could not have relied on his schedules.[399] The court stated that "[t]he bankruptcy court may 'accept' the debtor's assertions by relying on the debtor's nondisclosure of potential claims in many ways."[400] Similarly, in *Cunningham v. Reliable Concrete Pumping, Inc.*,[401] a Washington state court used judicial estoppel to stop a plaintiff from pursuing a personal injury case, even though his bankruptcy case was reopened.[402] Relying on *Hamilton*, the court reasoned that Cunningham benefited from the initial discharge, even if the bankruptcy case was subsequently reopened.[403]

394. *Id.* at 750.

395. *Id.* at 750-51 (citation omitted).

396. Interestingly, at least one court has suggested that courts may still apply judicial estoppel where a bankruptcy is reopened for purposes of amending the filings to add the claim, yet the trustee eventually abandons the claim. *See In re* Upshur, 317 B.R. 446 (Bankr. N.D. Ga. 2004).

397. 270 F.3d 778 (9th Cir. 2001).

398. *Id.* at 784.

399. *Id.*

400. *Id.*

401. 108 P.3d 147 (Wash. App. 2005).

402. *Id.*

403. *Id.*

Still, it makes sense for courts to encourage honesty in debtors by penalizing what may be characterized as "lies of omission." However, a third consideration militates against the use of judicial estoppel in this context, particularly in situations in which the trustee has expressed an interest in attempting to gather assets from the employment discrimination case to pay the debtor's creditors, or has stated that he would not have pursued the claim. "A third consideration is 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."[404] The opposing party here, the potentially discriminating employer, is in no way placed in an unfair advantage if the plaintiff/debtor is not estopped. Indeed, the employer essentially is the recipient of a windfall: Judicial estoppel provides an automatic defense to potentially discriminatory employers who just happen to encounter an employee who had financial misfortunes that forced him or her into bankruptcy. While punishing the plaintiff/debtor in this manner arguably may lead to increased debtor candor and therefore integrity in the bankruptcy system,[405] it undermines another important area of law that is at issue in these cases—employment discrimination law.

The Supreme Court in *New Hampshire* noted that the concept of judicial estoppel was flexible and that "[a]dditional considerations may inform the doctrine's application in specific factual contexts."[406] An obvious important consideration in these cases that courts have left out of their analysis is that potential discriminating employers—entities that were not parties to the bankruptcy proceedings—are unfairly being let off the hook, which in some cases not only means that a victim of discrimination is not compensated, but also that these employers are free to continue their discrimination. This result undermines the purposes of Title VII, which are to make victims whole and to deter employers from discriminating.[407] Indeed, given the alacrity with which courts are willing to dismiss these cases under the auspices of judicial estoppel, it is of small surprise that employment defense attorneys, a relatively prosperous group of lawyers with ample resources, have taken advantage of this tool.[408] It is of equally small surprise that defense publications have

404. New Hampshire v. Maine, 532 U.S. 742, 751 (2001).

405. We use the term "arguably" here because it is unclear whether many of these debtors really intended to deceive the bankruptcy court. Instead, they appear to be rather unsophisticated litigants who are victims of poor advice by bankruptcy counsel.

406. *New Hampshire*, 532 U.S. at 751.

407. Theresa M. Beiner, Gender Myths v. Working Realities: Using Social Science to Reformulate Sexual Harassment Law 175-76 (2005).

408. *Cf.* Carol McHugh Sanders, *Current Decisions*, 69 Def. Couns. J. 355, 359-61 (2002) (detailing the successful use of judicial estoppel to stop a plaintiff/debtor from pursuing damages against his former employer based on an employment discrimination case).

informed these lawyers of this easy way out of employment discrimination lawsuits.[409] Indeed, discovery-taking tips for employment defense counsel already include determining if the plaintiff has filed bankruptcy.[410]

Yet, in the one case in which the United States Supreme Court could have used judicial estoppel against an employment discrimination plaintiff, the Court chose not to do so, instead holding that employment discrimination plaintiffs could, under appropriate circumstances, take inconsistent (or potentially inconsistent) positions.[411] In *Cleveland v. Policy Management Systems Corp.*, the Court addressed whether a plaintiff could simultaneously make a claim for social security disability benefits and a claim under the Americans with Disabilities Act, which included an allegation that the plaintiff could work with reasonable accommodations.[412] The Court concluded that a plaintiff could do so, but had to proffer a sufficient explanation for the discrepancy.[413] The Court suggested that judicial estoppel may not apply, because the two positions are not necessarily mutually exclusive, given the differing legal standards under each claim.[414] The Court therefore did not see this as a purely factual conflict, such as might be the case with a plaintiff/debtor's representations in bankruptcy. So, while this case is not directly on point, it does demonstrate the Court's reluctance to dismiss employment discrimination plaintiff's claims without permitting them to explain their potentially inconsistent conduct in multiple proceedings.

B. *Judicial Estoppel as an End-Run Around the Rules of Preclusion and Joinder*

It is useful to determine whether either of the preclusion doctrines would apply in bankruptcy/discrimination judicial estoppel cases. In the standard factual scenario in which an individual files a Chapter 7 bankruptcy case and omits a pending employment discrimination lawsuit or charge, claim preclusion cannot apply because the discrimination claim has not been adjudicated at all. Although claim preclusion includes causes of action that could have been brought, the underlying claim itself—the employment discrimination claim—must in some way be decided.[415] Issue preclusion will rarely apply for the simple reason that

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409. *See id.*

410. *See, e.g.*, Zachary D. Fasman, *Taking the Plaintiff's Deposition – the Defense Viewpoint*, 712 PLI/LIT 513, 521-22 (2004).

411. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999).

412. *Id.* at 797.

413. *Id.* at 806.

414. *Id.* at 802-03.

415. *See supra* notes 279-286 and accompanying text.

the issue of the debtor's ownership of the chose in action will not have been litigated in the prior action.[416]

Dismissal against the debtor, however, is not all that a defendant wants. Indeed, dismissal against the debtor that is not binding on the trustee is of little benefit to the defendant. However, issue preclusion is even less appropriate against the trustee than it is against the debtor. Non-mutual defensive issue preclusion is bound by the due process clause, which prohibits precluding in the second action those litigants who "have never had a chance to present their evidence and arguments on the claim."[417] Given the Chapter 7 trustee's lack of knowledge of the claim, and the adversarial position the trustee would take against a debtor's assertion that she had no prepetition rights in a prepetition action in which she was plaintiff, the trustee could not be estopped. Furthermore, where the trustee is not made a party to the employment discrimination claim, the trustee is not bound by or precluded by the judgment in that action.[418]

Given that the trustee cannot properly be precluded from bringing the same claim, it is reasonable to ask what benefit there is to entering judgment against the debtor. Why would a defendant want, and why would a district court grant, judgment that will not fully dispose of the litigation? Presumably, the defendant would prefer an adjudication that will prevent re-litigation. And presumably the court would prefer the same.

The defendant's interest in obtaining a judgment that would be preclusive against both the debtor and the trustee suggests the defendant would want to invoke Federal Rule of Civil Procedure 17, which provides for the joinder of the real party in interest. Most courts regard the trustee as the real party in interest of prepetition claims that have not been abandoned.[419] According to the 1966 advisory committee notes, "the modern function of [Rule 17] in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata."[420] The district court might therefore reasonably interpret the defendant's assertion that the suit is an

416. This leaves aside any problems of privity. In addition to the same claim, there must also be the same party for claim preclusion to apply. Once again, the defendant/employer was not before the bankruptcy court, and therefore there is no identity of parties.

417. Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971); *accord* Ceres Terminals, Inc. v. Chicago City Bank and Trust Co., 635 N.E.2d 485, 497 (Ill. App. Ct. 1994).

418. *Ceres Terminals, Inc.*, 635 N.E.2d at 497.

419. *See, e.g.*, Steger v. Gen. Elec. Co., 318 F.3d 1066, 1080-81 (11th Cir. 2003).

420. FED. R. CIV. P. 17 advisory committee's note.

unscheduled asset of a Chapter 7 estate as a motion to dismiss under Rule 17. Under Rule 17, however, dismissal would be inappropriate before the trustee had been notified and given an opportunity for ratification, joinder, or substitution.[421] Instead, defendants often opt for a procedural basis for dismissal that does not require notice to the trustee and thus makes proceeding to a trial on the merits less likely. Furthermore, many district courts oblige defendants' requests for such dismissal.

Federal Rule of Civil Procedure 19, which governs the joinder of necessary and indispensable parties, is also a well-established rule for addressing the consequences of the absence of someone who should be joined. It could be expected that a defendant would wish a bankruptcy trustee to be joined in order that the defendant might have its liability determined in a single action. It might also be reasonably expected that the district court would favor adding the bankruptcy trustee once the court learns the lawsuit is an unscheduled asset of a bankruptcy estate. "Forcing inclusive joinder in this situation is aimed at ensuring that courts do not enter partial or 'hollow' judgments — judgments that do not effectively resolve the parties' entire controversy."[422] The "complete relief" provision of Rule 19 is generally read narrowly as being applicable only when the court cannot grant complete relief with respect to those who are already parties; it is generally not read to require joinder merely because an absent party might sue later.[423] Given, however, that the bankruptcy trustee could sue the defendant whether the defendant won or lost, the bankruptcy trustee would seem to be a person whose nonjoinder might leave the defendant "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest."[424] Therefore, a reasonable defendant would want its estoppel-based motion for summary judgment treated as a Rule 19 motion.

But if Rule 19 joinder is not necessary for the benefit of either the court or the defendant, it would seem to be necessary for the benefit of the bankruptcy trustee. Rule 19 is applicable when the absentee who claims an interest in the subject matter of the litigation "*is so situated*

421. *See, e.g.*, Olexy v. Interstate Assurance Co., 113 F. Supp. 2d 1045 (S.D. Miss. 2000); *cf.* Feist v. Consol. Freightways Corp., 100 F. Supp. 2d 273, 279-80 (E.D. Pa. 1999), *aff'd*, 216 F.3d 1075 (3d Cir. 2000) (holding that case could be dismissed where debtor did not make honest mistake as to proper party). The court may substitute the bankruptcy trustee as the proper party under Rule 25 of the Federal Rules of Civil Procedure. Bauer v. Commerce Union Bank, 859 F.2d 438, 440-42 (6th Cir. 1988).

422. 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 19.03[2][a] (3d ed. 2005).

423. *Id.* § 19.03[2][b][ii].

424. FED. R. CIV. P. 19(a)(2)(ii).

that nonjoinder will threaten harm *either* to the absentee or to an extant party."[425] The harm to the absentee party must be that, "as a practical matter," the nonjoinder may "impair or impede the person's ability to protect that interest."[426] Given, for example, that employers who successfully invoke judicial estoppel argue that disposition based on judicial estoppel is preclusive as to the trustee,[427] the trustee would seem to be a party whose interest in the subject matter of the litigation would, as a practical matter, be impaired or impeded by a disposition and, therefore, a party to be joined if feasible.[428] Of course, the applicability of preclusion is not necessary for joinder under Rule 19, and if the trustee is such a party, it is curious that dismissal occurs without consideration of whether the trustee can be made a party.[429]

Some courts might be reluctant to order joinder of the trustee if the debtor already adequately represents the trustee's interest. Although Rule 19, unlike Rule 24, does not explicitly contain such a condition, some courts have interpreted it as implicitly containing one, arguing that the absent party's interest is not impaired or impeded if it is adequately represented.[430] The Ninth Circuit, which grafts an adequate representation clause into Rule 19(a)(2)(i), follows a strict standard. Whether a party's interest is adequately represented by an extent party depends on whether:

> "the interests of a present party to the suit are such that it will undoubtedly make all" of the absent party's arguments; whether the party is "capable of and willing to make such arguments"; and whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect.[431]

Few debtors to whom the district court imputes motives of manipulating the bankruptcy court and deceiving the trustee could be expected to make all of the trustee's arguments. If the debtor has attempted to deceive the trustee, their interests are hardly identical. If, however, the debtor failed to schedule the asset from ignorance of bankruptcy law, it is unlikely that the plaintiff/debtor is expert enough to make the trustee's arguments. Indeed, one problem the judicial estoppel cases generally suffer from is that parties often fail to make arguments based on the Bankruptcy Code and bankruptcy policy—a problem that would not

425. MOORE ET AL., *supra* note 422, § 19.03[4][a] (emphasis added).
426. FED. R. CIV. P. 19(a)(2)(i).
427. *See, e.g.*, Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002).
428. *See, e.g.*, Takeda v. Nw. Nat'l Life Ins. Co., 765 F.2d 815, 821 (9th Cir. 1985).
429. *See, e.g.*, Crook v. Prudential Ins. Co. of Am., 34 F. Supp. 239-40 (W.D. Ky. 1940).
430. *E.g.*, Washington v. Daley, 173 F.3d 1158, 1167-68 (9th Cir. 1999); Gwartz v. Jefferson Mem'l Hosp. Ass'n, 23 F.3d 1426, 1429 (8th Cir. 1994).
431. *Daley*, 173 F.3d at 1167 (quoting Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992).

exist if more district courts were amenable to joining the trustee, or at least, asking the trustee to file a brief or make an appearance.

The trustee, therefore, is likely a "necessary party." And the defendant's motion in the district court, which asserts that there is or has been a bankruptcy case, that the action is a prepetition asset of the estate, and that the action was not listed as an asset on the debtor's schedules, tells the district judge everything he or she needs to know to demonstrate that an order under Rule 19 would be appropriate. Yet few, if any, courts order joinder.

One explanation for this treatment of procedural rules as "more like a set of guidelines than actual rules" might be found in the fact that some defendants have been able to persuade courts that the plaintiff should be judicially estopped; this is more easily accomplished if the trustee is not a party to the discrimination action. And once the dismissal or summary judgment has been obtained, those defendants have been able to persuade the courts that the judgment judicially estopping the plaintiff should be preclusive against the trustee.[432]

Another reason, from the defendant's point of view, is that a judgment that is preclusive against all persons who can be precluded requires that all such persons be made parties. It is for this reason that the rules of joinder are designed to facilitate adding anyone as a party who could bring the action. But, since judicial estoppel is not properly applicable against a trustee, defendants generally do not want them joined. Consequently, an action in which the trustee has been made a party is one that is more likely to proceed to adjudication on the merits. A defendant would perhaps prefer that the trustee never find out about the action, or find out after the statute of limitations has run for the trustee. Either way, the defendant seeks to ensure that the trustee never realizes whatever value the action may have.

To summarize, the defendant asserts as grounds for dismissal judicial estoppel, which is a doctrine that depends on the notion of some harm to the integrity of the judicial process, when the only person to suffer any harm is the trustee. Judicial estoppel is the one method the defendant has to obtain dismissal without causing the trustee to learn of the harm or take steps to rectify that harm. In seeking dismissal, the defendant invokes a doctrine predicated on the assumption that the first court is unable to adjust the consequences of the first statement, even though that court has a number of ways to do exactly that. And once the defendant obtains dismissal based on that erroneous assumption, the defendant then engages in egregious bootstrapping, arguing that the dis-

432. *E.g.*, *Burnes*, 291 F.3d 1282.

missal is binding on the trustee in a way that renders the procedures to adjust the consequences ineffective. With the action conclusively dismissed, there is no basis for reopening the case to administer the asset, and reopening the case is no basis for avoiding the preclusive effect of the dismissal. Once the asset is thus put beyond the trustee's reach, the curse cannot be lifted. The defendant has played fast and loose with the courts and keeps the gold, all sanctioned by court order. "I guess that's what you call ironic."[433]

C. *Judicial Estoppel Is Unnecessary When the First Case Is a Bankruptcy Proceeding*

Judicial estoppel, according to the courts that invoke it, is a doctrine that protects the integrity of the judicial process by requiring consistency from each party. Old statements justifying the doctrine emphasize that it "upholds the sanctity of an oath" by prohibiting one who has sworn from "repudiating the [oath] when he thinks it to his advantage to do so."[434] Such statements tend to support the absolute form of judicial estoppel, which precludes a person from maintaining a position contrary to one previously maintained in a judicial proceeding whether or not the court accepted the position.[435] More recent statements are similar, although they emphasize the integrity of the judicial system over the integrity of the oath and, therefore, tend to support the version of judicial estoppel that applies when the first court has accepted the prior position of the party to be estopped.[436] If that party were permitted to take a contrary position, and if the second court were to accept it, the inconsistent results would make it glaringly apparent that one court or the other would be wrong.

Under the current majority view, the doctrine does not address inconsistency within the same case, nor would it serve much utility if it were employed within a single case, because the right of parties to plead "in the alternative" largely vitiates any intra-case consistency requirement.[437] As one court has put it, "before being deemed to be 'playing fast and loose,' a party must attempt to invoke the authority of one tribu-

433. PIRATES, *supra* note 1.

434. T.H. Malone, *The Tennessee Law of Judicial Estoppel*, 1 TENN. L. REV. 1, 1 (1922); *accord* Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, *supra* note 281, at 1133.

435. *See* BOYERS, *supra* note 273, at 1245-46.

436. *See* New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001).

437. *See* FED. R. CIV. P. 8(e)(2); United States v. Newell, 239 F.3d 917, 921 (7th Cir. 2001); United States v. Levasseur, 846 F.2d 786, 793 (1st Cir. 1988); Cayuga Indian Nation of N.Y. v. Pataki, 188 F. Supp. 2d 223, 234 (N.D.N.Y. 2002); Bd. of Educ. of Indian Prairie Sch. Dist. No. 204 v. Du Page County Election Comm'n, 793 N.E.2d 954, 957 (Ill. App. Ct. 2003); Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409, 420 (1987)

nal to override or flout a bargain made with another."[438] Clearly, in a single case it cannot ordinarily be said that the court has yet accepted any given position.

Judicial estoppel does address inconsistency *between* cases. As demonstrated, however, it serves little purpose with respect to inter-case inconsistency because of the existence of the preclusion doctrines. And to the extent that judicial estoppel has effect beyond the preclusion doctrines, its use may negate the limits on those doctrines. Its use, therefore, should be limited so as to prevent an end-run around the limits of the preclusion doctrines.

There may be circumstances of inter-case inconsistency that would not otherwise fall under one of the preclusion doctrines and should nonetheless be prohibited in the second case. However, instances in which the first case is a bankruptcy case, and the debtor's position in the first case is the omission of an asset will rarely provide such instances.

VI. ANOTHER EXAMPLE OF JUDICIAL HOSTILITY TO EMPLOYMENT DISCRIMINATION CLAIMS

Some would argue that the use of judicial estoppel in these bankruptcy/discrimination cases amounts to yet another example of federal judicial hostility to employment discrimination plaintiffs. Legal scholars have charted perceived judicial hostility to employment discrimination plaintiffs in a variety of contexts.[439] The use of judicial estoppel and other procedural devices to undermine debtors' employment discrimination claims could be viewed as yet another example of courts reaching to rid themselves of what might very well be meritorious claims without reaching the merits.

To begin with, studies have shown that plaintiffs in employment discrimination cases fare poorly before both trial and appellate judges.[440] In a study of twenty-three categories of federal cases terminated in the courts of appeals during 1988 to 1997, Clermont and Eisenberg found that not only do win rates for plaintiffs and defendants differ apprecia-

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(concluding that "judicial estoppel cannot be applied to inconsistent assertions made in the course of a single trial" because rule 8(e)(2) expressly allows alternative pleadings).

438. *Levasseur*, 846 F.2d at 793.

439. *See supra* note 9; *see, e.g.*, Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).

440. *See, e.g.*, Clermont, Eisenberg & Schwab, *supra* note 439; Clermont & Eisenberg, *supra* note 439.

bly, but the difference was largest in the civil rights category of "jobs," which includes employment discrimination claims.[441] As they explain their findings:

> In these cases, plaintiffs obtain appellate reversals of trial wins by defendants in less than 6% of their appeals. In contrast, defendants obtain appellate reversals in nearly 44% of their appeals. This differential is . . . highly statistically significant. Another computation is telling. For the 266 cases appealed by defendants with a decisive appellate outcome, the 44% reversal rate is not statistically significantly different from a 50% reversal rate. One cannot reject the hypothesis that defendants win half their appeals.[442]

Likewise, their study showed that plaintiffs won in 30% of the job discrimination cases that were tried. However, on appeal, defendants had a 43.61% reversal rate—the second highest reversal rate of all case categories studied.[443] The only category of cases that fared worse was "other civil rights cases," which includes other types of discrimination cases, first amendment cases, police misconduct cases, and the like.[444] These high rates of reversal are particularly troubling, because employment discrimination cases often depend on the intent of the defendant, a finding that is factual in nature and therefore "should be largely immune from appellate reversal."[445] Of course, in cases in which courts apply judicial estoppel, the courts never consider issues of intent or any other arguments on the merits of an employment discrimination claim. Plaintiffs are per se barred from proceeding.

Plaintiff win rates have been particularly low for plaintiffs claiming under the Americans with Disabilities Act ("ADA"). Many of the cases described above are ADA cases. A study by the American Bar Association of Title I cases decided between 1992 and 1997 found that employers won 92% of such cases.[446] Likewise, in a study that included both published and unpublished opinions, Professor Ruth Colker found that employers prevailed at trial in 94% of cases, and on appeal in 84% of cases in which the plaintiff appealed an adverse judgment.[447] Colker made an effort to control for potential frivolous cases by deleting "frivo-

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441. *See* Clermont & Eisenberg, *supra* note 439, at 957.

442. *Id.* at 957-58 (footnote omitted).

443. *Id.* at 958.

444. *Id.*

445. *Id.*

446. Am. Bar Ass'n, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998).

447. Colker, *supra* note 439, at 107-08. Colker opines that defendant win rates at trial are likely even higher, given that not all cases result in an obtainable opinion. *Id.* at 109.

lous, unpublished opinions from the database."[448] She concluded, "both the trial and appellate court processes yielded results that were not hospitable to plaintiff's discrimination claims."[449] Thus, the chance of a plaintiff winning an ADA case is especially bleak. Perhaps it is not surprising that courts have added judicial estoppel to their arsenal for dismissing these cases.

Given purported judicial attitudes, it is unsurprising that employment discrimination plaintiffs fare worse in front of judges than in front of juries. In an early study of employment discrimination cases, Theodore Eisenberg found that in cases tried between 1978 and 1985, plaintiffs won only 22% of the time.[450] In comparing bench trials to jury trials, plaintiffs won 42.6% of the time before juries, whereas they won only 19.2% of the time before judges.[451] This has led the Second Circuit Task Force to opine that "one plausible explanation is that judges, removed as they are from contact with the day-to-day operation of the business world, are less sympathetic than jurors to the complexities of current workplace relationships."[452]

These findings are consistent with anecdotal evidence coming from gender bias task forces. The Second Circuit Task Force explained that a common perception from focus groups was that judges do not like employment discrimination cases.[453] Indeed, one judge actually reported that "colleagues criticize the employment discrimination areas as 'highly emotional,'" leading the judge to speculate that "highly emotional might well be a code phrase for 'female.'"[454] The Task Force suggested other reasons for the perceived judicial hostility to these claims, including the fact that the plaintiffs often appear pro se, that the cases are small and clog the docket, and that they exacerbate already growing caseload problems.[455] Likewise, the Eighth Circuit's Gender Fairness Task Force found that 29% of plaintiffs' counsel and 11% of defense counsel reported indications from judges that discrimination cases are undeserving of federal court resources.[456] The Special Committee on Gender to the D.C. Task Force reported that 26% of female

448. *Id.* at 106 (footnotes omitted). Interestingly, this resulted in fewer than a dozen cases being eliminated from her data set. *Id.*

449. *Id.* at 108.

450. Eisenberg, *supra* note 9, at 1583.

451. *Id.* at 1591.

452. *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 117, 345 (1997).

453. *Id.* at 342.

454. *Id.* at 343, 344.

455. *Id.* at 343.

456. *Final Report and Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 CREIGHTON L. REV. 9, 72-73 (1997).

attorneys and 10% of male attorneys have observed a judge treat a gender-based employment discrimination case as a waste of time, and 23% of female attorneys and 14% of male attorneys similarly observed a judge treat a race or national origin discrimination case as a waste of time.[457] In the Ninth Circuit, "focus group participants reported that most federal district court judges before whom they had appeared are less receptive to employment discrimination cases of all types than they are to commercial cases with high monetary stakes."[458] Further, "[i]n sexual harassment or discrimination cases before a male judge, plaintiff's lawyers report a minimization of their clients' trauma and 'an across the board lack of understanding' as to the female plaintiff's situation and point of view."[459]

Indeed, courts assessing judicial estoppel in this context misapprehend plaintiff motives in employment discrimination cases. Discussion in the judicial estoppel cases focuses exclusively (to the extent it is discussed at all) on the claim as an asset. While occasionally the courts must consider other aspects of employment discrimination claims because of a prayer for reinstatement, the primary concern is on the claim as an asset reducible to money. Yet, often there are dignitary harms related to employment discrimination lawsuits that go beyond money damages. Plaintiffs often want their day in court and an adjudication that the employer engaged in wrongdoing. This sentiment was summed up well by a sexual harassment plaintiff, who, after being questioned by a trial judge as to why she brought the lawsuit, never mentioned money damages:

> Because I felt I needed to do something to get in control of the situation. I felt so humiliated and so downtrodden, that I needed a way to overcome this. Um, I wanted to set right what was wrong. I - I wanted to, um, be able to have a chance to say what I felt was wrong; what had been done to me, and the injustices I felt at the time. I - I felt they were never addressed, and now is my chance to address them. Whether I win or not, I'm still going to win in my heart, because I was able to sit here and address the people that wronged me.[460]

However, judicial estoppel effectively bars the plaintiff from having her day in court and from having the chance for a court to find the

457. *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias*, 84 GEO. L.J. 1657, 1759-63 n.151 (1995).

458. *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force: The Quality of Justice.* 67 S. CAL. L. REV. 745, 885 (1994).

459. *Id.* at 887.

460. Catchpole v. Brannon, 42 Cal. Rptr. 2d 440, 447 (Cal. Ct. App. 1995).

employer's actions wrong. In doing so, the doctrine fails to acknowledge that employment discrimination claims are not just about money.

VII. Conclusion

Many defendants seek dismissal or summary judgment in employment discrimination actions that should have been, but were not, listed as assets by a plaintiff who has filed bankruptcy, asserting that the plaintiff/debtor should be judicially estopped from pursuing the action after having failed to acknowledge ownership of the asset. District courts should refuse to acquiesce to these requests. The appropriateness of judicial estoppel depends on the bankruptcy court's acceptance of the plaintiff/debtor's position, which it has not done, and on its lacking the means of adjusting the bankruptcy case for the debtor's false statement, which it does not lack. The Bankruptcy Code provides substantive and procedural rules that safeguard for the bankruptcy creditors the value of the lawsuit as an asset. The Federal Rules of Civil Procedure counsel for joinder of the trustee. Nonetheless, many courts apply judicial estoppel against the debtor and some have subsequently precluded the trustee from pursuing the action. The district courts that employ judicial estoppel in this fashion are permitting a windfall to defendants who may be manipulating the court system, even as such courts profess to be guarding the judiciary against manipulation by the plaintiff/debtor. One is left wondering whether the willingness to apply judicial estoppel, wrong as a matter of bankruptcy law and wrong as a matter of procedure, reflects judicial hostility toward discrimination plaintiffs.