Consumer Track

Chapter 13 Panel

Edgardo Mangual-Gonzalez, Moderator
EMG Despacho Legal, CRL; San Juan, P.R.

José R. Carrión
Standing Chapter 13 Trustee; San Juan, P.R.

Gustavo A. Chico-Barris
Ferraiuoli LLC; San Juan, P.R.

Rosamar García-Fontán
Fiddler, Gonzalez & Rodriguez, P.S.C.; San Juan, P.R.

Alejandro Oliveras-Rivera
Standing Chapter 13 Trustee; San Juan, P.R.

Chapter 13 debtors' pre and post-petition causes of action and the disclosure and determination of value of same; management of plan provisions and objecting and defending same.

Panel Moderator / Speakers

Moderator: Edgardo Mangual, Esq ***EMG Despacho Legal CRL, San Juan, PR***
José R. Carrión, ***Standing Chapter 13 Trustee, Old San Juan, PR***
Alejandro Oliveras, ***Standing Chapter 13 Trustee, San Juan, PR***
Gustavo Chico, Esq., ***Ferraiuoli LLC, San Juan, PR***
Rosamar Garcia, Esq. ***Fiddler, Gonzalez & Rodriguez, LLC***

INTRODUCTION

The essential principle of Bankruptcy is to give a debtor the opportunity to have a Fresh Star when said debtor cannot continue to make regular payments to creditors as established in the original contractual obligation. As stated by the United States Supreme Court "the principal purpose of the Bankruptcy Code is to grant a " 'fresh start' " to the " 'honest but unfortunate debtor.' " *Grogan v. Garner,* 498 U.S. 279, 286, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Both Chapter 7 and Chapter 13 of the Code permit an insolvent individual to discharge certain unpaid debts toward that end. Chapter 7 authorizes a discharge of prepetition debts following the liquidation of the debtor's assets by a bankruptcy trustee, who then distributes the proceeds to creditors. Chapter 13 authorizes an individual with regular income to obtain a discharge after the successful completion of a payment plan approved by the bankruptcy court. Under Chapter 7 the debtor's nonexempt assets are controlled by the bankruptcy trustee; under Chapter 13 the debtor retains possession of his property. A proceeding that is commenced

under Chapter 7 may be converted to a Chapter 13 proceeding and vice versa. Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 366-367, 127 S.Ct. 1105, 1107 (U.S.,2007)

The Bankruptcy Estate is describe by Section 541 of the bankruptcy code as follows:

[1] **§ 541. Property of the estate**

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, **all legal or equitable interests of the debtor in property as of the commencement of the case.**

…

(7) Any interest in property that the estate acquires after the commencement of the case."

11 U.S.C.A. § 541(a).

In any given bankruptcy case, statutory requirements are imposed on a debtor by virtue of the U.S. Bankruptcy Code and Federal Rules of Bankruptcy Procedure, as well as by local practice. Among a debtor's foremost duties is that of § 521(1) of the Bankruptcy Code to "file a ... schedule of assets and liabilities,". The bankruptcy Code requires a debtor to list all "contingent and unliquidated claims of every nature ... counterclaims of the debtor, and rights to setoff as personal property assets. Lynne B. Xerras, Judicial Estoppel As Applied to Unscheduled Litigation Claims, Am. Bankr. Inst. J., July 2012, at 58, 58.

The duty of disclosure is undeniably a continuing one. Most practitioners are aware that a consequence of inadequate disclosure or other lack of truthfulness in a debtor's bankruptcy filings can result in denial of a discharge, the dismissal of a case or the result of losing the right of a cause of action. When a debtor is a plaintiff in prepetition litigation or asserts a claim against a third party arising from pre-petition conduct, yet fails to schedule the cause of action, the doctrine of judicial estoppel may result in the dismissal of the debtor's litigation as another repercussion of failure to abide by unequivocal statutory duties. Id.

In this next track it will be discussed the basic of disclosure of assets, the importance to valuate said assets and the consequences of failure to disclosed. You will see the Debtors, Trustees and Creditor’s points of views and the different remedies that apply to the disclosure of causes of action and management of plan provisions and objecting and defending said causes.

VALUATION OF LEGAL CLAIMS

José R. Carrión Morales
Alejandro Oliveras Rivera

INTRODUCTION

The bankruptcy code has several instances where the general theme of "valuation" is present, either explicitly or implied. For example, we find in section 101(32) the term "insolvent", which means with respect to certain entities, that financial condition such that the sum of the entity's debts are greater than all of the entity's property at a fair valuation.[1]

When a case is converted from Chapter 13 to Chapter 11 or 12 valuations of property made in the Chapter 13 phase shall apply, but not so if it is converted to Chapter 7.[2]

Adequate protection payments are predicated on value, specifically, a decrease thereof.[3] Value may find itself subsumed in equity as a determination to be made of the debtor's interest in property when an entity seeks relief from stay.[4]

A trustee may sell property free and clear of liens, for instance, if the element of value (as represented by the sale price) exceeds the aggregate value of all liens on the property.

[1] Unless otherwise indicated, the terms "Bankruptcy Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., as amended. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure, and all references to "Rule" are to the Federal Rules of Civil Procedure. All references to "Local Bankruptcy Rule" are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the District of Puerto Rico. And all references to "Local Civil Rule" are to the Local Rules of Civil Practice of the United States District Court for the District of Puerto Rico.

[2] 11 U.S.C. Sec.348(f)(1)(B).
[3] 11 U.S.C. Sec. 361.
[4] 11 U.S.C. Sec. 362(g)(1).

VALUATION OF LEGAL CLAIMS

We can consider the process of determining the secured status of a creditor, as the preeminent provision of the bankruptcy code on valuation. The claim is secured to the extent of the value of the creditor's interest in the estate's interest in the property. It is in the determination of this status, that we have a hint at how to go about finding "value": "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property…"[5]. See also, In re PONCE DE LEON 1403, INC. 523 B.R. 349 United States Bankruptcy Court, D. Puerto Rico and In re SW BOSTON HOTEL VENTURE, LLC 748 F.3d 393 United States Court of Appeals, First Circuit.

As it relates to exemptions, we also see value playing a significant role. In this field it has a definition provided for by the bankruptcy code, that being of "fair market" for property existing pre-petition or acquired post- petition, and the fixing of that fair market value, at petition date, or as of the date the property becomes property of the estate.[6]

We are to examine some cases that build on the method of valuing a particular asset that debtors may bring into bankruptcy as part of the estate at the petition date or acquired later. We shall refer to the particular asset, generally, as "legal claims". In this term we include, any cause through which a debtor stakes a claim against another, the successful outcome of which would entail a monetary compensation or benefit to the debtor. An example would be a claim in tort.

ESTATE PROPERTY

A) 11 U.S.C. §541

[5] 11 U.S.C. Sec. 506(a)(1).
[6] 11 U.S.C. Sec. 522(a)(2).

The filing of a voluntary petition in bankruptcy creates an estate. This creature is comprised of certain property wherever located and by whomever held. The first category of property is "…all legal or equitable interests of the debtor in property as of the commencement of the case."[7]

B) 11 U.S.C. §1115, 1207 and 1306

The above sections have a text similar in nature with respect to property of the estate whereby, in addition to the property detailed in section 541, an estate also includes that property acquired after the commencement off the case.

THE LEGAL CLAIMS

Back in 1986 the United States District Court for the District of Puerto Rico had the opportunity to examine the interplay of causes of action and section 541 of the bankruptcy Code. "Apart from minor exceptions not applicable here, property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. sect. 541(a). This provision has been interpreted to include as property of the estate a debtor's claim for injuries to the person whether the claim is unliquidated or settled at the time of filing the bankruptcy petition. *Tignor v. Parkinson,* 729 F.2d 977, 981 (4th Cir.1984); *see also,* 4 Collier on *Bankruptcy,* sect. 541.10[3] (5th Ed.1986). The debtor's personal injury claim remains the property of the bankruptcy estate unless it qualifies as an exception under 11 U.S.C. sect. 522."[8]

The assessment of Medina-Figueroa was reiterated sixteen years later by the bankruptcy court of the same district. "Clearly,

[7] 11 U.S.C. Sec. 541(a)(1).
[8] Medina-Figueroa v. Heylinger, 63 BR 572 - Dist. Court, D. Puerto Rico 1986

the Debtor's personal injury claim is property of the estate under §§ 541(a) and 1306(a)[6] and therefore must be disclosed in a Chapter 13 plan."[9] The internal footnote 6 of the Cabral case reads as follows: "Property of the bankruptcy estate includes all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a). Thus, property of the estate includes a debtor's claim for personal injuries whether the claim is unliquidated or settled at the time of filing the bankruptcy petition. A debtor's personal injury claim remains the property of the bankruptcy estate unless it qualifies as an exemption under 11 U.S.C. § 522."

More recently we have yet another case in line with the above tenet: "When an individual files for bankruptcy, all of his property—including causes of action—becomes property of the estate. 11 U.S.C. § 541."[10]

THE SPECIAL REQUIREMENT OF THE CHAPTER 13 HYPOTHETICAL CHAPTER 7 LIQUIDATION

Under 11 U.S.C. § 1325(a)(4), in order to be confirmed, a plan of reorganization must provide for distribution of property of equal or greater value than the amount unsecured creditors would receive in a liquidation under Chapter 7 of the Bankruptcy Code. A Debtor's proposed Chapter 13 plan does not meet the requirement of § 1325(a)(4) when in Chapter 7 bankruptcy case the unsecured creditors would be entitled to a pro rata distribution of the proceeds from the personal injury claim, which is not provided for in the Chapter 13 plan.

VALUATION METHODOLGY

[9] In re Cabral, 285 BR 563 - Bankr. Appellate Panel, 1st Circuit 2002, at 579.
[10] In re Barroso-Herrans, 524 F. 3d 341 - Court of Appeals, 1st Circuit 2008.

VALUATION OF LEGAL CLAIMS

It is very frequent to have the controversy of how to value a cause of action within the context of the concomitant claim of exemption.[11] The 7th. Cir. Court of Appeals had the opportunity to expound on this subject in the Case of In re Polis.[12] While in her Chapter 7, Mary Polis, became aware that she might have a claim against a Travel Service. She exempted it by assigning a value of zero. Eventually a controversy ensued where Polis was arguing a very small value to her claim and the trustee and defendant on the other hand were arguing it had a value above the particular exemption cap.

Chief Judge Posner, starts his analysis with the following: "Legal claims are assets whether or not they are assignable, especially when they are claims for money; as a first approximation, the value of Polis's claim is the judgment that she will obtain if she litigates and wins multiplied by the probability of that (to her) happy outcome. That is roughly how parties to money cases value them for purposes of determining whether to settle in advance of trial. They do so whether or not the claim is assignable; unassignable claims (tort claims, for example) command positive prices in the settlement "market."

Continuing with the analysis, Judge Posner offers the following thoughts on the valuation process: "When there is uncertainty about whether some benefit, here an award of money in a class action suit, will actually be received, the *value* of the (uncertain) benefit is less than the *amount* of the benefit if it is received. A *claim* for $X is not worth $X. A 50 percent chance of obtaining a $1,000 judgment is not worth $1,000. As a first approximation it is worth $500 (less if the owner of the chance

[11] Id.
[12] In re Polis, 217 F. 3d 899 - Court of Appeals, 7th Circuit 2000

is risk averse, more if he is risk preferring, but these are refinements unnecessary to consider in this case).”

The following portion of the decision sheds light on how particular factors influence the value analysis: “Getaways did offer Polis $1,500 to settle the case, which was turned down; and a refused settlement offer normally is good evidence of the minimum fair market value of a claim. The bankruptcy court thought, therefore, that Getaways' offer showed that Polis's claim was worth at least $900. But the district court was right to be skeptical about this because of the class-action nature of the suit. Since Polis was the only named plaintiff, since the statute of limitations was running (has in fact now run), and since the trustee in bankruptcy apparently had no interest in pursuing the claim against Getaways (another reason to doubt the claim has much value), Getaways had a chance to kill the class action either by settling with Polis before the class was certified, see *Mars* 904*904 *Steel Corp. v. Continental Illinois National Bank & Trust Co.*, 834 F.2d 677, 680-81 (7th Cir.1987), or simply by convincing the court that the claim should not be exempted and would therefore revert to the trustee. In other words, for $1,500 Getaways may have been trying to buy not only Polis's claim but also, in effect, the claims of all the other members of the class as well—"in effect" because Getaways was not offering *them* anything and because the offer might kill the class action even if Polis rejected it.” (Underline in text ours except for case citation.)

Now let us see a case, closer to home, where the subject was viewed within the context of the liquidation value analysis, required for confirmation of a Chapter 13 plan. In the case at

hand[13] the Trustee filed an unfavorable report basically on two grounds: lack of feasibility and the inability to determine the liquidation value of the state; the latter due to the fact that debtor did not assign a value to a state court cause of action she was pursuing. Debtor responded to the last point indicating the "unknown" listing of value was made, "…because it is difficult to assign a value to a pending or potential lawsuit and the Debtor has chosen the state exemptions which means that there is no exemption applicable to the cause of action of the Debtor at the state court." In a subsequent pleading the Debtor posited that "…she listed the value of her legal claim as "unknown" because there is no tangible amount determined and Debtor has not claimed an exemption on this claim and all the proceeds, if any, will be devoted to fund the plan."

The Bankruptcy Court, through Judge Lamoutte, sets out that "A debtor's pre-petition legal claim whether the same is unliquidated or settled at the time of the bankruptcy petition constitutes property of the estate." Regarding confirmation of a Chapter 13 plan the obvious focus of the decision lies in "best interest of creditors test"[14] tailored so that "…unsecured creditors will be paid, at a minimum, the amount which they would be paid if the case were a hypothetical chapter 7 liquidation case." And the Judge describes this code provision as "…designed to protect the unsecured creditors in Chapter 13 cases."

The Judge, citing Lundin & Brown finds that the standard for valuation under section 1325(a)(4) has produced few cases; that intuitively, the property should be valued at what a Chapter 7 trustee would get, i.e. liquidation, foreclosure or forced sale

[13] IN RE CUMBA, 505 BR 110 - Bankr. Court, D. Puerto Rico 2014
[14] 11 U.S.C. Sec. 1325(a)(4)

value. On the specific issue of the valuation of the state court claim the Court finds,

> "Thus, all of the property of the estate must have an assigned value in order to perform a liquidation analysis."

Its conclusion is:

> "…the value the Debtor must assign to her legal claim is an estimate of the current value she deems that particular claim is worth."

It then goes on to recognize debtor's predicament and suggests a course of action:

> "The court understands the difficulty in assigning a current value to a legal claim, given that a market does not exist for such an asset. The court finds that the best guide for establishing the current value of a particular cause of action (legal claim) is to find out the monetary awards that the state courts have awarded to similar legal claims (causes of action) in the past."

Then, a monkey's wrench is thrown into the purpose of section 1325(a)(4), which had originally been described as "…designed to protect the unsecured creditors in Chapter 13 cases." Judge Lamoutte states:

> "However, the Debtor is not required to personally fund distribution to unsecured creditors based upon the hypothetical recovery value of a legal claim. The requirement is to pay the amounts actually received."

We dare say, that this last pronouncement of In re Cumba, will come before the court again. And we see the suggestion of Judge Lamoutte "…the best guide for establishing the current value of

a particular cause of action (legal claim) is to find out the monetary awards that the state courts have awarded to similar legal claims…" as a tool to be added to those considered by Judge Posner in In re Polis. While Judge Lamoutte in his finding on where to look for value, points in the direction of the state courts, we understand recourse could also be made to pronouncements in similar cases by federal courts.

On the wisdom of making a deliberate effort to ascertain the value of causes of action, as opposed to the expedient disclosure of "unknown" we quote the following:

> *"Thus, we do our clients a disservice if we fail to assess the value of assets and exemptions in Schedules B and C. When preparing schedules, an explanation of the determination of value is beneficial for several reasons: (1) it prevents courts and defense counsel from invoking judicial estoppel based on a low value; (2) it explains the basis for determination of market value; and (3) it prevents an objection to discharge based on improper valuation."*[15]

From the same authors we have this overview on a methodology for assessing value:

> "Although a pre-petition cause of action is difficult to value prior to settlement or final judgment, counsel can include a description indicating the amount of damages prayed for in the complaint. A tort claim without more is possibly worthless. After review by an attorney, the value increases. When a lawsuit is filed, the claim has more value because the filing fee was paid, a complaint was

[15] Proper Valuation of Property and Exemptions in Consumer Cases by Marc S. Stern & Janine Lee. ABI Journal 22 July 2014.

> drafted, a defendant was identified, and an attorney may have begun discovery or attended an early case conference. Other considerations include the stage of the case, collectability, the identity of the defendant and the competency of its counsel.
>
> For instance, the market value of a claim with a "face value" of $250,000 may have a current FMV of $25,000 because of (1) pre-discovery, (2) no admitted liability, (3) vagaries of litigation, (4) doubt as to liability, or (5) contributory or comparative negligence. However, per *Schwab*, you can then claim the entire asset exempt and determine an amount to show the allocation of the exemptions. Ultimately, the value on the filing date is the sale or settlement value of the claim. A claim against a hapless teenage driver has less value than a claim against a drunken employee returning from a holiday party in his work vehicle. Certainly, the latter claim has more potential collectability, and thus settlement value…[16]

CONCLUSION

"Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors…" Schwab v. Reilly, 130 S. Ct. 2652 - Supreme Court 2010. The best interest of creditors test requires a valuation of all the assets of the estate. A cause of action is an estate asset that must be valued. Case law has illustrations on the methodology to be followed. If the requirement is to pay the amounts actually received, In re Cumba, the issue will probably see its day in court again.

[16] id

AMERICAN BANKRUPTCY INSTITUTE
2016 CARIBBEAN INSOLVENCY SYMPOSIUM

DEBTOR'S FAILURE TO DISCLOSE CAUSES OF ACTION AND THE APPLICATION OF THE JUDICIAL ESTOPPEL DOCTRINE

By: Rosamar García-Fontán, Esq.[1]

> "The purpose of the [judicial estoppel] doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742 (2001).

I. Introduction

A Chapter 13 debtor has the affirmative obligation to disclose all his or her assets to the Bankruptcy Court, including any cause of action and legal claim that the debtor might have. This obligation is a continuing one. If a debtor knows of a potential claim but fails to disclose it in the bankruptcy proceeding, then such debtor may be judicially estopped from asserting such claim in a later state proceeding. Judicial estoppel is a doctrine of equity grounded in the principle of protecting the integrity of the judicial process and prevent litigants from playing "fast and loose with the courts."[2]

II. Duties and Obligations of Chapter 13 Debtor; Property of

[1] Member of the Real Estate, Financing & Bankruptcy Group, Corporate Division of the Law Firm of Fiddler, González & Rodríguez, P.S.C. Ms. García-Fontán would like to recognize Rubén G. Fernández-Agramonte Esq., Associate in the Real Estate, Financing & Bankruptcy Group, Corporate Division of the Law Firm of Fiddler, González & Rodríguez, P.S.C., for his collaboration in the preparation of the materials.

[2] *Payless Wholesale Distributors v. Culver*, 989 F.2d 570 (1st Cir. 1993)

the Estate

One of the primary purposes of the Bankruptcy Code is to give the deserving debtor a fresh start and to maximize the payment to creditors. *In re Cunningham*, 513 F.3d 318, 324 (1st Cir. 2008); *Berliner v. Pappalardo (In re Puffer)*, 674 F.3d 78, 85 (1st Cir. 2012). In order to achieve this purpose, the Bankruptcy Code imposes upon debtor's the obligation to disclose its financial affairs to the Court. To maintain the integrity of the bankruptcy system, the Code requires full and accurate disclosures by debtors. Under section 521(a)(1) of the Bankruptcy Code a debtor has the obligation to file, among other things "…a list of creditors; and (B) unless the court orders otherwise (i) a schedule of assets and liabilities, (ii) a schedule of current income and current expenditures; (iii) a statement of the debtor's financial affairs…", including all causes of actions and legal claims that debtor may have. 11 U.S.C. §521(a)(1); 11 U.S.C. §541(a)(1); *Howe v. Richards*, 193 F.3d 60, 61 (1st Cir. 1999).

"The accuracy and completeness of bankruptcy schedules is important "[i]n order to preserve the requisite reliability of disclosure statements and to provide assurances to creditors regarding the finality of plans which they have voted to approve (…) Full and honest disclosure in a bankruptcy case is crucial to the effective functioning of the federal bankruptcy system."

Guay v. Burack, 677 F.3d 10 (1st Cir. 2012).

Debtor's pre petition legal claims become part of the bankruptcy estate which is created upon the commencement of a bankruptcy case and comprises "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a). "The bankruptcy estate is created automatically by operation of law immediately after the bankruptcy petition is filed." *In re National Promoters and Services, Inc.*, 499 B.R. 192, 199 (Bankr. D.P.R. 2013). Estate property includes "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. §541(a)(7). As such, the 2015 amendment to schedule B specifically incorporates a question regarding debtor's claims against third parties and other contingent and unliquidated claims.[3]

The importance of properly disclosing a debtor's pre petition cause of action and assigning a value to it was discussed in the recent case of *In re Fuentes*, 504 B.R. 731 (Bankr. D.P.R. 2014). In this case, the Bankruptcy Court concluded that a chapter 13 debtor must assign a value to all of his or her assets, including on going causes of actions, in order to determine if the proposed chapter 13 plan complies with the 'best interests of creditors' test:

[3] *See* Official Form B106 A/B, http://www.uscourts.gov/forms/individual-debtors/schedule-ab-property-individuals

> The "best interest of creditors test" is designed to protect the unsecured creditors in Chapter 13 cases. "To determine compliance with the test, a hypothetical liquidation of the debtor's estate under Chapter 7 on the 'effective date of the plan' must be compared to the value on 'the effective date of the plan' of what the debtor proposes to distribute to the holders of allowed unsecured claims. Two mathematical calculations are required: (1) an estimate must be made of what would be available for distribution to unsecured claim holders in a Chapter 7 case; and (2) the distributions to unsecured claim holders under the proposed plan must be 'present valued' (discounted) as of the effective date of the plan." *See* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th Edition, § 160.1 at ¶ [2], Rev. June 7, 2004, www.Ch13***o***nline.com.

Thus, debtor's compliance with the case's 'best interests of creditors' test relates to, and impacts, the amount of moneys to be distributed by the chapter 13 trustee between all unsecured creditors.

A debtor in a chapter 13 case must also disclose a claim acquired after the filing of the bankruptcy petition. Debtor must amend his or hers asset schedules and petition if circumstances change during the bankruptcy proceeding. "A debtor is under a duty both to disclose the existence of pending lawsuits when he files a petition in bankruptcy and to amend his petition if circumstances change during the course of the bankruptcy." *Guay v. Burack*, 677 F.3d 10 (1st Cir. 2012) (citations omitted).

"The law is abundantly clear that the burden is on the debtors to list the asset and/or amend their schedules…The duty

to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change. (…) Hence, failure to amend schedules to include pre-petition rights, be it assets or liabilities, can ultimately result in denial or revocation of a discharge order. The debtor carries a duty to amend its/his/her schedules upon becoming aware of an asset or liability." *In re Pick & Save, Inc.*, 478 B.R. 110, 119-120 (Bankr. D.P.R. 2012) (citations omitted).

Debtor's knowledge of all the facts or legal basis for a cause of action is not necessary, "rather, if the debtor has enough information…prior to confirmation to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclose. Any claim with potential must be disclosed, even if it is 'contingent, dependent, or conditional'." *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999).

III. Judicial Estoppel

"[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. *Davis v. Wakelee,* 156 U.S. 680, 689, 15 S.Ct. 555, 39

L.Ed. 578 (1895). This rule is known as judicial estoppel." *Hampshire*, at 749. Judicial estoppel bars not only inconsistent positions with respect to a particular issue, but also all successive claims inconsistent with that representation. *See White v. Wyndham Vacaction Ownership*, 617 F.3d 472 (6th Cir. 2010).

Judicial estoppel is an equitable doctrine and prevents "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. *Pegram v. Herdrich*, 530 U.S. 211, 227, n.8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000)" *Guay*, at 16. The equitable doctrine of judicial estoppel is ordinarily applied to prevent a party from asserting "…a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *Id.*

Although there is no mechanical test use by courts to determine the application of the judicial estoppel doctrine, "courts widely agree that, 'at a minimum, two conditions must be satisfied before judicial estoppel can attach.' First, the two positions taken by the litigant must be directly inconsistent with one another. Second, the party against whom estoppel is sought must have successfully persuaded a court to accept its

earlier position." *Flores-Febus v. MVM, Inc.*, 45 F.Supp. 3d 175, 178 (Bankr. D.P.R. 2014).

A third factor is frequently considered by courts, however it is not required; this third factor considers "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." *Guay v. Burack*, at 16; *Flores-Febus v. MVM*, at 179. However, "benefit is not a sine qua non to the applicability of judicial estoppel." *Alternative System Concepts v. Synosys Inc.*, 374 3d. 23 (1st Cir. 2004).

Judicial estoppel has been applied in the context of claims not disclosed by a debtor in a previous bankruptcy case. Causes of action not disclosed by debtor's in a bankruptcy proceeding is a prior inconsistent position that may serve as the basis for application of judicial estoppel. Thus, barring the debtor from asserting the undisclosed claim in a later proceeding. *Guay v. Burack*, at 17; *Rodriguez-Torres v. Government Development Bank of P.R. (Rodríguez v. GDB)*, 750 F. Supp. 2d 407, 414 (D.P.R. 2010).

In a bankruptcy context, the first element of judicial estoppel is met if the debtor fails to disclose in his or her schedules an existent claim while a pursuing a legal claim in a state court. It is also met when a debtor fails to disclose a potential claim, waits to receive the discharge order, and then

files a claim in a state court proceeding. The second requirement is met when the bankruptcy court grants a discharge order, or confirms a plan, and "accepts a litigant's position 'taken in the form of omissions from bankruptcy schedules'". *Flores-Febus*, at 179.

In *Payless Wholesale v. Alberto Culver*, the First Circuit addressed the application of judicial estoppel on the basis of bankruptcy schedules. In that case the plaintiff sought to bring claims that were not disclosed in its bankruptcy schedules. The Court observed that "a long-standing tenet of bankruptcy law requires one seeking benefits under its terms to satisfy a companion duty to schedule, for the benefit of creditors, all his interests and property rights." *Payless Wholesale v. Alberto Culver*, at 571.

As stated by the Circuit Court, debtor's failure to disclose claims as assets in bankruptcy proceedings in order to litigate those claims independently constitutes is unacceptable and contrary to bankruptcy principals. "Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively." *Payless Wholesale v. Alberto Culver*, at 571.

"The First Circuit Court of Appeals has held that nondisclosure of claims as assets in bankruptcy proceedings in

order to litigate those claims independently constitutes 'a palpable fraud that the court will not tolerate, even passively'. A bankruptcy debtor 'having obtained judicial relief on the representation that no claims exited, can not…resurrect them and obtain relief on the opposite basis.'" *Rodríguez-Torres v. Governmental Development Bank of Puerto Rico*, 750 F.Supp. 2d 407 (D.P.R. 2010).

B. Exception to the application of the doctrine

The Supreme Court stated in the case of *New Hampshire* that it may be appropriate not to apply the doctrine of judicial estoppel when a party's prior position was based on inadvertence or mistake. "[W]e do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." *New Hampshire*, at 751.

There is a split between the circuits as to the application of the inadvertence or mistake exception to the doctrine. "The Fifth, Tenth and Eleventh circuits take a dim view of inadvertence arguments. In those circuits, a debtor's failure to disclose a lawsuit to the bankruptcy court is presumed to be deliberate and is only regarded as inadvertent or mistaken when 'the debtor either lacks knowledge of the undisclosed claims or has no motive for concealment'. Put differently, those courts

will presume bad faith". William H. Burgess, *Dismissing Bankruptcy-Debtor Plaintiff's Cases on Judicial Estoppel Grounds*, 62-May Fed. Law 54, 56 (2015).

On the other hand, "[t]he Sixth, Seventh, and Ninth[4] circuits accept the Fifth, Tenth and Eleventh circuit's propositions that courts may presume bad faith or deliberate manipulation when a debtor has knowledge of the claims and a motive to conceal them. [H]owever, the presumption is not irrebuttable, and courts consider a range of explanation from plaintiff's to rebut or avoid the presumption." *Id*, at 57.

The First Circuit courts identified the limited applicability of the good faith exception but did not apply it, *see Alternative System Concepts supra*, *Rodriguez-Torres supra*, and *Guay supra*.

One court in the First Circuit did not apply the doctrine of judicial estoppel in the instance where debtor amended her bankruptcy schedules to include the previously undisclosed claim after defendant filed a request for dismissal under the judicial estoppel doctrine. "The Court will not dismiss the claim on judicial estoppel grounds given that [plaintiff], in filing her amended schedule, is no longer 'asserting a position in one

[4] The Ninth Circuit articulated a new test for applying the judicial estoppel doctrine in the case of *An Quin*. The Circuit held that if the debtor alleges that his or her failure to disclose a claim was due to a mistake or inadvertence and he or she intends to reopen the bankruptcy case to amend the schedules, the court, prior to applying the doctrine, must first examine the debtor's subjective intent regarding how she or he filled out the schedule. *See An Quin v. County of Kauai Dept. of Transp*., 733 F.3d 26 (9th Cir. 2013).

legal proceeding which is contrary to a position it has already asserted in another'." *Vidal v. Doral Bank*, 363 F.Supp 2d 19 (D.P.R. 2005).

However, in a subsequent case in the year 2010 where plaintiff failed to amend the schedules, the District Court for the District of Puerto Rico cautions that "allowing [a debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them". *Rodriguez-Torres,* at 415. Furthermore, the District Court notes that "[p]ermitting [plaintiff] to escape the consequences of judicial estoppel because of those amendments would do nothing to protect the integrity of the courts and would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of debtor's assets." *Id.*

It is important to point out the case of *Oquendo-Claudio v. Santander Fin. Servs.*, 2011 WL 5163319 in light of the present discussion, where the District Court for the District of Puerto Rico made a difference between a plaintiff in a chapter 7 case and a plaintiff in a chapter 13 case in the application of the judicial estoppel doctrine. In the *Oquendo-Claudio* case, the four plaintiffs filed a complaint against Santander for alleged

violations of the Fair Debt Collection Practices Act. Three of the plaintiffs, Oquendo, Arroyo and Quinones, had previously filed a chapter 7 case; Delgado had previously filed a chapter 13 case.

Defendant Santander filed a motion to dismiss on grounds of judicial estoppel. The District Court granted defendant's request for Oquendo, Arroyo and Quinones because they had already obtained the discharge order under a chapter 7 and they move to amend the schedules only after defendant filed the request for dismissal. Citing the case of *Rodríguez-Torres*, *supra*, the Court "finds that Oquendo, Quinones and Arroyo's representations in the bankruptcy court preclude them from maintaining their claims". Notwithstanding, the District Court denied defendant's request for dismissal for plaintiff Degaldo since she had amended the schedules in the chapter 13 case. Citing the case of *In re DiVittorio*, 430 B.R. 26, 48 (Bankr. Mass. 2010), the Court concluded that "a debtor that has not been granted any relief, such as discharge, may still amend the schedules and the Chapter 13 plan to reflect an omitted asset."

IV. Conclusion

To summarize, a debtor has the continuing obligation to disclose to the court, to the chapter 13 trustee, to the creditors and all parties in interests, of all claims and potential causes of action that debtor may have, whether

existing prior to the commencement of the bankruptcy case or arising thereafter. If such claims were not disclosed by debtor during the bankruptcy case, and are later asserted in a separate proceeding, the defendant-creditor may have an affirmative defense against such claims pursuant to the judicial estoppel doctrine, assuming all requisites for the doctrine to be applicable exist, and may request with success the dismissal of such proceedings.

Claim Estoppel

I. Basics

- Claim estoppel is a federal doctrine designed to protect the integrity of the judicial process by preventing a litigant from intentionally taking different positions in separate judicial or quasi-judicial proceedings.

- Hamilton v Zimmerman, 37 Tenn. 39, 40-42 (1857): *The doctrine of estoppel … will not, in some instances, suffer a man to contradict or gainsay what, under particular circumstances, he may have previously said or done. This doctrine is said to have its foundation in the obligation under which every man is placed to speak and act according to the truth of the case; and in the policy of the law to suppress the mischiefs from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true.*

- In New Hampshire v. Maine, 532 U.S. 742 (2001), the Supreme Court of the United States defined the doctrine of judicial estoppel and endorsed its application for the first time.

    - When 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."*

  It also laid out the several factors that a court should consider when determining the applicability of judicial estoppel:

- ***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 second court was misled.* ***Third***, *courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on an opposing party if not estopped.*
- The Supreme Court emphasized that *"it may be appropriate to resist application of the doctrine of judicial estoppel when a party's prior position was based on inadvertence or mistake."*

- In the bankruptcy context, the doctrine of judicial estoppel often arises when a debtor filing for bankruptcy fails to disclose a claim or cause of action in his or her bankruptcy schedules, and then later pursues that claim or cause of action in a separate litigation. Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570 (1st Cir. 1993) (discussing Payless' failure to list claims in its schedules). When the debtor fails to list a lawsuit in the bankruptcy schedule and then pursues the lawsuit, "the positions are clearly inconsistent," the debtor succeeded in convincing the first court to accept the first position, and the debtor obtained an unfair advantage.

- In Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002), the United States Courts of Appeal for the Eleventh Circuit took the position that, irrespective of the type of bankruptcy, the need for "complete and honest disclosure in all types of bankruptcies" is so compelling that judicial estoppel may be asserted if a debtor knows of a claim (asset), has a

motive to conceal it, and fails to disclose it. Even if a debtor acts on advice of an attorney, the debtor is nevertheless responsible for the filing.

  - Thus, judicial estoppel is operative "*in situations involving* ***intentional contradictions, not simple error or inadvertence***."

- Southmark Corp. v. Trotter, Smith & Jacobs, 212 Ga. App. 454, 442 S.E.2d 265 (1994): "*the doctrine does not require reliance or prejudice before a party may invoke it*."

- If a debtor omits a pending lawsuit from his or her bankruptcy schedules and then obtains a discharge, judicial estoppel may bar the debtor from continuing the pending lawsuit. Ah Quin v. Cnty. of Kauai Dep't of Transp., 733 F.3d 267, 271 (9th Cir. 2013) (citing Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir. 1993); Hay v. First Interstate Bank, N.A., 978 F.2d 555, 557 (9th Cir. Mont. 1992)

II. Intent vs. Inadvertence

- In New Hampshire v. Maine, 532 U.S. 742 (2001), the Supreme Court stated that when a party's prior position was based on inadvertence or mistake, an exception may apply and judicial estoppel may be inappropriate. Therefore, under that exception, if a debtor's failure to list a pending lawsuit in the bankruptcy schedules was due to inadvertence or mistake, judicial estoppel may not apply. *Whether the Doctrine of Judicial Estoppel Applies if the Debtor Fails to List a Lawsuit in His or Her Bankruptcy Schedules*, 6 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 23 (2014).

- The courts will apply judicial estoppel broadly to bar any claim that the plaintiff-debtor had knowledge of prior to his or her

bankruptcy case and failed to list because he or she will always have the motive to conceal these claims from the bankruptcy court. In Eastman v. Union Pac. R.R. Co., 493 F.3d 1151 (10th Cir.2007), the United States Courts of Appeal for the Tenth Circuit affirmed the district court's decision to apply judicial estoppel because the plaintiff failed to list his personal injury action when he filed for bankruptcy. In reaching its decision, the court stressed that the plaintiff knew of his pending personal injury suit and that he had a motive to conceal the claim.

- Ah Quin v. County of Kauai Dept. of Transp., 733 F.3d 267 (9th Cir. 2013): the United States Courts of Appeal for the Ninth Circuit articulated a new test for applying the judicial estoppel doctrine and held that if a plaintiff-debtor: (1) claims that her failure to list a pending lawsuit in a bankruptcy schedule was due to a "mistake" or "inadvertence" and (2) seeks to reopen the bankruptcy proceeding, then the court must first examine the plaintiff-debtor's **subjective intent** regarding how he or she filled out the schedule before deciding that the judicial estoppel applies. The Ninth Circuit explained that, in these circumstances, where a plaintiff reopens and amends the initial bankruptcy filing, two of the three New Hampshire v. Maine, *supra* factors no longer apply.

  This case demonstrates that if the plaintiff-debtor fails to list a lawsuit in his schedules, it is **important that the debtor seek to reopen his case and amend his schedules as soon as possible**. Even under the Ninth Circuit's "subject intent" test, a court may still apply judicial estoppel after the debtor reopens his bankruptcy case if the court finds that the omission was intentional and did not result from mistake or inadvertence. *Whether the Doctrine of Judicial Estoppel Applies if the Debtor*

Fails to List a Lawsuit in His or Her Bankruptcy Schedules, 6 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 23 (2014).

- Guay v. Burack, 677 F3d 10 (1st Cir. 2012): the Guays did not schedule the lawsuit as an asset, even after the court instructed them to amend their schedules. To the contrary, they actually filed an affidavit with the court affirming that their schedules were complete. The bankruptcy court granted the Guays a discharge. The State prevailed and the United States Courts of Appeal for the First Circuit affirmed, finding that: a) the Guays had adopted a contrary position when they failed to schedule the lawsuit in their bankruptcy case; and b) the bankruptcy court accepted the contrary position in when it granted the bankruptcy discharge. The panel dismissed the debtors' argument that the "oral" disclosure of the suit at the creditors' meeting militated against the application of judicial estoppel. Held that debtor was judicially estopped from bringing claims against government officials and police officer as a result of failure to disclose claims by amending schedule of assets prior to obtaining bankruptcy discharge.

  "Some circuits have held that parties who fail to identify a legal claim in bankruptcy schedules may escape the application of judicial estoppel if they can show that they "either lack[ed] knowledge of the undisclosed claims or ha [d] no motive for their concealment." Eastman v. Union Pac. R.R. Co., *493 F.3d 1151, 1157 (10th Cir.2007); see also* Robinson v. Tyson Foods, Inc., *595 F.3d 1269, 1275 (11th Cir.2010) (same);* Eubanks v. CBSK Fin. Group, Inc., *385 F.3d 894, 898 (6th Cir.2004) (same);* Browning Mfg. v. Mims *(In re Coastal Plains, Inc.), 179 F.3d 197, 210 (5th Cir.1999)".*

- Reed v. City of Arlington, 620 F.3d 477 (5th Cir. 2010): the court stated that an innocent trustee can pursue for the benefit

of creditors a judgment or cause of action that the debtor fails to disclose in bankruptcy.

- Love v. Tyson Foods, Inc., 677 F3d 258 (5th Cir. 2012): Love did not disclose the discrimination/retaliation claim in his bankruptcy case. The feature which distinguishes Love from Reed is that Love was a debtor in a case under chapter 13 of the Bankruptcy Code rather than a debtor in a case under chapter 7. Although there is a "chapter 13 trustee," the trustee does not typically take control of the debtor's assets or the debtor's business. Love not only failed to disclose his discrimination/retaliation claim on his schedules, but also did not account for it in his chapter 13 plan. The panel affirmed the lower court's determination that he was judicially estopped from pursuing his claim.

- Flugence v. Axis Surplus Insurance Company, et al., 738 F.3d 126 (5th Cir. 2013): the panel reaffirmed the basic tenant of Love that while a chapter 13 debtor may be judicially estopped from enjoying the benefits of a knowingly undisclosed claim, the chapter 13 trustee may pursue the claim for the benefit of creditors. In those cases in which there is an innocent trustee available to pursue a claim, the prospective defendants will not escape liability merely because the debtor has knowingly failed to disclose it.

- Nettles v. State Farm Fire & Cas. Co., 2011 U.S. Dist. LEXIS 64335 (M.D. Ga. June 17, 2011): Nettles filed for Chapter 13 bankruptcy before experiencing fire damage to a State Farm-insured Georgia home. The day following the fire, Nettles notified State Farm of the loss. Three days later, Nettles advised the bankruptcy trustee that the property was covered by a State Farm policy and that he had "met with a field rep." It bears repeating that, under Chapter 13 bankruptcy law, a debtor

has a continuing duty to update asset listings in a petition for bankruptcy. However, Nettles did not follow through and amend the bankruptcy files.

Nettles filed suit when State Farm failed to pay the claim, after which State Farm moved for summary judgment based on judicial estoppel—Nettles's failure to list the State Farm claim as an asset in bankruptcy court while demanding payment of the claim in another court (Bankruptcy Court). After State Farm raised the judicial estoppel defense, the Nettles plaintiffs asked their attorney to amend the bankruptcy filing. When the attorney failed to do so, Nettles fired him and retained another attorney who made proper amendments.

In rejecting State Farm's motion, Judge Clay Land recognized that the insured had knowledge of the pending claim, had motive to conceal the lawsuit, and made no official amendment to the filing until State Farm invoked an equitable estoppel defense. **However**, considering the record as a whole, he concluded that Nettles **"lacked the requisite intent for judicial estoppel to apply."** Citing precedent, he characterized **"intent" as "cold manipulation and not an unthinking or confused blunder … a purposeful contradiction—not simple error or inadvertence."** A time element was also noted from precedent: **intent is the state of mind "at the time of nondisclosure."**

In evaluating intent, the court recognized that Nettles had promptly notified State Farm, the mortgagor, and the bankruptcy trustee about the loss; moreover, Nettles demanded that the bankruptcy attorney amend the Chapter 13 filing and retained another attorney to amend the filing when the first attorney failed to amend. In addition, Nettles moved to add the trustee as a party to the case. The court also concluded that any recovery from State Farm would not go directly to the Nettles family but to the estate to pay creditors.

"In a perfect world," Judge Land noted, "perhaps the Nettles in the midst of a significant fire loss should have put everything else on hold while they located a typewriter, amended their bankruptcy schedules and immediately rushed down to the bankruptcy court to file them; **but any reasonably prudent person would have been justified in believing that by notifying the trustee, they had notified the bankruptcy court of the potential claim.**"

- Cook v. United Health Care, 2010 U.S. Dist. LEXIS 94720 (M.D. Ala. Sept. 10. 2010): a dispute over chargebacks in insurance commissions, independent insurance agent Cook filed for Chapter 13 bankruptcy on October 15, 2005. After filing the bankruptcy, Cook carried on a continuing battle with defendants by complaining to regulators, retaining counsel, complaining to his congressman, and **eventually filing a lawsuit against the insurer over the commission dispute**. When the defendants pled judicial estoppel as a defense because Cook did not include the claim for disputed commissions in his bankruptcy filings, Cook claimed that he did not amend his bankruptcy filing **because he was uncertain of the value of his claim against the insurers**, exactly when the debt arose, and why it arose.

  In deciding against Cook, the court stated: *It is implausible that Mr. Cook was not on notice of whom he had claims against, given that he had signed contracts with Defendants, and in light of the evidence that Mr. Cook undertook multiple complaints about Defendants' conduct to various authorities during his bankruptcy. Further, the bankruptcy forms are clear that there is no requirement that a debtor be aware of the precise amount of a claim, much less on the exact date on which it arose….*

Further, Cook had disclosed several other lawsuits without detailing the amounts due and had complained to state officials in June 2008 that defendants owed him a specific amount of money. Cook's inconsistencies simplified the court's ability to conclude **that mere inadvertence was not behind his failure to list the claim against the defendants.**

III. Effect of failure to disclose a claim

- Discovering a failure by a plaintiff/debtor to disclose an existing personal injury claim in a federal bankruptcy petition can give rise to a motion for summary judgment by a defendant based upon judicial estoppel. Byrd v. J.R.C. Towne Lake, 225 Ga. App. 506, 507, 484 S.E.2d 309 (1997); Cochran v. Emory University, 251 Ga. App. 737, 738, 555 S.E.2d 96 (2001).

- Faced with a motion for summary judgment based on failure to disclose the claim in the bankruptcy petition, a plaintiff/debtor may attempt to amend an existing bankruptcy asset schedule or, if the bankruptcy court discharged the bankruptcy, petition the court to re-open the bankruptcy. If the plaintiff/debtor is successful in re-opening or amending the bankruptcy, then the motion for summary judgment might be ruled by the trial court as moot. Johnson v. Trust Company Bank, 478 S.E.2d 629, 223 Ga. App. 650 (1996).

- Section 541 of the Bankruptcy Code provides that virtually all of a debtor's assets, both tangible and intangible, **vest in the bankruptcy estate** upon the filing of a bankruptcy petition providing that the bankruptcy estate includes "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 USC § 541. Such property includes causes of action belonging to the debtor at the commencement of the bankruptcy case. Barger v. City of Cartersville, 348 F.3d

1289, 1292 (11th Cir. 2003) cited in Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004). In determining if a cause of action is included in property of the estate, **it is included only if, at the commencement of the bankruptcy case, the debtor could have brought a cause of action under applicable state law**. In re Swift, 198 B.R. 927 (W.D. Texas 1996).

- Causes of action that belong to the bankruptcy estate cannot be prosecuted by the plaintiff/debtor and can only be prosecuted by a trustee of the bankruptcy estate. Miller v. Shallford Community Hosp. Inc., 767 F.2d 1556 (11th Cir. 1985); Lawrence v. Jackson Mack Sales, Inc., 873 F. Supp 771 (S.D. Miss. 1992). A cause of action is a property right which passes to the trustee in bankruptcy "even if such cause of action is not included in the schedules filed with the bankruptcy court." Carlock v. Pillsbury Co., 719 F. Supp. 791 (D. Minn. 1989). Any asset not properly scheduled in the bankruptcy petition remains property of the estate under 11 USC § 554 (d), and it remains property of the estate even after discharge. In re Drexel Burnham Lambert Group Inc. 160 B.R. 508 (S.D. N.Y. 1993).

IV. Litigation Trust

- Kipperman v. Onex Corp., 411 B.R. 805, 879 (N.D. Ga. 2009): The Plaintiff in this matter is Richard M. Kipperman, not individually but solely in his capacity as Trustee for the Magnatrax Litigation Trust ("the Trust"). The Trust was established during Magnatrax's bankruptcy pursuant to the Litigation Trust Agreement and the Magnatrax Debtors' Fifth Amended and Restated Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code ("the Plan") Defendants maintain that allowing Plaintiff to recover more than the value of the Trust Beneficiaries' claims would violate (1) "the absolute priority rule," (2) section 550 of the Bankruptcy Code, and (3) principles

of judicial estoppel. The court finds that judicial estoppel does not "cap" the Trustee's recovery.

- Adelphia Recovery Trust v. Goldman Sachs & Co., 748 F.3d 110 (2d Cir. 2014): the Adelphia Recovery Trust (the plan-created litigation trust established for the benefit of the creditors of Adelphia Communications Corp. ("ACC"), the parent entity of the various Adelphia companies) appealed from the District Court's dismissal on summary judgment of its fraudulent conveyance action against Goldman Sachs & Co.

  The United States Court of Appeals for the Second Circuit held that a fraudulent conveyance claim brought by a litigation trust, created to recover assets for the benefit of unsecured creditors of Adelphia Communications Corp. ("ACC"), was barred by the doctrine of judicial estoppel because the funds at issue were transferred from an account that the plaintiff's predecessor-in-interest scheduled as an asset of one of the predecessor's subsidiaries, not the predecessor itself. The court applied judicial estoppel to the litigation trust's fraudulent conveyance claim because ACC's various schedules and chapter 11 plan, which was substantially consummated, all indicated that Adelphia Cablevision owned the concentration account at issue. The court held that the doctrine of judicial estoppel barred the fraudulent conveyance claim because "*revisiting the accuracy of [the asset] schedules to permit the instant action to proceed would have clearly threatened the integrity of bankruptcy proceedings*."