Judicial and Collateral Estoppel

James E. Bailey
Butler Snow LLP; Memphis

Mark H. Shapiro
Steinberg Shapiro & Clark; Southfield, Mich.

2015

COLLATERAL ESTOPPEL (ISSUE PRECLUSION)

Mark H. Shapiro, Esq.
Steinberg Shapiro & Clark
25925 Telegraph Rd., Suite 203
Southfield, MI 48033
(248) 352-4700

a. Res judicata.

The concept of *res judicata* (sometimes referred to as "claim preclusion") bars parties from re-litigating previously litigated claims or claims that could have been litigated in a prior proceeding. In the Sixth Circuit, a claim is barred by the res judicata effect of prior litigation if each of these four elements are established: "'(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.'" *Browning v. Levy*, 283 F.3d 761, 771 (6th Cir. 2002) (citation omitted). A party asserting res judicata as a defense bears the burden of proving each element. Id. at 772.

In bankruptcy, the doctrine of res judicata is encountered less frequently than that of collateral estoppel because res judicata is inapplicable to non-dischargeability proceedings. *See Bay Area Factors v. Calvert* (*In re Calvert*), 105 F.3d 315, 318 n.4 (6th Cir. 1997) (citing *Brown v. Felsen*, 442 U.S. 127, 139 n.10, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979)).

Res judicata, however, is important in Chapter 13 cases because "[a]n order confirming a Chapter 13 plan is res judicata as to all issues which were or could have been decided at the confirmation hearing." *Salt Creek Valley Bank v. Wellman* (*In re Wellman*), 322 B.R. 298, 301 (BAP 6th Cir. 2004). Thus, the parties are bound by the terms of a confirmed plan, including the values assigned to collateral and the amount of payment to be received. *Id.*

b. Collateral estoppel.

Collateral estoppel (sometimes referred to as "issue preclusion") is often recognized as an extension of the doctrine of *res judicata*. It covers issues—as opposed to claims—already litigated in a prior proceeding by the same parties.

The doctrine of collateral estoppel or issue preclusion provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Dowling v. United States*, 493 U.S. 342, 347 (1990) (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)). This doctrine, precluding the re-litigation of issues, is designed to promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments. *See Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 553 (1990); *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440 U.S. 147, 153–54 (1979).

The preclusive effect given to state-court judgments under the doctrine of collateral estoppel is a function of the full faith and credit statute. In determining whether a state court judgment precludes re-litigation of issues under the doctrine of collateral estoppel, the Full Faith and Credit Statute, 28 U.S.C. § 1738, requires bankruptcy courts to "consider first the law of the State in which the Judgment was rendered to determine its preclusive effect." *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 317 (6th Cir. 1997) (quoting *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 375 (1985)). If the state court would not give preclusive effect to a default judgment, the analysis is complete. If, however, the state would accord the judgment preclusive effect, the federal court must give preclusive effect to the judgment unless Congress has expressly or impliedly created an exception to § 1738 which ought to apply to the facts before the federal court. *Marrese*, 470 U.S. at 386.

There is no exception under § 1738 for non-dischargeability actions; thus, collateral estoppel principles apply, and state court judgments can have preclusive effect in those proceedings. *See Grogan v. Garner*, 498 U.S. 279, 285 (1991).[1]

Collateral estoppel can be used both offensively and defensively. When collateral estoppel is an affirmative defense, it is ordinarily deemed waived if it is not raised in the pleadings. *Gilbert v. Ferry*, 413 F.3d 578, 579 (6th Cir.2005).

1. The parties must be the same in both actions.

A. Direct interest.

For purposes of collateral estoppel, a "party" is "one who is 'directly interested in the subject matter, and had a right to make a defense, or to control the proceeding, and to appeal from the judgment.'" *Musilli v. Droomers* (*In re Musilli*), 398 B.R. 447 (E.D. Mich. 2008) (quoting *Howell v. Vito's Trucking and Excavating Co.*, 386 Mich. 37, 43 (1971)).

The *Musilli* case involved two partners in the law firm of Musilli, Baumgardner, Wagner & Parnell, PC. Droomers, also an attorney, sued the law firm seeking a $352,636.60 referral fee and later added a *quantum meruit* claim. While the case was pending, the state court ordered the law firm to deposit an amount equal to the referral fee in escrow.

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[1] If the issue was litigated in a Michigan court, Michigan law will determine the applicability of collateral estoppel. In Michigan, a party seeking to invoke the doctrine of collateral estoppel must prove:

1. that the same parties were cast as adversaries in the first action
2. there was a valid and final judgment in the first proceeding,
3. the same issue was actually litigated and necessarily determined in the first proceeding, and
4. the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding.

Phillips v Weissert (*In re Phillips*), 434 B.R. 475, 485 (BAP 6th Cir. 2010) (citations omitted).

Droomers ultimately prevailed on her quantum meruit claim and was awarded a total of $312,297.40. The escrow deposit, however, was never made, so a judgment of criminal contempt was entered against Musilli and Baumgardner for damages incurred by Attorney Droomers in excess of $400,000.

The criminal contempt was later vacated based on a settlement. But Musilli and Baumgardner defaulted on the settlement and filed separate bankruptcy cases. The bankruptcy stays were lifted to allow the reopening of the state criminal contempt proceedings. The state court judge reinstated his findings of criminal contempt and reaffirmed the money judgment in favor of Droomers.

Droomers then filed an adversary proceedings in Musilli and Baumgardner's bankruptcies alleging, among other things, that under Bankruptcy Code § 523(a)(6) the state court criminal contempt money judgments were nondischargeable.

In its opinion on the merits, the bankruptcy court discussed the applicability of collateral estoppel at some length and ultimately granted summary judgment in favor of Droomers. On appeal, one of the issues was whether the bankruptcy court erred in applying collateral estoppel because the state court was the "party" to the contempt proceeding, not Attorney Droomers. The district court concluded that Attorney Droomers was the one directly interested in the monies that were supposed to be paid into escrow. And Droomers had the right to request that the court order Musilli and Baumgardner to show cause why they should not be held in contempt, as well as the right to appeal. Thus, for purposes of collateral estoppel, there was an identity of parties.

B. Indirect interest.

Sometimes, collateral estoppel will apply even if the parties are not technically the same as those in the prior action. For example, in an adversary proceeding involving the bankruptcy

estate, the bankruptcy trustee stands in the shoes of the debtor and is bound by any collateral estoppel principles that would apply to the debtor. *See TTOD Liquidation, Inc. v. Jin Lim* (*In re Dott Acquisition, LLC*), 2014 Bankr. LEXIS 603 (Bankr. E.D. Mich. Feb. 13, 2014) (where state court entered judgment in favor of plaintiff on breach of contract and "as to defendant's counterclaims" and defendant later files bankruptcy, the Chapter 7 trustee is collaterally estopped from raising issues previously asserted in counterclaims).

2. There must be a valid and final judgment.

Valid final judgments must be issued by courts with appropriate personal and subject matter jurisdiction. It is notable, however, that an error does not make a decision invalid. Reversible errors must be appealed. In federal court, judgments on appeal are given preclusive effect. But if the decision is vacated, then the preclusive effect of the judgment fails.

Collateral estoppel principles also apply to factual findings made during arbitration proceedings. *Tweedie v. Hermoyian* (*In re Hermoyian*), 466 B.R. 348, 362 (Bankr. E.D. Mich. 2012) (citations omitted).

3. The issue must have been actually litigated and necessarily determined.

A. Was the issue actually litigated?

An issue is "actually litigated," if it is "put into issue by the pleadings, submitted to the trier of fact for determination, and is thereafter determined." *Micco Constr. Co. v. Brunett* (*In re Brunett*), 394 B.R. 425, 428 (Bankr. E.D. Mich. 2008) (citation omitted).

Thus, for example, a Debtor cannot use collateral estoppel to beat a non-dischargeability (§ 523(a)(2)(A) or § 523(a)(4)) claim even though state court jury determined that the defendant did not commit fraud, because the standard of proof used by the state court in determining the fraud claim was higher than the standard for a nondischargeability claim.

So in assessing whether collateral estoppel applies, one should begin by identifying the elements of the claim at issue, and compare them with the elements necessary to establish the previous claim. If the elements are the same, examine the previous complaint to determine if the facts necessary to establish the elements were alleged. If the elements were alleged, then examine the judgment to determine if the elements in the previous claim were actually litigated and necessarily determined by the judgment. The basis of the prior complaint must be clear, definite, and unequivocal. *People v. Gates*, 434 Mich. 146, 452 N.W.2d 627, 631 (Mich. 1990).

i. Default judgments—penalty default.

Penalty default judgments are default judgments entered as a sanction "[w]here a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits, but subsequently chooses not to do so, and even attempts to frustrate the effort to bring the action to judgment[.]" *Anderson v. Fisher*, 2014 Bankr. LEXIS 3908, n.1 (6th Cir. BAP, Sept. 15, 2014) (citation omitted).

In *Anderson,* the debtors were defendants in a prepetition civil action in Tennessee Circuit Court involving, among other claims, fraud, misrepresentation, deceit, negligence, conversion, and breach of contract. Debtors answered the complaint and failed to comply with discovery orders in the case. Plaintiff/Creditor filed a motion to compel, for sanctions, for entry of a default judgment, and to dismiss for the discovery abuses. The state court granted the motion for default judgment as to liability.

Before the hearing to liquidate the damages in the state court, the debtors filed a voluntary joint chapter 7 case. The creditor then filed an adversary proceeding seeking a determination that its debt was non-dischargeable under 11 U.S.C. § 523(a)(2)(A) and a motion

for summary judgment arguing that the prior state court default judgment on its complaint which sounded in fraud had preclusive effect in the dischargeability action.

The debtors argued that the default judgment was not entitled to preclusive effect because the default judgment failed to satisfy the "actually litigated" prong of the issue preclusion analysis. The bankruptcy court found that there were no genuine issues of disputed fact and that the creditor was entitled to a determination that its debt was nondischargeable under § 523(a)(2)(A) on the basis of collateral estoppel.

The Bankruptcy Appellate Panel affirmed, noting that "the Debtors retained an attorney, filed an answer, and participated in the discovery process…" The debtors' participation in the litigation process was sufficient to meet the "actually litigated" component of collateral estoppel.

ii. Default judgments—true defaults.

A true default occurs when a defendant fails to participate in the litigation in any manner and, consequently, a default judgment is entered. Collateral estoppel applies to true default judgments in bankruptcy dischargeability proceedings in those states which would give such judgments that effect. *Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 322 (6th Cir. 1997).

In Michigan, issues determined by a true default judgment can still meet the "actually litigated" requirement of collateral estoppel. *See McCallum v. Pixley* (*In re Pixley*), 504 B.R. 852, 860 (Bankr. E.D. Mich.2014) (holding that "a true default judgment is to be given preclusive effect under Michigan law of collateral estoppel"). The *McCallum* court concluded that the 6th Circuit BAP got it wrong in *Dantone v. Dantone* (*In re Dantone*, 477 B.R. 28 (BAP 6th Cir. 2012) when it expressed doubt about whether Michigan law gives preclusive effect to a default judgment under the doctrine of collateral estoppel. *See also Comerica Bank v. Kory* (*In re*

Kory), 2013 Bankr. LEXIS 1267 (Bankr. E.D. Mich. Mar. 28, 2013). *But see Vogel v. Kalita* (*In re Kalita*), 202 B.R. 889 (Bankr. W.D. Mich.1996) (holding that "true default" judgments do not meet the "actually litigated" requirement and are not entitled to collateral estoppel effect under Michigan law).

Vogel, however, was decided before *Barnes v. Jeudevine*, 475 Mich. 696 (2006) which was largely relied on in *Kory* and *McCallum*. In *Barnes,* the Michigan Supreme Court stated: "[a] default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest." *Id.* at 315. Thus, the holding in *Vogel* may be outdated.

iii. Non-specific judgments (default or otherwise).

Often judgments are granted on complaints containing alternative theories of relief, some of which would support collateral estoppel on a nondischargeability claim and others that would not. The judgment may simply grant relief on all counts of the complaint or otherwise fail to specify on what grounds the judgment is awarded. In these circumstances, the application of collateral estoppel by Michigan bankruptcy courts is varied.

Kashike v. Frank (*In re Frank*), 425 B.R. 435 (Bankr. W.D. Mich. 2010) (giving preclusive effect to each count of a multi-count default judgment without examining state court record to ascertain on which counts the judgment was based).

McCurdie v. Strozewski (*In re Strozewski*), 458 B.R. 397, 405-07 (Bankr. W.D. Mich. 2011) (affording preclusive effect to state court judgment entered on complaint asserting multiple causes of action, even though the judgment did not indicate that it was based on all counts of the complaint or any specific count).

Contra:

Chamberlain v. Messer (In re Messer), 500 B.R. 875, 882 (Bankr. E.D. Mich.2013). If it is not possible to determine from the judgment or the record below on which counts the judgment is based and the judgment does not apportion damages among the independent accounts, the basis of the judgment is not clear, definite, and unequivocal, and collateral estoppel does not apply.

Bell v. Sims (In re Sims), 2011 Bankr. LEXIS 5723(Bankr. E.D. Mich. Aug. 11, 2011) (refusing to apply collateral estoppel to judgment on multi-count complaint that failed to state on which basis the judgment was rendered).

Brij Gujral v. Kalinowski (*In re Kalinowski*), 2012 Bankr. LEXIS 4629 (Bankr. E.D. Mich. Oct. 2, 2012. In *Kalinowski*, a state court judgment had been entered against the debtor piercing the corporate veil of her company. Creditor filed a nondischargeability complaint under § 523(a)(2)(A) followed by a motion for summary judgment. Creditor argued that Michigan law requires a showing of fraud or illegality before the corporate veil will be pierced. Thus, since the state court entered judgment piercing the corporate veil, fraud had to be a factor and creditor argued that it was entitled to summary judgment on collateral estoppel grounds.

The bankruptcy court disagreed, noting that the corporate veil can be pierced only when honoring the corporate structure would subvert justice or perpetuate fraud. The bankruptcy court further interpreted the state court decision to have pierced the veil based on subversion of justice not on the alternative theory of fraud. And because subversion of justice does not satisfy the elements of § 523(a)(2)(A), collateral estoppel did not apply.

B. Was the issue necessarily determined?

Even where all of the necessary elements of a nondischargeability claim are pleaded and "actually litigated," collateral estoppel will not apply if any of the elements of the

nondischargeability claim were not "necessarily determined" by the underlying judgment. For an issue to have been "necessarily determined," it must have been essential to the judgment. *Livingston v. Transnation Title Ins. Co.* (*In re Livingston*), 372 Fed. Appx. 613, 617 (6th Cir. 2010) (citations omitted).

In *McCallum v. Pixley* (*In re Pixley*), 504 B.R. 852, 860 (Bankr. E.D. Mich.2014), a default judgment was entered against the debtor on all counts of a state court complaint, one of which included a claim for statutory conversion. After the debtor filed bankruptcy, the plaintiff sought to have the judgment debt declared nondischargeable. Plaintiff moved for summary judgment, arguing that collateral estoppel precluded the debtor from contesting that the debt was nondischargeable under §§ 523(a)(2)(A) and 523(a)(6). After finding that collateral estoppel can be applied to true defaults, the court considered the separate claims. Plaintiff argued that because the Debtor was found liable for conversion, the elements of § 523(a)(6) were satisfied and summary judgment should enter in his favor on that claim.

The bankruptcy court concluded that all of the necessary elements of plaintiff's § 523(a)(6) nondischargeability claim for "willful and malicious injury" were "actually litigated" in the state court judgment because they were pleaded in the complaint and the judgment was entered on all counts. *McCallum,* 456 B.R. at 785-87. The court, however, ruled that the willfulness element under § 523(a)(6) was not "necessarily determined" by the judgment because in Michigan, the tort of conversion can be committed "unwittingly." *Id.* at 788. And because the conduct necessary for a § 523(a)(6) claim must be "willful," collateral estoppel did not apply.

What if some of the required elements necessary to establish a claim meet the requirements of collateral estoppel but others do not? That question was addressed in *McCallum*. *Id.* The bankruptcy court ruled in its summary judgment opinion that collateral estoppel did not

preclude the debtor from contesting certain specific elements of McCallum's §§ 523(a)(2)(A) and 523(a)(6) nondischargeability claims, because those specific elements were not both "actually litigated" and "necessarily determined" in the state court default judgment.

Thus, the case proceeded to trial. In his post-trial brief, the debtor argued that because the court did not apply collateral estoppel to all of the necessary elements of the nondischargeability claims, he was not precluded from contesting any of the nondischargeability elements. The debtor asserted that "[c]ollateral estoppel may be applied to a valid and final judgment on an all or nothing basis; collateral estoppel does not apply to conclusively establish only certain elements for a cause of action . . . ." *Id*. at 862 (quoting debtor's post-trial brief).

Citing Sixth Circuit precedent, the bankruptcy court held that collateral estoppel applies on an "issue-by-issue" basis. *McCallum* at 863 (citing *Smith v. Sushka*, 117 F.3d 965 (6th Cir. 1997)). In other words, a party is precluded from re-litigating each issue that meets the collateral estoppel requirements, even if collateral estoppel does not bar litigation of other elements of the claim.

4. The party must have had a full and fair opportunity to litigate the issue.

The last factor for collateral estoppel—whether the party against who the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding—requires a showing that the party was aware of the litigation. As an initial matter, there must be proof of proper service of process. *See Sill v. Sweeney* (*In re Sweeney*), 276 B.R. 186, 191-192 (B.A.P. 6th Cir.2002); *see also Allstate Insurance Co. v. Harris* (*In re Harris*), 480 B.R. 281, 290 (Bankr. E.D. Mich. 2012) (collateral estoppel held inapplicable when defendants had no actual notice of the lawsuit, until after the default judgments were entered against them).

Other factors that the Michigan Supreme Court instructs courts to consider in determining if a party had a full and final opportunity to litigate are those set forth in *1 Restatement Judgments, 2d, ch. 3, Former Adjudication, §§ 28-29 Tweedie v. Hermoyian* (*In re Hermoyian*), 466 B.R. 348, 363 (Bankr. E.D. Mich. 2012) (citation omitted).

Thus, for example, under the *Restatement* § 28(l), collateral estoppel doesn't apply where the party against whom preclusion is sought could not as a matter of law have obtained review of the judgment in the initial action. *See id.*

Other examples in the *Restatement* include a new determination being warranted where the issue is one of law and the two actions involve claims that are substantially unrelated or where there are differences in the quality or extensiveness of the procedures followed in the two courts. *See id.*

JUDICIAL ESTOPPEL

Materials prepared by:
Winnifred P. Boylan, Esq.
Lambert Leser, Attorneys at Law
916 Washington Ave. Suite 309
PO Box 835
Bay City, MI 48707-0835
(989) 893-3518
Offices also located in
Troy and Midland, Michigan

A. Definition and Purpose – "doctrine of preclusion of inconsistent positions" Black's Law Dictionary 554 (9th ed. 2009)

In New Hampshire v. Maine, 532 U.S. 742 (2001), the Supreme Court established factors that typically are applied in determining the application of judicial estoppel.

1. a party has taken a position in a legal proceeding that is "clearly inconsistent" with a position that party has taken previously in either the same or separate legal proceeding;

2. that 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'" and

3. that party "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Judicial estoppel is intended to protect the integrity of the judicial system, NOT the litigants. (DeMarco v. Ohio Decorative Products, Inc., 19 F.3d 1432 (1994 WL 59009).

As an equitable doctrine, judicial estoppel generally prevents a party from prevailing on an argument and then relying on a contradictory argument to later prevail in a separate proceeding. White v. Wyndham Vacation Ownership, Inc., 617 F3d 472, 476 (6th Cir. 2010). This doctrine is meant to "preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship." Browning v. Levy, 283 F3d 761, 776 (6th Cir. 2002). Under this model of judicial estoppel, if a party "successfully and unequivocally" asserts a position in a prior proceeding, they are estopped from asserting an inconsistent position in a subsequent proceeding, Paschke v. Retool Indus., 445 Mich. 502, 509; 519 NW2d 441 (1994), but it does not require the party against whom the judicial estoppel doctrine is invoked to "have prevailed on the merits," Spohn, 296 Mich. App at 480, quoting Reynolds v. Internal Revenue Comm'r, 861 F2d 469, 473 (6th Cir. 1988).

In Spohn, the court held that to support a finding of judicial estoppel in the bankruptcy context a reviewing court must find that:

> (1) [the plaintiff] assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as preliminary matter or as part of a final disposition; and (3) [the plaintiff's] omission did not result from mistake or inadvertence [id. At 480-81, quoting White, 617 F3d at 477-478.]

B. Standard of Review –

The court in Eubanks v. CBSK Fin. Grp., Inc., 385 F.3d 894, 897 (6th Cir. 2004) applied de novo review regarding judicial estoppel decisions. However, reviewing judicial estoppel decisions de novo appears inconsistent with the Supreme Court in New Hampshire v. Maine, wherein judicial estoppel was concluded to be an equitable doctrine invoked by the court at its discretion. In dicta of an unpublished opinion, a panel of the Sixth Circuit noted this discrepancy with binding Supreme Court precedent and the fact that the Sixth Circuit's use of a de novo standard of review is the minority position. (See Lewis v. Weyerhaeuser Co., 141 F. App'x 420, 423-24 (6th Cir. 2005)) "In light of New Hampshire and the extensive contrary authority, we question the continued use of the de novo standard in the context of judicial estoppel").

Most recently, the Sixth Circuit questioned the viability of the de novo review standard versus the abuse of discretion standard in Javery v. Lucent Techs., Inc. Long Term Disability Plan for Mgmt. or LBA Emples., 741 F.3d 686 (6th Cir.2014). The court avoided addressing the issue of the proper standard of review in the judicial estoppel setting because the district court's ruling was appropriate even under the de novo review standard.

C. Invoking the Doctrine in Consumer Cases –

In the consumer bankruptcy context, judicial estoppel is commonly applied when a debtor fails to disclose assets in accordance with section 521 of the Code. The requirement of full disclosure of assets often arises in the judicial estoppel setting when a debtor fails to disclose on Schedule B "…all contingent and unliquidated claims of every nature, … counterclaims of the debtor, and rights to set off claims." (See Schedule B, #21, OFFICIAL BANKR. FORMS; Also see Love v. Quest Diagnostic 2012, WL 5363576 (E.D. Mich. Southern Div. October 30, 2012).

In a non-bankruptcy case, retiree filed suit against employer and successors seeking benefits under a 2000 supplemental executive retirement plan. Later, the retiree sought benefits from the employer in a separate action under a 1995 supplemental executive retirement plan. The court did not apply judicial estoppel against the retiree because the retiree had not prevailed in the earlier action. Trimas Corp. v. Meyers, _____ Fed Appx. ____, 2014 WL 3376958 (6th Cir. July 11, 2014).

D. An Innocent Chapter 7 Trustee May Pursue a Claim that a Debtor Fails to Disclose

The Sixth Circuit and many other appellate, district and state courts have held, or have noted in dicta, that a debtor's misconduct should not judicially estop an innocent trustee from pursuing claims. Stephenson v. Malloy, 700 F.3d 265, 271-72, 275 (6th Cir.2012) held that the debtor's omission of a lawsuit from his bankruptcy was inadvertent and, therefore, judicial estoppel did not apply. However, Stephenson adopted the holding of many other circuits that judicial estoppel did not apply to bar the trustee from pursuing debtor's negligence claims. Most courts are recognizing that an innocent trustee should not be tainted by a debtor's wrongdoing.

E. Presumption of Advertent Non-Disclosure

"… 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." 179 F.3d 197, 210 (5th Cir. 1999) (emphasis added), (But see, Dorbeck v. Sykora, No. 09-cv-14646, 2010 WL 3245327, at *2 (E.D. Mich. Aug. 16, 2010) where the court applied judicial estoppel on other grounds.)

As the United States District Court for the Eastern District of Michigan stated, "Leniency has not been the watchword that characterizes the Sixth Circuit's treatment of judicial estoppel claims in the bankruptcy context." Riddle v. Chase Home Finance, No. 09-11182, 2010 WL 3504020 (E.D. Mich. Sept. 2, 2010). However, it is unclear as to whether the Sixth Circuit has accepted the presumption of advertent non-disclosure.

1. Browning v. Levy, 283 F.3d 761 (6th Cir. 2002) – the court had not decided whether bad faith or attempt to mislead were required to be established in order to apply judicial estoppel, but held that it was inappropriate where the failure to disclose was due to a mistake or inadvertence.

2. Eubanks v. CBSK Financial Group, Inc., 385 F.3d 894 (6th Cir. 2004) – appears to require some degree of fraudulent intent towards the court before judicial estoppel applies. Thus, the presumption of advertence seems precluded.

3. White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472 (6th Cir. 2010) – it appears that the White court requires some showing of bad faith before judicial estoppel may be applied and it also appears that this court places the burden of showing an absence of bad faith on the plaintiff. To satisfy the burden, the court in Harrah v. DSW, Inc., 852 F.Supp 2nd 900, 905 (N.D. Ohio 2012) quoted White, "the timing of correction efforts is 'significant,' with affirmative efforts that pre-date a 'judicial estoppel' motion from the defendant being 'more important' than efforts generated in response to a dispositive motion."

4. Stephenson v. Malloy, 700 F.3d 265 (6th Cir. 2012) – ultimately held that judicial estoppel was inapplicable because "the bankruptcy trustee was told of the non-disclosed lawsuit long before Defendants sought summary judgment on judicial estoppel grounds", but also included language that the debtor-plaintiff may have had a motive to conceal the claim so as to keep any settlement or judgment to himself. This would seem to suggest that motive to conceal would be presumed in bankruptcy. (Also see Kimberlin v. Dollar General Corp., 520 Fed. Appx 312 (6th Cir. March 20, 2013) where nearly a year after the bankruptcy case closed, debtor filed a "public policy tort" claim for which her claim arose during her chapter 13 repayment period. Debtor never amended her Schedules or filings to reflect the claim. Debtor asserted mistake or advertence for which the court disagreed noting that there was a lock of affirmative actions taken to notify the trustee or the bankruptcy court of the omitted claim).

Presumption of advertence may be inconsistent with the principles of equity. Advertence also is seemingly out of line with the emphasis found in binding Supreme Court precedent that "judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" New Hampshire, 532 U.S. at 750 (quoting Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990)).

F. Equitable Claims

Counsel opposing an individual consumer plaintiff would be wise to investigate whether a plaintiff filed a previous bankruptcy and if the subject claim had been disclosed. If not disclosed, and the plaintiff stood to benefit from that nondisclosure, it is likely that the defendant will be successful in dismissing the case on judicial estoppel grounds. However, while judicial estoppel is frequently used as a bar to recovery of monetary damages by the plaintiff, some courts have held that the plaintiff is not barred from pursuing claims with no monetary value such as reinstatement or other injunctive relief. Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1288-89 (11th Cir.2002)); accord Matthews v. Potter, 316 F. App'x 518, 523-24 (7th Cir. 2009); Clark v. Strober-Haddonfield Grp. Inc., Civ. No. 07-910 (RBK), 2008 WL 2945972, at *3 (D.J.J. July 29, 2008); see also Javaid v. Allied-Barton Sec. Servs., No. CIV S-07-0386 FCD GGH PS, 2008 WL 1925233, at *10 (E.D. Cal. Apr. 30, 2008) (agreeing in dicta), report and recommendation adopted by 2008 WL 2261297 (E.D. Cal. June. 2, 2008).

On the other hand, a plaintiff was not permitted to recover on her equitable claim in Piper v. Dollar Gen. Corp., No. 3:11-554, 2011 WL 4565432, at *7 n.6 (M.D. Tenn. Sept. 29, 2001). Relying on White, "[T]he Sixth Circuit would not allow a judicially estopped plaintiff … who asserted both monetary and equitable claims at the onset of litigation, to proceed with her equitable claims. At the core of White is the notion that plaintiffs who were not completely forthcoming in their bankruptcy filings lose the benefit of being able to assert undisclosed

claims. This notion of protecting the bankruptcy process and promoting full disclosure is relevant and 'in play' whether or not the undisclosed claims have an equitable element."

G. Alternative Tools to Judicial Estoppel

1. revoke discharge

2. reopen bankruptcy case 350(b)

3. criminal penalties 18 U.S.C. §152

H. Statute of Limitations – When Does a Claim Arise?

1. when debtor suffers the wrongful conduct, rather than when the debtor has exhausted remedies Harrah v. DSW, Inc., 852 F. Supp. 2d 900, 906 (N.D. Ohio 2012) (citing Wallace v. Johnston Coca-Cola Bottling Grp., Inc., 2007 WL 927929, at *4 (S.D. Ohio Mar. 26, 2007).

2. debtor need not know all the facts or even the legal basis for a cause of action Smith v. Rosenthal Collins Grp., LLC, No. 03-2360 M1/AN, 2005 WL 2210208 (W.D. Tenn. Sept. 10, 2005) at *4 (quoting Browning Mfg. v. Mims (In re Coastal Plains, Inc.), 179 F.3d 197, 208 (5th Cir. 1999).

I. Judicial Acceptance – Did a Judge Accept an Inconsistent Position?

Some courts require a showing that the party to be estopped previously convinced a court to adopt his earlier position. New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001). In the consumer bankruptcy setting, the judicial acceptance element might be satisfied in numerous ways. For example:

1. lifts of stay based, in part, upon debtor's non-disclosure in Schedules;

2. approval of plan; or

3. approval of amended Schedules.

J. Attorney Error

Courts have not hesitated to apply judicial estoppel despite attorney error. Love v. Quest Diagnostics, 2012 WL 5363576 (E.D. Mich. Southern Div. October 30, 2012). While the plaintiff acknowledges that she did not disclose her claim against the defendant in her

bankruptcy case, she asserts in a subsequent lawsuit that her failure to disclose a claim should be excused because her bankruptcy attorney did not inquire whether she had any pending claims. The court held:

> "ignorance of the law is no excuse"; and as the court noted in Lewis, clients are bound by the action – and inactions – of their lawyers, who are presumed to be freely-chosen agents. The simple fact of the matter is that while plaintiff was telling the bankruptcy court that her liabilities outstripped her assets by approximately $122,000, she simultaneously was telling this court that her former employer owed her over $2 million for having discriminated and retaliated against her. Having omitted the claim in order to obtain the relief she sought in the bankruptcy court, plaintiff is estopped from pursuing the claim here."

Bad legal advice does not relieve the client of the consequences of her own acts when the representation she made is false; the client obtained the benefit of a discharge; the client never tried to make the creditors whole; and now the client wants to contradict previous position in order to win a second case. Judicial estoppel blocks any attempt to realize on this claim for personal benefit to the client. Lewis v. Weyerhaeuser Co., 141 F. App'x 420, 427-29 (6th Cir. 2005) But, see Sharp v. Oakwood Untied Hosps., 458 F. Supp. 2d 463, 473 (E.D. Mich. 2006) (holding judicial estoppel inapplicable where the court is "persuaded by Plaintiff's assertion that she relied in good faith on the advice of her counsel".

When a litigant is judicially estopped from bringing a claim due to attorney error to ensure disclosure, that attorney may be subject to malpractice liability Arruda v. C & H Sugar Co., No. 2:06-cv-2308-MCD-EFB, 2007 WL 754627, at *6 (E.D. Cal. Mar. 8, 2007) (citing Estel v. Bigelow Mgmt. Inc., 323 B.R. 918 (E.D. Tex. 2005).

Appearing Pro Se generally does not excuse nondisclosure:

> "… if the court were to equate lack of legal training regarding a statutory duty to disclose or absence of affirmative efforts to conceal the claim with excusable mistake or inadvertence, it would undermine the familiar maxim that, even for pro se litigants, ignorance of the law is no excuse" Riddle v. Chase Home Fin., No. 09-11182, 2010 WL 3504020, at *6 (E.D. Mich. Sept. 2, 2010) (citing Graham-Humphreys v. Memphis Brooks Museum or Art, Inc., 209 F.3d 552, 561-62 (6th Cir. 2000).