Recent Developments in Judicial Estoppel and Dismissal of Employment Discrimination Suits

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Judicial estoppel prevents a party from taking a position in one legal proceeding contradictory to a position that same party took in other litigation, thereby “making a mockery” of the judicial system and playing “fast and loose” with the courts.¹ The common-law doctrine is applied in federal and state courts, with state courts often relying on federal court decisions to develop the doctrine, particularly when federal law is implicated.² Prior to its decision in New Hampshire v. Maine,³ the Supreme Court did not substantively comment on the doctrine for more than 100 years, creating a split in federal circuits regarding judicial estoppel’s application, with some circuits disfavoring the doctrine so greatly that they categorically held it invalid.⁴

In New Hampshire, the Court set forth three guidelines that “typically inform the decision [as to] whether to apply the doctrine”: whether (1) the party’s subsequent position is “clearly inconsistent” with its initial position, (2) a previous court accepted the party’s initial position and (3) the party attempting to assert the inconsistent position “would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”⁵ The Court emphasized that “the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle” and that the three guidelines were not “inflexible” or “exhaustive.”⁶ Thus, New Hampshire clarified the general tenets underlying the judicial estoppel doctrine, revived it for those circuits that thought it dead and provided several broad considerations for use in its application, but left the circuits and state courts to determine how to apply the doctrine in various circumstances.

One of those circumstances is where an individual debtor fails to disclose a pending employment discrimination lawsuit on his or her bankruptcy schedules, effectively asserting a position before the bankruptcy court that the litigation does not exist. In these instances, courts are faced with judicial estoppel’s directive to protect the integrity of the judicial system from perversion and mockery and the Bankruptcy Code’s fundamental principle of the necessity of full disclosure by the debtor, and the Code’s countervailing directive to carry out the orderly and equitable repayment of a debtor’s creditors.⁷ If a court applies judicial estoppel, dismissing with prejudice a debtor’s discrimination lawsuit, it deprives the debtor’s creditors of any recovery from such suit and allows the purportedly discriminating defendant to escape without answering at all for the allegations based on the plaintiff’s inconsistent position in a proceeding most likely not involving the defendant. Conversely, if a court finds judicial estoppel inappropriate, it sanctions the debtor’s potentially knowing and deceitful nondisclosure, frustrating one of the most vital aspects of the bankruptcy process, and acquiesces to the debtor’s challenge to the integrity of the courts.

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Practice & Procedure

Judicial Estoppel as Generally Applied to Nondisclosure

Because both federal and state courts largely agree that the instant a debtor files a bankruptcy petition and schedules, he or she is asserting a position before the bankruptcy court that the scheduled assets and liabilities represent all of the debtor’s potential assets and liabilities, and that a bankruptcy court’s acceptance of a debtor’s schedules constitutes acceptance of that position, a court’s inquiry into whether the debtor should be judicially estopped from pursuing an undisclosed lawsuit focuses on whether the debtor “would derive an unfair advantage” from the omission. To balance the interests implicated in applying judicial estoppel to nondisclosure in bankruptcy,

¹ Barnes v. Pemco Aeroplex Inc., 291 F.3d 1282, 1285 (11th Cir. 2002).
⁵ New Hampshire, 532 U.S. at 750-51.
⁶ Id. at 750-51.
⁷ See Cloud, 79 Cal. Rptr. 2d at 560 (discussing bankruptcy law); Dugas, supra n.1, at 216-18 (discussing goals of bankruptcy law).
federal and state courts focus their analysis on the debtor’s intent. Most circuits and state courts require some showing of a motive for concealment and of maliciousness as evidenced by not only the initial nondisclosure, but continued efforts to hide the pending litigation, such as not updating schedules when the omission becomes apparent. Because such an inquiry is fact-intensive, courts have arrived at differing conclusions about the requisite level of bad faith necessary for judicial estoppel to apply. During the first eight months of 2010, three circuit courts published decisions that further clarify what evidence may be necessary to convince a court that an omission was unintentional and prevent the dismissal of a pending employment discrimination suit.

The Sixth Circuit
Correct the Omission Prior to the Filing of a Motion to Dismiss, and Be Clear When Doing So

Most recently, in White v. Wyndham Vacation Ownership Inc., in a split decision, the Sixth Circuit held that debtor–plaintiff Betsy White’s limited attempts to disclose a pending sexual harassment suit that she did not list initially in her chapter 13 petition were insufficient to prevent judicial estoppel from applying. In turn, it upheld the district court’s summary judgment dismissal of the suit with prejudice.

In July 2001, Fairfield Resorts and Wyndham hired White to work in one of their offices. White alleged that throughout her employment, she was subjected to sexually suggestive and derogatory comments by Gerald Hayes, a fellow employee, and offensive bodily contact by Hayes that left her in “apprehension of an immediate battery on a daily basis.” In November 2006, White filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming sex discrimination. On July 8, 2008, the EEOC issued a “right to sue” letter.

One month later, White, aided by counsel, filed her chapter 13 petition, which did not list her harassment claim. On Oct. 1, 2008, the bankruptcy court confirmed her chapter 13 plan. Of pertinent, the transcript from that hearing did not mention the harassment claim.

One day later, White filed her sexual harassment suit in the District Court for the Eastern District of Tennessee, seeking $250,000 in compensatory damages and $1 million in punitive damages. The next day, White filed an application with the bankruptcy court to employ counsel in regards to the harassment claim. The application failed to identify White as the plaintiff or provide any details regarding the claim.

On Nov. 6, 2008, defendants Wyndham and Fairfield filed a motion to dismiss (later joined by Hayes) in the district court, arguing that White should be judicially estopped from proceeding. In response, on Nov. 11, 2008, White partially amended her bankruptcy schedules, noting the suit but not disclosing its amount. Further, in her response to the motion to dismiss, White attached an affidavit from her bankruptcy counsel stating that her counsel knew of the claim and that the claim was discussed during the plan confirmation hearing. Before ruling, the district court converted the motion to dismiss to a motion for summary judgment.

Noting that the Sixth Circuit has held that “the absence of bad faith prevents the application of judicial estoppel” and that in previous decisions the Sixth Circuit had placed particular emphasis on a debtor’s “numerous attempts,” or lack thereof, to rectify its error, on appeal, the majority affirmed the district court’s ruling. The majority explained that White had made unclear and ill-timed attempts to correct her omission, an omission for which she had a motive: If the harassment claim was included in her bankruptcy estate, any recovery would first go to repaying White’s creditors. In particular, the majority focused on the inconsistency between her counsel’s affidavit asserting that the harassment claim was discussed during the plan confirmation hearing and the official transcript from the hearing, which did not evidence any discussion of the claim, the vagueness of White’s application to employ counsel as to the harassment claim and the fact that White amended her bankruptcy petition after the defendants moved to dismiss the claim. The majority also highlighted that White had included another pending lawsuit on her initially filed schedules, which the majority took to confirm that White understood what disclosures were necessary for judicial estoppel, one that promotes Code policies and prevents a potentially liable defendant from suffering no consequences for egregious behavior, may provide future debtors with an opportunity to argue that their omissions should not result in the dismissal of their pending employment discrimination lawsuits, even if they did not clearly correct those omissions at the requisite time.

The D.C. Circuit
Do Not Actively Continue an Undisclosed Suit While a Proceeding Is Pending, Especially if Other Pending Litigation was Disclosed

Prior to New Hampshire, the D.C. Circuit had effectively ruled the doctrine of judicial estoppel invalid. In Moses v. Howard Univ. Hospital, the D.C. Circuit held that the doctrine was alive
and well, and that a court may apply judicial estoppel when an employment discrimination suit is not disclosed in a bankruptcy proceeding.

In February 1999, debtor-plaintiff Vijayakumar Moses filed a suit against Howard University Hospital, his then employer, alleging race discrimination, national origin discrimination, age discrimination and retaliation. In October 2000, after all these claims were settled, Howard terminated Moses. Moses again filed suit against Howard, asserting that he was terminated in retaliation for his original suit. On Sept. 14, 2001, Moses received a “right to sue” letter from the EEOC and subsequently initiated a suit in the District Court for the District of Columbia.

While this lawsuit pended and the parties moved forward with motion practice, Moses filed two separate bankruptcy proceedings. First, on Sept. 20, 2003, Moses initiated a chapter 7 proceeding, which was discharged shortly thereafter. Then, in early 2007, Moses filed a chapter 13 petition. Finding Moses’ proposed chapter 13 plan deficient, the bankruptcy court closed the chapter 13 proceeding on June 25, 2007. Several months later, Howard learned of Moses’ two bankruptcy proceedings and further discovered that Moses had not disclosed his pending discrimination suit in either proceeding. With this information in hand, Howard moved for summary judgment, arguing that Moses was barred by judicial estoppel from continuing with the employment discrimination suit.

Despite Moses’ successful reopening of the chapter 7 proceeding and amendment of his schedules to include the suit, the D.C. Circuit upheld the district court’s dismissal of the suit based on judicial estoppel. In so holding, the court focused on Moses’ actions that indicated bad faith, noting that Moses had already filed and continued to pursue the employment discrimination suit at the time of both bankruptcies and, as in White, that Moses had disclosed other pending litigation on the schedules filed in both bankruptcy proceedings. The court concluded that not only did Moses know of the suit, he also knew it should be disclosed and, more importantly, that through the chapter 7 proceeding discharge, he successfully hid the suit from the bankruptcy court, creating a situation “in which he could gain an advantage over his creditors” and whereby he “offended the integrity of the District Court.”

Also similar to White, the court was unimpressed with Moses’ belated amendment of his schedules, opining that allowing a debtor to escape the effects of judicial estoppel by correcting an omission after it had been challenged would incentivize debtors to conceal pending litigation.

The Eleventh Circuit Beware of the Continuing Duty to Disclose, Even if a Chapter 13 Plan Provides for Full Repayment to Creditors

Brenda Robinson worked for Tyson Foods for more than 15 years before resigning in September 2005 due to the persistent racial harassment and discrimination she said that she was forced to endure from her boss. In October 2006, Robinson initiated a suit in the District Court for the Northern District of Alabama against Tyson Foods, claiming that her boss’ actions were so severe as to constitute constructive termination. Years before, in May 2002, a bankruptcy judge confirmed Robinson’s chapter 13 plan, which Robinson successfully completed in July 2007, repaying all of her debts in full. Robinson, however, failed to disclose the suit to the bankruptcy court, causing Tyson to move for summary judgment, arguing that Robinson was barred by judicial estoppel from continuing with the suit.

In Robinson v. Tyson Foods Inc., the Eleventh Circuit affirmed the district court’s dismissal of Robinson’s suit based on judicial estoppel. The court first confirmed that a debtor with a pending chapter 13 plan has a continuing duty to disclose changes in assets, including litigation. Accordingly, when Robinson filed the employment discrimination suit, she had a duty to amend her schedules, and when she did not, she took inconsistent positions before two courts. Second, focusing on Robinson’s motives, the court acknowledged that her chapter 13 plan contemplated complete repayment of creditors, but ultimately agreed with the district court that this did not necessarily mean that Robinson had no motive to conceal the suit: At the time the suit was filed, Robinson was still making payments pursuant to her chapter 13 plan, a plan she should have defaulted on, causing creditors to go after proceeds from the suit to satisfy Robinson’s debts. Because Robinson had a readily apparent motive to conceal the suit, pursuant to Eleventh Circuit precedent, the court upheld the district court’s inference that she intentionally concealed the employment discrimination suit, and thus upheld the dismissal.

In a concurrence echoing the dissent in White, the judge suggested that the Eleventh Circuit’s precedent may create an “inflexible formula” that is particularly problematic in the context of a motion for summary judgment. These comments may provide future plaintiffs with another opportunity to argue that their omissions should not result in the dismissal of their pending employment-discrimination lawsuits, particularly at the summary-judgment stage, even if their actions do not fully convince a court that their omissions were inadvertent.

Successfully Avoiding Judicial Estoppel

The application of judicial estoppel can provide a swift, fatal blow to an employment-discrimination suit that is often in the interests of no party but the allegedly discriminating defendant and, amorphously, the judicial system. In protecting its integrity, a court that dismisses an employment-discrimination suit deprives innocent creditors of any proceeds from such suit, deprives the plaintiff of her or his day in court and thwarts the purpose of employment-discrimination laws, giving employees (and their employers) yet another way to escape answering for their destructive behavior. Moreover, courts seem to ignore the viability of denying a debtor discharge, thereby allowing the discrimination suit to proceed without affecting the interests of the debtor’s creditors and without rewarding the debtor’s bad conduct.

With the judicial estoppel doctrine fully revived, it benefits counsel to individual debtors to inquire repeatedly as to pending litigation, and advise and remind chapter 13 debtors of their continuing duty to disclose new litigation. If an undisclosed pending suit is discovered, the most effective way to correct the omission is to amend the debtor’s schedules immediately in all the necessary places and also separately inform the bankruptcy court and the trustee of the oversight. Additionally, if the most direct and timely means of correcting the omission is to verbally inform the bankruptcy court, counsel should ensure that any correcting statements appear on the record. Further, when making other
statements to the bankruptcy court and trustee regarding the pending litigation, counsel and the debtor should take care to fully describe the litigation, even if the bankruptcy court and the trustee indisputably know of the suit.

If a motion to dismiss is brought before schedules are amended, depending on the stage of the bankruptcy proceeding and the debtor’s willingness to support this strategy, counsel could suggest that the bankruptcy court deny the debtor discharge. Otherwise, the best strategy is to disclose any and all communications during the bankruptcy proceeding even slightly related to the suit, thereby hopefully providing the court with enough evidence to call upon the dissent in White and concurrence in Robinson, and, keeping the Supreme Court’s statement that judicial estoppel is a flexible doctrine in mind, find that the debtor-plaintiff and its creditors should not be unduly harmed by the omission.


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