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Bankruptcy and Judicial Estoppel: Serious Problems for Creditor and Debtor Alike

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Bankruptcy and Judicial Estoppel:
Serious Problems for Creditor and Debtor Alike

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Introduction

The Federal Rules of Civil Procedure state that the purpose of the rules is to secure a “just, speedy, and inexpensive determination of every action and proceeding.” This sentiment is also announced in the Federal Rules of Bankruptcy Procedure. Although the court system strives for this just determination, the creditors, debtors, bankruptcy court are not getting this result in some circumstances. The application of judicial estoppel in non-bankruptcy cases where the debtor has inadvertently failed to list the non-bankruptcy case in their schedules does not allow for a just determination of the case. A debtor who files Chapter 13 bankruptcy, pays off all the debts to all secured and unsecured creditors, and later files suit against a former employer for a claim that arose prior to the discharge of the bankruptcy will find that the failure to amend his or her bankruptcy schedules when the claim arose will preclude the debtor’s ability to pursue the claim. The Court applying the doctrine of judicial estoppel will determine that the debtor took inconsistent positions between the bankruptcy case and the non-bankruptcy case and is therefore unable to pursue the second case. The debtor, the bankruptcy court, and the debtor’s creditors have no recourse and no way to recover the monies owed to the bankruptcy estate.

This paper will discuss the current application of judicial estoppel in the context of a debtor or prior debtor and their non-bankruptcy cases, the problems associated with this application and the possible solutions that the court system could use instead of judicial estoppel.

Bankruptcy

When a debtor files for bankruptcy, the debtor has the duty of disclosing all assets that the debtor has an interest in to the bankruptcy court. In order to fulfill this duty, the debtor fills out schedules of assets and liabilities as well as a financial statement. The debtor must disclose all assets and liabilities because “all legal and equitable interest of the debtor in property” become part of the bankruptcy estate. The debtor, when filing for bankruptcy, fills out a summary of all schedules as well as a number of separate schedules that request the debtor to enter the type of asset and the value of said asset. It is in these Schedules that the debtor must enter information about any claims they may have against other persons or entities. In addition to the schedules, the debtor must fill out a financial statement that includes the information about the claims so that the court can make an adequate judgment of the debtor’s

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4 Robinson v. Tyson Foods, Inc. 595 F.3d 1269 (11th Cir. 2010).
5 Id. at 1275.
10 USCS Bankruptcy F 6 (2010) (Form 6 of the Official Bankruptcy Forms are the schedules and summary of the schedules).
11 Supra. Note 6 at 203.
plan.\textsuperscript{12} It is during this process that many debtor’s fail to list the claims that have taken place, but not been filed in a court of law.\textsuperscript{13}

A debtor who fails to comply with the Bankruptcy Code’s disclosure provisions can find themselves dealing with some harsh consequences.\textsuperscript{14} If the debtor tries to pursue his or her claim against another person in a non-bankruptcy court, he or she may find themselves looking a complete dismissal by way of the doctrine of judicial estoppels.\textsuperscript{15} The debtor may also find themselves looking at criminal consequences.\textsuperscript{16} A debtor could be sentenced to imprisonment, a fine or both.\textsuperscript{17} The Bankruptcy Code itself also has some consequences for a debtor who fails to disclose all of his or her information. The Bankruptcy Code provides for the non-discharge or even the dismissal of the bankruptcy case.\textsuperscript{18} The judicial system’s consequences of non-disclosure should show a debtor how important it is to disclose more than is necessary rather than less.

**Judicial Estoppel**

**History**

The doctrine of judicial estoppel was first used by the Tennessee Supreme Court in Hamilton v. Zimmerman,\textsuperscript{19} and is meant to stop parties “from playing fast and loose with the courts to suit the exigencies of self interest.”\textsuperscript{20} The basic idea of judicial estoppel is that the court system does not want to allow a party to take one position in one court and then try to take the opposite position in a second court.\textsuperscript{21} The court system wants to stop what would be the misleading of the second court or the inconsistent decisions between the two courts.\textsuperscript{22} Although the Tennessee Supreme Court is the first court to use the doctrine of judicial estoppels, almost every state and federal court now applies the doctrine.\textsuperscript{23}

**Minority View**

When the Tennessee Supreme Court announced the doctrine of judicial estoppel, it announced it as a black line rule that would always be used whenever someone took two separate positions in court.\textsuperscript{24} The Tennessee Court felt that any prior inconsistent position in

\textsuperscript{12} Hoffman v. First Nat’l Bank of Akron (In re Hoffman), 99 B.R. 929, 935 (N.D. Iowa 1989). (applicable mostly to a chapter 11 or 13 case where the debtor is making a plan as to the future repayment of the creditors, but could be applicable to a chapter 7 to determine if the trustee wants to go after the claims in order to bring more money into the estate).

\textsuperscript{13} Supra note 6 at 202.

\textsuperscript{14} \textit{Id}.

\textsuperscript{15} \textit{Id.} at 197

\textsuperscript{16} 18 USCS § 152 (2010).

\textsuperscript{17} \textit{Id}.

\textsuperscript{18} \textit{Id}.

\textsuperscript{19} 37 Tenn. (5 Sneed) 39 (1857) (Information about the first use of judicial estoppels was gotten from The Honorable William Houston Brown, Debtor’s Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums, 75 Am. Bankr. L.J. 197, 200 (2001).)

\textsuperscript{20} Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988).

\textsuperscript{21} Supra note 6 at 200.

\textsuperscript{22} \textit{Id}.

\textsuperscript{23} \textit{Id}.

any court proceeding would warrant the usage of the doctrine. The minority of courts who apply judicial estoppel use it only to stop parties from “playing fast and loose” with the court system. Although the Tennessee courts (which are the only courts that still apply the black letter rule) and the minority of courts positions appear to be the same, the minority courts do not have any requirement that the first position be adopted at all by the prior court, simply that the prior position was taken.

Majority Procedure

The majority of courts have a three factor test that is used to determine whether or not to apply the doctrine of judicial estoppel. The court determines whether the present position is clearly inconsistent with the earlier position; whether the party succeeded in persuading a court to accept the earlier position; and whether the party advancing the inconsistent position would derive an unfair advantage from the inconsistent positions. The first factor requires the court to determine if the party is truly taking an inconsistent position. All courts agree that the inconsistent statements must be taken under oath, and that the inconsistent statements must be directly inconsistent with each other. The courts however do not agree on whether the inconsistent statement can be only a statement of fact or can also be a statement of law. The second factor requires the court to determine whether or not the party persuaded the court to accept the earlier position which would create the perception that either the first or second court was mislead. The third and final factor is to determine whether or not the party advancing the position would derive an unfair advantage. Not all majority view courts require a showing that the party would have an unfair advantage, some courts only require that by being allowed to proceed under the inconsistent positions would allow the party to “win” twice.

Judicial Estoppel and Bankruptcy

Current Procedure

Currently, if a debtor fails to put the non-bankruptcy claims on the schedules and then later tries to file the claim in court, the courts have held this to be having two inconsistent positions and therefore applied judicial estoppel. Judicial estoppel is also used if the claim arises during the bankruptcy case, and the debtor fails to amend the schedules to place the

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25 Id.
26 Patriot Cinemas Inc., v. General Cinema Corp., 834 F.2d 208, 213 (1st Cir. 1987). (In state court, Patriot submitted a brief stating that it would not pursue an antitrust claim. Later in Federal Court, Patriot tried to retract that statement saying it would pursue the antitrust claim if it were appropriate. The Courts felt that this was Patriot trying to play fast and loose with the system and even though the first court did not adopt the statement that it would not pursue the claim, Patriot was still precluded from pursuing it in either state or federal court.)
27 Supra note 24 at 339.
28 Id. at 336
29 Supra Note 6 at 222.
31 Supra Note 6 at 225.
32 Id.
33 Id.
34 Id. at 200.
The courts look to the schedules as determining whether or not the claim is “substantively valid” and if the claim is not scheduled, the court determines that the debtor did not actually believe he or she had a good case or that there was a claim at all. Although the current usage creates a black letter rule for unscheduled or disclosed non-bankruptcy claims after a debtor has filed bankruptcy, it creates a number of inequalities for the debtor, creditors, and the bankruptcy courts.

Procedural Issues with Application in Bankruptcy Cases

The black letter rule that the majority of courts have been using in the context of a non-bankruptcy claim that a debtor failed to schedule in his or her bankruptcy case has created some very harsh consequences to all of the parties involved. The courts when making the determination as to whether or not to apply the doctrine of judicial estoppel do not look to whether or not the failure to disclose was made in error or whether or not the bankruptcy court actually accepted the debtor’s inconsistent position in such a way that the second court would be mislead. As these two issues are central to the applicability of judicial estoppel, the non-bankruptcy courts should take an in-depth look into these areas of the doctrine.

A debtor, who fails to schedule or disclose a claim against a third party, may not intentionally be trying to pursue inconsistent positions. In many cases, the debtor alone fills out the schedules and then submits them to either his or her attorney or to the bankruptcy court. The language in the portion of the schedules that requires the debtor to list the claims states “any unliquidated or liquidated, contingent or non-contingent claims.” A debtor who fills out these forms without the assistance of his or her attorney may not know what these terms entail. Although, the attorney should go through the schedules and explain the information contained within to the debtor, it is apparent that the attorney does not. In other cases, the debtor may not realize that a claim that has not been filed in court must still be disclosed to the bankruptcy court. The claim that is subject to the judicial estoppel application may also have arisen after the filing of the bankruptcy case and the debtor may be unaware of the debtor’s duty to amend the schedules should a claim arise. Although in cases where the debtor fraudulently tries to keep the claims from the hands of the bankruptcy court or his or her creditors, the court system is more than justified in applying the doctrine, the results are entirely different when the debtor’s failure is of a non-fraudulent intent. As there are numerous reasons as to why the debtor may not have disclosed the claim to the bankruptcy court without any fraudulent intent, it should be part of the court system’s process to determine whether the failure is deserving of the application of judicial estoppel.

In order for the doctrine of judicial estoppel to be applied, the court must determine that the original court adopted the inconsistent position. In the case where the debtor failed to schedule a claim in a bankruptcy case, it is unclear that the court actually adopted the

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36 Robinson v. Tyson Foods, Inc. 595 F.3d 1269 (11th Cir. 2010).
37 Supra note 35
38 Supra note 6 at 208.
39 Id. at 206.
40 USCS Bankruptcy F 6 (2010) (Form 6 of the Official Bankruptcy Forms are the schedules and summary of the schedules on Schedule B at sections 20 & 21).
41 Supra note 6 at 197.
42 Id. at 200.
43 Robinson v. Tyson Foods, Inc. 595 F.3d 1269, 1274 (11th Cir. 2010).
44 Supra note 6 at 200.
45 Supra note 24 at 354.
schedules in most cases.\textsuperscript{46} In the majority of courts, adoption means that the court relied on the inconsistent statement,\textsuperscript{47} took the statement as true,\textsuperscript{48} or the party in some way “won” by using the inconsistent statement.\textsuperscript{49} In a bankruptcy case, it is unclear many times whether or not the court ever looked at the schedules.\textsuperscript{50} In this type of a case, it would be virtually impossible to state with certainty that the bankruptcy court relied on as true any of the statements within the schedules as the court never saw or used the schedules to make any type of determination.\textsuperscript{51} Although, there is a case to be made that even if the bankruptcy court itself did not look and make a decision based on the schedules, the creditors more than likely did use the schedules to determine whether it would or would not accept the debtor’s proposed plan.\textsuperscript{52} The difficulties in determining whether or not the bankruptcy court relied on, took the schedules as true, or whether or not the debtor “won” by using the inconsistent position are one reason why the application of judicial estoppel is not as applied the appropriate way to deal with these types of cases.

**Problems Arising With the Bankruptcy Court**

The application of the doctrine of judicial estoppel within the bankruptcy context has application problems when it is applied in the non-bankruptcy, but the application also creates problems for the bankruptcy court.\textsuperscript{53} When a court makes the determination that judicial estoppel is appropriate because the debtor failed to disclose the claim and did not amend the bankruptcy case to reflect the claim, many times the court is making this determination while the debtor is applying to the bankruptcy court in order to amend the schedules.\textsuperscript{54} The court does not give the bankruptcy court enough time to allow the amendment before dismissing the claim under the doctrine of judicial estoppel.\textsuperscript{55} In not giving the bankruptcy court the opportunity to amend the schedules, reopen the case or take the action that it feels is necessary, the non-bankruptcy court is in essence tying the bankruptcy court’s hands.

A second problem that is created for the bankruptcy court is that the court is not taking into account whether or not the bankruptcy proceedings even necessitated a disclosure of the claim. Although the debtor is under a duty to disclose, the amendment of the schedules could end up being moot if the debtor satisfies his or her debts to all of the creditors through the bankruptcy plan without the unscheduled claims.\textsuperscript{56} The courts are not looking to determine whether or not the claim would have been necessary at all in the bankruptcy case. If the debtor paid all of his or her debts in full through a chapter 7, chapter 13 or chapter 11 bankruptcy case, the scheduling of the claim would be unimportant as well as the bankruptcy court after looking at the plan would have little need to look at the schedules and to take them as true.\textsuperscript{57} If the bankruptcy never accepted the debtor’s inconsistent position as true (especially in a case where all of the creditors were satisfied without the necessity of locating other assets), the first and second prong of the test to determine the applicability of judicial estoppel are not met and

\begin{itemize}
\item \textsuperscript{46} Supra note 6 at 208.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Supra note 26
\item \textsuperscript{49} Supra note 24 at 354.
\item \textsuperscript{50} Supra note 6 at 207.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Supra note 35 at 482.
\item \textsuperscript{53} Supra Note 6 at 205.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Supra Note 43
\item \textsuperscript{57} Supra note 6 at 208.
\end{itemize}
therefore the case should not be dismissed. However, the current procedure in applying the doctrine of judicial estoppel does not look into these factors.

Effects
The effect of simply applying judicial estoppel without regard to the intent of the debtor, the bankruptcy court's position, or the creditors is very simple, a loss of monies for the bankruptcy estate at the very least and a get out of jail free card for the third party that the claim is against. In applying the doctrine of judicial estoppel in the way that it has, the courts have allowed what could be a great deal of money to escape the bankruptcy estate. The courts by dismissing the claim under the doctrine of judicial estoppel have stopped the bankruptcy court from re-opening the bankruptcy case so that the trustee could potentially pursue the claim. This dismissal means that the claim cannot be re-filed and therefore neither the debtor nor the creditors of the debtor will be able to obtain any of the monies that could be available if the claim were pursued. The third party whom the claim is against is also getting a free pass basically. The third party no longer has any liability for his or her actions in the events that lead to the claim. Although, this effect is probably unintentional, the courts should be aware of the impact that they could potentially have on the bankruptcy court. This is especially true in a case where the debtor could not possibly repay all of his or her creditors through a payment plan or through a liquidation of all of his or her assets, in that case, the bankruptcy court would want to have the opportunity to bring more assets into the bankruptcy estate.

Alternatives to the Use of Judicial Estoppel

Standing
When a debtor files a bankruptcy case, all of the debtor’s assets and liabilities become part of the bankruptcy estate. In the case of a non-bankruptcy case being part of the bankruptcy estate, the debtor no longer has standing to pursue the claim in court. The trustee takes on this capacity upon the commencement of the bankruptcy case. As the debtor no longer has standing, the court can dismiss the case for lack of standing without prejudice. As the court has not made a determination based on the merits of the case, the dismissal would be without prejudice. The dismissal without prejudice would give the trustee in the bankruptcy case, the opportunity to pursue the claim.

The positive point in having the case dismissed for lack of standing is that the trustee has the opportunity to pursue the claim if the trustee feels that it is appropriate. This procedure would allow the bankruptcy estate to make a determination as to what the estate would like to do with the claim. The trustee could decide to litigate the claim in order to bring more money into the bankruptcy estate for the creditors or the trustee could decide to abandon the

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58 In researching for this paper, I was able to locate thousands of cases where judicial estoppel was used to dismiss non-bankruptcy claims where the claim was not scheduled in the bankruptcy case, however, there is no information as to the possible dollar amounts lost in not being able to pursue these claims as well as whether or not the claims would be pursued.
61 **Id.** (The exception to the trustee being the person with standing to sue or be sued on behalf of the bankruptcy estate is if it is a case where there is a DIP (debtor in possession). In the case of a DIP, the DIP retains the rights to sue and be sued.)
property.\(^{64}\) If the trustee decided to abandon the property as it would not benefit the estate, the debtor could then re-file his or her case and have standing to pursue those claims. The trustee could also not do anything with the property and at the closing of the case, the property would transfer back to the debtor.\(^{65}\)

If the court dismisses for a lack of standing, it is possible that the court will receive the case again from the trustee or from the debtor if the trustee abandons the property. Therefore, the court could be burden further by dismissing the case once and then having to go back (upon the filing of a new complaint) and try the case. The burden that this may put onto the court system is minimal since there are numerous cases that are dismissed without prejudice and re-filed later. There would also be a burden placed on the bankruptcy court and trustee in these cases. The trustee would have to determine if the claim was worth pursuing or to abandon it to the debtor. The trustee would already be going through this process if the debtor had properly scheduled the claim to begin with, therefore the burden would not actually be an additional burden. The bankruptcy court would also have to grant leave for the debtor to amend the bankruptcy schedule as well as to allow the debtor to re-open the bankruptcy case in some instances. Although this may create some additional burden to the bankruptcy court, the potential positives to the bankruptcy estate outweigh the burden.

**Request Information from the Bankruptcy Court**

The two situations where the application of the doctrine of judicial estoppel are most troubling is where the debtor has paid all of the creditors in full without having to use the non-bankruptcy claim and where the trustee would want to pursue the claim in order to be able to put more money into the bankruptcy estate in order to pay more to the debtor’s creditors. These situations are most troubling because in one scenario the bankruptcy case had no need for the non-bankruptcy claim and therefore the nondisclosure had no effect at all on the bankruptcy case and the other because the creditors should receive as much as possible in return for the discharge of any further debts. One way that the non-bankruptcy court could determine if the case before them falls into one of these scenarios would be to simply ask the bankruptcy court.

The papers in a bankruptcy case are available to any entity to examine.\(^{66}\) An entity is any governmental unit, a United States trustee, a person, estate, or a trust.\(^{67}\) Therefore, a non-bankruptcy court could get the information contained in the bankruptcy filings in order to make a determination of whether or not the debtor paid all of his or her creditors in full. Although the bankruptcy court can limit the information that is received by some persons, the idea behind the limitations are to protect trade secrets (and items like this) and persons from identity theft.\(^{68}\) Since neither of those two situations would be applicable in the case where a judge would be looking to receive information on the schedules and discharge of the case, there would be no reason why the court could not get this information easily.\(^{69}\)

\(^{65}\) *Id.* at 554(c). (Although in order for the debtor to receive the property back at the closing of the case, the debtor must have scheduled the assets. In other words, the debtor would need to reopen or amend the schedules in order for this particular scenario to happen. Later in the paper, there will be a discussion on the reopening of the bankruptcy cases.)
\(^{68}\) *Supra* note 66.
\(^{69}\) 18 U.S.C. § 154 (2006) (There are actually criminal penalties for a failure to allow reasonable opportunity for inspection).
In order to determine if the trustee would want to pursue the claim, it would be more problematic for the court. The court would have to contact the trustee in some way and request that the trustee look into the matter. Although creating this step in the process could create some extended wait times as well as some burden, the trustee and therefore the creditors would have the opportunity to take the steps in the best interest of all the parties involved. If the trustee determined that he or she did want to pursue the claim, the trustee could be substituted for the debtor in the current case, or the case could be dismissed without prejudice to be re-filed by the trustee. If the trustee decided that he or she did not wish to pursue the claim then the non-bankruptcy court could move forward with its application of the doctrine of judicial estoppel.

The problems within this solution are apparent. It would take time to go through and inspect the bankruptcy papers before making a determination of the application of the doctrine. The burden on both courts would be much larger in these types of situations. The solution also does not deal with other non-fraudulent debtors that don’t fall into either of the two scenarios spoken about. The problem with dealing with all debtors in this manner would cause a lot of extra work for the courts. Based on the amount of work this particular solution would require and the fact that there isn’t already a set procedure for completing it makes it an unlikely candidate for acceptance.

Reopening/Amending the Bankruptcy Case

The final way that the non-bankruptcy court could deal with the inconsistent positions is to simply allow the debtor the opportunity to amend the bankruptcy schedules. The debtor has a duty to file a supplementary schedule within 10 days of acquiring an interest in the asset.\(^\text{70}\) Although the debtor would most definitely be beyond the 10 day requirement, the debtor could still provided that the bankruptcy case was still open, file an amended schedule.\(^\text{71}\) The debtor’s claim would become part of the bankruptcy estate and the trustee would have to determine whether or not to abandon the property or to pursue the claim.\(^\text{72}\)

A problem arises for the debtor if the bankruptcy case has already been closed. If the bankruptcy case has already been closed, the debtor does not have leave to simply amend the schedules.\(^\text{73}\) The debtor must petition to have the bankruptcy case reopened in order to amend the schedules.\(^\text{74}\) The bankruptcy court has broad discretion as to determine whether or not to allow the reopening.\(^\text{75}\) Since the bankruptcy court has broad discretion, it will not reopen the case if there will be no affect on the case.\(^\text{76}\) If the bankruptcy court refuses to re-open the case, the debtor may not have any options left in correcting the error in the schedules.

Although the bankruptcy court has broad discretion to determine whether or not to re-open the case, the bankruptcy court should take into account the impact on the debtor if not allowed to amend the schedules. In some cases, the courts have addressed the issue of whether it is proper to reopen the case to administer previously unknown assets and the determination has been favorable.\(^\text{77}\) The question becomes whether or not an unscheduled claim is an unadministered asset and whether or not the creditors need the asset.\(^\text{78}\) If the

\(^{73}\) Supra note 71.
\(^{74}\) 11 U.S.C. § 350(b).
\(^{75}\) In re Leach, 194 B.R. 812 (E.D. Mich. 1996).
\(^{76}\) In re Weitzman, 381 B.R. 874 (Bankr. N.D. Ill. 2008).
\(^{77}\) In re Arboleda, 224 B.R. 640 (Bankr. N.D. Ill. 1998).
\(^{78}\) Zinchiak v. CIT Small Bus. Lending Corp., 406 F.3d 214 (3d Cir. 2005).
bankruptcy court were to simply re-open the case for the debtor to amend the schedules without trying to determine whether or not it would have any effect on the bankruptcy case, the debtor would be in a better situation. The non-bankruptcy court would have to wait for the bankruptcy court to finish its proceedings prior to dismissing the case or the reopening would be of no use.

**Conclusion**

In order for all of the parties to be adequately take care of in the case of a non-bankruptcy case that was not scheduled in the bankruptcy case, the courts should stop using the doctrine of judicial estoppels to dismiss these claims. By using the doctrine of judicial estoppel, the courts are depriving all of the persons involved of an adequate resolution of the case. The creditors at the very least deserve the opportunity to recoup some of their losses in the bankruptcy case whether the debtor fraudulently or non-fraudulently failed to schedule the non-bankruptcy claims. In order for this to be accomplished, the court system would have to abandon the doctrine of judicial estoppel in these cases.

The application of judicial estoppel is problematic to begin with. The court never determines if the debtor actually intended to pursue inconsistent positions or whether the non-disclosure was a mistake. If the non-disclosure was by mistake or was done unknowingly, the court is punishing the debtor for an error that if made in a different context would have been allowed to be corrected. The courts are also not able to adequately state that the bankruptcy court adopted the debtor’s inconsistent position as it is usually unclear as to whether or not the bankruptcy court relied in any way on the debtor’s schedules in making its determinations. The problems within the application of judicial estoppel in the bankruptcy setting are enough to show that the courts should not use the doctrine in these scenarios.

There are other methods for dealing with cases where the debtor failed to schedule a non-bankruptcy claim in his or her bankruptcy case. The most logical and easiest to manage would be to simply dismiss the case for lack of standing. If the court dismissed the case for lack of standing, the trustee would still have the ability to re-file the case if he or she felt it was appropriate and if at the closing of the bankruptcy case the trustee decided to abandon the claim, the debtor would be able to re-file the claim. If for some reason, the bankruptcy court did not allow the debtor to amend his or her schedules to include the claim or if the bankruptcy court did not allow the debtor to reopen his or her bankruptcy case, the claim would not be able to be re-filed because only scheduled assets can be returned to the debtor at the closing of the bankruptcy case.  

This method of dealing with these cases is the most practical because it allows for a proper resolution for all persons involved. The creditors are able to gain more assets in the bankruptcy case if it is necessary, the debtor does not lose the cause of action completely, the court still punishes the debtor for not scheduling the claim in the first place, and the third party does not get to get a free pass.

If the court were to adopt one of the other two solutions noted in this paper, the burden would be much greater than if it simply dismissed the cases for lack of standing. There are numerous people that must be involved if the court determines that the best method is to look into the bankruptcy court’s findings. There would have to be persons who would spend their time going through all of the bankruptcy files for these cases as the court system already has enough cases without the judge taking days off at a time to deal with these files. The courts would also have to determine a method for figuring out if the trustee would or would not want to pursue the claim. The second solution, reopening the bankruptcy case, is incorporated into the

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standing solution with the exception that the court would have to sit on the claim until the bankruptcy court made a decision as to whether or not to reopen. By having to wait until a determination by the bankruptcy court is completed, the courts could have to wait long periods of time and leave the cases pending on its docket. If the court simply dismissed the case for lack of standing, the debtor could return to the bankruptcy court, take care of any reopening or amendments necessary and then proceed with the claim as necessary. The court would not have to wait on a determination by the bankruptcy court because once the bankruptcy court had made a decision, the debtor or trustee could re-file the claim.

As the application of judicial estoppel in these scenarios creates an unfair result for all of the parties involved, the courts should abandon the use of the doctrine. The courts should instead dismiss the claims for lack of standing and allow the debtor and bankruptcy court to take the determinations from that point forward.