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Bankrupt Estoppel: The Case for a Uniform Doctrine of Judicial Estoppel as Applied Against Former Bankruptcy Debtors

Eric Hilmo

NOTES

BANKRUPT ESTOPPEL: THE CASE FOR A UNIFORM DOCTRINE OF JUDICIAL ESTOPPEL AS APPLIED AGAINST FORMER BANKRUPTCY DEBTORS

*Eric Hilmo**

This Note examines the role judicial estoppel plays in supporting the U.S. federal bankruptcy regime. Though once considered an obscure doctrine, the use of judicial estoppel to bar pursuit of previously undisclosed claims by former bankrupts has grown apace with burgeoning bankruptcy filings over the last decade. While the doctrine's application in federal courts has evolved toward a common standard of application, state courts' application remains idiosyncratic. The Note argues that under the established laws of judgment recognition and in light of federal courts' sophisticated application of the doctrine, state courts should apply federal judicial estoppel standards to further national uniformity in bankruptcy practice.

TABLE OF CONTENTS

* J.D. Candidate, 2013, Fordham University School of Law; B.S., M.A., 2005, Georgetown University. The author would like to thank Professor Marc Arkin, without whose help the publication of this Note would not be possible.

INTRODUCTION

An essential element of the American legal system is the expectation that the execution of proceedings, suits, and actions in its courts are not founded upon fraud. To fulfill this expectation, legislators and courts impose requirements of honesty and good-faith when parties bring claims to the courts for resolution.[1] In addition to litigants' statutory and pseudostatutory obligations, the courts have additional "inherent powers" through which judges ensure efficient, orderly, and fair disposition of cases.[2] Among these powers is a court's ability to guard against litigant duplicity by employing the equitable doctrine of judicial estoppel.[3]

Briefly put, judicial estoppel permits a court to dismiss claims inconsistent with a petitioning party's representations in a prior legal proceeding. Invoked to protect the integrity of the judicial system, judicial estoppel has become an increasingly popular means of dismissing claims brought by individuals who have previously filed for bankruptcy and failed to disclose those claims as assets in the bankruptcy proceeding.[4] There is now a strong consensus among the federal circuits as to the standards to be applied in such cases.[5]

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1. *See* 18 U.S.C. § 1621 (2006) (criminalizing as perjury the willful misrepresentation of one's beliefs while under oath); FED. R. CIV. P. 11 (requiring counsel to certify, inter alia, that their representations to the court are presented for a proper purpose, founded in existing law, and supported by evidence).

2. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 58 (1991) (Scalia, J., dissenting) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812))).

3. *See* New Hampshire v. Maine, 532 U.S. 742, 749 (2001) ("This rule, known as judicial estoppel, generally 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." (internal quotation marks ommitted)).

4. *See generally* Eastman v. Union Pac. R.R., 493 F.3d 1151 (10th Cir. 2007); Barger v. City of Cartersville, 348 F.3d 1289 (11th Cir. 2003); Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002); Browning v. Levy, 283 F.3d 761 (6th Cir. 2002); *In re* Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999).

5. *See infra* note 206 and accompanying text.

Underpinning the courts' common application of the doctrine are the broadly recognized interests served by the United States' uniform Bankruptcy Code and the desire of the courts to ensure the integrity of their processes.[6] By contrast, state application of judicial estoppel post-bankruptcy, though at times roughly following federal law, is subject to varying standards which may lead to divergent results from those of the federal courts.[7] Consequently, there is mixed guidance for courts considering application of judicial estoppel in new circumstances[8] and a growing need for a uniform doctrine to ensure the integrity of the bankruptcy process.

In fact, the need for uniformity has never been greater. Over the past decade, the frequency and complexity of federal bankruptcy petitions rose significantly.[9] Today, in the aftermath of the 2008 financial crisis, bankruptcy courts are beset by a record number of bankruptcy petitions[10] and must increasingly deal with the repercussions of foreign bankruptcy proceedings.[11] In the years ahead, both federal and state courts will apply judicial estoppel to decide whether to allow petitioners to pursue claims they failed to disclose when seeking bankruptcy's protections. To ensure that these decisions adequately protect the integrity of the bankruptcy process, the courts must apply a uniform standard of judicial estoppel.

This Note examines the doctrine of judicial estoppel in its narrow application against former bankrupts in subsequent litigation. This Note proceeds in four parts, first examining the purposes underlying the doctrine of judicial estoppel and bankruptcy proceedings.[12] It then looks specifically at the federal courts' evolving application of the doctrine[13] and contrasts it against state courts' application.[14] Next, it briefly discuss two key U.S. Supreme Court cases that should provide insight for courts applying the

6. "The basic principle of [U.S.] bankruptcy is to obtain a discharge from one's creditors in return for all one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh." Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir. 1993).

7. *Compare* Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996) ("[J]udicial estoppel would be inappropriate in any event as there is no evidence that Ryan acted in bad faith."), *with* Ruffin v. Kinder Morgan Liquids Terminal, LLC, No. L-8976-04, 2009 WL 17887, at *7 (N.J. Super. Ct. App. Div. Jan. 2, 2009) ("[A] finding of 'bad faith' is not a requirement under New Jersey law." (quoting City of Atlantic City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68 (N.J. Super. Ct. App. Div. 2006))).

8. *See generally* Sea Trade Co. v. FleetBoston Fin. Corp., No. 03 Civ. 10254, 2008 WL 4129620 (S.D.N.Y. Sept. 4, 2008) (applying the doctrine of judicial estoppel after extensive and contested review of bankruptcy disclosure requirements under Argentine Bankruptcy Law).

9. *See infra* notes 327–28 and accompanying text.

10. *See id.*

11. *See infra* notes 352–56 and accompanying text.

12. *See infra* Part I.A–B.

13. *See infra* Part II.A.

14. *See infra* Part II.B.

doctrine in the future.[15] Finally, it makes recommendations for a uniform application of the doctrine based largely on the current federal model.[16]

By examining both the theoretical principles underlying the doctrine of judicial estoppel as well as its historic application by the courts, this Note identifies the considerations that should guide courts considering the application of judicial estoppel in the unique context of post-bankruptcy litigation.[17] Hopefully, future application of judicial estoppel will provide greater protection to the interests of the judiciary in ensuring that judicial estoppel is used appropriately, to protect the integrity of the judicial system by denying former debtors the opportunity to play "fast and loose" with its courts.

I. COMMON THEMES IN JUDICIAL ESTOPPEL & BANKRUPTCY

A. Judicial Estoppel

The equitable doctrine of judicial estoppel has long been applied by U.S. courts seeking to prevent litigants from playing "fast and loose" in litigation.[18] Somewhat unique among the equitable estoppel doctrines, the central purpose of judicial estoppel is to protect the integrity of the legal system itself.[19] The basic formulation of the doctrine varies from one court to another, though common tenets pervade.[20] Among those elements of the doctrine that courts commonly recognize is a refusal to apply the doctrine against petitioners whose inconsistent positions stem from a good-faith mistake.[21] Generally, this exception ensures that judicial estoppel's "harsh results" reach only litigants truly seeking to hoodwink the judiciary.[22]

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15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part IV.

18. *See* New Hampshire v. Maine, 532 U.S. 742, 749–50 (2001) (collecting circuit decisions).

19. *In re* Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999) (characterizing judicial estoppel as protecting "the judicial system, *rather than the litigants*").

20. *Compare id.* at 206 ("Most courts have identified at least two limitations on the application of the doctrine: (1) it may be applied only where the position of the party to be estopped is clearly inconsistent with its previous one; and (2) that [the] party must have convinced the court to accept that previous position."), *with* Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 1308 (11th Cir. 2001) ("First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system.").

21. *See, e.g.*, Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362–63 (3d Cir. 1996); *In re* Cassidy, 892 F.2d 637, 642 (7th Cir. 1990). *But see* Levin v. Robinson, 586 A.2d 1348, 1358 (N.J. Super. Ct. Law Div. 1990) ("If courts were to entertain such claims of 'good faith mistake' . . . the doctrine of judicial estoppel would be emasculated or severely eroded, and, accordingly, its purpose subverted.").

22. Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996) (identifying intent to mislead the court as the determinative factor in applying judicial estoppel).

1. Basic Concepts

Stated simply, the doctrine of judicial estoppel bars a litigant from proceeding with a claim which is at odds with a position asserted by the litigant in a prior legal proceeding.[23] While jurists and scholars have identified numerous objectives of the doctrine, at its core, the doctrine is about guarding against litigant chicanery.[24]

The Supreme Court first articulated the doctrine's general outlines in 1895 in *Davis v. Wakelee*.[25] In *Wakelee*, the court barred a former debtor from claiming that a judgment against him for a monetary debt by one of his creditors was invalid on jurisdictional grounds.[26] To secure a discharge in his prior bankruptcy proceeding, however, the debtor had convinced the bankruptcy court that the creditor's judgment was valid.[27] In reviewing the case, the *Wakelee* court stated as a general proposition that:

> [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.[28]

Wakelee was the Supreme Court's first formulation of this general rule, though the practice of barring plaintiffs' claims in equity due to prior contrary positions in judicial proceedings was already well established in federal and state courts.[29] Full recognition of judicial estoppel in its present form, however, would not occur until the twentieth century.[30]

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23. *New Hampshire*, 532 U.S. at 749.

24. *See id.* at 750.

25. 156 U.S. 680, 689 (1895). Commentators sometimes point to *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857), as the original source of the term "judicial estoppel" itself, if not the first articulation of the need for a doctrine to protect the integrity of oaths taken in judicial proceedings. William Houston Brown, Lundy Carpenter & Donna T. Snow, *Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197, 200 (2001).

26. *Wakelee*, 156 U.S. at 692.

27. *Id.* at 689.

28. *Id.*

29. *See, e.g.*, Phila., Wilmington, & Balt. R.R. v. Howard, 54 U.S. 307, 308 (1851) (estopping a railroad company from denying the authenticity of a sealed document which the company had previously relied upon as authentic in prior litigation); Everett v. Saltus, 15 Wend. 474, 478 (N.Y. 1836) (holding that a party may not later assert a claim for value of a lien against property as the property's bailee, where the party initially claimed ownership of the property as a bona fide purchaser).

30. State courts began the process of distinguishing "judicial estoppel" from certain other estoppel doctrines prior to 1900. *See* Alexander v. Bourdier, 8 So. 876, 877 (La. 1891) ("Judicial estoppel and estoppel *in pais* [are] different."). *Emlenton Ref. Co. v. Chambers*, 35 F.2d 273 (3d Cir. 1929), appears to be the first federal articulation of the doctrine of "judicial estoppel" as distinct from its sister doctrines of "equitable estoppel," "collateral estoppel," or "res judicata." *See id.* at 276. Prior to 1929, the various estoppel doctrines (including that of *res judicata*) were inconsistently referred to by courts as "judicial estoppels." *See* U.S. Fid. & Guar. Co. v. Porter, 3 F.2d 57, 59 (D. Idaho 1924) (referring to "[a] third defense, that of res adjudicata, or judicial estoppel."). In fact, the term was often used to refer to any final judgment by a judicial or even quasi-judicial body. *See* Clark v. Milens, 28 F.2d 457, 458

Moreover, it was not until 2001 that the Supreme Court examined the doctrine in detail in *New Hampshire v. Maine*.[31] In *New Hampshire*, the court applied judicial estoppel to prevent the state of New Hampshire from asserting that its Piscataqua River boundary with Maine ran along the Maine shore of the river, contrary to a 1970s consent judgment under which New Hampshire had agreed the boundary ran along the geographic center of the river.[32] The court cited the *Wakelee* definition but elaborated on the doctrine's unique position as a protector of the judicial process.[33] As the Court noted, the doctrine is used to "prevent the perversion of the judicial process"[34] by "prohibiting parties from deliberately changing positions according to the exigencies of the moment."[35] Other courts have been more colorful in describing the doctrine's ultimate aims of promoting fair and honest dealing in the courts.[36] Yet, the central thrust of all these formulations remains the same: the protection of the "integrity of the judicial process."[37]

2. Distinguishing Characteristics

Because judicial estoppel protects against the "improper use of judicial machinery,"[38] the doctrine is distinguishable from its sister doctrines of collateral and equitable estoppel.[39] For one, the doctrine of judicial estoppel has broader preclusive effects than that of collateral estoppel, which has been described as a doctrine of "issue preclusion."[40] Though

(9th Cir. 1928) (holding that because the judgment of a bankruptcy referee is binding upon the parties to the bankruptcy, "[i]t constitutes a judicial estoppel.").

31. 532 U.S. 742, 749–50 (2001) (noting that the Court has "not had occasion to discuss the doctrine elaborately.").

32. *Id.* at 749.

33. *See id.* at 749–50.

34. *Id.* at 750 (quoting *In re* Cassidy, 892 F.2d 637, 641 (7th Cir. 1990).

35. *Id.* (quoting United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993).

36. *See* Reynolds v. Comm'r, 861 F.2d 469, 472 (6th Cir. 1988) (citing the various metaphors courts have used to describe the evils judicial estoppel guards against, including: "playing fast and loose with the courts," Scarano v. Central R.R., 203 F.2d 510, 513 (3d Cir. 1953); "blowing hot and cold as the occasion demands," Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 n.3 (4th Cir. 1982); and "hav[ing] [one's] cake and eat[ing] it too," Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1177 (D.S.C. 1974)).

37. *New Hampshire*, 532 U.S. at 749–51 (citing various cases to illustrate the uniform agreement among the courts as to the purpose of judicial estoppel).

38. Konstantinidis v. Chen, 626 F.2d 933, 938 (D.C. Cir. 1980).

39. *See generally* Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 360 (3d Cir. 1996) (distinguishing judicial estoppel from equitable estoppel); Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589, 589–753 (1998) (outlining the general differences in the various preclusive doctrines).

40. *See* Anderson & Holober, *supra* note 39, at 669 ("The doctrine provides that when an *issue of fact or law* has been litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (emphasis added) (internal quotation marks omitted)); *see also New Hampshire*, 532 U.S. at 749.

application of judicial estoppel will often stem from a party's advancement of a singular fact or legal argument, the preclusive effect of that representation is to bar not only an inconsistent position with respect to that issue, but also all successive "claims" inconsistent with that representation.[41] And, unlike "equitable estoppel," which requires the party asserting the doctrine to prove that it relied on the prior representation to its detriment, a party asserting judicial estoppel need not prove its reliance on its opponent's inconsistent position.[42]

Among the various preclusive doctrines, that of res judicata is most similar to judicial estoppel, though there are important distinctions.[43] Unlike res judicata, judicial estoppel does not require a "final judgment" in a prior proceeding to be invoked.[44] Likewise, the doctrine is often invoked where the estopped party's prior inconsistent position was advanced in a nonjudicial proceeding.[45] Judicial estoppel may bar subsequent litigation even where the preceding legal action was unrelated to the present case.[46]

Another interesting distinction between collateral estoppel and judicial estoppel is its potential use in an offensive context. Since judicial estoppel is not dependent upon the litigation process to establish a fact, but upon parties' intentional representations before the court, it theoretically would be permissible to allow plaintiffs not party to the prior litigation to assert the doctrine in an offensive manner. *Cf.* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 (1979) ("The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.").

41. *See generally* White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472 (6th Cir. 2010) (applying judicial estoppel to bar continued pursuit of plaintiff's sexual harassment claims).

42. *See* Lowery v. Stovall, 92 F.3d 219, 223 n.3 (4th Cir. 1996).

43. To reduce confusion, this paper distinguishes the doctrine of res judicata from that of collateral estoppel, though this distinction is somewhat misleading since many authors characterize collateral estoppel as a category within the broader doctrine of res judicata. *See* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 (2d ed. 2011). Procedurally, judicial estoppel appears to be treated similarly to questions of res judicata since it may be raised by defendants in a motion to dismiss or for summary judgment. *See* Dunellen, LLC v. Getty Props. Corp., 567 F.3d 35, 37–38 (1st Cir. 2009) (upholding trial court's application of res judicata and judicial estoppel in granting summary judgment). Also similar to res judicata, the doctrine can be raised sua sponte by the court itself. *In re* M Cassidy, 892 F.2d 637, 641 (7th Cir. 1990) (citing Allen v. Zurich Ins. Co., 667 F.2d 1162, 1168 n.5 (4th Cir. 1982)) (doctrine may be raised by court on appeal sua sponte).

44. *See White*, 617 F.3d at 478–79 (applying judicial estoppel where the court adopted prior position as a "preliminary matter").

45. Smith v. Pinner, 891 F.2d 784, 787 (10th Cir. 1989) (applying judicial estoppel to bar contradiction of a stipulation made in a workers' compensation proceeding); Smith v. Montgomery Ward & Co., 388 F.2d 291, 292 (6th Cir. 1968) (barring the contradiction of statements made in a prior workers' compensation proceeding).

46. *Compare* Brown v. Felsen, 442 U.S. 127 (1979) ("Under res judicata, 'a final judgment on the merits bars further claims by parties or their privies based on the *same* cause of action.'" (citing Montana v. United States, 440 U.S. 147, 153 (1979)) (emphasis added)), *with* Schomaker v. United States, 334 F. App'x 336, 339–40 (1st Cir. 2009) (applying judicial estoppel to bar plaintiff from asserting a tort law claim of wrongful retention of property against the United States, where the value of the property was significantly underreported in plaintiff's prior no-asset bankruptcy proceedings). Indeed, some have

Thus, unlike res judicata, nonparties with no expressed interest in the prior litigation may invoke judicial estoppel in the second proceeding.[47]

Given the underlying purpose of judicial estoppel, it is no surprise that among the various formulations of the judicial estoppel rule, the virtually universal first element is that the party to be estopped must be asserting a position "irreconcilably inconsistent" with one previously advanced.[48] Estoppel is therefore not appropriate where there is only an appearance of inconsistency but where the two positions may be reconciled,[49] for example due to differing legal definitions of the same terms in different jurisdictions.[50] In some contexts application of this requirement is straightforward, yet courts have grappled with this requirement in the face of modern pleading rules which allow parties to plead in the alternative.[51] Some courts have accommodated modern pleading practices by requiring that a prior inconsistent position be one based on fact rather than an argument of law before applying judicial estoppel.[52] Other courts decline

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argued that judicial estoppel acts to "fill in the gaps" left by res judicata. *See* 18 WRIGHT ET AL., *supra* note 43, at § 4403 ("[M]ore recent decisions have resurrected the "judicial estoppel" label and seem to be expanding preclusion under this label to pick up some points that res judicata theory does not reach.").

47. *Compare* Montana v. United States, 440 U.S. 147, 154–55 (1979) (finding that res judicata presupposes identical claims and that the claims of nonparties brought in subsequent litigation differ by definition from those in the original litigation), *with* Sea Trade Co. v. FleetBoston Fin. Corp., No. 03 Civ. 10254, 2008 WL 4129620, at *17 (S.D.N.Y. Sept. 4, 2004) (holding that the asserting party was not a party to the plaintiff's prior bankruptcy proceeding, but still permitted to assert judicial estoppel in subsequent litigation), *aff'd sub nom.* Adrogué Chico S.A. v. FleetBoston Fin. Corp., 427 F. App'x 43 (2d Cir. 2011).

48. Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 239 (3d Cir. 2011) (quoting G–I Holdings, Inc. v. Reliance Ins. Co., 586 F.3d 247, 262 (3d Cir. 2009)); *see also* Browning v. Levy, 283 F.3d 761, 775 (6th Cir. 2002) ("[J]udicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding. . . ."); United States v. Hook, 195 F.3d 299, 306 (7th Cir. 1999); *In re* Coastal Plains, Inc., 179 F.3d 197, 206 (5th Cir. 1999); Hossaini v. W. Mo. Med. Ctr., 140 F.3d 1140, 1143 (8th Cir. 1998); Maharaj v. BankAmerica Corp., 128 F.3d 94, 98 (2d Cir. 1997).

49. *See In re* Cassidy, 892 F.2d 637, 642 (7th Cir. 1990).

50. For example in *Linnehan Leasing v. State Tax Assessor*, 898 A.2d 408 (Me. 2006), the Maine Supreme Court declined to apply judicial estoppel to bar the state from taxing two corporate entities separately even though the state had previously argued the two corporations were a "single unit" in a prior unfair trade practices action. *Id.* at 414–15. The court found that because the state's prior position was not asserted in reliance on an interpretation of the tax code, which the subsequent suit required, the judicial estoppel argument failed. *Id.*

51. *See* Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982) ("[Judicial estoppel] obviously contemplates something other than the permissible practice, now freely allowed, of simultaneously advancing in the same action inconsistent claims or defenses which can then, under appropriate judicial control, be evaluated as such by the same tribunal, thus allowing an internally consistent final decision to be reached." (citing FED. R. CIV. P. 8(e)(2))). The court in *Allen* went on to apply the doctrine to prevent the plaintiff from recovering in a personal injury suit in which the plaintiff asserted an employee-employer relationship at odds with that asserted in one prior judicial proceeding and two prior administrative proceedings. *See generally id.*

52. *See* Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996) ("[T]he position sought to be estopped must be one of fact rather than law or legal theory.").

to limit the doctrine to factual inconsistencies alone.[53] Such distinctions between inconsistency in law or fact, however, may be irrelevant when viewed in light of the doctrine's secondary elements which better define judicial estoppel's application.[54]

Beyond the inconsistent position itself, jurists and scholars often identify two secondary elements that courts examine before invoking judicial estoppel: (1) whether the tribunal in the prior proceeding relied upon the representation in reaching some conclusion; and (2) whether the inconsistency is evidence of bad faith undermining a litigant's obligation to be honest in his representations.[55] These observers in turn classify courts as embracing either a "judicial acceptance" or "sanctity of the oath" version of judicial estoppel.[56]

Where courts adopt the "judicial acceptance" standard, they look to whether allowing a case to proceed would give the appearance that the judiciary was misled in the prior action.[57] The "judicial acceptance" analysis entails determining whether the duplicitous party derived a benefit or obtained an advantage as a result of the inconsistent positions.[58] As noted above, the opposing party's reliance on the prior inconsistent position is not required, but where accepting an inconsistent position will convey an unfair advantage to the party asserting the inconsistent position, courts may apply judicial estoppel.[59]

It should be noted however, that neither an unfair advantage, nor a material benefit to the inconsistent party is necessary to find the "judicial acceptance" required to judicially estop a litigant.[60] All that need be shown is that the prior tribunal or agency relied upon the representation in reaching some decision.[61] Courts applying judicial estoppel thus review the

53. *Cassidy*, 892 F.2d at 642 ("[I]n this case we think that the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact.").

54. *In re Coastal Plains*, 179 F.3d 197, 208, 210 (5th Cir. 1999) (noting another circuit's requirement of inconsistency in factual representations but expressing no opinion on the requirement and applying judicial estoppel due to prior judicial acceptance of bankruptcy filings valuing estate assets at less than $20,000).

55. *See* Anderson & Holober, *supra* note 39, at 624–32 (contrasting the "sanctity of the oath" and the "judicial acceptance" approaches in the application of judicial estoppel).

56. *Id.*

57. "[A]bsent judicial acceptance . . . the judicial process is unaffected and the perception and/or danger that either the first or subsequent court was misled is not present." Stevens Technical Servs., Inc. v. S.S. Brooklyn, 885 F.2d 584, 588–89 (9th Cir. 1989).

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

59. *See* Scarano v. Cent. R. Co. of N.J., 203 F.2d 510, 513 (3d Cir. 1953).

60. *See In re* Cassidy, 892 F.2d 637, 640–41 (7th Cir. 1990) (applying judicial estoppel to bar litigant's appeal from a prior adverse judgment); *see also* Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982) ("Though perhaps not necessarily confined to situations where the party asserting the earlier contrary position there prevailed, it is obviously more appropriate in that situation.").

61. Lewandowski v. Nat'l R.R. Passenger Corp. (Amtrak), 882 F.2d 815, 819–20 (3d Cir. 1989) (noting that while a prior favorable jury verdict did not necessarily mean the jury found the individual permanently disabled, the party was judicially estopped from seeking to reclaim his job from his employer four days after the verdict because if the individual's

opinions, verdicts, or orders of the prior proceedings and determine whether the court expressly or implicitly relied on the representation.[62] Consequently, judicial estoppel may be applied in cases where a litigant did not ultimately prevail on his case in chief, but convinced a tribunal to rely on his representation to reach some conclusion in a prior case.[63] Where it cannot be determined if the court relied on the representation, for example where a case settles before any court order is issued, judicial estoppel is not applied.[64]

Where the inconsistency in positions is so egregious as to manifest bad faith by the party in fulfilling its obligations of fair dealing and honesty to the court, courts may apply judicial estoppel even where there was no reliance by the court in the prior proceeding.[65] Courts adopting this standard are often characterized as seeking to preserve the "sanctity of the oath."[66] *Konstantinidis v. Chen*[67] sets forth the most commonly cited justification for this policy: "[T]o the extent that prior sworn statements are involved, the doctrine upholds the 'public policy which exalts the sanctity of the oath.'"[68] In these courts, the general inquiry is whether the litigant was under a duty as the result of an oath or other obligation, to make an honest representation in the prior proceeding.[69] Application of judicial estoppel in such circumstances guards against "reckless and false swearing," thereby preserving the public's confidence in the judiciary.[70]

A common requirement under either the judicial acceptance or sanctity of the oath version of judicial estoppel is actual intent to mislead the court.[71] As the Supreme Court noted in *New Hampshire*, the doctrine "'prohibit[s] parties from *deliberately* changing positions according to the exigencies of the moment.'"[72] Such bad faith may be discerned from the record where

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employability had been made known to the jury, the prior verdict would likely have been affected).

62. *Id.*

63. Guinness PLC v. Ward, 955 F.2d 875, 899–900 (4th Cir. 1992) (holding that appellant's success in petitioning British appellate courts was sufficient to estop later cause of action even though his appeals ultimately failed).

64. *See In re* Allegiance Telecom, Inc., 356 B.R. 93, 106–07 (Bankr. S.D.N.Y. 2006) (discussing when prior settlements provide sufficient evidence of judicial acceptance to support an application of judicial estoppel).

65. *See In re* Corey, 892 F.2d 829, 835–36 (9th Cir. 1989); Anderson & Holober, *supra* note 39, at 624.

66. Anderson & Holober, *supra* note 39, at 624.

67. 626 F.2d 933 (D.C. Cir. 1980).

68. *See id.* at 937 (quoting Melton v. Anderson, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948)).

69. *Id.*

70. *Id.*

71. *See id.* at 939–40 (declining to apply judicial estoppel where litigant's prior inconsistent position was based on a medical diagnosis he reasonably believed).

72. New Hampshire v. Maine, 532 U.S. 742, 749–50 (2001) (emphasis added) (quoting United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993)).

the inconsistency constitutes a particularly egregious affront to judicial dignity.[73]

Concomitant with the requirement of bad faith is the widespread practice of declining to apply judicial estoppel where an inconsistency is the result of a "good-faith mistake" on the part of the litigant.[74] While courts vary as to when mistakes are made in good faith,[75] in the context of judicial estoppel, only true inadvertence or a seemingly obvious mistake with respect to a given factual condition will ordinarily prevent application of the doctrine.[76] Where a litigant is merely unsure of the law and his legal obligations, the courts often do not find that the mistaken belief or action is in good faith.[77] This is true even when the litigant relied on the advice of an attorney in pursuing a given course of action.[78] Instead, courts treat malpractice as the appropriate remedy for defective legal advice.[79]

As with any equitable doctrine, courts' independent evaluation of each case's specific factors make generalizations about the doctrine's application difficult.[80] Consequently, courts have resisted articulating universal criteria for the doctrine's application in all litigious proceedings.[81] Where the litigation in which judicial estoppel is invoked touches on prior legal proceedings with common themes and procedures, however, application of the doctrine often results in similar results despite varying legal standards.[82]

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73. *See* Klein v. Stahl GMBH & Co. Maschinefabrik, 185 F.3d 98, 111 n.13 (3d Cir. 1999).

74. *See* Simon v. Safelite Glass Corp., 128 F.3d 68, 73 (2d Cir. 1997); Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996); John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995); *see also Konstantinidis*, 626 F.2d at 939–40 (refusing to apply judicial estoppel where litigant's inconsistency is due to unintentional error).

75. Allowance for a good faith mistake is common to many bodies of law and, as with judicial estoppel, the definitions vary widely. *See, e.g.*, United States v. Laub, 385 U.S. 475, 487 (1967) (refusing to find a violation of law where the defendant relied in good faith upon vague and undefined laws before traveling to a restricted country); Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd., 239 F.3d 1000, 1002–03 (9th Cir. 2001) (denying an untimely request for a jury in a criminal trial where the late request was due to an attorney's incorrect understanding of a law).

76. *See In re* Coastal Plains, 179 F.3d 197, 210–11 (5th Cir. 1999).

77. *See* White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 483–84 (6th Cir. 2010).

78. *See id.*; A & J Constr. Co. v. Wood, 116 P.3d 12, 17–18 (Idaho 2005). Courts sometimes apply a narrow exception to this general rule where, despite finding a litigant's prior inconsistent position at odds with their legal obligations, courts recognize that the law is genuinely unsettled (for instance where there are conflicting judicial rulings on the matter). *See* Woodard v. Taco Bueno Rests. Inc., No. 4:05-CV-804-Y, 2006 WL 3542693, at *11 (N.D. Tex. Dec. 8, 2006).

79. *See* Barger v. City of Cartersville, 348 F.3d 1289, 1295 (11th Cir. 2003) (quoting Link v. Wabash R.R., 370 U.S. 626, 633–34 (1962)).

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

81. *Id.* at 750 ("[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." (quoting Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982)) (internal quotation marks omitted)); Hughes v. Mitchell Co., 49 So.3d 192, 203 (Ala. 2010); *A & J Constr. Co.*, 116 P.3d at 17.

82. *See* Benjamin J. Vernia, *Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions As To Claim or Interest in Bankruptcy Proceeding*, 85

Not surprisingly, post-bankruptcy litigation has proven fertile ground for application of the doctrine given the scope, procedural and statutory uniformity, and commonly recognized interests in federal bankruptcy.[83]

B. Federal Bankruptcy

The nature of federal bankruptcy—its scheme and motivations—lends itself to the application of judicial estoppel as a safeguard of the integrity of the bankruptcy process. In its current form,[84] U.S. bankruptcy law is comprised of a uniform federal Bankruptcy Code[85] that allows for state to state variation to protect certain property rights.[86] The power to establish uniform laws for the administration of bankruptcy proceedings is expressly reserved to Congress in the U.S. Constitution.[87] Title 11 of the U.S. Code creates standard types (chapters) of bankruptcy proceedings applicable in every federal jurisdiction.[88] To preserve the integrity of the bankruptcy process, the Bankruptcy Code imposes strict requirements of disclosure and honest dealing upon debtors seeking bankruptcy's numerous protections.[89] As interpreted by the courts, these obligations reflect Congress's interest in protecting both the parties whose legal rights are affected by the bankruptcy process and the integrity of the bankruptcy process itself.[90] As employed in post-bankruptcy litigation, judicial estoppel reinforces and backstops these

A.L.R.5TH 353 (2011) (cataloguing state and federal cases in which the facts led the court to apply judicial estoppel in post-bankruptcy litigation).

83. Practitioners' publications examining judicial estoppel in the post-bankruptcy context often highlight the growing application of judicial estoppel in courts of various jurisdictions. *See generally, e.g.*, Tanya N. Lewis, *Bankruptcy Filings and Civil Litigation—Judicial Estoppel in Action*, UTAH BAR J., Nov.–Dec. 2011, at 34–37; Seymour Roberts, Jr., *Preserving Claims for Postconfirmation Litigation*, NORTON ANN. SURV. BANKR. L., Sept. 2007; Craig A. Roeb, *Disclose or Dismiss: Part of Any Litigator's Due Diligence Should Be To Determine If the Plaintiff Has a Pending Bankruptcy Action*, L.A. LAW., Nov. 2008, at 25–31.

84. The early history of bankruptcy law in the United States was characterized by fits and starts in which Congress enacted and subsequently repealed various bankruptcy legislation. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 344–69 (1991) (chronicling U.S. bankruptcy law throughout the 1800s and describing the evolving effects of bankruptcy discharge during the nineteenth century). Consequently, for long periods of the United States' first century, bankruptcy law was wholly shaped by state bankruptcy practice. *See id.*

85. *See generally* 11 U.S.C. (2006).

86. *See id.* § 522 (deferring to state laws governing the exemption of property).

87. "The Congress shall have Power to . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." U.S. CONST. art. 1, § 8, cl. 4.

88. *See id.* §§ 701–784 (Chapter 7—Liquidation); *id.* §§ 901–946 (Chapter 9—Adjustment of Debts of a Municipality); *id.* §§ 1101–1174 (Chapter 11—Reorganization); *id.* §§ 1201–1231 (Chapter 12—Adjustment of debts of a family farmer or fisherman with regular annual income); *id.* §§ 1301–1330 (Chapter 13—Adjustment of debts of an individual with regular income); *id.* §§ 1501–1532 (Chapter 15—Ancillary and other cross-border cases).

89. *See id.* § 521.

90. Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988).

interests by eliminating opportunities for debtors to profit from bad-faith conduct when seeking bankruptcy's protections.[91]

1. National Uniformity

At its core, federal bankruptcy law provides a nationally uniform means of resolving debtor insolvency via the preemption of state debt collection laws.[92] Though bankruptcy proceedings are the exclusive jurisdiction of federal courts, state law plays a significant role in its application.[93]When a debtor or creditor successfully petitions a bankruptcy court,[94] the immediate effect of the petition is to vest all of the debtor's property interests in a bankruptcy estate.[95] The federal bankruptcy court will then distribute the estate in an orderly manner to the debtor's creditors in accordance with the applicable bankruptcy chapter under which the petition was filed.[96] Though the power to distribute the estate is solely that of the federal bankruptcy court, the process of distribution, in particular the assets which may not be distributed to creditors are shaped by state law.[97] In the strictest sense, U.S. bankruptcy practice, thus, varies in each state.[98] Viewed as a whole, however, the Code is better characterized as embodying Congress's desire to create a nationally uniform means of addressing debtor insolvency, while acknowledging states' important interests in regulating the property rights of their citizens.[99]

Title 11 contains the federal statutes governing the bankruptcy and insolvency process that are employed by the federal bankruptcy courts of the United States.[100] Under Title 11, debtors may pursue any of six different means of distributing the bankruptcy estate, each different avenue generally referred to by its corresponding statutory chapter.[101] Among

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91. *See id.* at 419–20.

92. *See* NATHALIE MARTIN & OCEAN TAMA, INSIDE BANKRUPTCY LAW: WHAT MATTERS AND WHY 31–32 (2011).

93. *See* 11 U.S.C. § 522 (deferring to state laws governing the exemption of property).

94. *See id.* §§ 301, 302, 303 (establishing grounds for the commencement of voluntary, joint, and involuntary bankruptcy proceedings, respectively).

95. *See id.* § 541.

96. *See, e.g.*, *id.* §§ 726, 1142.

97. Federal courts apply these "homestead" provisions, so named due to their frequent protection of debtor's primary domiciles, under § 522.

98. In addition to state "homestead" statutes, the federal bankruptcy courts of each district are permitted to enact their own rules of procedure. *See* FED. R. BANKR. P. 9029.

99. MARTIN & TAMA, *supra* note 92, at 30.

100. *See generally* 11 U.S.C. §§ 101–1532. These federal bankruptcy courts lack full adjudicatory powers under Article III of the Constitution. *See* Stern v. Marshall, 131 S. Ct. 2594, 2608–09 (2011). Instead, their powers stem from Congress's delegation of bankruptcy authority to federal district courts under 28 U.S.C. § 157, and the district courts may in turn refer the bankruptcy proceedings to bankruptcy judges. Because they are not full Article III courts, however, bankruptcy courts' powers are limited to the adjudication of matters directly related to the bankruptcy proceeding. *See Stern*, 131 S. Ct. at 2608–11.

101. *See generally* 11 U.S.C. §§ 701–784 (Chapter 7—Liquidation); *id.* §§ 901–946 (Chapter 9—Adjustment of Debts of a Municipality); *id.* §§ 1101–1174 (Chapter 11—Reorganization); *id.* §§ 1201–1231 (Chapter 12—Adjustment of debts of a family farmer or

these, Chapter 7, Chapter 11, and Chapter 13 proceedings are the most common.[102]

Each of these three more popular chapters employs a different process to aid debtors and creditors in restoring debtor solvency or providing the debtor with a fresh start.[103] Under Chapter 7, the bankruptcy estate of a debtor is liquidated by a court appointed bankruptcy trustee.[104] The proceeds from the liquidation are used to settle all claims by creditors,[105] paying each based on rank preference as established by the Code.[106] Upon liquidation of the debtor's estate, the court will grant a discharge which effectively resolves all debts that existed prior to the bankruptcy petition,[107] provided that the debtor has complied with his obligations to the bankruptcy court in good faith.[108] This process of liquidation differs significantly from those of Chapter 11 or 13 which are employed to "reorganize" and repay debtors' obligations to designated classes of creditors.[109]

Under both Chapters 11 and 13, the bankruptcy estate is administered via a reorganization plan that is negotiated with the debtor's creditors and implemented with court supervision over a period of time.[110] Aside from the parties that typically file under each chapter,[111] the two chapters differ principally in the process employed by the bankruptcy court to draft and implement the plan.[112] Under Chapter 11, a debtor assumes the role of "debtor-in-possession," incurring a fiduciary duty as a trustee to act on behalf of the bankruptcy estate to develop and implement a reorganization plan under the supervision of a court-appointed bankruptcy administrator.[113] Under Chapter 13, the court appoints a bankruptcy trustee

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fisherman with regular annual income); *id.* §§ 1301–1330 (Chapter 13—Adjustment of debts of an individual with regular income); *id.* §§ 1501–1532 (Chapter 15—Ancillary and other cross-border cases).

102. *See Bankruptcy*, U.S.COURTS.GOV, http://www.uscourts.gov/FederalCourts/Bankruptcy.aspx (last visited Nov. 16, 2012).

103. *Compare* 11 U.S.C. §§ 701–784 (Chapter 7—Liquidation) *with id.* §§ 1101–1174 (Chapter 11—Reorganization), *and id.* §§ 1301–1330 (Chapter 13—Adjustment of debts of an individual with regular income).

104. *See Chapter 7, Bankruptcy Basics*, U.S.COURTS.GOV, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx (last visited Nov. 16, 2011).

105. *See id.*

106. *See* 11 U.S.C. § 726.

107. *See id.* § 727(b).

108. *See generally id.* § 727(a) (identifying the grounds for a denial of a Chapter 7 discharge).

109. *Compare id.* § 726, *with id.* §§ 1123, 1322.

110. *See id.* §§ 1101–1146, 1301–1330.

111. Though individuals may file under Chapter 11, the reorganization process under Chapter 11 is typically more amenable to corporate entities seeking to manage their debts while maintaining operations. *See id.* § 109(d); *Process*, U.S.COURTS.GOV, http://www.uscourts.gov/FederalCourts/bankruptcy/BankruptcyBasics/Process.aspx (last visited Nov. 16, 2012). Individual debtors seeking a reorganization plan are more likely to file under Chapter 13 where possible. *See id.*

112. *Compare* 11 U.S.C. §§ 1101–1130, *with id.* §§ 1301–1330.

113. *See id.* § 1107.

to develop and implement the reorganization plan.[114] Under both chapters, the reorganization plan is ultimately confirmed by the court[115] with input from creditors[116] and may involve the reduction of the debtor's total financial obligations.[117]

2. Duties of Debtors

Despite the differences, there are numerous procedural commonalities among all of the various bankruptcy chapters.[118] As a rule, all debtors have the right to file voluntarily for bankruptcy.[119] Section 109, however, specifies which chapter debtors may file under, limiting petitioning corporations to Chapter 11 but allowing individual filers to file under any of the three chapters.[120] Individual debtors are also subject to additional restrictions which allow for the dismissal or conversion of Chapters 7 and 13 petitions where the debtor's income or debt fails to meet statutorily established levels,[121] or the nature of his debts precludes filing under Chapter 7.[122] Regardless of the chapter chosen, upon filing, all debtors are subject to the same general duties to inform the bankruptcy court of their financial affairs such that the court may accurately value the bankruptcy estate and efficiently conduct the bankruptcy proceedings.[123] Thus, chief among any petitioner's obligations is his duty to disclose any and all assets he may possess at the time of the petition.[124]

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114. *See id.* § 1302.

115. *See id.* §§ 1129, 1325.

116. The level of creditor involvement in the development of the reorganization plan varies significantly under the two Chapters. Creditors to Chapter 11 debtors vote on the terms of the reorganization plan and may propose their own plans for approval by other creditors. *See id.* § 1121(c). Chapter 13 plans, by contrast, involve less creditor involvement since the terms of payment are generally limited by the debtor's monthly disposable income, which serves as a cap on monthly payments. *See id.* §§ 1324–1325.

117. *See id.* § 1123(a)(3) (requiring a reorganization plan to specify how "impaired claims," those that will not be fully repaid under the plan, will be treated); *id.* § 1322(a)(4) (allowing for less than full payment of secured claims where the reorganization plan ensures all of the debtor's disposable income will otherwise be used toward payment of like claims during the implementation of the plan).

118. *See generally id.* §§ 101–561.

119. *See id.* § 301. Only Chapter 7 and Chapter 11 bankruptcy cases may be initiated involuntarily. *Id.* § 303. Placing a debtor under Chapter 13 involuntarily would effectively constitute a form of indentured servitude. *See generally* 11 U.S.C.A. § 303 (2010) (historical and statutory notes).

120. *See generally id.* § 109. Section 109 also specifies the conditions under which individuals or business entities may file under any of the other "special" chapters. *Id.*

121. *See id.* § 707(b)(2)(A) (allowing dismissal of a case filed under Chapter 7 where maintenance of the case would constitute an abuse of the chapter's provisions given a debtor's monthly income). In contrast to the maximum income level limitations imposed on Chapter 7 petitioners, individuals seeking Chapter 13 protection have statutory debt maximums above which they are ineligible to pursue Chapter 13 reorganization. *See id.* § 109(e).

122. *See id.* § 707(b)(1) (allowing for dismissal or conversion of a Chapter 7 case to a Chapter 11 or 13 case where the Chapter 7 petitioner's debts are primarily consumer debts).

123. *See generally id.* § 521.

124. *See id.*

The duty to disclose does not end at the moment of filing, however, and a debtor seeking bankruptcy protection is said to face substantial and ongoing asset disclosure obligations.[125] The assets a debtor must disclose when seeking bankruptcy are not defined explicitly or itemized in the relevant statute, 11 U.S.C. § 521.[126] Instead, courts have characterized the requirements in § 521 as comprising a "non-exhaustive list."[127] In effect, a debtor is required to divulge every conceivable asset, including real and personal property, financial holdings, and any claims the debtor holds to property not in his immediate possession.[128] These claims include the debtor's legal interest in any future civil suits based upon an already accrued cause of action, though highly speculative claims are exempt.[129]

Procedurally, the debtor's first opportunity to divulge his assets and any prospective claims or causes of action arises under his "duty to file . . . a schedule of assets and liabilities . . . [and] a statement of the debtor's financial affairs."[130] In addition to this initial notification, Chapter 11

125. *See generally id.* § 521(f); White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 479 n.5 (6th Cir. 2010) (permitting the court to require disclosure of a debtor's federal tax returns while the bankruptcy case is still in effect).

126. Under 11 U.S.C. § 521(a)(1), a debtor must file

> (A) 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 . . . .

127. *See* Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988).

128. *See id.* at 417.

129. *See* Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 323 (3d Cir. 2003) ("Although we do not require debtors to list hypothetical claims that are so tenuous as to be fanciful, we do require them to advise creditors . . . [where they have] 'enough information . . . prior to confirmation to suggest that [they] may have a possible cause of action[] . . . .'" (quoting *In re* Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir. 1999))).

130. *See* 11 U.S.C. § 521. The requirement to divulge ongoing or prospective civil claims has in fact been incorporated into the official filing forms. *See* B-6B (Official Form 6B), Schedule B Personal Property, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006B_1207f.pdf ("Except as directed below, list all personal property of the debtor of whatever kind."). The column "Type of Property" includes, inter alia:

> 17. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.
>
> 18. Other liquidated debts owed to debtor including tax refunds. Give particulars.
>
> 19. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule A—Real Property.
>
> 20. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.
>
> 21. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.

Id.; *see also* B-7 (Official Form 7), Statement of Financial Affairs, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Official_2010/B_007_0410.pdf. Under Requirement 4, "Suits and administrative proceedings, executions, garnishments and attachments," the following information must be disclosed: "[A]ll suits

petitioners must also file an additional disclosure statement along with their plan of reorganization.[131] This disclosure statement must contain "adequate information," or "information . . . in sufficient detail, as far as is reasonably practicable . . . that would enable . . . a hypothetical investor . . . to make an informed judgment about the plan[] . . . ."[132] The Chapter 11 debtor's duty is a "continuing one,"[133] the fulfillment of which courts have found to be part-and-parcel of a Chapter 11 petitioner's right to be heard during reorganization proceedings.[134] Though Chapters 7 and 13 do not expressly require debtors to file separate disclosure statements, Chapters 7 and Chapter 13 filings permit later amendment, thus implying a similar continuing duty of disclosure upon petitioners under those chapters.[135]

3. Future Claims

Ultimately, all future causes of action will be included in the assets of the bankruptcy estate, defined by 11 U.S.C. § 541 as "all legal or equitable interests of the debtor."[136] The court, trustee, and creditors will then use the information disclosed to determine the proper way to liquidate the estate or in their consideration of whether to confirm and execute the bankruptcy plan.[137]

Given the all-encompassing nature of the bankruptcy estate under § 541, a discharge from bankruptcy where a debtor failed to disclose certain assets places those assets in a form of legal limbo.[138] Because the assets were

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and administrative proceedings to which the debtor is or was a party within *one year* immediately preceding the filing of this bankruptcy case." *Id.*

131. *See generally* 11 U.S.C. § 1125.

132. *Id.* § 1125(a)(1).

133. *In re* Coastal Plains, Inc., 179 F.3d 179, 208 (5th Cir. 1999).

134. *See* Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988) ("We regard the right-conferring language of *Southmark* as confirmation of the debtor's express obligation of candid disclosure." (citing Southmark Props. v. Charles House Corp., 742 F.2d 862, 871 (5th Cir. 1984) (articulating debtor's right to participate in reorganization proceedings))).

135. *See* 11 U.S.C. §§ 541(a)(7), 1306(a)(1) (defining the bankruptcy estate as including property interests acquired after the initial petition and filings); Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380, 384–85 (5th Cir. 2008) (requiring continuing disclosure in Chapter 7 proceedings); De Leon v. Comcar Indus., 321 F.3d 1289, 1291–92 (11th Cir. 2003) (requiring continuing disclosure in Chapter 13 proceedings); *Oneida*, 848 F.2d at 417 (requiring continuing disclosure in Chapter 11 proceedings).

136. Section 541 states that:

> (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.

11 U.S.C. § 541(a)(1); *see also id.* § 541(a)(7) ("[S]uch estate is comprised of . . . (7) Any interest in property that the estate acquires after the commencement of the case.").

137. *See Oneida*, 848 F.2d at 417.

138. *See* Brooks v. Beatty, 25 F.3d 1037 (1st Cir. 1994) (unpublished table decision), No. 93-1891, 1994 WL 224160, at *3 (May 27, 1994) ("[B]ecause the [debtor's] action was not scheduled as an asset, it was never abandoned by the [C]hapter 7 trustee." (citing 11 U.S.C.

never distributed by the courts, the assets remain part of the bankruptcy estate.[139] Consequently, where a former bankrupt later seeks to assert an undisclosed claim in civil litigation, courts will often dismiss the suit for lack of standing.[140] In these instances, only the trustee may bring the claim on behalf of creditors.[141] Dismissal of such claims for lack of standing where the prior bankruptcy occurred under Chapter 13 is problematic, however, since under a strict reading of Chapter 13 a debtor acting as the trustee appears to retain full possession of any estate property not distributed under the plan.[142] Despite the language of the statute, courts disagree on the exact legal status of claims not disclosed in a Chapter 13 bankruptcy.[143] Perhaps to avoid this confusion, bankruptcy courts looking to ensure final settlement of the bankruptcy case may cite the all-inclusive nature of the bankruptcy estate under § 541 as evidence of the need for debtors' complete disclosure of assets and interests.[144]

4. Benefits of Bankruptcy

The significant benefits that debtors derive from the bankruptcy process warrant such intrusive disclosure requirements. Upon successfully petitioning a bankruptcy court, a debtor immediately receives the protection of a stay in all proceedings initiated against him.[145] Absent this protection, debtors' assets would remain subject to lien or seizure in accordance with their local states' collection laws.[146] Such laws, often based on the

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§ 554(d) and United States v. Grant, 971 F.2d 799, 803 n.4 (1st Cir. 1992) (en banc))). The *Grant* court had held that abandonment by trustee "does not relinquish an undisclosed interest in property." *Grant*, 971 F.2d at 803 n.4 (citing Dushane v. Beall, 161 U.S. 513, 516 (1896)).

139. *See Brooks*, 1994 WL 224160, at *3.

140. *See id.*

141. *See* Barger v. City of Cartersville, 348 F.3d 1289, 1292 (11th Cir. 2003) (permitting the trustee to pursue a bankrupt debtor's undisclosed employment discrimination suit under Federal Rule of Civil Procedure 17(a), which states that "[e]very action shall be prosecuted in the name of the real party in interest.").

142. *See* 11 U.S.C. § 1306(b) (2006) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."); *see also* Barbosa v. Solomon, 235 F.3d 31, 36–37 (1st Cir. 2000). Additionally, a trustee may decide or be ordered by a court to abandon interests in the estate, thus relinquishing undisclosed claims to the debtor. *See* Moses v. Howard Univ. Hosp., 606 F.3d 789, 791 (D.C. Cir. 2010) (holding that Chapter 7 trustee's abandonment of claims conveyed standing on a debtor to bring claims post-bankruptcy); Eastman v. Union Pac. R.R., 493 F.3d 1151, 1155 (10th Cir. 2007) (permitting a former debtor to serve as the "real-party-in-interest" in a suit following a bankruptcy where the bankruptcy court had previously directed the trustee to abandon any interest in the suit).

143. *See* Woodard v. Taco Bueno Rests., Inc., No. 4:05-CV-804-Y, 2006 WL 3542693, at *4–11 (N.D. Tex. Dec. 8, 2006) (identifying five different legal standards applied to determine the property rights of assets following the confirmation of a Chapter 13 bankruptcy plan but prior to completion of the debtor's payments under the plan).

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

145. *See generally* 11 U.S.C. § 362. The stay is subject to numerous exceptions, though these are generally related to criminal, family law, and tax proceedings. *Id.* § 362(b).

146. MARTIN & TAMA, *supra* note 92, at 11.

principle of "first in time is first in right," create strong incentives for creditors to engage in aggressive collection practices[147] which may border on, or indeed constitute criminal harassment of, the debtor.[148] The "breathing room" the automatic stay provides is therefore a significant benefit to bankruptcy petitioners beset by numerous creditors and facilitates the orderly disposition of all debts through the bankruptcy proceeding.[149]

In addition to the initial stay, the Bankruptcy Code permits petitioners to wholly exempt some property from the claims of creditors.[150] Section 522 outlines the properties exempt under the federal code and allows for exemptions under state law.[151] These "homestead exemptions" vary across states and in some cases permit debtors to shield valuable debtor property from creditors.[152] Also beneficial to petitioners, execution of a repayment plan under either Chapters 11 or 13 often takes place over a protracted period of time.[153] Likewise under either chapter, the plan approved by the court with creditor input will often reduce the total liabilities owed to creditors.[154]

Perhaps most important, at the end of the bankruptcy process under each chapter, the debtor receives a "fresh start."[155] That is, subject to certain statutorily defined exceptions,[156] discharge from bankruptcy resolves any debts a debtor possessed prior to their bankruptcy petition.[157] Indeed, the

147. Elina Chechelnitsky, Note, *D&O Insurance in Bankruptcy: Just Another Business Contract*, 14 FORDHAM J. CORP. & FIN. L. 825, 831 (2009).

148. Congress took note of the ill effects of zealous debt pursuit by creditors in 1977 when it passed the Fair Debt Collection Practices Act. *See* Pub. L. No. 95-109, 91 Stat. 874 (1977). Thus, the harm that abusive debt-collection practices inflicts on debtors is now recognized by the law. *See* 15 U.S.C. § 1692 (2006).

149. *In re* Soares, 107 F.3d 969, 977 (1st Cir. 1997) ("Congress intended the stay to afford debtors breathing room and to assure creditors of equitable distribution." (citing The Bankruptcy Reform Act of 1978, H.R. REP. 95-595 (1978))).

150. *See* 11 U.S.C. § 522.

151. *Id.*

152. Michelle J. White, *Bankruptcy: Past Puzzles, Recent Reforms, and the Mortgage Crisis*, 11 AM. L. & ECON. REV. 1, 4 (2009). In states like Texas and Florida, for example, the homestead exemption laws have no statutory maximum value, thus, a debtor may exempt a multimillion dollar home from creditors. *Id.*

153. Section 1143 requires creditors seeking to participate in the plan to present security interests and claims within five years of confirmation of the plan, suggesting the debtor's period of repayment may extend for many years. *See* 11 U.S.C. § 1143. In the case of Chapter 13 petitioners, though a debtor must begin making payments to the court appointed trustee within thirty days of filing, § 1326(a), full payment of claims under the plan may take as long as five years. *See id.* § 1322(d)(1)–(2).

154. In fact, under 11 U.S.C. § 1124, all claims addressed in the reorganization plan are presumed "impaired" (i.e., they modify the value the creditor would otherwise receive from the debtor), and their repayment under the plan is subject to approval by the court. *See id.* § 1129.

155. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004).

156. *See* 11 U.S.C. § 523 (defining nondischargeable debts).

157. *Tenn. Student Assistance Corp.*, 541 U.S. at 447 ("The discharge order releases a debtor from personal liability with respect to any discharged debt by voiding any past or future judgments on the debt and by operating as an injunction to prohibit creditors from attempting to collect or to recover the debt." (citing 11 U.S.C. § 524)); *see also* 11 U.S.C. §§ 727, 1141, 1328 (identifying the specific effects of discharge under each Chapter).

Supreme Court noted in *Local Loan Co. v. Hunt*,[158] that to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes" is central to U.S. bankruptcy law's aims.[159]

5. Preventing Abuse

Courts are on guard for abuses of bankruptcy's protections by debtors.[160] Given the various ways in which the bankruptcy process provides debtors an opportunity to shield themselves from valid claims by creditors, courts seek to ensure only debtors facing legitimate financial difficulties employ federal bankruptcy's protections.[161] The Bankruptcy Code itself permits the court to dismiss a bankruptcy petition in its entirety where permitting the case to continue would constitute an abuse of the law's purpose.[162] Substantial judicial gloss has effectively turned these procedural powers of the court into a de facto obligation of goodfaith on the debtor seeking bankruptcy's protections.[163] Consequently, in the interest of protecting creditors, during the bankruptcy proceedings, representations and actions before the court are strictly scrutinized for compliance with the Code's provisions.[164] Noncompliance may be punished by both adverse rulings in the bankruptcy proceeding itself or criminal charges of perjury.[165]

A similar implied interest has been recognized by courts seeking to promote finality in bankruptcy proceedings.[166] Though the Bankruptcy Code expressly allows for the reopening of bankruptcy cases,[167] other provisions of the Code impose on the court an obligation to ensure that implementation of the bankruptcy is realistic and unlikely to result in a

158. 292 U.S. 234 (1934).

159. *Id.* at 244–45 (citing Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915)); *see also id.* (collecting cases affirming the new opportunity bankruptcy is intended to provide the honest debtor).

160. *See generally In re* Am. Prop. Corp., 44 B.R. 180, 182 (Bankr. M.D. Fla. 1984) (examining bankruptcy's good-faith requirement).

161. "[D]ebtors seeking protection of the Bankruptcy Court must have real debt, real creditors, and a legitimate business purpose." *Id.*

162. *See* 11 U.S.C. § 707(b)(1) (permiting dismissal where continuing in bankruptcy would constitute an abuse); *id.* § 1112(b)(1) (permitting dismissal "for cause"); *id*. § 1307(c) (same).

163. *Am. Prop. Corp*., 44 B.R. at 182. ("Although Chapter 11 does not by its terms require that a petition be filed in 'good faith' the Courts have implied such a provision to prevent abuse of the Bankruptcy laws and to protect jurisdictional integrity.").

164. "[T]he Code makes plain that bankruptcy courts have the authority—indeed, the obligation—to direct a debtor to conform his plan to the requirements of [the relevant provisions]." United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1381 (2010).

165. *See generally* 11 U.S.C §§ 110, 727(a)(4)(B); 18 U.S.C. § 152 (2006) (outlining the criminal penalties for fraudulent bankruptcy filings); FED. R. BANKR. P. 9011 (authorizing sanctions against debtors and attorneys for false representations made during a bankruptcy proceeding).

166. *See* Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988).

167. *See* 11 U.S.C. § 350.

reopening of the case.[168] Perhaps it is not surprising then, that various estoppel doctrines, in particular res judicata's focus on finality in litigation, have long served to bar collateral attack on actions by the bankruptcy court.[169] Given its similarity to res judicata, and additional focus on promoting the integrity of the judicial process, a court's application of judicial estoppel post-bankruptcy has come to serve a similar role.

II. FEDERAL UNIFORMITY VS. STATE DISCORD

Given the broadly recognized interests served by the United States' uniform Bankruptcy Code and the desire of the courts to ensure the integrity of their processes,[170] judicial estoppel has become an increasingly popular means of dismissing claims brought by former debtors who failed to disclose those claims as assets in their prior bankruptcy proceedings. There is now a strong consensus among the federal circuits as to the standards to be applied in such cases.[171] By contrast, state application of judicial estoppel post-bankruptcy, though at times roughly following federal law, is subject to varying standards which may lead to divergent results from those of the federal courts and potentially undermine the bankruptcy process.[172]

A. The Circuit Courts' Evolution Toward a Uniform Practice

The federal application of judicial estoppel post-bankruptcy has steadily evolved toward a uniform application of the doctrine.[173] Just ten years ago, few would have predicted such an evolution might occur.[174] Prior to the turn of the century, federal courts largely applied their own versions of judicial estoppel, and one circuit refused to recognize the doctrine

168. *See id.* §§ 1129(a)(11), 1325(a)(6). In addition, the provisions of the Code covering discharge of the bankruptcy case are structured on the presumption that a discharge granting relief from a creditor's claims will occur. *See generally id.* §§ 727(a), 1141(d)(1), 1328(a).

169. *See generally* Taylor v. Freeland & Kronz, 503 U.S. 638, (1992); Stoll v. Gottlieb, 305 U.S. 165 (1938).

170. "The basic principle of [U.S.] bankruptcy is to obtain a discharge from one's creditors in return for all one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh." Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir. 1993).

171. *See generally* Eastman v. Union Pac. R.R., 493 F.3d 1151 (10th Cir. 2007); Barger v. City of Cartersville, 348 F.3d 1289 (11th Cir. 2003); Browning v. Levy, 283 F.3d 761 (6th Cir. 2002); Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002); *In re* Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999).

172. *Compare* Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996) ("[J]udicial estoppel would be inappropriate in any event as there is no evidence that Ryan acted in bad faith."), *with* Ruffin v. Kinder Morgan Liquids Terminal, LLC, No. L-8976-04, 2009 WL 17887, at *7 (N.J. Super. Ct. App. Div. Jan. 2, 2009) ("[A] finding of 'bad faith' is not a requirement under New Jersey law." (quoting City of Atlantic City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68 (N.J. Super. Ct. App. Div. 2006)).

173. *Compare* Brown, Carpenter & Snow, *supra* note 25, at 222–23 (noting that in 2001, no consistent federal standard of judicial estoppel existed), *with infra* note 206 and accompanying text.

174. *Id.* at 222.

altogether.[175] Today, while the federal circuits may otherwise diverge in their general application of judicial estoppel, recognition of the interests protected by federal bankruptcy has led to largely uniform application of the doctrine among the nine circuits that have applied the doctrine in the post-bankruptcy context.[176] The result is a strong protection within federal jurisdictions of the bankruptcy process and its attendant disclosure requirements, while allowing for flexible application of judicial estoppel in unusual circumstances.[177]

1. Evolution of Doctrine

The first federal circuit case considering the doctrine of judicial estoppel to bar prior bankrupts from pursuing claims undisclosed as assets in their bankruptcy proceedings was *Oneida Motor Freight, Inc., v. United Jersey Bank.*[178] In *Oneida*, the Third Circuit affirmed the dismissal of various contract claims by the Oneida Freight trucking company, against United Jersey Bank, due largely to the company's failure to include the claims as assets in its prior Chapter 11 bankruptcy.[179] Though the decision actually rested on the doctrine of equitable estoppel,[180] the court noted judicial estoppel as an alternative available theory.[181] More important to the development of the doctrine itself was the court's focus on the importance of full disclosure under U.S. bankruptcy law.[182]

The *Oneida* decision was the first at the federal circuit level to analyze and integrate the Bankruptcy Code's broad disclosure requirements with judicial estoppel.[183] Among other observations, the *Oneida* court noted that in the context of a U.S. bankruptcy, a debtor is obligated to schedule all his interests and property rights.[184] The court added that the disclosure statement is a source of great reliance for both the creditors and the bankruptcy court.[185] Lastly, given the strong interest in achieving finality

175. *Id.* (citing United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986) ("The Tenth Circuit . . . has rejected the doctrine of judicial estoppel.")).

176. *See infra* note 206 and accompanying text.

177. *See* Sea Trade Co. v. FleetBoston Fin. Corp., No. 03 Civ. 10254, 2008 WL 4129620, at *17 (S.D.N.Y. Sept. 4, 2008) (applying judicial estoppel to bar a suit undisclosed in a prior bankruptcy proceeding in Argentina), *aff'd sub nom.* Adrogué Chico S.A. v. FleetBoston Fin. Corp., 427 F. App'x 43 (2d Cir. 2011).

178. 848 F.2d 414 (3d Cir. 1988).

179. *See id.* at 418.

180. *Id.*

181. *See id.* at 419.

182. *See id.* at 416–18.

183. It can be argued that this decision in effect created the modern day obligation for petitioners in bankruptcy to schedule litigable claims as assets under 11 U.S.C. § 1125's broad disclosure requirements. Prior to *Oneida*, only district and bankruptcy courts had addressed the issue. *See, e.g.*, Monroe Cnty. Oil Co. v. Amoco Oil Co., 75 B.R. 158, 162 (Bankr. S.D. Ind. 1987) (applying equitable estoppel to bar claims undisclosed in bankruptcy in subsequent litigation); *In re* Galerie Des Monnaies of Geneva, Ltd., 55 B.R. 253, 259–60 (Bankr. S.D.N.Y. 1985).

184. *See Oneida*, 848 F.2d at 416–17.

185. *See id.* at 417.

in bankruptcy proceedings,[186] the court argued that permitting the suit to proceed would constitute a "collateral attack" on the bankruptcy court's confirmation of the Chapter 11 proceeding.[187] In this context, the court found that Oneida's failure to disclose the suit, "worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect."[188] Other circuits soon followed suit,[189] but none explored judicial estoppel in the unique context of post-bankruptcy litigation nor offered a clear articulation of its requirements at the circuit level until the Third Circuit addressed the question eight years later in *Ryan Operations v. Santiam-Midwest Lumber Co*.[190]

In *Ryan*, the court drew upon the *Oneida* court's reasoning when it declined to apply judicial estoppel against a debtor corporation that had failed to disclose claims for breach of warranty against a number of creditors in its bankruptcy petition.[191] The *Ryan* decision rested largely on the court finding no bad faith conduct by the debtor.[192] The court found that the debtor innocently failed to disclose assets and liabilities, both of which the debtor sought to correct in amended filings.[193] Additionally, at the time of the attempted modification, the debtor was acting as a debtor-in-possession under Chapter 11, and any recovery under the claim would inure to the benefit of creditors.[194] Thus, the apparently innocent omission of the claim by the debtor[195] and the lack of motive to conceal the claim, given the creditors' participation in any recovery, led the court to conclude application of judicial estoppel was inappropriate under the circumstances.[196] Though the court did not expressly establish a standard by which good faith mistake may be established to prevent application of judicial estoppel, the court's observations would become the backbone of the good-faith mistake standard later announced by the Fifth Circuit.[197]

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186. *See id.* (citing Stoll v. Gottlieb, 305 U.S. 165 (1938), Bohack Corp. v. Iowa Beef Processors, Inc., 715 F.2d 703 (2d Cir. 1983)).

187. *Id.* at 418.

188. *Id.* at 419.

189. *See* McGillvary v. City of Troy, 30 F.3d 134 (6th Cir. 1994) (unpublished table decision); Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc., 989 F.2d 570 (1st Cir. 1993); Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555 (9th Cir. 1992).

190. 81 F.3d 355 (3d Cir. 1996).

191. *See id.* at 365.

192. *See id.* at 363–64.

193. *Id.* at 363 ("Ryan's failure to list the instant claims as contingent assets was offset by its failure to list the corresponding claims of homeowners against Ryan resulting from the allegedly defective wood trim as liabilities.").

194. *Id.*

195. *See id*. at 363.

196. *See id*. (holding that because creditors would receive or bear the same percentage of any gains or losses from continued pursuit of Ryan's claims, Ryan apparently derived and intended no appreciable benefit from failing to disclose the claims).

197. *Compare id*. ("[In *Oneida*, the] combination of knowledge of the claim and motive for concealment in the face of an affirmative duty to disclose gave rise to an inference of intent sufficient to satisfy the requirements of judicial estoppel."), *with In re* Coastal Plains, Inc., 179 F.3d 197, 210 (5th Cir. 1999) ("[I]n considering judicial estoppel *for bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when

In 1999, the Fifth Circuit combined the theories announced in *Oneida* and *Ryan* into a single cohesive theory, articulating a clear standard for judicial estoppel as applied in the post-bankruptcy context.[198] In *In re Coastal Plains, Inc.*,[199] the court applied judicial estoppel to bar a breach of contract suit brought by the former Chief Executive Officer (CEO) of Coastal Plains, Inc., a then-defunct Chapter 11 debtor-corporation.[200] The debtor's CEO had formed a new company and purchased the residual of Coastal Plains' estate from a third party.[201] Though this later purchase by the CEO's new company expressly included the claim, Coastal Plains' schedule of assets had contained no mention of the claim.[202]

In effect, the court adopted a three part standard for application of the doctrine in the context of post-bankruptcy litigation:

> "(1) [Judicial estoppel] may be applied only where the position of the party to be estopped is clearly inconsistent with its previous one";[203] and
>
> "(2) that party must have convinced the court to accept that previous position";[204] and
>
> (3) the parties' inconsistency was not inadvertent; the debtor acts inadvertently if
>
> (a) "the debtor . . . lacks knowledge of the undisclosed claims"; or
>
> (b) "has no motive for their concealment."[205]

This standard, as derived from the initial *Oneida* ruling, including *Coastal Plains*' standard for good-faith mistake, has become the de facto standard for federal courts applying judicial estoppel to claims previously undisclosed in bankruptcy brought by former debtors.[206]

. . . the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment.").

198. *See Coastal Plains, Inc.*, 179 F.3d at 206.

199. 179 F.3d 197 (5th Cir. 1999).

200. *See id.* at 203–04.

201. *See id.* at 203.

202. *Id.*

203. *See id.* at 206.

204. *Id.*

205. *See id*. at 210.

206. *See generally* Moses v. Howard Univ. Hosp., 606 F.3d 789 (D.C. Cir. 2010); Schomaker v. United States, 334 F. App'x 336 (1st Cir. 2009); Eastman v. Union Pac. R.R., 493 F.3d 1151 (10th Cir. 2007); Stallings v. Hussmann Corp., 447 F.3d 1041 (8th Cir. 2006); Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314 (3d Cir. 2003); Browning v. Levy, 283 F.3d 761 (6th Cir. 2002); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001); *see also* Barger v. City of Cartersville, 348 F.3d 1289 (11th Cir. 2003). The Second Circuit recently endorsed the first two elements of the standard in *In re Adelphia Recovery Trust*. *See* 634 F.3d 678, 695–96 (2d Cir. 2011). Prior to *Adelphia Recovery Trust*, the court had endorsed *Coastal Plains* in unpublished opinions. *See, e.g.*, Sea Trade Co. v. FleetBoston Fin. Corp., No. 03 Civ. 10254, 2008 WL 4129620, at *17 (S.D.N.Y. Sept. 4, 2008) (citing *Coastal Plains* favorably and barring a suit undisclosed in prior bankruptcy proceedings where the debtor knew of a potential claim and had a motive to conceal it), *aff'd sub nom.* Adrogué Chico S.A. v. FleetBoston Fin. Corp., 427 F. App'x 43 (2d Cir. 2011); *see also In re* I. Appel Corp., 104 F. App'x 199, 201 (2d Cir. 2004)

Critical to the doctrine's growing acceptance over the ensuing decade was the Supreme Court's reexamination of judicial estoppel in *New Hampshire*.[207] While not a bankruptcy case, the *New Hampshire* decision gave the Supreme Court's imprimatur to the application of judicial estoppel and outlined general principles to guide courts applying the doctrine in the future.[208] *New Hampshire* led the Tenth Circuit to abandon its prior resistance to the doctrine in *Johnson v. Lindon City Corp.*[209] The Tenth Circuit later applied the doctrine to a debtor post-bankruptcy in *Eastman v. Union Pacific Railroad*[210] The *Eastman* court barred the plaintiff from pursuing a personal injury claim he mischaracterized as a workmen's compensation claim in oral representations during his prior bankruptcy.[211] In doing so, the court expressly endorsed the standards for good-faith mistake announced in *Coastal Plains*, noting the doctrine's wide acceptance among various circuits.[212]

The *New Hampshire* ruling also led some courts to incorporate an additional requirement into their judicial estoppel standards that the litigant stand to gain an "unfair advantage" by maintaining the two inconsistent positions.[213] In the post-bankruptcy context, however, the effect of this addition (which appears to be more akin to an equitable estoppel analysis)[214] has largely proven irrelevant given the good-faith mistake requirements outlined *Coastal Plains* as derived from *Ryan*.[215] Indeed, as first discussed in *Ryan*, a court's determination that a litigant lacked "motive to conceal" implies the litigant would gain no unfair advantage as a result of the inconsistent positions.[216]

The Eleventh Circuit for some time maintained a somewhat unique standard of judicial estoppel among the federal circuits.[217] While the standard announced in *Coastal Plains*, not to mention the *New Hampshire* decision itself,[218] is effectively an endorsement of the "judicial acceptance"

(distinguishing various circuits in declining to apply judicial estoppel where a debtor's prior disclosures sufficiently informed the bankruptcy court of potential claims).

207. *See* 532 U.S. 742 (2001); *see also supra* notes 29–33 and accompanying text.

208. *See Eastman*, 493 F.3d at 1156 n.4.

209. 405 F.3d 1065, 1068–69 (10th Cir. 2005).

210. *See Eastman*, 493 F.3d at 1156.

211. *See id.* at 1153–55.

212. *See id.* at 1157–58.

213. *See In re* Adelphia Recovery Trust, 634 F.3d 678, 696 (2d Cir. 2011); Moses v. Howard Univ. Hosp., 606 F.3d 789, 798 (D.C. Cir. 2010) (citing New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001) (requiring courts to answer before applying judicial estoppel, inter alia: "Will the party seeking to assert an inconsistent position derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped?")).

214. *See* Lowery v. Stovall, 92 F.3d 219, 223 n.3 (4th Cir. 1996).

215. 179 F.3d 197, 210 (5th Cir. 1999).

216. *See* Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 363 (3d Cir. 1996) (distinguishing *Oneida* from the instant case where the litigant lacked "motive for concealment" since he would have gained no advantage through maintenance of the suit).

217. *Compare* Barger v. City of Cartersville, 348 F.3d 1289, 1295 (11th Cir. 2003), *with Coastal Plains*, 179 F.3d at 210.

218. *See supra* note 206 and accompanying text.

version of judicial estoppel, until recently, the Eleventh Circuit judicial estoppel standard was structured as a "sanctity of the oath" standard.[219] Prior to *New Hampshire*, the Eleventh Circuit required that the inconsistent party's prior position be both made under oath and calculated to make a mockery of the judicial system.[220] Following *New Hampshire*, the Eleventh Circuit began to gradually integrate the more common judicial acceptance standard,[221] eventually applying the doctrine without consideration of the oath requirement.[222] This shift is more subtle than substantive, since in the context of post-bankruptcy petitions, any divergence between the two formulations proves largely irrelevant.[223]

2. Federal Application

Given the requirements imposed by the Bankruptcy Code, failure to disclose assets or claims of which the debtor has knowledge is always a violation of the debtor's "oath."[224] Courts have noted that the discrepancy between a debtor's sworn disclosures or representations and a later position may serve as evidence that the individual's two positions are "intentionally inconsistent."[225] Additionally, the level of judicial acceptance required to justify application of the doctrine is generally fairly low.[226] While a court may not apply judicial estoppel if the prior bankruptcy proceeding was dismissed immediately upon petition,[227] a court's de minimis acceptance of the debtor's asset representations may be sufficient to justify estoppel in a subsequent suit.[228] Thus, most undisclosed suits brought subsequent to a successful bankruptcy petition will satisfy one standard or the other.

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219. *See Barger*, 348 F.3d at 1293–94 ("The applicability of judicial estoppel largely turns on two factors. First, a party's allegedly inconsistent positions must have been made *under oath* in a prior proceeding. Second, the inconsistencies must be shown to have been calculated to make a mockery of the judicial system." (citations and internal quotation marks omitted)).

220. *See* Taylor v. Food World, Inc., 133 F.3d 1419, 1422 (11th Cir. 1998) ("Judicial estoppel 'is applied to the calculated assertion of divergent *sworn* positions . . . [and] is designed to prevent parties from making a *mockery* of justice by inconsistent pleadings.'" (quoting McKinnon v. Blue Cross & Blue Shield of Ala., 935 F.2d 1187, 1192 (11th Cir. 1991) (emphasis added))).

221. *See* Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285–86 (11th Cir. 2002).

222. *See, e.g.*, Jaffe v. Bank of Am., N.A., 395 F. App'x 583 (11th Cir. 2010); Fetterhoff v. Liberty Life Assurance Co., 282 F. App'x 740 (11th Cir. 2008).

223. *See Burnes*, 291 F.3d at 1285–86 (finding the Eleventh Circuit standard consistent with the *New Hampshire* standard).

224. *See supra* note 162 and accompanying text.

225. *See* Schomaker v. United States, 334 F. App'x 336, 340 (1st Cir. 2009).

226. *See* White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 478–79 (6th Cir. 2010) (applying judicial estoppel where prior bankruptcy court adopted inconsistent position as a preliminary matter).

227. *See* Stallings v. Hussmann Corp., 447 F.3d 1041, 1049 (8th Cir. 2006) (finding no judicial acceptance a where former bankruptcy proceeding was dismissed upon a motion by the trustee reviewing the filing).

228. *See White*, 617 F.3d at 476 (noting that in the bankruptcy context, judicial estoppel is applicable "where the prior court adopted the contrary position . . . 'as a preliminary matter'" (quoting Browning v. Levy, 283 F.3d 761, 775–76 (6th Cir. 2002))).

The ease with which judicial estoppel may be applied should not suggest that the federal courts are inflexible in their application of the doctrine.[229] The federal circuits often note that, as an equitable doctrine, application is at the discretion of the court,[230] and that the standards applied are not to be enforced mechanistically.[231] To that end, the courts often decline to estop a litigant whose filings may have omitted potential future claims, but whose other representations to the court provide sufficient notice of potential future suits.[232] Generally, where a debtor did not list a potential claim in his schedule of assets but disclosed the contemplated suit in his statement of financial affairs, the court will find such disclosure sufficient to defeat judicial estoppel.[233] The same is true where oral representations made by the debtor to the trustee or creditors provide notice of future claims.[234] Where a debtor reveals potential claims but mischaracterizes them and their worth, however, the courts may still apply the doctrine of judicial estoppel.[235] Similarly, boilerplate disclaimers hinting at future litigation but providing no information about the basis or value of any future recovery are also inadequate.[236] In short, courts appear most inclined to apply the doctrine's harsh effects only where the debtor's actions belie a clear intent to defraud the courts.[237]

This inclination extends to efforts by the debtor to amend his bankruptcy filings or reopen previously discharged bankruptcy cases to disclose the claims.[238] Where the debtor's petition to amend or reopen his bankruptcy case is only filed in response to an opponent's efforts to invoke judicial estoppel in the second suit, the courts are not inclined to believe the debtor's initial omission was inadvertent.[239]

Another circumstance in which the federal standard has proven flexible is in its accommodation of foreign bankruptcy regimes.[240] In *Sea Trade Co. v. FleetBoston Financial Corp.*,[241] the district court engaged in a thorough review of Argentine bankruptcy law in applying judicial estoppel to bar a

229. *See* New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (finding that there is no clear set of rules for the application of judicial estoppel).

230. *Id.*

231. *See id.*; *White*, 617 F.3d at 476.

232. *In re* Kane, 628 F.3d 631, 639–40 (3d Cir. 2010); *In re* I. Appel Corp., 104 F. App'x 199, 201 (2d Cir. 2004).

233. *See Kane*, 628 F.3d at 640 n.4.

234. *See id.*

235. Eastman v. Union Pac. R.R., 493 F.3d 1151, 1158–59 (10th Cir. 2007).

236. *In re* United Operating, LLC, 540 F.3d 351, 355–56 (5th Cir. 2008) (holding that a blanket reservation of "any and all claims" did not provide proper notice to creditors of the claims' value).

237. Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996) ("Because of the harsh results attendant with precluding a party from asserting a position that would normally be available to the party, judicial estoppel must be applied with caution.").

238. *See* Higgins v. Potter, 416 F. App'x 731 (10th Cir. 2011).

239. *See id.* at 732.

240. *See* Sea Trade Co. v. FleetBoston Fin. Corp., No. 03 Civ. 10254, 2008 WL 4129620, at *17 (S.D.N.Y. Sept. 4, 2008).

241. No. 03 Civ. 10254, 2008 WL 4129620 (S.D.N.Y. Sept. 4, 2008).

real estate development company from pursuing a breach of contract claim it had not disclosed in its prior Argentine bankruptcy proceedings.[242] The court's finding, that Argentine bankruptcy law imposed the same disclosure requirements on debtors as the U.S. Bankruptcy Code, was essential to its holding.[243] Conversely, implicit in the *Sea Trade* reasoning is the recognition that where a foreign bankruptcy regime does not impose such stringent disclosure requirements on bankruptcy petitioners, judicial estoppel would not be appropriate.[244] In such a situation, barring other evidence, the debtor's positions would not be inconsistent.[245]

In effect, the *Sea Trade* decision illustrates the maturity of the federal standard of judicial estoppel post-bankruptcy. While the consensus among the circuits derives from the common recognition of the importance of U.S. bankruptcy's integrity,[246] the federal courts' experience with the doctrine allowed for its nuanced application in the context of foreign law recognition. Not surprisingly, the *Sea Trade* court drew from several sister-circuit opinions, including *Oneida* and *Coastal Plains*, in reaching its decision.[247] Thus, the once "discrete" doctrine of judicial estoppel, as broadly employed across the federal courts, has become a powerful and effective tool with which to guard the integrity of bankruptcy proceedings.

B. The States' Idiosyncratic Applications of the Doctrine

Unlike the federal courts, where a general consensus has emerged with respect to judicial estoppel in the post-bankruptcy context, application of the doctrine in the state courts remains varied. Though the *New Hampshire* ruling has effectively resolved the question of the doctrine's validity,[248] a number of idiosyncratic practices and exceptions to judicial estoppel exist among the states.[249] A few of these practices are wholly rejected by all federal jurisdictions.[250] Other practices are based on imprecise application of federal precedent and subsequent modification within the state.[251] Consequently, the largely uniform federal application of judicial estoppel in

242. *Id.*
243. *Id.*
244. *Id.* at *6 ("To decide whether Adrogué Chico's position in the Argentine bankruptcy proceeding was inconsistent with its present claim, the Court must look to the applicable provisions of the [Argentine Bankruptcy Law (ABL)]. The Court must determine whether, under the ABL, Adrogué Chico was required to make the disclosures identified by the Bank and, if the disclosures were in fact required, whether their omission in the Argentine proceeding is fundamentally inconsistent with Adrogué Chico's pursuit of its claim in this Court.").
245. *Id.* at *6–7.
246. *See supra* note 206 and accompanying text.
247. *See Sea Trade*, 2008 WL 4129620, at *12.
248. Prince Constr. Co., v. D.C. Contract Appeals Bd., 892 A.2d 380, 386 n.7 (D.C. 2006) (describing the District of Columbia's gradual acceptance of the doctrine and the *New Hampshire* decision's role in that process).
249. *See infra* notes 252–86 and accompanying text.
250. *See infra* note 283 and accompanying text.
251. *See infra* notes 282–86 and accompanying text.

the post-bankruptcy practice is at times undermined by states' novel interpretations of this discrete doctrine.

1. State Practices

New York courts' experiences with judicial estoppel are illustrative of common divergences made by states. In some instances, courts appear to be simply unfamiliar with the doctrine of judicial estoppel and bankruptcy's disclosure requirements.[252] For example, in *Rodriguez v. Koval, Rejtig & Dean, PLLC*,[253] a New York trial court justice denied summary judgment to the defendant law firm, which was accused of failing to commence a personal injury action on behalf of the plaintiff.[254] The firm asserted as a defense that its decision not to file the action stemmed from the plaintiff's failure to include his personal injury action in his prior bankruptcy, which had been fully discharged.[255] The court, though noting the preclusive effects of judicial estoppel,[256] declined to apply the doctrine.[257] Instead, the court found, contrary to established federal bankruptcy practice, that because the claim had not been commenced, the plaintiff was under no duty to include the claim in his schedule of assets.[258]

The *Rodriguez* opinion also highlighted another common misconception in the state courts: the conflation of the doctrine of judicial estoppel and post-bankruptcy standing.[259] Indeed, the practice of barring claims brought by debtors post-bankruptcy for lack of standing[260] has often colored application of judicial estoppel.[261] Given their interrelatedness, the two

252. *See* Rodriguez v. Koval, Rejtig & Dean, PLLC, 889 N.Y.S.2d 884 (Sup. Ct. 2009) (unpublished table decision), 2009 WL 1587186, at *2 (May 13, 2009). *See generally* Bunnell v. Lewis, No. 05-92-02558-CV, 1993 WL 290781 (Tex. App. July 27, 1993) (finding debtor not required to disclose future suit for value of partnership interest).

253. 889 N.Y.S.2d 884 (Sup. Ct. 2009) (unpublished table decision), 2009 WL 1587186 (May 13, 2009).

254. *See id.* at *2.

255. *Id.* at *1.

256. *Id.*

257. *Id.* at *2 ("Here, the defendants have not demonstrated, as a matter of law, that the plaintiff, in failing to list the personal injury action as an asset in his bankruptcy proceeding has taken an 'inconsistent' position, or is playing fast and loose with the court and therefore, is precluded from pursuing the instant action for legal malpractice.").

258. *Compare id.* ("[I]t is axiomatic that plaintiff did not list the personal injury action as an asset in his bankruptcy proceeding as the action was not commenced."), *with supra* notes 128–29 and accompanying text.

259. The *Rodriguez* court relied upon *Pinto v. Ancona*, 692 N.Y.S.2d 128 (App. Div. 1999), to suggest that by reopening his bankruptcy case, the plaintiff may be permitted to avoid application of judicial estoppel. *See Rodriguez*, 2009 WL 1587186, at *2. The *Ancona* decision, however, does not address the question of judicial estoppel at all and is instead a ruling on debtor standing. *See Ancona*, 692 N.Y.S.2d 128.

260. *See supra* notes 138–43 and accompanying text.

261. *Compare* Kenney v. Nat'l Fuel Gas Distrib. Corp., 8 A.D.3d 989, 989 (N.Y. App. Div. 2004) (denying application of judicial estoppel to an undisclosed personal injury action because a Chapter 13 debtor retains standing to bring suit), *with* Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1276 (11th Cir. 2010) (applying judicial estoppel to a Chapter 13 debtor).

questions are often addressed simultaneously.[262] Federal courts, however, have routinely rejected the premise that a former debtor's standing to bring a claim is a bar to applicability of judicial estoppel.[263]

Similarly, federal courts refuse to impute any curative effect to a debtor's efforts to reopen a bankruptcy case.[264] Some, but not all, state courts have also adopted this position.[265] In New York, however, the curative effect of reopening a bankruptcy case developed out of a line of cases demonstrating a common error in state court application of judicial estoppel post-bankruptcy.[266] In *Koch v. National Basketball Ass'n*,[267] the court denied summary judgment to defendants seeking to estop plaintiff from pursuing a suit for photographic slides not disclosed in the plaintiff's prior bankruptcy.[268] The court held that, because the reopening of the bankruptcy estate restored the debtor's rights under the Code, the reopening of the case had the effect of nullifying any "final determination . . . endorsing the party's inconsistent position" upon which judicial estoppel could be based.[269] While federal law makes no exception to the judicial estoppel of a debtor where he reopens a case,[270] the reopening of a bankruptcy case continues to nullify the application of judicial estoppel under New York state law.[271]

Like the curative effects of reopening, New York's requirement of a "final determination" is also at odds with both the predominant federal and other states' standards of acceptance.[272] The standard as applied in New

262. *See* B.N. Realty Assocs. v. Lichtenstein, 801 N.Y.S.2d 271 (App. Div. 2005); Best v. Metlife Auto & Home Ins. Co., 793 N.Y.S.2d 682 (Sup. Ct. 2004).

263. *See* Moses v. Howard Univ. Hosp., 606 F.3d 789, 791 (D.C. Cir. 2010).

264. *See In re* Superior Crewboats, Inc., 374 F.3d 330, 335 (5th Cir. 2004); Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1288 (11th Cir. 2002). *But see* Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380, 388 (5th Cir. 2008) (permitting a trustee to pursue claims on behalf of the bankruptcy estate although the debtor might indirectly benefit).

265. *See, e.g.*, Skinner v. Holgate, 173 P.3d 300 (Wash. Ct. App. 2007).

266. *See infra* notes 273–86 and accompanying text.

267. 666 N.Y.S.2d 630 (App. Div. 1997).

268. *See id.* at 630.

269. *See id.*

270. Federal courts will allow a claim to be pursued by a bankruptcy trustee on behalf of creditors, but the debtor will otherwise be judicially estopped from pursuing the claim. *See, e.g.*, Reed v. City of Arlington, 650 F.3d 571 (5th Cir. 2011); Eastman v. Union Pac. R.R., 493 F.3d 1151 (10th Cir. 2007); Biesek v. Soo Line R.R., 440 F.3d 410 (7th Cir. 2006); Parker v. Wendy's Int'l, Inc., 365 F.3d 1268 (11th Cir. 2004).

271. *See also In re* Miller, 767 N.Y.S.2d 729, 729 (App. Div. 2003) (citing *Koch* favorably).

272. *See* White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 479 (6th Cir. 2010) ("[W]hen a bankruptcy court—which must protect the interests of all creditors—approves a payment from the bankruptcy estate on the basis of a party's assertion of a given position, that, in our view, is sufficient judicial acceptance to estop the party from later advancing an inconsistent position." (citations omitted)); Gottlieb v. Kest, 46 Cal. Rptr. 3d 7, 19 (Dist. Ct. App. 2006) ("In California, courts consider . . . whether [inter alia] . . . '(1) the same party has taken two positions . . . (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); . . . .'" (citation omitted)).

York is derived in part from both state and federal law.[273] The federal case upon which the standard is based, *Bates v. Long Island Railroad*,[274] established that judicial endorsement of a settlement by the parties in a prior litigation does not demonstrate sufficient judicial acceptance to support the application of judicial estoppel.[275] While New York courts have fashioned their "final determination" standard from that ruling, the *Bates* court has since supported application of judicial estoppel in circumstances involving less than a complete discharge of the bankruptcy estate.[276]

New York's idiosyncratic application of judicial estoppel typifies the legal divergence that emerges as state court jurisprudence, though perhaps founded in part on federal law, departs steadily from current federal practice, though there are other examples.[277] In *City of Atlantic City v. California Avenue Ventures, LLC*,[278] the New Jersey Superior Court Appellate Division upheld a New Jersey tax court's application of judicial estoppel to bar Atlantic City from appealing the tax-assessment value of six parking lots.[279] The court in *Atlantic City* cited *Alternative Systems Concepts, Inc. v. Synopsys, Inc*.[280] as persuasive authority, claiming that in *Alternative System Concepts*, the First Circuit did not require a showing of bad faith to apply judicial estoppel.[281] This standard was later applied in the post-bankruptcy context *in Ruffin v. Kinder Morgan Liquids Terminal, LLC*,[282] which cited *Atlantic City* for the proposition that "[a] finding of 'bad faith' is not a requirement under New Jersey law."[283] Ironically, the court in *Alternative System Concepts*, upon which *Atlantic City* and by extension *Ruffin* relied, in effect required a showing of bad faith when it noted the general inapplicability of judicial estoppel in circumstances of good-faith mistake,[284] but held that the plaintiff "[could not] colorably lay claim to the exception."[285] Thus, a federal ruling was imputed to justify a

273. The *Koch* "final determination" standard was derived from *Manhattan Avenue Development Corp. v. Meit*, 637 N.Y.S.2d 134 (App. Div. 1996), in which the court cited both federal and state precedent for the proposition that a settlement does not constitute a "judicial endorsement"" of a party's claims nor therefore success necessary to apply judicial estoppel. *See id.* at 134 (citing Bates v. Long Island R.R., 997 F.2d 1028, 1038 (2d Cir. 1993)), and Chem. Bank v. Aetna Ins. Co., 417 N.Y.S.2d 382, 382 (Sup. Ct. 1979)).

274. 997 F.2d 1028 (2d Cir. 1993).

275. *See id.* at 1038.

276. *See In re* Adelphia Recovery Trust, 634 F.3d 678, 697 (2d Cir. 2011) (finding that a court ordered sale of property was sufficient acceptance to apply judicial estoppel).

277. *See infra* notes 278–86 and accompanying text.

278. 23 N.J. Tax 62 (Super. Ct. App. Div. 2006).

279. *Id.* at 69.

280. 374 F.3d 23 (1st Cir. 2004).

281. *See Atlantic City*, 23 N.J. Tax at 67–68.

282. No. L-8976-04, 2009 WL 17887 (N.J. Super. Ct. App. Div. Jan. 2, 2009).

283. *Id*. at *7.

284. *Alt. Sys. Concepts, Inc.*, 374 F.3d at 35 ("[The] exception may be available if the responsible party shows that the new, inconsistent position is the product of information neither known nor readily available to it at the time the initial position was taken.").

285. *Id.*

state legal standard at odds with every federal jurisdiction,[286] not to mention the federal case upon which the legal reasoning relied.[287]

2. *Lex Fori*

The frequently cited justification for states' continued application of their own judicial estoppel standards is that the purpose of the doctrine is to protect the integrity of the tribunal in which the inconsistent position arises.[288] This rule of *lex fori*,[289] or the "law of the tribunal,"[290] in the application of judicial estoppel is another area where state practices vary.[291] Courts applying the *lex fori* standard, argue that judicial estoppel is intended to guard against inconsistent positions, and the forum in which the inconsistency arises is best suited to address the issue.[292] As a general rule, this application of state standards in applying judicial estoppel conforms to the prevailing practice in federal courts.[293] In the unique context of post-bankruptcy litigation, however, the *lex fori* standard, besides leading to the divergent practices noted above,[294] fails to acknowledge the significant federal interests inherent in bankruptcy that merit application of federal judicial estoppel standards to former bankruptcy petitioners.

III. *STOLL* AND *SEMTEK*: INSIGHT FOR THE STATES

What preclusive effect will be given to prior federal bankruptcy proceedings in state courts is not a novel question.[295] The Supreme Court examined the importance of state recognition of federal bankruptcy proceedings more than seventy years ago.[296] Similarly, the Court has opined on when states may be obligated to recognize the cooptation of their

286. *Compare Ruffin*, 2009 WL 17887, at *7, *and Atlantic City*, 23 N.J. Tax at 68–69, *with supra* note 206 and accompanying text.

287. *Compare Alt. Sys. Concepts, Inc.*, 374 F.3d at 35, *with Ruffin*, 2009 WL 17887, at *7, *and Atlantic City*, 23 N.J. Tax at 68–69.

288. State, Dep't of Law & Pub. Safety, Div. of Gaming Enforcement v. Gonzalez, 641 A.2d 1060, 1070–71 (N.J. Super. Ct. App. Div. 1994).

289. Middleton v. Caterpillar Indus., Inc., 979 So.2d 53, 60 (Ala. 2007).

290. Anderson & Holober, *supra* note 39, at 613.

291. *Compare* Heartland Holdings, Inc. v. U.S. Trust Co. of Tex. N.A., 316 S.W.3d 1 (Tex. App. 2010) (applying the rule of judicial estoppel applicable in the jurisdiction of the prior proceeding), *with Gonzalez*, 641 A.2d at 1070–71 (applying the *lex fori* standard).

292. *See Gonzalez*, 641 A.2d at 1070–71.

293. Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 603–04 (9th Cir. 1996); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 n.4 (6th Cir. 1982); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 n.4 (4th Cir. 1982); Rand G. Boyers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244, 1269 (1986) (noting that the "current tide" in federal jurisprudence was flowing toward application of federal rules in diversity cases).

294. *See supra* notes 273–86 and accompanying text.

295. *See generally* Stoll v. Gottlieb, 305 U.S. 165 (1938) (requiring states to recognize the res judicata effects of a bankruptcy confirmation order).

296. *Id.*

own rules of preclusion in giving effect to federal judgments.[297] Consequently, in the unique context of post-bankruptcy litigation, there is strong precedent requiring states to adopt and apply the standards of judicial estoppel common in federal courts.

A. Stoll v. Gottlieb*: The Effect of Bankruptcy Proceedings*

The clearest articulation of the preclusive effect states must give federal bankruptcy adjudications was made in *Stoll v. Gottlieb*.[298] In *Stoll*, the Supreme Court reversed the Supreme Court of Illinois, holding that a federal bankruptcy court's confirmation of a debtor's reorganization plan and extinguishment of various guarantees constituted a judgment that could not later be challenged by the former holder of the guarantees in state court.[299] Though the principal inquiry in *Stoll* was whether the bankruptcy court's determination of jurisdiction over the parties must be given res judicata effect by the state court,[300] the court acknowledged that, "where the judgment or decree of the federal court determines a right under a federal statute . . . res judicata is to be given the federal order."[301]

Stoll thus highlights an important consideration that should guide states in applying judicial estoppel post-bankruptcy. *Stoll* makes clear that the preclusive effects of federal bankruptcy proceedings are not dependent upon a final discharge of the debtor from bankruptcy. In *Stoll* itself, preclusive effect was afforded the bankruptcy court's confirmation of a reorganization plan.[302] The language in *Stoll*, moreover, suggested that any order issued by the bankruptcy court which addressed the rights of the parties in bankruptcy was entitled to preclusive effect.[303] Thus, while not specifically addressing application of judicial estoppel, *Stoll* implied that the preclusive effects of federal bankruptcy proceedings bind the states.[304] This includes the effects of orders or decrees amounting to less than full adjudications.[305]

B. Semtek International Inc. v. Lockheed Martin Corp.*: The Choice of Law*

Which jurisidiction's rule of preclusion should apply in recognizing the effect of the bankruptcy proceedings? Here, *Semtek International Inc. v.*

297. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) (holding that, where an interest in the integrity of the federal judiciary is at stake, states may need to defer to the federal rule of preclusion).

298. 305 U.S. 165 (1938).

299. *See id.* at 177.

300. *See id.* at 171–72.

301. *See id.* at 170–71 (emphasis omitted).

302. *Id.* at 171–72.

303. *Id.*

304. *Id.* (applying res judicata to preclude a state claim due to a prior federal bankruptcy court's plan confirmation).

305. *Id.* (affording preclusive effect to a bankruptcy plan confirmation prior to full a discharge of the bankruptcy).

Lockheed Martin Corp.[306] is instructive. In *Semtek*, the Court addressed the issue of states' recognition of prior federal judgments where the prior federal court was sitting in diversity.[307] The court held that, where state law claims were adjudicated in federal court, subsequent court proceedings must apply the rules of preclusion required by federal common law.[308] Under federal common law, the court would apply the laws of the state in which the federal court sat.[309] *Semtek* premised this holding on the lack of a need for a uniform national rule because state, rather than federal, substantive law was at issue[310] and on the desire to discourage forum shopping between state and federal courts.[311] The court noted, however, that reference to state law would be inappropriate in some circumstances.[312] In particular, the *Semtek* court suggested that a federal rule should apply where state laws were incompatible with a federal interest—for example, when "federal courts' interest in the integrity of their own processes might justify a . . . federal rule."[313]

The logic in both *Stoll* and *Semtek* thus support nationwide application of the federal rule of judicial estoppel in the post-bankruptcy context. Because debtors' disclosure requirements in federal bankruptcy proceedings are defined by federal law, it is arguable that a bankruptcy court's acceptance of those disclosures and any attendant legal implications constitute federal questions.[314] Under *Stoll* and *Semtek*, courts must afford these decisions preclusive effect[315] as defined by federal law, in this case the federal rules of judicial estoppel, which the states must follow.[316]

Alternatively, where a debtor's nondisclosed causes of action arise under state law, affirmation of the existence or absence of such claims' could be characterized as a question of state law.[317] Under *Semtek*, a state's subsequent evaluation of a federal bankruptcy court order acknowledging the existence or lack of a state law claim would normally involve a reference to federal common law under which the court would apply the law of the state in which the federal court sat.[318] As *Semtek* noted, however, such reference to state law would not be warranted in circumstances where a widely recognized safeguard of federal courts'

306. 531 U.S. 497 (2001).
307. *See id.*
308. *See id.* at 507–08 (citing Dupasseur v. Rochereau, 88 U.S. 130 (1874)).
309. *See id.*
310. *See id.* at 508.
311. *See id.*
312. *See id.* at 509.
313. *Id.*
314. *See* 11 U.S.C. § 521 (2006); *see also In re* Cool Fuel, Inc., 210 F.3d 999, 1006 (9th Cir. 2000) ("Even when a cause of action is based on state law, 'the question of when a [claim] arises under the bankruptcy code is governed by federal law.'" (citations omitted)); *see also* Gottlieb v. Kest, 46 Cal. Rptr. 3d 7, 21 (Dist. Ct. App. 2006).
315. *See* Stoll v. Gottlieb, 305 U.S. 165, 171–72 (1938).
316. *See Semtek*, 531 U.S. at 507–08.
317. *Accord Kest*, 46 Cal. Rptr. 3d at 21–22.
318. *See Semtek*, 531 U.S. at 507–08.

integrity is implicated.[319] Given that judicial estoppel has become one of the principal means of protecting the integrity of the bankruptcy process,[320] federal judicial estoppel would again appear to be the appropriate standard for subsequent state courts to apply.

The court's reasoning in *Semtek* also makes a strong case for uniform rules of preclusion following bankruptcy. *Semtek* sought to prevent federal versus state court forum shopping and inequitable administration of laws by subjecting litigants to the same preclusive standards whether or not suit was brought in federal or state court.[321] There is no risk of federal versus state court forum shopping in bankruptcy, however, since all bankruptcy courts are federal.[322] Because of state divergence in the practice of judicial estoppel, however, clever bankrupts could still engage in a kind of forum shopping by bringing a post-bankruptcy suit for undisclosed claims in states more reluctant to apply judicial estoppel.[323] In effect, litigants could undermine the integrity of the bankruptcy process by forum shopping, engaging in exactly the fast and loose behavior that judicial estoppel and *Semtek* seek to avoid.[324] Conversely, states enforcing judicial estoppel more harshly than federal courts would penalize debtors whose bankruptcy petitions were made in reliance on federal standards.[325] In short, only through application of a uniform federal rule of judicial estoppel will the U.S. bankruptcy regime retain the balance of integrity and flexibility federal courts have sought to preserve.

IV. ADOPTING THE FEDERAL MODEL

There is a practical and legal need for a nationwide standard for judicial estoppel post-bankruptcy. Though considered a "discrete doctrine" eleven years ago,[326] judicial estoppel is now widely recognized throughout the federal judiciary and the states. At the same time, the U.S. courts are beset with growing numbers of personal and commercial bankruptcy filings.[327] Following the 2008 financial crisis, U.S. courts saw an average of 1.492 million filings between 2009 and 2011, a 10 percent increase over the

319. *Id.* at 508–09.

320. *See supra* note 206 and accompanying text.

321. *See Semtek*, 531 U.S. at 508–09.

322. *See* 28 U.S.C. § 1334 (2006) (conferring original jurisdiction for bankruptcy proceedings on the district courts).

323. For example, debtors in New York may participate in the recovery of valuable claims so long as their trustee is willing to reopen the bankruptcy case on behalf of their creditors. *See supra* notes 267–69 and accompanying text.

324. *Semtek*, 531 U.S. at 508.

325. For example, defendants in New Jersey appear to have absolute immunity from suits inadvertently omitted in a plaintiff's prior bankruptcy. *See supra* notes 282–83 and accompanying text.

326. New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

327. *Annual Business and Non-business Filings by Year (1980–2011)*, AM. BANKR. INST., http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=63164 (last visited Nov. 16, 2012).

previous decade's annual average (1.353 million).[328] Given this economic climate, both state and federal courts will likely grapple with the effects of prior bankruptcy proceedings on subsequent litigation for some time, and judicial estoppel will undoubtedly play a significant role. To best ensure the integrity of the bankruptcy process, however, the application of the doctrine must be uniform.

This need for a nationally uniform body of laws addressing the legal impacts of debtor insolvency existed even in the United States' infancy as a nation.[329] Congress's enactment of one authoritative Bankruptcy Code to which states' laws must yield is a reflection of that need.[330] Given the Code's structure and conceptual scheme—the requirement of full disclosure of assets,[331] the debtor's obligation of truthfulness,[332] and the all-encompassing nature of the bankruptcy estate[333]—the system adopted lends itself to protection through application of the doctrine of judicial estoppel. While some states have recognized this important feature,[334] others perpetuate idiosyncratic applications of the doctrine that serve to undermine, rather than reinforce, the federal bankruptcy regime.[335]

Unfortunately, the current jurisprudence surrounding the doctrine is ill-suited to achieve the uniformity bankruptcy requires. Courts, both federal and state, focused on protecting the integrity of their own forum, have perpetuated the *lex fori* standard in their choice of law decisions involving judicial estoppel.[336] The divergent practices seen in the states[337] are thus not surprising. This variance may be warranted in the application of judicial estoppel outside of the post-bankruptcy context. The growing consensus among federal courts applying judicial estoppel where bankruptcy's unique features are implicated,[338] however, suggests that states should recognize the doctrine's special role in backstopping the decisions of federal bankruptcy courts.

The impact of bankruptcy court decisions, moreover, given their scope[339] and their cooptation of state property law,[340] represents an application of federal power *sui generis*. The Supreme Court's recognition of bankruptcy's special character in *Stoll*, laid the groundwork for a federal rule of preclusion post-bankruptcy based on judicial estoppel. *Stoll* mandated that states recognize the authoritative effect of bankruptcy court

328. *Id.*
329. *See supra* note 84 and accompanying text.
330. *See supra* notes 84–86 and accompanying text.
331. *See* 11 U.S.C. § 521 (2006); *see also supra* notes 123–29.
332. *See supra* notes 160–62 and accompanying text.
333. *See supra* notes 138–40 and accompanying text.
334. *See* Conrad v. Bank of Am., 53 Cal. Rptr. 2d 336, 346–47 (Dist. Ct. App. 1996).
335. *See generally supra* Part II.B.
336. *See supra* notes 288–93 and accompanying text.
337. *See generally supra* Part II.B.
338. *See generally supra* Part II.A.
339. *See supra* notes 138–40 and accompanying text.
340. *See supra* notes 92–99 and accompanying text.

orders and decisions even before full discharge of the bankruptcy estate.[341] The ruling implies that, in bankruptcy, it is the process of administrating the estate and the attendant judicial decisions shaping that administration that are the adjudicative elements to which future courts must yield, not simply the final discharge of the case. Judicial estoppel, with its requirement of judicial acceptance, preserves the integrity of that process by binding debtors to the representations made in seeking bankruptcy's protections.

As it has come to be applied by the federal courts, judicial estoppel plays an integral role in courts' defense of the bankruptcy process distinct from judicial estoppel's traditional role.[342] Given the extensive asset disclosure obligations in federal bankruptcy,[343] a debtor's failure to report the existence of known potential claims in which he retains a property interest is inherently inconsistent with the future prosecution of those claims. By removing any incentive for the debtor to conceal these claims, judicial estoppel ensures the bankruptcy court and the debtor's creditors are informed of potentially valuable assets critical to the liquidation or reorganization of the estate. Thus, unlike traditional applications of judicial estoppel, in the post-bankruptcy context, the doctrine's protective effects preserve both the integrity of the prior bankruptcy proceeding and any future litigation. This relationship between judicial estoppel and federal bankruptcy constitutes a unique federal application of the doctrine that should be afforded appropriate recognition by the states under *Semtek*.[344]

Other substantial reasons exist for the states to apply federal standards in the post-bankruptcy context as well. For one, federal application of the doctrine in the post-bankruptcy context is now well-developed.[345] All of the federal circuits now have case law addressing the problem of a debtor's nondisclosure in a prior bankruptcy.[346] Federal courts have also examined how a prior bankruptcy's Chapter may affect application of the doctrine and have applied the doctrine against former debtors following Chapter 7, 11, and 13 bankruptcies.[347] Furthermore, the federal courts have addressed the question of judicial estoppel against former debtors at various stages of the bankruptcy process including pre- and post-liquidation and pre- and post-confirmation of reorganization plans as well as post-discharge. The courts have also addressed the application of the doctrine where the debtor has sought to reopen his bankruptcy proceedings and what effect, if any, reopening will have on application of judicial estoppel.[348]

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341. *See supra* notes 298–305 and accompanying text.

342. *Cf.* Brown, Carpenter & Snow, *supra* note 25, at 217–18 (suggesting that the application of the relatively novel doctrine of judicial estoppel may impair the function of bankruptcy courts in the future).

343. *See supra* notes 123–29 and accompanying text.

344. *See supra* notes 313–24 and accompanying text.

345. *See generally supra* Part II.A.

346. *See generally supra* Part II.A.

347. *See generally supra* Part II.A.

348. *See supra* note 264 and accompanying text.

Federal courts' application of the doctrine developed to encompass exceptions to the doctrine. The federal circuits are nearly unanimous in their adoption of a standard for good-faith mistake, or inadvertence focused on the debtor's knowledge of, and motive for, concealment of undisclosed claims.[349] The *Coastal Plains* standard, along with the courts' flexible standard of adequate disclosure,[350] strikes an appropriate balance in safeguarding bankruptcy's disclosure requirements while ensuring that only truly duplicitous conduct by debtors is punished. Furthermore, federal courts' limitation of the doctrine's application to debtors themselves[351] ensures that the doctrine does not serve to punish trustees seeking to resolve the claims for the benefit of the debtors' creditors and exemplifies the doctrine's flexibility.

The federal courts have also demonstrated the ability to adopt the doctrine to encompass new scenarios likely to arise in the future—in particular the question of foreign bankruptcies' effects.[352] Congress, recognizing the growing need for standards addressing cross-border bankruptcy proceedings, passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[353] creating the Chapter 15 foreign bankruptcy recognition provisions.[354] At the same time, foreign nations looking to reform and modernize their commercial insolvency laws, increasingly adopt the U.S. Bankruptcy Code, in particular Chapter 11.[355] Federal courts have begun to grapple with the complex questions that recognition of foreign bankruptcy proceedings present.[356] The ability to adapt the well-established principals of judicial estoppel in these novel situations is a testament to the federal standard's utility and an example upon which future courts may develop the doctrine.

CONCLUSION

Given the important interests at stake, further development of judicial estoppel in the post-bankruptcy context should not begin from a disjointed hodge-podge of jurisprudence. The importance of the federal bankruptcy regime, which must include the courts that give effect to the bankruptcy court's actions, is too great. Federal courts over the past few decades shaped the application of post-bankruptcy judicial estoppel into a flexible

349. *See supra* note 206 and accompanying text.
350. *See supra* notes 232–37 and accompanying text.
351. *See supra* note 270 and accompanying text.
352. *See* Sea Trade Co. v. FleetBoston Fin. Corp., No. 03 Civ. 10254, 2008 WL 4129620, at *17 (S.D.N.Y. Sept. 4, 2008), *aff'd sub nom.* Adrogué Chico S.A. v. FleetBoston Fin. Corp., 427 F. App'x 43 (2d Cir. 2011).
353. Pub. L. No. 109-8, 119 Stat. 23 (2005).
354. *See id.*
355. *See* Mohamed Faizal Mohamed Abdul Kadir, *Doing Away with the Emperor's New Clothes: Dispelling the Myth of the Good Faith Filing Requirement Under Chapter 11 & Its International Implications*, 19 J. BANKR. L. PRAC. 513, 513 n.6 (2010) (citing Pauline Gan, *Insolvency Law in Asia: Recent Developments*, 22 ASIA BUS. L. REV. 12, 19 (1998)).
356. *See Sea Trade*, 2008 WL 4129620.

tool to preserve the integrity of the bankruptcy system. These courts created a doctrine capable of accommodating each of a wide variety of cases reflecting the need to accommodate the many issues that arise out of the resolution of debtor insolvency in bankruptcy courts. State courts must defer to the standard developed by the federal judiciary and must continue to follow apace with any evolution in the federal standard. It is not a choice, but an obligation stemming from the preclusive effects of bankruptcy proceedings, the number of which are growing at an alarming pace. This "bankrupt estoppel" is essential to the states, therefore, to not only preserve the integrity of their own courts but to preserve the federal bankruptcy regime as well.