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Consumer Panel—Judicial Estoppel: Its Development, Current Status, and How the Eleventh Circuit's Forthcoming Opinion in Slater Might Portend the End of its Rigidity

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CONSUMER BANKRUPTCY PANEL
**JUDICIAL ESTOPPEL: ITS DEVELOPMENT, CURRENT
STATUS, AND HOW THE ELEVENTH CIRCUIT'S
FORTHCOMING OPINION IN *SLATER* MIGHT PORTEND
THE END OF ITS RIGIDITY**

*The Honorable Paul W. Bonapfel**

*Sacha Dyson***

*J. Erik Heath****

*Leon Jones*****

MR. JUMBECK: Good morning, everyone. Welcome to our *Journal's* Fourteenth Annual Symposium. My name is Jake Jumbeck, and I'm this year's Editor-in-Chief. It's a pleasure to have you all here today for these two terrific panels. Before I introduce Dean Schapiro, who's going to say a few remarks, there are a few certain individuals that I need to thank.

First and foremost, thank you to Jacob Dean and Kaylynn Webb, our Executive Symposium Editor and Symposium Editor, respectively, for their hard work that stretches back as far as this summer. These two have gone above and beyond to research topics, research panelists—to do everything they could to make sure that this event goes off without a hitch. And I know that for everyone here today, we're all truly indebted to them.

Second, thank you to our panelists for being here today. We know that being here today involves taking time away from the bench, the office, the classroom, flying in from California, Arizona, Chicago. We're truly appreciative of that commitment and your support of our *Journal* and our event here today.

Finally, I must thank the Emory Law School staff, Amy Tozer, Rhonda Heermans, Amy Marcellana, Susan Clark, Amish Mody, Alyssa Ashdown, Corky Gallo, Scott Andrews; anybody else I forgot to mention, I'm sorry. This event requires so much behind-the-scenes work that very few people see, and

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without the help and support of these individuals it simply does not happen. So please join me in giving these individuals a round of applause.

Please welcome Dean Robert Schapiro.

DEAN SCHAPIRO: Thanks very much, Jake. Thanks to all of you for being here. Welcome to Emory Law School. I certainly want to add my thanks to the people who made today possible. I'd like to thank the sponsors of this event. Please look at your program to see their names. Happily, too many for me to name individually, but we are very grateful and many of those firms are represented here. We'd like to thank those who are involved in the *Emory Bankruptcy Developments Journal*. The faculty advisor, Ralph Pardo, couldn't be here today. Of course we also Charlie Shanor, and of course the advisor Keith Shapiro who helps us with everything we do here at the *Emory Bankruptcy Developments Journal*. And of course the outstanding students of the *Emory Bankruptcy Developments Journal*. I'd like to add my thanks to Jacob Dean, the Executive Symposium Editor, Kaylynn Webb, the Symposium Editor, and of course Jake Jumbeck, the Editor-in-Chief of the *Emory Bankruptcy Developments Journal*.

I'd like to thank the panelists who come from near and far to be with us today. Especially pleased that many of them have been here before as visiting faculty or teaching here for longer than that. We'd like to think that when there are exciting things going on in bankruptcy it all in some ways touches Emory Law School.

Now I will say this is our centennial year, so making 100 years of advancing the School of Law. It's a chance for us to celebrate some of the milestones in the history of Emory Law School. To mention some of those milestones include 1983 when the *Emory Bankruptcy Developments Journal* was founded. 2004 when this Symposium was created and has become such an important part of the fabric of Emory Law School.

It's also a chance for us to celebrate our commitment to a curriculum that integrates theory and practice, to the close ties we like to foster between the Law School and the bench and the bar, and our bankruptcy program is an outstanding illustration of all of that. The way in which we are able to connect so closely and can do what we do because of the support of practitioners and judges in Atlanta and elsewhere. And as we see this Symposium today, it's a wonderful way of illustrating that as we bring together outstanding academic

practitioners and judges from around the country to address the most compelling topics in the consumer and corporate areas.

Again, with regard to our students who always make this happen, a little note. It was two years ago they weren't sure if we could have the symposium because it was snowing in Atlanta on this day. Not too delighted, but the symposium did go on. Today it's sun rather than snow that is greeting our guests. Whether it's sun or snow, we know that this is always an outstanding event on the calendar of Emory Law School. So thank you again to our panelists. Thanks to all of you. Thanks for being here. Look forward to an outstanding day.

JACOB DEAN: Good morning. My name is Jacob Dean, and I'm the Executive Symposium Editor for this year's *Emory Bankruptcy Developments Journal*. I have the pleasure today of introducing the Consumer Panel, and just to give you an idea of the timeline of events, it's also printed in your pamphlets. We're going to have a ninety-minute consumer panel, followed by a ten-minute break. That's going to be followed by a ninety-minute corporate panel, and then we'll end with lunch today at 12:15.

They've asked me to keep the panel introductions short, but I don't want you to mistake a short introduction for a short CV. They just want to dive into the materials, and I'm happy to let them do that.

Seated to my right is Judge Paul Bonapfel. He's a bankruptcy judge at the Northern District of Georgia where he's served since 2002. He graduated from Florida State University, and had his J.D. from the University of Georgia. He has a *Chapter 13 Practice and Procedure* that he co-authors, and if you'd like to be entered for a raffle for that, you can put your business card outside.

Seated to his right is Leon Jones. Mr. Jones is a partner and co-founder of Jones & Walden, LLC. He graduated with his undergrad degree from the University of Georgia, and also received his J.D. from there as well. He practices consumer bankruptcy litigation as well as other bankruptcy litigation matters.

Seated to his right is Ms. Sacha Dyson. She's sort of the outlier, but really relevant for this discussion. She's not a bankruptcy attorney.

JUDGE BONAPFEL: She's a real lawyer.

MR. DEAN: She's a real lawyer. She practices employment law mainly, and also business litigation matters in Tampa, Florida, and will bring the employment law perspective to the panel. She received her undergraduate degree from the Rochester Institute of Technology and her J.D. from Stetson University College of Law.

Then finally at the end we have Mr. Erik Heath. Erik previously practiced here in Atlanta for quite a while but now practices in San Francisco, California. He wins the award for the farthest panelist to come all the way from California. He's operating on West Coast time today. He received his undergraduate degree from Southern Methodist University and his J.D. from Northeastern University School of Law. His relevance here is he submitted an *amicus* brief on behalf of the National Association of Consumer Bankruptcy Attorneys in the *Slater* case that was just argued recently. I'm sure we'll hear more about that. I'm going to sit down now and conclude the introductions, but please join me in welcoming the Consumer Panel. Thank you.

JUDGE BONAPFEL: Good morning. We're delighted to be here. Our topic, as you know, is judicial estoppel, and in particular we're going to talk about development of case law in the Eleventh Circuit similar to other circuits, and then get into the Eleventh Circuit has recently heard *en banc*, the pronunciation of which is a matter of discussion and you can ask your academic panelists in the next program which one is proper if you want.

We have a disclaimer which is we're here basically as CLE faculty, and not in our own individual capacities. We also have these other disclaimers, in particular, the opinions expressed may or may not be our own, and *si non cogitas nimis bonum, non nimis cogita*. That is Latin for, "if you don't think too good, don't think too much."

Here's what judicial estoppel is about. There's a case called *New Hampshire v. Maine*,¹ and so this is a quote from there. It's "[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."² So that's the Supreme Court in a 2001 case citing a nineteenth century case. That's where this idea comes from. There have been other descriptions that are in the materials.

¹ 532 U.S. 742 (2001).

² *Id.* at 749 (quoting *Davis v. Wakelee* 156 U.S. 680, 689 (1895)).

In the Eleventh Circuit, one of the frequent statements is, “[T]he doctrine is designed to prevent the parties from making a mockery of justice by inconsistent pleadings” and prevents them from playing fast and loose with the courts.³ We’ll come back to some of that also.

There are three factors in the *New Hampshire v. Maine* case:

One, a party’s subsequent position “must be clearly inconsistent with the party’s earlier position”;⁴

Two, a second factor is whether the party succeeded in persuading a court to accept the earlier position “so that judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’”;⁵

The third factor is whether the party making the inconsistent statement would obtain an unfair advantage or whether it would be an unfair detriment to the other party if they were permitted to do so.⁶

So how does that arise in a bankruptcy case? Well, the typical scenario that has been developed, and it’s often an employment discrimination case, but an individual files an employment discrimination case, possibly because she lost her job. People who lose jobs have a tendency to need bankruptcy relief. So the next thing that happens is she files a bankruptcy case, often a 7, could be a 13. She doesn’t disclose the asset. She gets a discharge. The defendant finds out that the debtor has filed bankruptcy and didn’t list the claim, and files a motion for summary judgment. Then the debtor moves the bankruptcy court to reopen the case if it’s been closed, or otherwise amends the schedules to add the asset. And then the defendant in the meantime has moved for summary judgment in the district court, and the district court typically grants summary judgment.

You might think, wait a minute. Aren’t there some factual issues here? One of the things is unfair advantage or unfair detriment. There’s a statement in the *Maine v. New Hampshire* case that you don’t apply judicial estoppel as the result of mistake or inadvertence. Couldn’t it be she just didn’t understand the question of what other assets do you have would include a lawsuit that she had filed.

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

⁴ *New Hampshire*, 742 U.S. at 750.

⁵ *Id.*

⁶ *Id.* at 751.

You might think there are factual issues, but as you will find out, in the Eleventh Circuit it's unlikely that the debtor is going to be able to prevail.

And then in addition to that, in the current state of the law in the Eleventh Circuit the debtor's trustee is barred from bringing that claim. That's one of the issues that the *Slater* case⁷ is presented with and will deal with one way or the other.

So, Leon, you were going to talk about the different scenarios here.

MR. JONES: Well, I think that some of the tension that arises, and we're going to be talking a lot about the development of the law in the Eleventh Circuit on judicial estoppel, and whether the debtor's failure to list the asset which is a claim against the third party was inadvertent. And I think it's helpful, part of the answer to that question whether the debtor's actions were inadvertent, a lot of it depends on where you sit and how you view bankruptcy in general.

If you're familiar with a high volume practice in consumer bankruptcy law, then you realize that the debtor comes in and they're often very unsophisticated. They are possibly being represented either by a law firm that files hundreds of bankruptcy cases a month, or alternatively a sole practitioner who files five cases a year. In either of those contexts, there may not be a full understanding by the debtor that they have an obligation to list a lawsuit which has been filed, or even a lawsuit which has not yet been filed. So that's a different scenario.

It also sort of involves the question of whether you view debtors as honest but unfortunate debtors who are entitled to a discharge, or as people who are not paying their debts, gaming the system and otherwise trying to take advantage of the system. So as we talk about the development of the law in the Eleventh Circuit, please keep in mind how this might be happening, how these facts develop on the ground in real time.

JUDGE BONAPFEL: How it applies and the issues vary, depending on what chapter you're in. If you're in chapter 7, there's an undisclosed pre-petition claim. There are some questions that arise. What if the motion for summary judgment is filed before the discharge? Does it matter? We have lots of

⁷ *Slater v. U.S. Steel Corp.*, 820 F.3d 1193 (11th Cir. 2016), *reh'g en banc granted, opinion vacated* (Aug. 30, 2016).

questions and very few answers here right now. But these are things to be just rolling around in your mind.

Is it property of the estate, is a question. Is it a post-petition claim or a pre-petition claim? And there's a case that Judge Vining decided, *Carroll v. Henry County*,⁸ that deals with whether a claim is pre-petition or post-petition. It was a malicious prosecution claim in a criminal matter. The arrest and all the facts took place prior to the bankruptcy. The acquittal or the decision not to prosecute occurred after bankruptcy. Judicial estoppel motion filed, and Judge Vining said judicial estoppel doesn't apply. This is a post-petition claim because of when it accrued. You can't sue it until the criminal proceeding is concluded, so held it was a post-petition claim.

MR. JONES: There's a great quote from Judge Vining, and it says, "Is it a potential claim or is it a claim with potential?" So if it's a claim with potential, then you have to disclose it and if you don't you're barred by judicial estoppel because if it's a claim with potential, it's not up to the debtor or debtor's counsel to determine whether it has value and therefore whether it should be disclosed. So if it's a claim, *i.e.*, in the malicious prosecution case, if the debtor has been acquitted, that's when the claim vests. But you don't have a claim for malicious prosecution until the case ends.

And there's also a case in Georgia, *Vojnovic v. Brants*.⁹ We've given you the federal cite on the screen, but if you're in a Georgia court, the Georgia Court of Appeals in 2005 ruled the exact same way. Under Georgia law, a claim for malicious prosecution does not arise, does not vest until you're acquitted or the case is dismissed.

JUDGE BONAPFEL: So in a chapter 7, post-petition property is not property of the estate, no obligation to disclose it, no problem. Chapter 13, if it's an undisclosed pre-petition claim, you have the same types of problems, but you don't have the same judicial acceptance in the form of a chapter 7 discharge because you have confirmation, and then you have a discharge. It's possible the case could be dismissed. And so there are a variety of nuances that occur in a chapter 13 case, none of which seem to matter to the appellate courts.

Again, you get into the question of what if the debtor amends the schedules prior to discharge but after the motion for summary judgment is filed. We'll

⁸ 336 B.R. 578 (Bankr. N.D. Ga. 2006).

⁹ 272 Ga. App. 475, 612 S.E.2d 621 (2005).

come back to that one. That's the *Robinson*¹⁰ case that we're going to talk about.

In a chapter 13 case, there's a question of the post-petition claim is not like the chapter 7 case because the courts, specifically the Eleventh Circuit, have ruled that a debtor has an obligation to disclose a post-petition claim in a chapter 13 case, and we'll talk about that. So judicial estoppel can apply even though there doesn't appear to be a requirement to disclose post-petition assets.

So how we got where we are, because usually judicial estoppel applies. It applies in summary because the Eleventh Circuit and other circuits basically come down and said, if you have a claim and you do not disclose it, you must know of the claim. That's the first test for application of judicial estoppel. And, two, you have an obligation to disclose it. If you do not disclose it, judicial estoppel applies. In a nutshell, that's the law of judicial estoppel in the Eleventh Circuit, and it's not a factual issue. The only fact is, did you know about the claim, did you schedule it? And if you did, if those two things are true, then judicial estoppel generally applies.

So how we got there and where *Slater*, which is the *en banc* matter that is now pending before the Eleventh Circuit, is what we're going to talk about.

MR. JONES: May I interject one thing? Just to wake up some of the corporate lawyers that may be out there, in talking about how this issue arises, we set forth a factual scenario which deals with consumer debtors, and we are the consumer panel at this symposium, but this issue does have impact in chapter 11's and corporate bankruptcy cases. In fact, the seminal case in Georgia which is *Southmark v. Trotter, Smith & Jacobs*¹¹ from 1994, which was the first time the Georgia courts recognized judicial estoppel arising in a bankruptcy case, involved the chapter 11 debtor's failure to disclose the claim against the third party in a chapter 11 disclosure statement. And in that case the claim was barred in Georgia under the doctrine of judicial estoppel. So this can happen in a chapter 7 case for an individual. It can happen in the most complex chapter 11 case filed in New York or Delaware. In fact, you can imagine where the corporate counsel for the debtor is trying to list all pending lawsuits in the disclosure statement or in the corporate debtor's schedules, and there may be a claim which there is no litigation pending for but which has accrued and therefore counsel for the chapter 11 debtor would have an obligation to

¹⁰ *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269 (11th Cir. 2010).

¹¹ 212 Ga. App. 454, 442 S.E.2d 265 (1994).

disclose that throughout the chapter 11 or it could be barred later. So don't think this is just a consumer issue.

MS. DYSON: Do I get to talk now?

JUDGE BONAPFEL: Sacha's outnumbered.

MS. DYSON: Well outnumbered.

JUDGE BONAPFEL: Most of us have one view and she has the other one.

MS. DYSON: But I can handle it.

JUDGE BONAPFEL: She can handle it.

MS. DYSON: So we're going to start where the doctrine starts which is from *New Hampshire v. Maine*,¹² which is a Supreme Court case, but it doesn't arise in the bankruptcy context and it doesn't deal with an employment claim. New Hampshire and Maine were fighting over a river and who owned which part of it. So it was really a boundary dispute, and what the Supreme Court found in that case is that New Hampshire had taken a prior position in litigation in the 1970s over lobstering rights about this particular river, and so therefore New Hampshire was estopped from being able to take a contrary position in this litigation against Maine. But in doing so it did recognize several factors, and those factors are those that Judge Bonapfel has gone through. There has to be an inconsistent position. There needs to be judicial acceptance. There has to be an unfair advantage or unfair detriment. I say "has to be," but not really because these are just factors that the court may consider; they're not required and they're not exclusive. And that's where the Eleventh Circuit comes in, in dealing with its first case which is *Burnes v. Pemco*.¹³

MR. HEATH: Now, before *New Hampshire v. Maine*, judicial estoppel cases were really rare. They probably arose every few years. Afterwards, they started becoming much more frequent after the Supreme Court brought attention to the matter. The first case that arose in the Eleventh Circuit that dealt with our issue today was the *Burnes* case. This is sort of the granddaddy of judicial estoppel cases in the Eleventh Circuit that deal with bankruptcy.

The *Burnes* court, what they did is interesting. Getting back to our common theme from today, this was an employment discrimination case. The plaintiff

¹² 532 U.S. 742 (2001).

¹³ 291 F.3d 1282 (11th Cir. 2002).

filed a chapter 13 case, and six months later filed a charge for discrimination, and then later got the right to sue and filed the lawsuit. After filing that lawsuit, the debtor converted to chapter 7 and was ordered to amend his schedules, and he amended his schedules, but in that amendment he did not disclose the existence of this pending lawsuit. So after he received his discharge, the employer moved for summary judgment based on judicial estoppel, won, and that's how it got up to the Eleventh Circuit.

The Eleventh Circuit, in looking at the case, was focused on two different issues. They split apart his monetary claims from his equitable relief claims. To start, they reaffirmed the general principle from *New Hampshire* that judicial estoppel is designed to prevent parties from making a mockery of the court system, but then it sort of went to its pre-*New Hampshire* judicial estoppel test which consisted of two prongs. This is a little bit different than the three-prong test we just heard from *New Hampshire*. These two prongs say that it must be shown that the alleged inconsistent positions were made under oath in the prior proceeding as prong number one. Then as prong number two, that to go back to our purpose, that the inconsistencies were calculated to make a mockery of the judicial system. So the court again said that these factors were not inflexible or exhaustive, and also believed that they were entirely consistent with *New Hampshire*.

The first prong is interesting because it defined the failure to disclose, it created this test really, that it can only exist where the debtor lacked knowledge of the undisclosed claims, like the debtor just didn't know of the facts that gave rise to these claims, and lacked a motive to conceal the claims. So this is sort of the beginning of where we get into the knowledge and motive test for the Eleventh Circuit.

After that, it rejected the debtor's attempt to reopen his chapter 7 bankruptcy. The court kind of viewed this as sort of a half-hearted attempt to escape judicial estoppel, and in some ways sort of a concession that judicial estoppel should apply anyway, because the debtor seemed to say, okay, well, I'm caught; now I'm going to back up and reopen my bankruptcy and please let me move forward. The court didn't take very kindly to that.

The court found that the debtor clearly knew about the underlying claims because the lawsuit was pending when he filed this amended schedule, and he also had motive to conceal the claims because obviously if he received his discharge and was able to pursue these claims on his own, none of that money would come back to the chapter 7 estate.

The court was clearly concerned in this case about debtor providing full and accurate disclosure in their schedules. That seemed to be the target of the court's decision, that, hey, this debtor was dishonest; this debtor did not provide full disclosure, so we're going to punish this debtor by taking away his claim. And that's really where this doctrine started in the Eleventh Circuit.

MS. DYSON: Then we move on to *DeLeon v. Comcar Industries*.¹⁴ *Burnes* was in the chapter 7 context, and *DeLeon* came up in the chapter 13 context. The court found that there is no distinction between these two chapters that is significant enough to make the doctrine of judicial estoppel apply any differently.

In *DeLeon*, what we had is that it starts in 1999 with an EEOC charge being filed. Then in 2000, basically a year later, that's when the chapter 13 petition was filed. Now, do any of you litigate employment cases? Good, none. That's great. I can tell you anything I want. What I will say is that the EEOC can take quite a while to investigate a charge of discrimination. So a charge of discrimination can be pending for years before the EEOC issues what's called a right-to-sue letter. The right-to-sue letter is the administrative prerequisite to being able to file a lawsuit. So in EEOC or employment-type claims, there are really two different types of statutes of limitations.

First you have 300 days or in Georgia 180 days to file the actual charge from the adverse employment action. My position is that the claim would accrue upon the adverse employment action. I think there may be some disagreement among the panel on that. But once you have that adverse employment action and file the charge of discrimination, then the EEOC investigates. Then once they issue the right-to-sue letter, then you have 90 days to actually file a lawsuit.

So what happened in *DeLeon* is that the charge was filed, then the chapter 13 petition was filed. Then a couple of months later the EEOC issued the right-to-sue letter. Then a month later the lawsuit was actually filed, but there was no amendment to the schedules. In July of 2001, the plan was confirmed. And then thereafter the employer discovered the bankruptcy, discovered the failure to disclose and filed a motion for summary judgment which caused the debtor to file an amended petition to reopen the bankruptcy estate, but then the district court granted the motion for summary judgment based on judicial estoppel.

¹⁴ 321 F.3d 1289 (11th Cir. 2003).

Now judicial estoppel as recognized by *New Hampshire* as well as *Burnes* is a discretionary doctrine. So it's reviewed by the Eleventh Circuit under an abuse of discretion standard, and the Eleventh Circuit did affirm on appeal, and concluded that there was not a significant enough distinction between chapter 7 and chapter 13 to warrant any different application, that a chapter 13 debtor has an equal motive to conceal assets as a chapter 7 does.

So then we come upon *Barger v. City of Cartersville*.¹⁵

JUDGE BONAPFEL: So now we get to *Barger*, and in the interest of full disclosure, *Barger* involved a bankruptcy case in Rome, Georgia, and a currently old and bald bankruptcy judge, your panelist, at the time was an old but younger but still bald bankruptcy judge, having just been appointed about two or three months earlier before all of these events arose. So I've waited a long time to be able to talk about that case.

In your materials at page 129 is a timeline that may be easier to follow than the PowerPoint that we've produced up here. Here's the story. Ms. Barger files an employment discrimination claim against the City of Cartersville. Later, she files a chapter 7 bankruptcy case and does not list the lawsuit. She goes to her 341 meeting and she tells the trustee about the lawsuit. Regrettably for her, about a month or so earlier, her lawyer had filed a motion. The employment discrimination started as a claim for only injunctive relief, reinstatement. Her lawyer filed a motion to amend the complaint to add a claim for back pay. That motion was granted two days before the 341 meeting. I haven't seen the transcript of the 341 meeting; don't know exactly what happened, but in the reported cases the observation is made that she told the trustee about the lawsuit, but said that she was only seeking reinstatement, when two days earlier she had filed her amendment to add a claim for back pay.

She received a discharge, a no-asset discharge. The day after the 341 meeting, the trustee filed a report of no distribution. The trustee did not even go look at the lawsuit. She got a discharge. The defendant filed a motion for summary judgment based on lack of standing because the claim doesn't belong to her, it belongs to the trustee, which is correct because of the principle that an unsecured claim that is not administered remains property of the estate.

The defendant filed a motion for summary judgment based on lack of standing or alternatively based on judicial estoppel. So what does the debtor do? The debtor moves to reopen the chapter 7 case, and that came before me

¹⁵ 348 F.3d 1289 (11th Cir. 2003).

shortly after I was appointed, and—this is a historical trivial footnote for those who care or who know about Rome, but that day I happened to have my calendar on the consumer cases in Judge Murphy’s courtroom, who is the District Judge who was handling the employment discrimination lawsuit. So all of this activity took place in the same courtroom. You can impress your friends at a cocktail party with that.

So the City appears and says, no, you shouldn’t reopen the case because of judicial estoppel, and basically I said, well, I’m going to reopen the case because there is an unscheduled asset, and creditors need to get the benefit of that asset, and the trustee should be able to pursue that claim. And as far as judicial estoppel goes, she disclosed it. And so I don’t see that it would apply, although that’s not my call; that’s the district court’s call because that’s where the motion is pending. So that hearing was June 5th, and I made that announcement in open court. On June 12th, Judge Murphy granted the motion for summary judgment based on judicial estoppel, and then on June 18th or 19th, I got my written order done and got it entered. Judge Murphy’s opinion is unreported but it’s in your materials.

So the debtor, Ms. Barger, filed a motion for reconsideration which said, hey, Judge Bonapfel said that judicial estoppel doesn’t apply and that I really didn’t do anything wrong. And Judge Murphy in his order denying the motion for reconsideration said, one, motions for reconsideration are for new things, new facts; and, two, with all due respect to the bankruptcy court—you always hate to hear that when you’re about to hear the rest—with all due respect to the bankruptcy court, the bankruptcy court got it wrong on judicial estoppel.

For reasons that I cannot explain, the trustee in that case was not appointed until August 7th. The original trustee was appointed, there’s a notice of appointment in the meantime, but then the actual trustee is appointed on August 7th and that’s the date that the district court denied the motion for reconsideration. And so now it goes up to the Eleventh Circuit on appeal. And at some point we know that the chapter 7 trustee was substituted for Ms. Barger, or at least the Eleventh Circuit in the *Barger* opinion said that the trustee succeeds to the debtor’s position and is simply substituted in the debtor’s stead from this point forward.

So now we’re in the Eleventh Circuit, and what does the Eleventh Circuit do? The Eleventh Circuit affirms, and in a two-to-one decision, Judge Rosemary Barkett dissented citing the opinion of the old, but not as old as now but still balding bankruptcy judge in her dissent. So what did the court say?

Basically the court applied the *Burnes* test, which they just talked about, and one, there are inconsistent positions. Now, interestingly, it's not an inconsistent prior position because the first position is the lawsuit and the second position is in the bankruptcy court. So the idea that the first statement has to be the inconsistent statement has kind of gone away. So there's inconsistent statements, number one, the first requirement; and the statement in the bankruptcy court is under oath. The statement in the bankruptcy court under oath, of course, is that there is no claim because it's not listed. So that's the first prong. That's met.

The second, is it calculated to make a mockery of the judicial system? That's the second test. So how do you figure that out? Well, the debtor said, I didn't mean to do this. I really didn't realize I was supposed to do this, and besides, I told my chapter 7 trustee and I told my lawyer to disclose it, and he just didn't. He forgot, which the lawyer admitted, I made a mistake.

Those things don't matter. Summary judgment. Those things don't matter because whether it's calculated to make a mockery of justice turns on two things: one, did you know about the claim? And two, did you have a motive to conceal it? She knew about the claim. She had to know about the claim. She filed it. And did she have a motive to conceal it? Yes, because by not making it known she would be able to prosecute the lawsuit and keep all of the money for herself to the detriment of her creditors.

The court went on to say you can't blame the attorney. You're bound by what the attorney does. Basically you've selected the attorney, you're stuck with it. And also noted, as I said before, that she did tell the trustee about it, but she misrepresented the nature of the lawsuit. She got it wrong. It was more than a claim for injunctive relief; it was a claim for back pay and damages. So she was not candid and as far as the trustee, well, you know, the trustee shouldn't be expected to have to go look at stuff when the trustee is misled.

So none of that worked, and the result was judicial estoppel, lawsuit over. Lawsuit mostly over, because as in *Burnes*, the claim for injunctive relief for reinstatement continued. What's the aftermath? The aftermath is that after the case was remanded to the district court, Ms. Barger and the city settled the claim for injunctive relief, not by reinstatement but by guess what? Money. And so the law firm representing her filed an application for approval of the settlement, which they didn't have to do because it's not property of the estate; it's a post-petition claim. So there's a reported decision at 2005 Westlaw

174880¹⁶ that explains that and also notes that the result of this case is, one, the creditors don't get anything; two, Ms. Barger and her employment discrimination lawyer get money; which will lead us to the *Parker v. Wendy's*¹⁷ case, the next case, but also leads me to the question of, what was the mockery of justice in the *Barger* case?

Now, the other thing I want to point out about the *Barger* case, and this is of interest beyond just this, but there's some discussion, and in the *Slater* case also, there's sort of an underlying current of, well, the district judge found the facts differently than the bankruptcy judge did in *Barger*. And my point on that simply is, that's not completely accurate because what happened is not in dispute. It's not in dispute. What happened is not in dispute in those cases. It's the effect of what happened that's in dispute, which I think is a legal issue because it's undisputed that when the things were filed and what she said, and what's disputed is what you make of those facts. So that gets back to the question of sometimes who gets to decide the facts may have an important outcome determinative effect on your case, and that gets back to the whole idea of whether it's the district judge or the bankruptcy judge who is going to hear your case and whether you have a *Stern v. Marshall* claim to be able to get the District Court to handle your case. That's for the corporate guys that are here.

MR. HEATH: So now that the Eleventh Circuit in *Barger* has prevented the trustee from pursuing these claims, now we get to *Parker* where they apparently backtrack and unknowingly sort of change the law a little bit. *Parker* involves a familiar fact pattern that we've heard I think several times already today. We have a debtor who filed a discrimination lawsuit and then filed a chapter 7 sometime afterwards, apparently not realizing that she had to disclose the discrimination lawsuit on her schedules.

Before any motion in the district court was filed, the trustee found out about the case and intervened. After the trustee intervened, then the employer moved for summary judgment based on judicial estoppel which was granted. Now we're back up at the Eleventh Circuit, and I think the court's language in analyzing this case illustrates that judicial estoppel may not be the best way to handle this particular issue. Really what we're looking at is an issue of standing. You'll notice here in the court's language they use the language of real party in interest. This is an undisclosed claim in a chapter 7 case, so it was

¹⁶ *In re Barger*, No. 01-41926-PWB, 2005 WL 174880, at *1 (Bankr. N.D. Ga. Jan. 21, 2005).

¹⁷ 365 F.3d 1268 (11th Cir. 2016).

still property of the estate. The trustee never abandoned it when the case was closed. But despite using this party in interest language, then the court concludes by saying, and because of this, the trustee is not judicially estopped from pursuing the claim.

I see that a lot in different circuits with these judicial estoppel cases, that there seems to be a conflation between judicial estoppel and standing issues. I might touch on that a little bit later if we have time. But the point in *Parker* was that the trustee was not the one who made the inconsistent statement, so the court did not want to estop the trustee from pursuing the claim. I think a reasonable outcome. I don't think anybody really disputes that that should not happen, but I guess the question is whether that was the right approach.

The next slide also made clear that the court in adopting this view was not abandoning its view that it's still going to punish the debtor for not disclosing the asset. In fact, if the trustee is really successful on the claim and there is some kind of a surplus, the court is warning the debtor that he shouldn't expect that surplus. Basically anything beyond the amount that it takes to fulfill the claims will be judicially estopped.

That leads us to the next development which arises not at the Eleventh Circuit but in the Fifth Circuit.

MS. DYSON: That's *Reed v. City of Arlington*.¹⁸ What *Reed* did is relied on *Parker*. Now *Reed* was an *en banc*, now I'm kind of afraid to say the word because I'm saying it correctly, but *en banc* decision of the Fifth Circuit. In *Reed*, the Fifth Circuit recognized that the Eleventh Circuit had decided along with the Seventh and Tenth Circuits that judicial estoppel should not be applied against an innocent trustee, and in relying on that concluded that the remedy in *Reed* was that the trustee could pursue the claim but the debtor was excluded from any recovery in that.

The original panel decision, however, I believe applied judicial estoppel to both and it was ultimately vacated *en banc*. And so that's where we thought we were in terms of how we're dealing with these claims.

Now the next case that came up was *Robinson v. Tyson Foods*. This is, again, back in the Eleventh Circuit, and we're talking about in a chapter 13 case. This one has somewhat unique facts because it was a chapter 13 petition that was filed that proposed a 100% repayment plan. Four years after that

¹⁸ 650 F.3d 571 (5th Cir. 2011).

petition was filed and the plan was confirmed, Ms. Robinson filed an employment discrimination lawsuit, but she didn't amend her schedules to disclose that lawsuit. A year after filing the lawsuit, the debtor completed the repayment plan and received a discharge under chapter 13. After the discharge, the employer filed the motion for summary judgment based on judicial estoppel. And the Eleventh Circuit affirmed the entry of summary judgment based on judicial estoppel finding there was knowledge and motive to conceal. Because while this was a five-year plan that was proposed, and I think it was about nine months before the completion of the plan is when the lawsuit was filed, and at that point in time Ms. Robinson was behind on her payments. And so the Eleventh Circuit concluded that she had a motive to conceal the lawsuit at the time that she filed the lawsuit instead of disclosing it in her bankruptcy case. Also it relied on the fact that she had failed to disclose another lawsuit which was a worker's compensation claim.

They found that the repayment of her debts didn't preclude a finding of motive to conceal, and that the doctrine was dependent on showing that the nondisclosure would've led to a different result. There doesn't have to be essentially detrimental reliance in this doctrine.

That brings us to the conclusion about motive. What the Eleventh Circuit said is that if she had realized any proceeds from the suit prior to the discharge of her bankruptcy, she could've kept those proceeds for herself, and that was the motive that she had to conceal that.

Now, Judge Anderson did concur in the judgment but questioned whether there was a fact issue that precluded summary judgment.

That leads us to some questions that arise out of *Robinson*. Do you want to handle those, Judge Bonapfel?

JUDGE BONAPFEL: Oh, of course. First of all, if anyone in this room can find a duty on the part of a chapter 13 debtor to disclose a post-petition asset other than the things under § 541(a)(5), inheritances, insurance recoveries, other stuff, if anybody can find that, if your copy of the Bankruptcy Code or the Bankruptcy Rules has that in it, would you please let me know, because my diligent search has not revealed a single thing that says that. And as Erik notes in his *amicus* brief, suppose you're representing Ms. Robinson and she comes and says, you know, I've just filed this lawsuit. Do I need to disclose it? You say, I don't know. Let me check. So you read the Eleventh Circuit precedent,

and you find the *Waldron* case.¹⁹ And the *Waldron* case, too difficult to get into here, but it basically says, there's no obligation on the part of a chapter 13 debtor to disclose a post-petition asset. So you go to your client and you say, Ms. Robinson, I've looked at the law in the Eleventh Circuit and *Waldron* says unless the court tells you to, you don't have to disclose a post-petition lawsuit. That's where we are. And so nevertheless we have *Robinson*.

Here's the result of *Robinson*: creditors get paid 100 cents on the dollar out of Ms. Robinson's money; two, the defendant doesn't have to pay anything on an employment discrimination claim. Now, where's the mockery of justice?

That brings us to other circuits.

MR. HEATH: Yes. That's actually the perfect segue into the way judicial estoppel is being applied in other circuits. I think this *Robinson* approach to judicial estoppel is really the harshest application of the doctrine because this doctrine was focused on protecting courts from prior inconsistent statements. Well, if the debtor doesn't make a statement and apparently looks to the Bankruptcy Code to determine whether they're required to make a statement and doesn't see any requirement to do so, how in the world is there a prior inconsistent statement? It's a question that still baffles me, yet in other circuits this is not turning out very well for the debtor, either.

For instance, the *Flugence*²⁰ case out of the Fifth Circuit, the debtor lost that case. Although there was no discussion in that case as to what the debtor's disclosure duties were, it was just sort of assumed that, oh, yeah, you were in a bankruptcy; you were required to go to the bankruptcy court and file amended schedules to show this fluctuation in your assets. The *Jones* case,²¹ which I was involved in, unfortunately also didn't turn out well for the debtor based on some other Eighth Circuit precedent. I think this is probably the harshest application of judicial estoppel that exists.

The one promising case is out of the Tenth Circuit and it's not a chapter 13 but a chapter 11 case where the Tenth Circuit actually did say, look, chapter 11, there's not a duty to amend these schedules so judicial estoppel just cannot apply in this context. And I think that's probably the most promising one. I've highlighted a few other cases here.

¹⁹ *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239 (11th Cir. 2008).

²⁰ *Flugence v. Axis Surplus Ins. Co.*, 738 F.3d 126 (5th Cir. 2013).

²¹ *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016).

JUDGE BONAPFEL: Do you think there will be questions of the author of that opinion at his upcoming hearings on this case?

MR. HEATH: I'm sorry. Which one?

JUDGE BONAPFEL: That's Gorsuch.

MR. HEATH: You know, I don't know.

JUDGE BONAPFEL: Maybe the Senate will ask him what he thinks about judicial estoppel.

MR. HEATH: I cited that case to note that he took a similarly kind of harsh approach with judicial estoppel, really kind of going the same route as the Eleventh Circuit, as many of these cases do, and he decided that—I think that case in particular there was sort of this automatic presumption that the debtor was doing this to deceive, and also that the debtor was prevented from doing anything to reopen the bankruptcy case to correct the issue.

Some other circuits, again, just to kind of highlight a couple of differences, most other circuits, most jurisprudence is out of the Fifth and Eleventh Circuits right now. For some reason this is where most of these issues are arising. Other circuits do largely take similar approaches. The one difference that I'll point out here and then we can move on, is out of the Ninth Circuit, the *Quin* case.²² The Ninth Circuit sort of realized that judicial estoppel is getting out of hand, and they refused to follow the Eleventh Circuit's approach in *Burnes* and *Barger*, and decided that a presumption of bad intent is not appropriate in these cases and it's just a much more factual issue than that. So I think that's the key case I wanted to highlight.

The state courts take a much more flexible approach by and large. A couple of examples that I'll give before passing the baton, in my now current state of California, courts are much more willing to entertain the facts of a particular case. So some examples of judicial estoppel that worked in California that would not work in the Eleventh Circuit include, well, I received bad legal advice from my bankruptcy attorney. I was told I didn't have to disclose that. That works in California state courts, as does just misunderstanding your schedules, like, for instance, for a *pro se* chapter 7 debtor. California courts also allow you to reopen a case and correct the mistake so that the asset can be administered.

²² *Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267 (9th Cir. 2013).

I cited Illinois also because there was a really good, interesting case from 2015 out of the Illinois Supreme Court, *Seymour*,²³ where the Illinois Supreme Court specifically said, we are not going to adopt the same approach the federal courts seem to be taking in terms of presuming debtors are somehow gaming the system, and again opening this issue up to a much more factual inquiry.

That said, I'll pass it on to Florida.

MS. DYSON: Florida is relatively easy because there's not a lot of case law. Most of the developments in Florida have happened in federal court. The case law that does exist in state court, though, is much more like California and Illinois. Florida requires mutuality of parties, which is basically not going to happen ever in a case of employment discrimination, because I can't think of an instance where an employer would typically be a creditor of a debtor or otherwise there would be a proceeding where there would be mutuality.

The Florida Supreme Court has recognized that there can be some exceptions to mutuality but I haven't seen those applied in any of the cases, and the intermediate appellate courts have rejected *Barger* and have rejected the suggestion that the trustee can't proceed. So that brings us to Georgia.

MR. JONES: Under Georgia, the fundamental thing to remember is that the court that's applying the principle of judicial estoppel will apply the law of its jurisdiction. There's a case that's cited in the materials from Georgia, from the Georgia Court of Appeals from 2009. It's *CSX Transportation v. Howell*.²⁴ In that case, the debtor had brought a claim under the Federal Employers Liability Act. So it's a federal claim, but it's being brought in Fulton County. In that case the defendant argued that because it was a federal claim that the court should apply the law of judicial estoppel, the federal law, which as we've talked about is a lot stricter than what you're seeing in the state law. But the Georgia Court of Appeals said that it's a procedural rule and the law of the forum governs it. So if the underlying claim is in a Georgia court, you're going to see a more flexible approach. You're going to see more deference to what the bankruptcy judge is doing in general.

The slide shows sort of a chutes and ladders approach to a brief overview of some of the cases cited in the materials of how it might play out in the Georgia court. And if it's a chapter 7 case, in general, like for example the

²³ *Seymour v. Collins*, 2015 IL 118432, 39 N.E.3d 961.

²⁴ 296 Ga. App. 583, 675 S.E.2d 306 (2009).

Georgia courts recognize that if the bankruptcy court reopens the case to allow the disclosure of the claim, then typically judicial estoppel would not apply against the debtor. There's also a couple of cases, what I call the divorce case corollary. Basically the Georgia courts are not applying judicial estoppel if the undisclosed claim was part of a divorce case. Also on the right-hand side in the chapter 13 arena, if there was an application to employ special counsel, if there was a motion to reopen the 13, if the chapter 13 case got dismissed, those types of fact scenarios all result in the non-application of the doctrine of judicial estoppel in the Georgia courts.

So if you're in a bankruptcy case and you're either the debtor or debtor's counsel or the judge, please keep in mind that the actions you take can have a positive influence on the debtor's rights to proceed with the case in the non-bankruptcy court because the Georgia courts are going to be more flexible.

JUDGE BONAPFEL: That brings us to *Slater*. I think, Leon, you were going to talk about it.

MR. JONES: Okay. We'll talk about *Slater*.²⁵ This is the case which is currently pending before the Eleventh Circuit as I think we've talked about a little bit. As we sit here today, their case is pending for an *en banc* review. The original facts of the case are it was an employment discrimination claim filed by the debtor. Twenty-one months after the discrimination lawsuit is filed, the debtor filed chapter 7. Of course the debtor failed to disclose the discrimination action in the schedules or in the statement of financial affairs. The trustee files a no-asset report, so it looks like a fairly standard chapter 7 case. Prior to the discharge, for some reason the discharge is delayed, U.S. Steel, who is the employer and defendant in the underlying discrimination suit, filed a motion for summary judgment in the district court based upon judicial estoppel. The debtor then amended the schedules, which as we've heard from our other panelists under current Eleventh Circuit law may not be enough to avoid the application of judicial estoppel. The debtor opposed U.S. Steel's motion for summary judgment in district court and asserted that the failure to disclose the discrimination claim was inadvertent or unintentional.

At that point, the bankruptcy court moved to approve the plaintiff's attorneys, the debtor's attorneys, as special counsel for the bankruptcy estate while the motion for summary judgment was still pending before the district

²⁵ *Slater v. U.S. Steel Corp.*, 820 F.3d 1193, 1195 (11th Cir. 2016), *reh'g en banc granted, opinion vacated* (Aug. 30, 2016).

court. So you have the estate seeking the employment of counsel and you've got the motion for summary judgment pending before the district court. So now you have the case teed up for what would be a very typical *Burnes–Barger* doctrine application by the district court. So what you would anticipate happening at that time, if it had stayed as it was, potentially the debtor is going to lose on the motion for summary judgment in the district court. So a twist comes along in the *Slater*—

JUDGE BONAPFEL: Well, at this point there's a chapter 7 trustee. If the chapter 7 trustee intervenes in the lawsuit it ought to be granted, and the district court under the *Parker v. Wendy's* case should say the debtor doesn't have standing, the trustee does, and judicial estoppel doesn't apply.

MR. JONES: Correct. But the debtor converts the case to chapter 13, perhaps fearing that the *Burnes–Barger* doctrine will prevail over *Parker v. Wendy's*, and under *Parker v. Wendy's*, the trustee is going to get the money and there's dicta in *Parker v. Wendy's* that says that the debtor shouldn't potentially recover anyway, even if the trustee recovers.

So the debtor makes the move and converts to chapter 13, amends the schedules to disclose the discrimination claim, and three months later the chapter 13 plan is confirmed. It's a forty-two-month payment plan. The record does not disclose whether it's a 100% plan, whether the plan contains any kind of special stipulation providing that the claim against the employer is specifically retained, but the district court without finding those types of facts to be a necessary ingredient in making its determination, denies the pending motion to dismiss as moot. There's two pending motions before the U.S. district court. One is a motion to dismiss based upon the fact that the real party in interest is not present. That's mooted out because now the trustee is not present anymore because there's not a chapter 7 trustee anymore because the case has been converted to 13.

The motion still remaining pending before the district court is a motion for summary judgment. The district court relies upon *Burnes v. Pemco*, the *Burnes–Barger* doctrine, and grants summary judgment in favor of the defendant. So that brings you to the *Slater per curiam* decision. There are two members of the panel who issue the *per curiam* decision. As Judge Bonapfel will talk about in greater detail in a minute, Judge Tjoflat issues a special concurrence whereby he agrees with the result but not how you got there. And the *Slater per curiam* decision does the best job that the Eleventh Circuit has done to date in trying to explain why its two-prong test under the *Burnes*

Barger doctrine satisfies the requirements of the United States Supreme Court three-prong test in *New Hampshire v. Maine*. In that, the Eleventh Circuit states that the doctrine of equitable estoppel is ordinarily applied in two scenarios. The first is where the party asserting the doctrine was a party in the earlier proceeding in which the party's adversary took a position inconsistent with the position the adversary is currently advancing. The second scenario is where the party asserting the doctrine was not a party in the earlier proceeding, and this presents the *Burnes* scenario.

So what the Eleventh Circuit is saying is there's two factual different scenarios. In fact, the language which the Eleventh Circuit uses is that the "factual predicates" in the U.S. Supreme Court's *New Hampshire* decision were different from the "factual predicates" that the district court applies in *Slater*. So I love that term factual predicates. That's the kind of thing you can use in your next discussion with your law partner or in your law school class with your colleagues or your fellow students, the factual predicates were different. So what they're saying is obviously the facts are different in the two different scenarios, and the Eleventh Circuit says, our two-prong test under *Burnes* and *Barger* is sufficient because the facts are different. We have the scenario where the party was not present in both disputes. So we can just sort of disregard the second and third prongs of the U.S. Supreme Court's *New Hampshire* test and apply our own.

So you have the Eleventh Circuit defending its long line of cases and upholding the decision of the district court. The Eleventh Circuit reviewed the *Barger* decision in detail. The Eleventh Circuit *per curiam* decision looks at *Burnes*, takes a long look at that and a full analysis of that decision, and the Eleventh Circuit finds that again the second prong which is the judicial acceptance is not applicable and the third prong is unfair advantage is not applicable. So you have a situation where the Circuit is applying its test and upholding it. And at that time, Judge Tjoflat recognizes the problem with the Eleventh Circuit law, specifically the *Wendy's* case and the fact that it's inconsistent with *Burnes Barger*. And he in his concurring opinion says that he actually was on the panel that decided *Wendy's*, that *Wendy's* violated the prior panel rule of the Eleventh Circuit, and the Eleventh Circuit, any panel that is deciding a case is bound to follow the decisions issued by any previous panel decision. And so Judge Tjoflat says that he is bound by *Burnes Barger*, that *mea culpa, mea culpa*. He uses those words in his concurring opinion that perhaps the *Parker v. Wendy's* court didn't follow the *Burnes Barger* doctrine, and that therefore he is bound to concur in the result reached by the *per curiam*

decision, but he then goes on to a concurrence which Judge Bonapfel is going to discuss.

But the bottom line in the *per curiam* decision that the Eleventh Circuit reached in *Slater* is back to the origins of judicial estoppel in the Eleventh Circuit which is that the debtor had knowledge of the claim and the debtor had a motive to conceal, so the debtor's claim against a third party is bound by the doctrine of judicial estoppel.

JUDGE BONAPFEL: Judge Tjoflat concurred, as Leon just mentioned.²⁶ You really need to think about the whole issues in *Slater*. There are two issues: one, does judicial estoppel apply against the trustee in the bankruptcy case? That's one issue. *Parker v. Wendy's* says it does not, and *Barger*, although it doesn't discuss the issue, holds that it does. So that's one issue, and Tjoflat attacks that and calls for *en banc* review to deal with that issue.

The other issue is the more general issue of how should and how does judicial estoppel properly apply in the bankruptcy context. He also takes aim at that, and that's what a lot of his opinion deals with.

MR. JONES: It is a mammoth concurrence.

JUDGE BONAPFEL: It is. We've included the *per curiam* and the concurring opinion in your materials. If you need to know about the law of judicial estoppel in the Eleventh Circuit, the *per curiam* and the concurring opinion are all you need to know. Judge Tjoflat cites every decision of the Eleventh Circuit dealing with judicial estoppel and goes back and traces its origins very well. Erik's *amicus* brief is a more concise treatment of the development of the law, but it is there and that's why we put it in there because it's very good material.

MR. JONES: And if you're a law student and you're looking for a great example of an appellate court brief, I would commend Erik's brief to you. It's very crispy and concise, in part ground by the fact that you have severe page limitations and font limitations in the Eleventh Circuit.

JUDGE BONAPFEL: So what is on the screen is what Judge Tjoflat says at the outset of his concurring opinion, and it is a summary of it. It says, "The results of today's decision speak for themselves. U.S. Steel no longer faces a set of potentially meritorious employment-discrimination claims. Judicial

²⁶ *Id.* at 1210–53 (Tjoflat, J., concurring).

estoppel disposes of Slater's claims without examination on the merits; indeed, the doctrine blocks them altogether. U.S. Steel is free and clear from any liability it may have owed to Slater. Conversely, for Slater's creditors there will be no recovery on the claims which belonged, by operation of law, to the bankruptcy estate the moment Slater filed her bankruptcy petition. And, the bankruptcy court, despite expressing no concern about the late-arriving claim"²⁷—what he's referring to there is that the bankruptcy court, there's a disclosure of the claim; the bankruptcy court approves the employment of special counsel, and the bankruptcy court later confirms the plan. So the fact that this nondisclosure has occurred is not a problem, the point is, to the participants in the bankruptcy case because nobody raises that question in the bankruptcy case. That's his point. The bankruptcy court, which is not worried about this, "receives no 'protection' through the doctrine. Instead, its experience and discretion are disregarded in favor of the District Court's judgment"²⁸ on judicial estoppel.

His opinion traces the evolution of the judicial estoppel doctrine in the Eleventh Circuit, and he notes as prior panelists have also noted, that the *Burnes* and *Barger* development no longer requires a prior proceeding because the nondisclosure occurs after the lawsuit is filed. It's the second proceeding. The inconsistent position is being taken in the second proceeding: lawsuit filed, bankruptcy filed. That's where the omission occurs. And under traditional notions of judicial estoppel, it's the second court that deals with the inconsistency, not the first one. So that's one of his points.

Then he notes that the judicial estoppel doctrine initially required both positions to be under oath, because, he observes, the federal rules pleading permit, yea, encourage inconsistent pleadings. Rule 8 specifically says you can assert any claims you have, any claim or defense, regardless of consistency. So he says district courts deal with inconsistent pleadings and alternative theories all the time. So the two sworn position has gone away because the positions in the lawsuit are not under oath. They're not required to be under oath.

He noted that in *Burnes* the Eleventh Circuit changed its focus of judicial estoppel from protecting the system to punishing the debtor. The debtor has a duty to disclose, the debtor didn't disclose, bad debtor; therefore, you don't get to prosecute this claim. And that's basically his point on that issue. Then he discussed, as I think Leon mentioned, the *Barger* situation at length. He goes

²⁷ *Id.* at 1211.

²⁸ *Id.*

into what happened in the bankruptcy court, what happened in the district court, what happened in the court of appeals.

MR. JONES: And quotes the bankruptcy judge in the *Barger* case at length and favorably, many, many years after that bankruptcy judge had originally ruled in *Barger*.

JUDGE BONAPFEL: And some of us might say it's about time. As I alluded to earlier, he specifically says the district judge rejected the bankruptcy court's findings. Well, actually the district judge didn't reject the findings because he didn't have them when he initially ruled because, although I was in his courtroom, he was not there and he I'm sure was not listening to what was going on, and I had not issued my opinion in writing before he issued his. So he really, at least in the original opinion, didn't reject them, although he did reject them in the motion for reconsideration.

MR. JONES: With all deference.

JUDGE BONAPFEL: He did, with all due respect. It's kind of like when Leon is before me, he'll say, "with all due respect, Your Honor," and then I know he's about to unload.

So the question again is in analyzing this and thinking about it, it's really not a dispute of fact; it's a question of how you view the law, and in a sense how you view the debtor. And we'll probably get into this more when we talk about it what's going to happen in *Slater*. We're there now.

These are the conclusions. This is the end of his opinion, and there are these basic points:

The continued application of *Burnes* and *Barger* "fails to preserve the integrity of the judicial system and to punish and deter oath-breaking."²⁹

He basically says it really doesn't do what it's supposed to do.

The equitable remedy of judicial estoppel is unnecessary and is in clear tension with the "perfectly adequate range of criminal and civil legal remedies designed by Congress to apply across proceedings in the bankruptcy system."³⁰

What he's talking about is he's saying that Congress in the Bankruptcy Code has remedies for failure to disclose assets. The Criminal Code of the

²⁹ *Id.* at 1235.

³⁰ *Id.*

United States has remedies for failure to disclose assets. One of the things on this point that Judge Tjoflat mentions is the bankruptcy judge in *Barger* didn't refer anything to the United States Attorney despite the obligation of a federal judge to refer suspected perjury to the United States Attorney. The bankruptcy judge didn't do it. The district judge didn't do it.

MR. JONES: I think that's one of the themes of Judge Tjoflat's concurrence is we have these bankruptcy judges here for a reason.

JUDGE BONAPFEL: And then, third, he calls for *en banc* review because this state of affairs works to impugn rather than preserve the judicial system's integrity. And again, it just says that it fails to accord the broad deference to the bankruptcy courts that Congress intended.

Slater is a pre-petition claim in a chapter 7 or maybe a chapter 13. If it's a 13, then whether the judicial estoppel doctrine applies against the 13 trustee or the 13 debtor when the 13 debtor is, a lot of appellate courts refer to the chapter 13 debtor as a debtor-in-possession as if it's just like chapter 11, and of course it's not because a chapter 13 debtor does not have the fiduciary duties of a trustee, which a chapter 7 or chapter 11 debtor does. So the standing doctrine point is arguably doesn't apply against a chapter 13 "debtor-in-possession" if the chapter 13 debtor is prosecuting the claims of the estate. So if *Slater* changes, then that's an issue that could become complicated. Tjoflat does not appear in his analysis to discuss or think about post-petition undisclosed claims, and that's another issue for another day.

So here is what happened. Here's the issue that is before the Eleventh Circuit: whether the doctrine of judicial estoppel as applied to *Barger* and *Burnes* should be overruled. That's the issue. That's what the Eleventh Circuit granted *en banc* review on. So everything in those cases presumably is fair game.

Oral argument was held on February 7th, so we will get an opinion soon, and what's the result going to be?

MR. HEATH: They're going to adopt my *amicus* wholesale.

JUDGE BONAPFEL: I think that brief was favorable to *Barger*, too, to my opinion in *Barger*. So Erik and I think we're going to win.

MS. DYSON: And I think it'll be rejected. I think that the doctrine of judicial estoppel needs to continue to apply. I think that it has been applied

appropriately. I do think that they will revisit the issue of the trustee. The one part of *Slater* that is sort of interesting is trustee never intervened in *Slater* because they converted it at that point. But the Eleventh Circuit still looks like they're taking up that issue even though the trustee didn't actually intervene. I assumed that *Parker* was good law. I thought that *Parker* meant that the trustee, if they come in before the entry of summary judgment, then the trustee has the right to proceed with that claim. And I do think that the Eleventh Circuit will figure out a way to reconcile that issue in the law. But the doctrine of judicial estoppel as it applies to the debtor needs to continue to apply because, with all due respect to Judge Tjoflat and Judge Bonapfel, there are no remedies. The civil remedies and criminal remedies that Judge Tjoflat speaks of are not ever employed in any context, and there does need to be some requirement to enforce the disclosure obligations in bankruptcy court.

And with all due respect, it's not a windfall to the employer because you have to remember the employer still has to deal with the equitable or injunctive relief claims which could be reinstatement. So the debtor shouldn't get the windfall from not disclosing it. I think that the cases that we've talked about here today with *Barger* and *Robinson* aren't the typical type of cases that this applies in. This applies in cases where there hasn't been any disclosure. In *Barger* there was some disclosure, or in *Robinson* where you have a 100% plan, those aren't the typical type of cases, and so there is a need for this doctrine to continue to apply.

MR. HEATH: How does treating this as an issue of standing not address that?

MS. DYSON: So I don't like the word standing.

MR. HEATH: Okay. Party in interest.

MS. DYSON: Because standing I think gives the impression that there is some type of constitutional standing, that the trustee can essentially come in and say there is no jurisdiction for the district court. But the issue of standing I think comes in, in that the real party in interest doesn't have to litigate the claim under Rule 17 of the Federal Rules of Civil Procedure. So the trustee, though, can come in and they have an obligation when there is a disclosure. So these cases where there's a motion for summary judgment and then there's a petition filed immediately, I think the trustee has an obligation to look up that case and to do something about it, to file a notice of appearance, to file a notice of intervention, to make some objection to that litigation proceeding if in fact there is an objection to that litigation proceeding.

JUDGE BONAPFEL: In the chapter 7 context, it is clear that is property of the estate, it's the trustee's claim, and the trustee should move to intervene, to be substituted as the party plaintiff. Chapter 13 case is a little more difficult because there's a dispute in the case of whether a chapter 13 debtor has standing to prosecute the claim. The claim belongs to the estate. It is property of the estate. So the question in a sense really is who has the standing, not in the constitutional sense, to prosecute that claim, and the courts go both ways. There are some courts that say only the trustee; some courts say only the debtor, and some courts say either. But in the *Slater* situation you would expect that the chapter 7 trustee would immediately move to be substituted as a party, and in this context you would hope that the chapter 13 trustee would, if upon conversion, would move to be substituted for the chapter 7 trustee. And then we know, and the courts know, that the bankruptcy estate is the party, not the debtor, and those two things are different. It's easy to lose track of that if you're not a bankruptcy guru like everybody in this room except Sacha the real lawyer is.

MR. JONES: That's one of the likely results in the *Slater en banc* review may deal with, is solving the problem, the divergence between *Parker v. Wendy's* and *Burnes-Barger*. And that you may likely get a result whereby the Eleventh Circuit says that the trustee is not bound by the doctrine of judicial estoppel. And then the question becomes whether the Eleventh Circuit then sort of adopts what the Fifth Circuit said and its dicta in the previous case, and says, well, even if the trustee is not bound by the doctrine of judicial estoppel, the debtor still is, and so then potentially the liability of the defendant is limited to the amount of claims in the case. If the debtor is going to be bound, then the debtor ultimately won't receive a recovery.

The other problem is that *Slater* is not necessarily teed up to address, and I think Judge Bonapfel was just alluding to this, is not teed up to really address what is potentially the worst or most restrictive decision that the Eleventh Circuit has issued in *Robinson v. Tyson*, where you had a 100% plan by a chapter 13 debtor. So will they talk about chapter 13 cases?

MR. HEATH: Let me add one comment to that, because a lot of people may not know there is another Eleventh Circuit case pending right now that was stayed pending the outcome of *Slater, Ingram v. AAA Cooper Transportation*. My hope is, I don't know if this is a prediction because of the way *Slater* is set up, my hope is that *Slater* will at least address the *Robinson* and chapter 13 issue in a way that will enable the *Ingram* court to really tackle that issue,

because that is an issue in the *Ingram* case. So maybe that's one potential outcome.

JUDGE BONAPFEL: Yes. I went to the oral argument. I think I would guess that *Parker v. Wendy's* is going to prevail. They're going to fix that. So they're going to follow *Reed* which follows them. *Reed* follows *Parker*, as have the other circuits. *Parker* was the first circuit court to say, wait a minute, this doesn't apply to the chapter 7 trustee.

We've been talking about *Reed* which is the Fifth Circuit *en banc* case. What *Reed* said was, here's what you do. You try the lawsuit, trustee is the party, you try the lawsuit, and once you get a result, whatever that result is, you don't limit the result in the district court. Then this by the way, footnote, is good news for the contingency fee plaintiff's lawyer. So you try the lawsuit in the district court and you take all the money and you give it to the chapter 7 trustee. What does the trustee do with it? The trustee takes the money, pays all the expenses, administrative expenses, pays himself, pays the contingency fee lawyer, and distributes all the money to the creditors in the case, possibly with post-petition interest at the federal judgment rate which is almost meaningless, and anything left over goes back to the defendant. So that's what *Reed* says. What's going to happen beyond they're going to fix that problem is up in the air. I would give it a really good shot that they're going to do what *Reed* said, and they might, based on some of the questions and observations from some of the judges, I would say they might conclude as Judge Anderson did in concurring in *Robinson*, and as Judge Barkett did in dissenting in *Barger* would find, you know, this really is a factual issue. Somebody has to look at the debtor and get them to testify and decide whether they really were intending to make a mockery of the system.

MR. JONES: That would be wholesale revocation of *Burnes-Barger*.

JUDGE BONAPFEL: It would eliminate the presumption. So there's a possibility that that's going to happen.

MS. DYSON: That's not a determination for a jury, correct?

JUDGE BONAPFEL: She's trying to get me to commit to this.

MS. DYSON: Let me say it this way: I don't believe that's the determination for a jury because I think judicial estoppel is to be decided by the judge, not a jury.

MR. HEATH: It's an equitable doctrine, so that might make sense.

MS. DYSON: Right. So if there is to be a factual determination it's not we deny the motion for summary judgment and let the jury sort it out. I think it's the judge who would then have to have a hearing. And it does get rid of the presumption, but the judge is still making the determination in that instance. They don't have to have an evidentiary hearing. They could use the facts as their determinant by the judge.

MR. JONES: And that still doesn't get the issue back to the bankruptcy judge. You're still having that hearing before the district court judge.

JUDGE BONAPFEL: And this is the point of going back to Judge Tjoflat, and Sacha, this is rebuttal. Sacha mentioned that the remedies for this dishonesty are just not being enforced. Well, I'm not sure that's true or not, but the point is that Congress said, here's what happens if people lie, cheat, and steal in a bankruptcy court. You convict them of a crime in Title 18, § 152 *et seq.*, or you deny the discharge, or you revoke the discharge, or you impose sanctions. That's what Congress said you do to debtors who are bad debtors. Congress didn't say you take away their assets, which is what *Burnes–Barger* does.

MR. HEATH: Judge, not to cut you off but I'm being told we're out of time.

JUDGE BONAPFEL: We did warn him, didn't we?

MS. DYSON: We did.

MR. DEAN: Thank you, Erik. Unfortunately, we don't have any time for questions, but I'm sure they'd be happy to entertain your questions personally. We're going to break for a quick ten-minute snack break. Before we do, please join me in thanking the panelists.