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Judicial Estoppel After *Slater*

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Introduction

On September 18, 2017, the Eleventh Circuit Court of Appeals (the "Circuit"), sitting *en banc*, overruled its prior precedent and held that, before invoking the doctrine of judicial estoppel, the courts must consider the "totality of the circumstances" to determine whether the plaintiff-debtor had the requisite intent to make a mockery of the judicial system. This standard–an intent to make a mockery of the judicial system–is the second element of the two-part test utilized by the Circuit to determine whether the application of judicial estoppel is warranted. Prior to *Slater v. United States Steel Corporation ("Slater II"),* [1] this standard operated as a strict liability on plaintiff-debtors who failed to disclose civil claims in their bankruptcy filings, and it centered around two considerations: (1) whether the plaintiff had knowledge of the claims and (2) a motive to conceal them. After *Slater II*, the second prong turns on a fact-intensive analysis, and the courts must now consider the "totality of circumstances" surrounding the debtor's nondisclosure, including the debtor's intent, before judicially estopping a plaintiff-debtor's claims.

Application of Judicial Estoppel Before *Slater II*

Judicial estoppel is an equitable doctrine that "is intended to 'prevent the perversion of the judicial process' and 'protect [its] integrity … by prohibiting parties from deliberately changing positions according to the exigencies of the moment.'"[2] "When a party does so, the doctrine of judicial estoppel allows a court to exercise its discretion to dismiss the party's claims."[3] The doctrine was articulated by the Supreme Court in *New Hampshire v. Maine,* a non-bankruptcy case

[1] *Slater v. U.S. Steel Corp*., 871 F.3d 1174, 1180 (11th Cir. 2017).

[2] *Slater II,* 871 F.3d at 1180 (citing *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)).

[3] *Id*.

that concerned a boundary dispute between two states.[4] In relation to bankruptcy proceedings, judicial estoppel is often raised in district court cases when a plaintiff-debtor has asserted a civil claim that was not listed in his or her bankruptcy filings.

The Court in *New Hampshire* identified three factors to determine whether the doctrine of judicial estoppel should be invoked.[5] The first factor was whether a party's earlier position was "clearly inconsistent" with its later position.[6] The second factor was whether the "party has succeeded in persuading a court to accept that … position, so that judicial acceptance of an inconsistent position … would create 'the perception that either the first or second court was misled.'"[7] And finally, the third factor was whether "the party seeking to assert an inconsistent position would derive an unfair advantage."[8]

Following *New Hampshire*, the Circuit formulated a two-part test for analyzing judicial estoppel in *Burnes v. Pemco Aeroplex, Inc.*[9] First, "the allegedly inconsistent positions [must have been] made under oath in a prior proceeding."[10] Second, the "inconsistences must … have been calculated to make a mockery of the judicial system."[11] The Circuit has defined this standard as:

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[4]*New Hampshire v. Maine*, *supra*.

[5]*Id*. at 750-51.

[6]*Id*. at 750.

[7]*Id*. at 750 (quoting *Edwards v. Atena Life Ins*., 690 F.2d 595, 599 (6th Cir. 1982)).

[8]*Id*. at 751.

[9]291 F.3d 1282, 1285 (11th Cir. 2002).

[10]*Burnes*, 291 F.3d at 1285 (citations omitted).

[11]*Burnes*, 291 F.3d at 1285 (citation omitted).

"a purposeful contradiction – not simple error or inadvertence."[12] Preceding *Slater II*, purpose was inferred from the debtor's knowledge about the undisclosed claims, and the debtor's motive to conceal them.[13] In other words, the Circuit "endorsed an inference that a plaintiff who failed to disclose a lawsuit in [] bankruptcy intended to manipulate the judicial system because the omission was not inadvertent."[14] In effect, the plaintiff's potential benefit from nondisclosure was sufficient to establish that he or she intended to make a mockery out of the judicial system. Hence, as Judge Tjoflat stated in his concurrence to *Slater I*, "the word inadvertent and mistake [were] meaningless."[15] The Circuit made no distinction between chapter 7 and chapter 13 filings for the second prong – an intent to manipulate the judicial system.[16]

Before *Slater II*, the Eleventh Circuit precedent regarding the second prong was predicated primarily on two cases: *Burnes* and *Barger v. City of Cartersville*. Under the *Burnes-Barger* holdings, a plaintiff-debtor who failed to list a cause of action in his or her bankruptcy filings had the necessary intent to make a mockery of the judicial system. For example, in *Burnes*, the Circuit held that a district court did not abuse its discretion in applying judicial estoppel to bar a plaintiff's monetary claims when he failed to include the lawsuit as an asset in his bankruptcy filings. The plaintiff-debtor filed for chapter 13 bankruptcy, and then later sued his employer for

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[12]*Barger v. City of Cartersville*, 348 F.3d 1289, 1294 (11th Cir. 2003) (citing *Burnes*, 291 F.2d at 1286).

[13]*Burnes*, 291 F.3d at 1287.

[14]*Slater II*, 871 F.3d at 1182.

[15]*Slater v. U.S. Steel Corp.*, 820 F.3d 1193, 1234 (11th Cir. 2016) ("*Slater I*")

[16]*De Leon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1291 (11th Cir. 2003) (concluding that there was not a significant enough distinction between chapter 7 and chapter 13 to want a different application of the two-prong judicial estoppel test and that a chapter 13 debtor has an equal motive to conceal assets as a chapter 7 debtor does).

discrimination. The plaintiff did not, however, amend his bankruptcy schedules to include the lawsuit. Subsequently, the plaintiff converted his chapter 13 case to a chapter 7 and, eventually, received a no-asset discharge.[17] Thereafter, the defendant employer moved for summary judgment. The district court granted the motion on judicial estoppel grounds, and the Circuit affirmed. In affirming the district court, the Circuit applied its two-part test and held that the plaintiff "had knowledge of his claims" and motive to conceal the lawsuit because "[i]t [was] unlikely he would have received . . . a no asset, complete discharge" if he had disclosed his multi-million-dollar claim.[18] In essence, as the Circuit later acknowledged in *Slater II*, that "[it] permitted the inferential leap [in *Burnes*] from [the plaintiff's] potential motive to hide the lawsuit to the conclusion that he in fact acted with such motive and thus intended to manipulate the proceedings."[19]

In *Barger*, the panel majority followed the *Burnes* rationale and held that the district court did not abuse its discretion when it found that the trustee was judicially estopped from pursuing the claims based solely on the plaintiff-debtor's failure to disclose the employment discrimination claims in her bankruptcy case.[20] In *Barger*, the defendant filed a dispositive motion based on judicial estoppel. The plaintiff-debtor responded that she informed her bankruptcy attorney and the chapter 7 trustee about the pending employment discrimination lawsuit, but her bankruptcy attorney did not disclose the lawsuit in her bankruptcy filings.[21] After the plaintiff-debtor received

[17] *Burnes*, 291 F.3d at 1284.

[18] *Id.* at 1288.

[19] *Slater II*, 871 F.3d at 1183.

[20] *Slater I*, 820 F.3d at 1124-25 (quoting *Burnes*, 291 F.3d at 1288).

[21] *Barger*, 348 F.3d at 1291.

a chapter 7 discharge, the defendant-employer moved for summary judgment on judicial estoppel grounds. The plaintiff then moved to reopen her bankruptcy case so that she could disclose her employment discrimination claims. The bankruptcy court granted the motion to reopen, and allowed the trustee to pursue the claims against the defendant, finding that the plaintiff had not intentionally concealed the lawsuit nor sought to obtain an unfair advantage for herself by failing to disclose it. Despite the bankruptcy court's ruling, the district court applied judicial estoppel to bar the lawsuit.[22]

An appeal followed, and a three-judge panel considered the trustee as the appellant since the plaintiff's claims constituted property of the bankruptcy estate. The Circuit attributed the plaintiff's conduct on the trustee, and determined that the district court did not abuse its discretion in invoking judicial estoppel to bar the claims.[23] The panel majority affirmed the district court, finding that the plaintiff obviously had knowledge of the undisclosed claims and had a motive to conceal them because by "omitting the claims, she could keep any proceeds for herself and not have them become part of the bankruptcy estate. [24] Thus, [her] knowledge of her discrimination claims and motive to conceal them [were] sufficient evidence from which to infer her intentional manipulation."[25] In reaching its determination, the panel majority noted that "the fact that the [plaintiff] informed the trustee about her discrimination suit did not aid her cause" because when

[22]*Id*. at 1291-1292.

[23]*Slater I*, 820 F.3d at 1207 (citing *Barger*, 348 F.3d at 1292-93 and 1295).

[24]The panel majority affirmed the district court judgment insofar as it dismissed the plaintiff's claims for monetary damages and held, like the plaintiff in *Burnes*, the plaintiff was not prohibited from seeking injunctive relief.

[25]*Id*. at 1296 (citing *Burnes*, 291 F.3d at 1287).

she was asked by the trustee regarding the monetary value of the suit, she stated that she only sought reinstatement of her previous position with the defendant, and she did not advise the trustee that she was seeking back pay and damages.[26]

Additionally, the Circuit found that:

> [the plaintiff's] attempt to reopen the bankruptcy estate to include her discrimination claim hardly casts her in the good light she would like. She only sought to reopen the bankruptcy estate after the defendants moved the district court to enter summary judgment against her on judicial estoppel grounds. …. As such, [the plaintiff's] disclosure upon re-opening the bankruptcy estate deserves no favor.[27]

In the concurrence to *Slater I*, Judge Tjoflat stated that *Barger* "further weakened the intent requirement by reinforcing *Burnes's* conclusion that it would diminish debtors' 'necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets' if a noncompliant debtor were 'allow[ed] to back up, re-open the bankruptcy case, and amend his bankruptcy filings.'"[28]

Following *Burnes* and *Barger*, the Circuit extended its reasoning to chapter 13 cases in *De Leon v. Comcar Indus., Inc.*, and *Robinson v. Tyson Foods, Inc*.[29]

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[26]*Barger*, 348 F.3d at 1296.

[27]*Id.* at 1297.

[28]*Slater I*, 820 F.3d at 1224-25.

[29]*De Leon*, 321 F.3d at 1291-92; and *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1275-76 (11th Cir. 2010) (affirming the district court's findings that a chapter 13 debtor had a continuing duty to amend her bankruptcy schedules and took inconsistent positions under oath in her bankruptcy proceedings and therefore she was barred from prosecuting the her employment discrimination claims under the doctrine of judicial estoppel even though she was paying her unsecured creditors 100% under her plan).

Slater v. United States Steel Corporation
(Slater I and Slater II)

In *Slater v. U.S. Steel Corp.*, the plaintiff, Sandra Slater ("Slater") filed a chapter 7 petition almost two years after she had initiated a civil lawsuit in the United States District Court for the Northern District of Alabama (the "District Court") against her former employer U.S. Steel Corporation ("U.S. Steel") for retaliation and discrimination in her employment ("*Slater I*").[30] When she filed her chapter 7 petition, Slater failed to disclose the lawsuit. In fact, in Schedule B and in the Statement of Financial Affairs, Slater affirmatively stated that she had no contingent claims or pending lawsuits. After Slater's bankruptcy case was fully administered, U.S. Steel moved for summary judgment in the District Court and sought a determination that Slater's employment discrimination claims were barred under the doctrine of judicial estoppel due to her failure to list the lawsuit in her chapter 7 bankruptcy case.[31]

The following day, Slater amended her bankruptcy filings to list the lawsuit. The bankruptcy court granted the trustee's motion to employ Slater's civil attorneys so they could continue to pursue the lawsuit in the District Court. Slater then converted her bankruptcy case from chapter 7 to chapter 13 but failed to make all required payments under her plan and the case was ultimately dismissed.[32]

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[30] *Slater v. U.S. Steel Corp.*, 820 F.3d 1193 (11th Cir. 2016).

[31] *Slater II*, 871 F.3d at 1177-1178.

[32] *Id*. at 1178.

Based upon Eleventh Circuit precedent, namely, *Burnes* and *Barger*, the District Court granted summary judgment in favor of U.S. Steel, and held that Slater was judicially estopped from pursuing the employment discrimination claims based upon her failure to disclose them in her bankruptcy case, and the presumption that she was motivated by the desire to conceal them from her creditors.[33]

On appeal, a three-judge panel[34] of the Circuit affirmed in a 32-page *per curiam* opinion.[35] First, the Circuit acknowledged the Circuit's general rule that judicial estoppel applies when a litigant takes inconsistent positions and intends to "make a mockery of the judicial system." Then, the Circuit found that the first prong of the two-part judicial estoppel test was met; Slater took inconsistent positions by omitting the claims from her bankruptcy filings.[36] The Circuit then focused on second prong of its two-part test – the element of intent. Under the *Burnes* and *Barger* holdings, the Circuit concluded that the intent to make a mockery of the judicial system was conclusively established by a plaintiff-debtor's nondisclosure "even if the plaintiff corrected his bankruptcy disclosures after the omission was called to his attention and the bankruptcy court allowed the correction without penalty."[37]

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[33]*Id.*

[34]The three-judge panel consisted of Eleventh Circuit Judges Gerald Tjoflat and William H. Pryor, Jr., and District Court Judge Robert N. Scola from the Southern District of Florida.

[35]*Slater I*, 820 F.3d at 1195.

[36]*Slater I*, 820 F.3d at 1199.

[37]*Id.*

Judge Tjoflat concurred in the court's judgment because the result was dictated by Eleventh Circuit precedent. However, in his concurring opinion,[38] Judge Tjoflat urged the court to reconsider its precedent *en banc*, and he stated that the *Burnes-Barger* regime "guarantees the very mockery of justice the doctrine of judicial estoppel was designed to avoid." Judge Tjoflat further stated that "the current state of our judicial-estoppel jurisprudence is both confused and confusing, calling to mind the old saw that justice ought not be dispensed under a rule that varies by the length of the presiding judge's foot."[39] "In sum," Judge Tjoflat stated that "trying to reconcile [the Circuit's] decisions applying judicial estoppel as a uniform doctrine proves problematic, to say the least."[40]

Judge Tjoflat devoted much of his concurrence to explaining why *Burnes* and *Barger* should be reversed, and why the courts should instead consider the totality of all the facts and circumstances when determining whether the plaintiff intended to make a mockery of the judicial system. The concurrence discussed avoiding "an unjustified windfall" to "an otherwise liable civil defendant" while depriving creditors of an asset and stripping the bankruptcy court of its discretion.[41]

In *Slater II*, the Circuit agreed to rehear the case *en banc* and it vacated the panel opinion from *Slater I*. With *en banc* review, the Circuit reconsidered whether "the mere fact of the plaintiff's nondisclosure is sufficient [to establish intent to make a mockery of the judicial system]

[38]Attorneys confronted with an issue in the Eleventh Circuit involving judicial estoppel should read Judge Tjoflat's 78-page concurrence. It discusses virtually everything a bankruptcy practitioner needs to know about the doctrine of judicial estoppel before *Slater II*.

[39]*Slater I*, 820 F.3d at 1231.

[40]*Id*. at 1233.

[41]*Id*. at 1235.

even if the plaintiff corrected his bankruptcy disclosures after the omission was called to his attention and the bankruptcy court allowed the correction without penalty."[42]

Judge Jill Pryor wrote for the majority and began the opinion with an analysis of the differences between chapter 7 and chapter 13. The Circuit found that, in chapter 7, the debtor's property becomes part of the bankruptcy estate to be administered by the trustee and, consequently, only the trustee has standing to pursue a pending lawsuit. On the other hand, in a chapter 13 case, the Circuit noted that upon confirmation, property of the estate reverts to the debtor and she has standing to maintain the lawsuit except as provided for in the plan or the confirmation order.[43]

With that difference in mind, the Circuit turned to the principles of the doctrine of judicial estoppel and the two-part test it employs: whether "(1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were 'calculated to make a mockery of the judicial system.'"[44] It is the second prong of this test that the Circuit focused on in its decision, noting that *Barger* and *Burnes* essentially created a presumption of satisfaction of the second prong by virtue of satisfaction of the first. Specifically, the Circuit explained that

> In *Burnes* and *Barger*, we endorsed an inference that a plaintiff who failed to disclose a lawsuit in a Chapter 7 bankruptcy intended to manipulate the judicial system because the omission was not inadvertent. In effect, we treated the fact that the plaintiff could potentially benefit from the nondisclosure as sufficient to establish that the plaintiff, in fact, intended to deceive the court and manipulate the proceedings. And we subsequently extended that reasoning to cases involving Chapter 13 debtors as well.[45]

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[42]*Slater II*, 871 F.2d 1174, 1176 (11th Cir. 2017).

[43]*Slater II*, 871 F.3d at 1179-80.

[44]*Id*. at 1181 (quoting *Burnes*, 291 F.3d at 1285).

[45]*Id*. at 1182 (citing *Robinson v. Tyson Foods, Inc.*, 595 F.3d at 1275-76); *De Leon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1291-92 (11th Cir. 2003)).

In effect, the Circuit recognized that Eleventh Circuit precedent has "treated the fact of the plaintiff's omission as establishing the requisite intent."[46]

The Circuit found that the decisions in *Burnes* and *Barger* could not be reconciled with other Eleventh Circuit precedent such as *Parker v. Wendy's Int'l, Inc.*[47] and *Ajaka v. Brooksamerica Mortg. Corp.*[48] In *Parker*, the Circuit reversed the district court's application of judicial estoppel to bar a chapter 7 trustee from pursuing a cause of action against a plaintiff-debtor's employer, which the plaintiff failed to disclose in her bankruptcy filings. The Circuit concluded that judicial estoppel should not bar the trustee because, as the representative of the bankruptcy estate, the trustee became "the proper party in interest, and … the only party with standing to prosecute causes of action belonging to the estate."[49] The Circuit held that because the trustee was the real party in interest in the lawsuit, and had never taken an inconsistent position under oath, the district court abused its discretion in applying judicial estoppel.[50] The Circuit recognized that the holding in *Parker* could not be reconciled with *Barger*.

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[46]*Slater II*, 871 F.3d at 1180.

[47]*Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004). In both *Slater I* and *Slater II*, the Circuit recognized that *Parker* was factually on all fours with *Barger*, but reached the opposite result. In *Parker*, the Circuit held that the claim against Wendy's belonged to the bankruptcy estate, and the trustee, not the debtor, was the proper party in interest; the trustee made no false or inconsistent statement under other oath in a prior proceeding; and therefore, judicial estoppel did not bar the trustee from prosecuting the claims. In contrast, in *Barger*, the Circuit held that the trustee was bound by the debtor's failure to disclose in her bankruptcy filings and, consequently, the trustee was barred under the doctrine of judicial estoppel from prosecuting the discrimination claims.

[48]453 F.3d 1339 (11th Cir. 2006).

[49]*Slater II*, 871 F.3d at 1184 (citing *Parker*, 365 F.3d at 1272).

[50]*Id.*

Additionally, the Circuit found that *Ajaka* could not be squared with *Burnes* and *Barg*er. In *Ajaka,* the Circuit "looked beyond a Chapter 13 debtor's failure to disclose a civil lawsuit to determine whether the debtor actually intended to make a mockery of judicial proceedings."[51] There, after the plaintiff-debtor filed a chapter 13 petition, he filed a Truth in Lending Act ("TILA") claim against his mortgage lender in district court. The debtor disclosed his TILA claim to his bankruptcy attorney, but the attorney failed to list it in the bankruptcy schedules.[52] The creditors were aware of the TILA claim and the debtor amended his schedules later to include it. Because the plaintiff failed to disclose his TILA claim, the defendant moved for summary judgment based on judicial estoppel.[53] The district court in *Ajaka* granted the motion for summary judgment and found that the plaintiff intended to make a mockery of the judicial system.[54] The Circuit found the district court's application of judicial estoppel to have been in error and remanded with instructions for the court to address whether the debtor had the requisite intent to conceal. In reaching its determination, the Circuit relied, in part, on the fact that the plaintiff subsequently amended his bankruptcy schedules.[55]

In *Slater II,* after recognizing the "flaws in [its] reasoning in *Burnes* and *Barger* and the inconsistencies in [Eleventh Circuit] precedent," the Circuit addressed how district courts should evaluate a debtor's intent. The Circuit found that the proper analysis of the second prong of the judicial estoppel test requires examination of a totality of the facts and circumstances including,

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[51] *Slater II*, 871 F.3d at 1184.

[52]*Slater II*, 871 F.3d at 1185 (citing *Ajaka*, 453 F.3d at 1342).

[53]*Id.*

[54] *Id*.

[55] *Slater II*, 871 F.3d at 1185 (citing *Ajaka*, 453 F.3d at 1343).

but not limited to, such factors as the debtor's level of sophistication, whether and under what circumstances she corrected the nondisclosure, whether the debtor's attorney and/or the creditors were aware of the lawsuit, whether the debtor revealed any other lawsuits to which she was a party, and what action the bankruptcy court deemed appropriate to address the late disclosure.[56] The Circuit then stated that "voluntariness alone does not necessarily establish a calculated attempt to undermine the judicial process."[57] Therefore, the Circuit overruled *Barger* and *Burnes* to the extent their holdings allowed a court to infer a debtor's intent to mislead without considering these and other relevant facts and circumstances.[58]

The Circuit gave three reasons to overrule the intent inference accepted in *Burnes* and *Barger*.[59] First, the Circuit stated that district courts "should look beyond a plaintiff's omission in determining whether the plaintiff intended to misuse the judicial process."[60] In doing so, the Circuit concluded that its "decisions in *Burnes* and *Barger* conflated the questions of whether the plaintiff's omission was inadvertent with the separate question of whether the plaintiff actually intended to manipulate the judicial system to his advantage."[61] In support of this conclusion, the Circuit presented a hypothetical plaintiff who may have failed to disclose a pending lawsuit because he did not understand the disclosure obligations. The Circuit stated "[i]t is not difficult to imagine that some debtors, particularly those proceeding *pro se*, may not realize that a pending

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[56] *Slater II*, 871 F.3d at 1185.

[57] *Id.* at 1177.

[58] *Id.* at 1185.

[59] *Id*.

[60] *Id*. at 1186.

[61] *Id.*

lawsuit qualifies as a 'contingent and unliquidated claim" that must be disclosed on a schedule of assets."[62]

Second, the Circuit found that reviewing all facts and circumstances would provide the district courts with the flexibility to consider relevant findings or other actions in the bankruptcy court. The Circuit began by writing that it previously justified the application of judicial estoppel "as necessary to ensure full and honest disclosure to the bankruptcy courts and protect 'the effective functioning of the federal bankruptcy system.'"[63] The Circuit stated that this justification, however, ignored certain realities of the bankruptcy courts, and the Bankruptcy Code and Rules.[64] For instance, the Circuit acknowledged that Bankruptcy Rule 1009 allows a debtor to amend a schedule or statement "as a matter of course at any time before the case is closed, and Bankruptcy Code § 350(b) allows bankruptcy courts to reopen a closed case to administer an asset that had not been scheduled."[65] According to the majority, "inferring intent to make a mockery of the court based upon omission alone is inconsistent with [bankruptcy] principles," especially in light of the bankruptcy court's own procedures to punish dishonest debtors.[66]

Third, the Circuit reasoned that its current ruling was more in line with the principles behind the doctrine of judicial estoppel. Specifically, the Circuit found that its current holding ensures that the debtor had the requisite culpable mental state and it better supports the equitable

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[62]*Id.*

[63]*Id.* at 1186 (citing *Burnes*, 291 F.3d at 1286).

[64]11 U.S.C. § 101, *et seq*. (the "Bankruptcy Code") and the Federal Rules of Bankruptcy Procedure (the "Rules" or "Bankruptcy Rules")

[65]*Id.* (citing Fed. R. Bankr. P. 1009 and 11 U.S.C. § 350(b)).

[66]*Id.* at 1187.

underpinnings of the doctrine. The Circuit also noted that "[i]f a court applies judicial estoppel to bar the plaintiff's claim absent such intent, it awards the civil defendant an unjustified windfall."[67] The Circuit stated "[j]ust as equity frowns upon a plaintiff's pursuit of a claim that he intentionally concealed in bankruptcy proceedings, equity cannot condone a defendant's avoidance of liability through a doctrine premised upon intentional misconduct without establishing such misconduct."[68] What is of more circumstance, the Circuit rationalized, is that "the application of judicial estoppel poses a potential risk of harm to innocent creditors" because when the lawsuit is dismissed on judicial estoppel grounds, the asset becomes worthless to the bankruptcy estate.[69]

Based upon these reasons, the Circuit overruled its prior precedent approving the inference of intent based solely on the failure to disclose the lawsuit in the bankruptcy. Instead, the Circuit held that district courts should consider all of the facts and circumstances of the case to determine whether a plaintiff intended to manipulate the judicial system.[70] In so holding, the Circuit noted that it joined three other circuits that have applied a totality of the circumstances analysis to judicial estoppel.[71] It disagreed with two circuits applying a presumption similar to *Barger* and *Burnes*.[72]

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[67] *Id*.

[68] *Id.* at 1187-88.

[69] *Id*. at 1188.

[70] *Id*. at 1189.

[71] *See Spanie v. Cmty. Contacts, Inc.*, 756 F.3d 542, 548 (7th Circ. 2014); *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 276 (9th Cir. 2013); *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.2d 894, 899 (6th Cir. 2004).

[72] *See, e.g., Eastman v. Union Pac. R.R. Co.*, 493 F3d 1151, 1157-60 (10th Cir. 2007); *In re Superior Crewboats, Inc.*, 374 F.3d 330, 335-36 (5th Cir. 2004).

In a concurring opinion, Chief Judge Ed Carnes emphasized that district court judges are not required to blindly accept a debtor's testimony regarding his own intent, even if the testimony is undisputed. According to Chief Judge Carnes, someone willing to intentionally mislead in bankruptcy courts – an act that amounts to perjury – would have no issue doing the same at the district court level. He reasoned that requiring the district court to accept a debtor's position wholesale would render the doctrine moot. In Chief Judge Carnes's view, the doctrine's end would be at the expense of honest creditors and the judicial system as a whole. Ultimately, the concurring opinion points to one critical sentence from footnote 12 in the majority opinion: "Of course, the district court may determine that a plaintiff's testimony that he misunderstood the disclosure obligations is not credible."[73]

Application of Judicial Estoppel After *Slater II*

Since *Slater II*, a majority of courts have applied the totality of the facts and circumstances to deny judgment as a matter of law on judicial estoppel grounds.[74] In fact, only two of the seven

[73]*Slater II*, 871 F.3d at 1187 n.12.

[74]*See Freeman v. Hotel Equities Grp.*, LLC, No. 5:16-CV-250, 2017 WL 5147103 (M.D. Ga. Nov. 6, 2017) (considering all of the facts and circumstances and concluding that defendant had not established as a matter of law that the *pro se* plaintiff intended to make a mockery of the judicial system based upon the plaintiff's level of sophistication and attempt to correct his schedules); *Chittim v. Chittim*, 230 So.3d 966 (Fla. D. Ct. App. 2017) (finding that, based upon the totality of the circumstances, wife was not judicially estopped from recovering attorney fees in dissolution proceeding because she disclosed the dissolution proceeding to the trustee and the trustee stated he had no interest in the attorney fees); *Brewton v. First Liberty Ins. Corp.*, No. 5:14-CV-436, 2017 WL 5616360 (M.D. Ga. Nov. 21, 2017) (finding that the evidence, considered as a whole, did not support the inference to establish that the plaintiff's actions were calculated to make a mockery of the judicial system because her nondisclosure appeared to be inadvertent and plaintiff intended to pay creditors 100% in her chapter 13 plan); *Romeo v. Israel*, No. 13-61411, 2017 WL 5068369 (S.D. Fla. Nov. 3, 2017) (citing *Slater II* and *Parker* and holding that the trustee was the real party in interest and had never taken an inconsistent position under oath and therefore was not judicially estopped from pursuing undisclosed claims); and *Hicks v. U.S. Bank Nat'l Ass'n*, No. 15-10005, 2018 WL 1115367 (Bankr. S.D. Ga. Feb. 27, 2018) (finding no inconsistent position

post-*Slater II* decisions have granted summary judgment based on judicial estoppel grounds.[75] In one of those cases, *Wholesalcars.com v. Hutcherson*, Chief Judge Bowdre (who presided over *Slater* in District Court) applied judicial estoppel to prevent the plaintiff-debtor from collecting an arbitration award against her former employer. The District Court found that the plaintiff-debtor intended to make a mockery of the judicial system based upon her failure to disclose the discrimination lawsuit, and the award, in her chapter 7 bankruptcy proceedings. However, Chief Judge Bowdre held that the chapter 7 trustee, instead of the debtor, could collect the arbitration award on behalf of the bankruptcy estate.

In *Hutcherson*, the plaintiff-debtor filed a civil case in July 2014 against her previous employer in district court. The case proceeded to arbitration on September 8 and 9, 2015.[76]

That same month, on September 25, 2015, the plaintiff filed a chapter 7 bankruptcy petition. The plaintiff did not list the civil case or the arbitration award in her bankruptcy filings. Additionally, when asked by the trustee at her 341 meeting on November 6, 2015, whether the plaintiff was "suing anyone for any reason," the plaintiff responded "[N]o sir."[77]

On November 25, 2015, the arbitrator awarded the plaintiff $116,677.22.[78]

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was taken at the time that the bankruptcy schedules were filed and defendant did not establish an intent to manipulate because court was aware of the plaintiff's positions).

[75]*Wholesalecars.com v. Hutcherson,* No. 16-CV-00155, 2018 WL 1509509 (N.D. Ala. March 27, 2018); and *Hardwood v. Miami-Dade Cty.*, No. 16-CV-21874, 2018 WL 1156010 (S.D. Fla. Mar. 1, 2018) (analyzing the totality of the circumstances including but not limited to the plaintiff's level of sophistication, his failure to amend the bankruptcy schedules, and the listing of other lawsuits in previous bankruptcy cases, and finding that the plaintiff intended to make a mockery of the judicial system).

[76]*Hutcherson*, 2018 WL 1509509, at *1.

[77]*Id*. at *1-2.

[78]*Id.* at *2.

Thereafter, in January 2016, the plaintiff amended her bankruptcy schedules to list some unscheduled debts. She did not disclose the award or adjust the value of her assets in the amended schedules.[79]

On January 7, 2016, the plaintiff received a chapter 7 discharge and soon after, Wholesalecars.com filed a motion to vacate which alleged that the plaintiff obtained the arbitration award through fraud. Specifically, Wholesalecars.com argued that the plaintiff did not tell the arbitrator that she was in bankruptcy and, therefore, falsely represented to the arbitrator that she was entitled to pursue the claim that actually belonged to the bankruptcy estate. Additionally, Wholesalecars.com argued that the plaintiff was barred under the doctrine of judicial estoppel from enforcing the award. Wholesalecars.com requested the district court to vacate the award or estop the plaintiff from collecting it. The district court allowed the chapter 7 trustee to intervene in the case.[80]

Chief Judge Bowdre declined to vacate the award, and found that the plaintiff's failure to tell the arbitrator that she was in bankruptcy was not sufficiently related to an issue in the arbitration. The court said that "[t]he arbitrator's decision, the merits of the case, and Wholesalecars.com's ability to present its defense would not have changed had [the plaintiff] revealed her lack of standing and the trustee was appropriately substituted in to the arbitration."[81]

Chief Judge Bowdre went on to conclude that the plaintiff was judicially estopped from collecting the award. Relying on *Slater II*, she found that the plaintiff's "repeated omissions of the

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[79]*Id.*

[80]*Id*. at *2.

[81]*Id*. at *3.

suit and the award evinced an intent to 'make a mockery of the judicial system.'" The court noted that the plaintiff-debtor had three opportunities to disclose the lawsuit and award; (1) she omitted them from them from original bankruptcy filings, (2) denied under oath at her 341 meeting of creditors that she was suing anyone, and (3) omitted the lawsuit and award from her amended bankruptcy filings.[82]

In regard to the first omission – failure to list the lawsuit in the original bankruptcy filings, Chief Judge Bowdre gave the plaintiff "the benefit of the doubt" but went on state "the court considers all facts and circumstances together and the court cannot excuse the remainder of [the plaintiff's] conduct.[83] Chief Judge Bowdre concluded that, "most egregiously," the plaintiff did not respond truthfully about her participation in any lawsuits when asked by the chapter 7 trustee at her 341 meeting of creditors.[84] Finally, in regard to the plaintiff's omission of the lawsuit and award from the amended schedules, Chief Judge Bowdre stated:

> Unlike the first omission, the court cannot construe this omission as a mere misunderstanding. When Ms. Hutcherson again represented that she did not have any previously unscheduled assets, Ms. Hutcherson knew she possessed an award from a prepetition cause of action worth $116,677.22. The size of the award itself—the award exceeds the total value of her scheduled assets by $41,002.22—evidences Ms. Hutcherson's awareness of and motive to conceal the award. Furthermore, she amended her liabilities on a form that prompted her to also report the value of her assets. (*See* Doc. 1-11 at 23). Because Ms. Hutcherson knew she had a duty to report—and did report—previously unscheduled *liabilities*, she likely knew she had to report previously unscheduled *assets* as well.[85]

[82] *Id.* at *4.

[83] *Id.*

[84] *Id.*

[85] *Id.* at *5 (emphasis in the original).

Based upon the foregoing, the District Court inferred that the plaintiff intended to make a mockery of the judicial system by intentionally hiding the lawsuit and the arbitration award from the bankruptcy court. Accordingly, Chief Judge Bowdre granted Wholesalecars.com motion to the extent that it requested the court to judicially estop the plaintiff from enforcing the arbitration award in her name. However, because the chapter 7 trustee never took inconsistent positions under oath, the court held that the trustee could enforce the award in the interest of the bankruptcy estate.[86]

The Circuit currently has another judicial estoppel case pending before it, *Kellie B. Ingram, et al v. AAA Cooper Transportation*.[87] It will be interesting to see how the judicial estoppel doctrine develops further in this case.

Conclusion

The Circuit's decision in *Slater II* does not change its two-part test for determining when judicial estoppel applies. The test includes (1) whether the plaintiff-debtor took inconsistent positions, and (2) whether the plaintiff-debtor intended to make a mockery of the judicial system. It is only the second prong, the plaintiff-debtor's intent, which has changed. Courts can no longer infer intent from an inconsistent position. The courts should consider all of the facts and circumstances surrounding the nondisclosure of a civil claim to determine whether judicial estoppel applies.

The effects of the Circuit's decision could have far-reaching consequences for plaintiff-debtors and defendants alike. As a result of the holding in *Slater II*, obtaining summary judgment

[86]*Id*. at *6. *See also Romeo*, 2107 WL 5068369 (citing *Slater II* and *Parker* and holding that the trustee was not judicially estopped from pursuing undisclosed claims because he had ever taken an inconsistent position under oath).

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or dismissal on judicial estoppel grounds may be more challenging, as evidenced by the post-*Slater* holdings thus far. Merely relying on the plaintiff's sworn bankruptcy filings is no longer sufficient to prove a judicial estoppel defense.

Courts should look to all the facts and circumstances of the case to decide whether a plaintiff's inconsistent statements were calculated to make a mockery of the judicial system. As Chief Judge Carnes reminded us with his concurrence, this change does not mean that the judicial estoppel doctrine has ended. District courts are not required to accept the plaintiff's denial of his or her intent to mislead, even if that testimony is uncontradicted. Rather, district courts have the authority and the responsibility to find the facts and not to blindly accept testimony.