BANKRUPTCY FOR THE NON-BANKRUPTCY LITIGATOR
(or, How to Stay Out of Trouble with the Bankruptcy Court)

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U.S. Bankruptcy Court for the Southern
District of Alabama
Alabama State Bar Meeting
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The Basics

- Chapter 7 -- Liquidation (either individual or corporate). Debtor turns over all his or its assets to a Chapter 7 trustee, who liquidates them and pays the proceeds to creditors. Under Alabama law, individual debtor is entitled to claim exemptions of $7,500 for personal property and $15,000 in homestead (after 6/11/15 amendments).

- Chapter 13 -- Wage earner reorganization. Most common type of bankruptcy in Alabama (80% of cases in S.D. Ala.). Individual debtor pays the Chapter 13 trustee a certain amount every month over a plan period of three to five years.

- Chapter 11 -- Reorganization. Debtor can be either a corporation or an individual, but the process is expensive, so not many individuals use it. Rules are complicated, but debtor must submit a reorganization plan to the court which shows that it or he will pay secured creditors at least the value of their collateral plus interest and will pay unsecured creditors more than they would receive in a Chapter 7 liquidation. Creditors get to vote on plan.

- Petition date -- Date that bankruptcy is filed.

- Automatic stay -- Stops any action against the debtor or asset of the bankruptcy estate to collect prepetition debt. Automatic stay takes effect immediately upon filing and stays in effect until the discharge. A motion for relief from stay is usually filed by a secured creditor but must also be filed to allow a lawsuit against debtor to proceed (see p. 6).

- Discharge -- Discharges the debtor from prepetition debt except to the extent otherwise provided by law or the plan.

- Proof of claim -- Must be filed before deadline in order to be paid from bankruptcy. Claim is presumed valid unless objected to. No need to file in a "no-asset" Chapter 7. Attach evidence of debt, collateral and perfection. Don't sign for client!

- Schedules and statement of financial affairs -- Detailed listing of debtor's assets, liabilities, claims of exemptions, income, expenses, and other information. The values for debts and assets are not binding on creditors; don't worry about trying to get the debtor to change them.

- Section 341 meeting of creditors -- Opportunity (usually brief in a Chapter 7, longer in an 11) to examine debtor under oath. There is no court reporter unless you bring one, but the examination is recorded. Debtor will usually not be prepared, so it can be very useful. You can file a motion for a Rule 2004 examination (more later) if you need more time.

- Adversary proceeding -- Non-jury lawsuit filed within the bankruptcy (uses a double caption).

Plaintiff as Bankruptcy Debtor

A prepetition claim becomes part of the bankruptcy estate, which is defined as broadly as possible. 11 U.S.C. § 541(a).

- Chapter 7 – Prepetition claim is owned and controlled by the Chapter 7 trustee except to extent claimed exempt by the debtor ($7,500 personal property exemption after June 2015).

- Chapter 13 -- Prepetition claim is still part of the bankruptcy estate. Chapter 13 trustee has input into handling or settlement and will require non-exempt settlement proceeds to go to creditors.

- Chapter 11 -- Prepetition claim is still part of the bankruptcy estate but is controlled by debtor unless a trustee is appointed for extraordinary cause.

Postpetition tort claim arising after bankruptcy filing:

- Chapter 7 or 11 -- Claim belongs to the debtor individually.

- Chapter 13 -- Claim becomes part of the bankruptcy estate during pendency of plan until the case ends. Waldron v. Brown, 536 F.3d 1239 (11th Cir. 2008). Debtor has a continuing duty to amend his schedules to reveal the claim. Robinson v. Tyson Foods, 595 F.3d 1269 (11th Cir. 2010).

Important: Bankruptcy court must approve of settlement of a prepetition claim under all chapters and also a postpetition Chapter 13 claim that arises during the pendency of the plan. Debtor's non-bankruptcy counsel and their fees must also be court-approved. See attached sample forms for contingency fee cases involving a Chapter 13 debtor.

Effect of plaintiff's failure to reveal prepetition claim on schedules (judicial estoppel):

- Eleventh Circuit -- Judicial estoppel requires (1) inconsistent position under oath and (2) intent to make a mockery of judicial system. Prepetition claim of Chapter 7 debtor belongs to trustee, who is not bound by debtor's failure to disclose, Parker v. Wendy's Int'l., 365 F.3d 1268 (11th Cir. 2004), but trustee may be barred as well if he fails to act promptly after learning of claim. Dunn v. Advanced Medical Specialties, 556 Fed. Apx. 785 (11th Cir. 2014). The Chapter 7 trustee's claim may be limited to the amount necessary to pay all bankruptcy claims. See Parker, 365 F.3d at 1273 fn. 4.

- Alabama -- Judicial estoppel requires (1) inconsistent position, (2) success in prior proceeding so that judicial acceptance of second position would create perception that one court was misled, and (3) unfair advantage. Failure to list claim in either Chapter 7 or 13 may be judicial estoppel against debtors, Martin v. Cash Express, Inc., 60 So. 3d 236 (Ala. 2010), but not their Chapter 7 trustee if the debtors go back and amend their schedules. E.g., Ex parte Jackson Hospital & Clinic, 2014 WL 5800518 (Ala. Nov. 7, 2014).

Defendant as Bankruptcy Debtor

- Automatic stay goes into effect immediately upon bankruptcy filing and without necessity of court order.

- Plaintiff with knowledge of defendant's bankruptcy has an affirmative duty to notify the court and to stop actions.

- File as a notice of stay rather than a motion to stay: "Notice of Bankruptcy Stay as to Defendant Danny Debtor. Plaintiff hereby notifies the Court that defendant Danny Debtor has filed a Chapter 7 bankruptcy in the U. S. Bankruptcy Court for the Southern District of Alabama, Case No. 14-1000, and thus the automatic stay of 11 U.S.C. § 362(a) is in effect as to that defendant."

- Stay applies only to the bankrupt debtor, not co-defendants and not debtor's corporate subsidiaries or affiliates unless they have also filed (check because sometimes affiliates file but then all bankruptcy pleadings are in the main case).

- Bankruptcy court must approve all attorneys for debtor, not just its bankruptcy attorneys. Check with client's bankruptcy counsel about getting approved if your client files bankruptcy.

- Discharge

  Some exceptions (some taxes, child support, alimony, student loans) are automatic. Other exceptions (fraud, defalcation, false financial statement, willful injury) require an adversary proceeding to be filed before a court deadline (60 days after first meeting of creditors) to determine dischargeability. 11 U.S.C. § 523(c); Bankruptcy Rule 4007. A pre-petition claim against the debtor will ultimately be discharged if an exception is not applicable. A debtor's discharge can be blocked entirely under Bankruptcy Code § 727 if the debtor commits bankruptcy fraud.

  Practice tip: If you're taking a default judgment in state court against a defendant who committed an act that might make the judgment non-dischargeable, put on evidence, have a court reporter, and have the trial court make specific findings of fact which will be collateral estoppel on that issue in bankruptcy court.

A creditor's claim is discharged even if the claim was not listed in the bankruptcy if the creditor had knowledge of the bankruptcy. Bankruptcy Code § 523(a)(3).

Domestic relations and bankruptcy

- Child support and alimony are now considered together as domestic support obligation ("DSO").

- DSO is not dischargeable (although a "property settlement obligation" may be in Chapter 13)

- Automatic stay does not apply to actions
  - -- to establish paternity
  - -- to establish or modify an order for DSO
  - -- concerning child custody or visitation
  - -- to dissolve a marriage, as long as it doesn't determine the division of property of the bankruptcy estate
  - -- regarding domestic violence
  - -- withholding income that is property of the estate or property of the debtor for payment of DSO (added in 2005)

- However, many domestic relations courts want an order lifting stay, which is routinely granted (no filing fee).

- Most bankruptcy courts will retain jurisdiction over distribution of property.

- Chapter 13 -- Postpetition earnings are part of bankruptcy estate. But see income withholding exception for DSO above.

- Property settlement obligations (as opposed to DSO) are subject to automatic stay.

- Non-payment of postpetition DSO is grounds for dismissal of a Chapter 11 or 13 bankruptcy.

Bankruptcy Procedure

- Bankruptcy Rules -- Include a modified version of Federal Rules of Civil Procedure.

- Rule 2004 examination -- Bankruptcy deposition. You must file a motion for one and set out the topics and documents requested, but the motions are almost always granted. Can be taken without an adversary proceeding.

- Removal to bankruptcy court -- Rarely works. Removal should be filed in district court under 28 U.S.C. § 1334 with a motion to "refer" the case to bankruptcy court if desired. Court has mandatory abstention for state court cases which are merely "related" to the bankruptcy rather than "arising under bankruptcy." 28 U.S.C § 1334(c)(2).

- Relief from stay to liquidate claim or pursue insurance -- Filed by motion in bankruptcy court. If there is no insurance, alternative is to file a proof of claim in the bankruptcy and wait to see if it draws an objection (however, there is no specific time limit for objections). Filing a proof of claim subjects the creditor to bankruptcy court jurisdiction if that is a concern (may lose right to litigate in state court). Reducing a debt to judgment doesn't in itself create any higher priority in the bankruptcy (absent a recorded judgment lien).

- Preferential payments or transfers (within ninety days for regular creditors, one year for insiders) -- Can be recouped by trustee or Chapter 11 debtor. Any payment on an unsecured debt or improvement in secured position can constitute a preference. There are exceptions for subsequent new value, contemporaneous exchange, or payments in the ordinary course of business. If you get a good judgment lien on real property or other security interest in good collateral, wait ninety days after perfection before taking other action to avoid pushing defendant into bankruptcy within the preference period.

- Notice of appearance -- Recommended because filing one will put you on the bankruptcy court e-mail service list and allow you to monitor the bankruptcy.

Sample

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE: CHAPTER 13

_____, Case No. _____

Debtor(s).

APPLICATION FOR EMPLOYMENT OF ATTORNEY
AS A PROFESSIONAL PERSON FOR A SPECIFIC PURPOSE IN A CHAPTER 13
CASE AND VERIFIED STATEMENT OF DISINTERESTEDNESS

Debtor(s) hereby applies to employ an attorney as a professional person pursuant to 11 U.S.C. §§ 327(e) and 328(a) and Bankruptcy Rule 2014 to prosecute a cause of action or suit on his or their behalf. In support of this application, debtor(s) provides the following information:

1. Name of attorney (and firm, if applicable) proposed to be retained: _____

_____.

2. Description of cause of action or suit: _____

_____.

3. The proposed fee is a contingent fee of (describe) _____

_____ plus reimbursement of out-of-pocket expenses. A copy of the fee agreement is attached. If there is no recovery, the debtor(s) and/or bankruptcy estate will not be responsible for attorney's fees or reimbursement of expenses.

4. Any other attorneys (other than members of the same firm) with whom the proposed attorney has agreed to share compensation: _____

_____.

5. No money has been paid to the proposed attorney or firm in connection with this matter prior to the filing of this application. The proposed attorney has not agreed to share compensation with other attorneys in this matter except as set out above and understands that he or she cannot share any compensation with attorneys other than members of his or her firm unless they are also approved by this Court.

6. Upon settlement or completion of the cause of action, the proposed attorney will apply to the Court for approval of any settlement recovered on behalf of the debtor(s) and/or the estate and for approval of fees and expenses pursuant to 11 U.S.C. § 328(a) and Bankruptcy Rule 2016.

_____

Attorney for Debtor(s)

ADDRESS
PHONE AND FAX
EMAIL

Verified Statement of Disinterestedness

I declare under penalty of perjury the following:

I have read the statements contained in the preceding application to employ, and they are true and correct. I do not represent or hold any interest adverse to the debtor(s) or the estate with respect to the matters upon which I seek to be employed. I have no connection with the Chapter 13 trustee, any creditors in this case, the bankruptcy administrator, the debtor(s), or their respective attorneys, or any other party-in-interest, other than the representation of the debtor(s) in the claim or lawsuit relating to which I am applying for employment as a professional person.

Date: _____

_____

Attorney

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Application on the parties listed below by placing same in the United States mail, postage prepaid and properly addressed, this _____ day of _____, 20___.

_____

Daniel B. O'Brien
Chapter 13 Trustee
One St. Louis Center, 2nd Floor
Mobile, AL 36602

Sample

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE:	)	
	)	
_____,	)	Case No. _____
	)	
Debtor(s).	)	

ORDER APPROVING EMPLOYMENT OF SPECIAL COUNSEL FOR CHAPTER 13 DEBTOR(S) ON A CONTINGENT FEE BASIS

This matter is before the Court on the application to employ _____ _____ of the law firm of _____ as special counsel for debtor(s) to prosecute a cause of action. No objections to the motion have been filed. The Court finds that the application should be approved on the condition that all fees and expenses are to be paid from any proceeds and not by the debtor(s) or the bankruptcy estate.

It is thus ORDERED that the application to employ on a contingent fee basis as set out in the application is approved pursuant to Bankruptcy Code § 328(a).

I HAD A GREAT LAWSUIT…AND THEN I TOOK A BANKRUPTCY TO THE KNEE[1]

An Examination of Judicial Estoppel in the Eleventh Circuit

Christopher Conte

Helmsing Leach, P.C.

It is fairly common for debtors in bankruptcy to have potential or pending lawsuits at the time that they file their bankruptcy case. In such situations, it is vitally important that the existence of the lawsuit be disclosed on the debtor's bankruptcy schedules. As will be discussed in detail below, the consequences for failing to list pending or even potential lawsuits can be dire, both for the debtor and creditors.

I. *Burnes v. Pemco Aeroplex, Inc.*

While there is Eleventh Circuit precedent regarding judicial estoppel prior to *Burnes v. Pemco Aeroplex, Inc.,*[2] the decision in *Burnes* represents the point where the Eleventh Circuit truly articulated the use of judicial estoppel as a complete bar to litigation that was not disclosed on the debtor's schedules. As such, any discussion of the doctrine of judicial estoppel in the Eleventh Circuit must begin with a discussion of the Court's decision in *Burnes*.

In *Burnes*, the debtor, Levi Billups, filed a petition for Chapter 13 bankruptcy relief in July of 1997.[3] In January of 1998 (5 months after filing the initial bankruptcy petition) Billups filed an EEOC complaint against Pemco Aeroplex, Inc.[4] In December of 1999, Mr. Billups and 35 other employees filed a lawsuit against Pemco.[5] Billups then moved to convert his case to a case under Chapter 7. As part of

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[1] The title of this paper is taken from *Skyrim*, a video game published in 2011. Throughout the game, you meet characters who tell you that they used to be great adventurers until some terrible fate befell them, most commonly an arrow to the knee. A thousand apologies to the creators and publishers of Skyrim.

[2] 291 F.3d 1282 (11th Cir. 2002).

[3] Id.at 1284.

[4] Id.

[5] Id.

the conversion, Mr. Billups filed amended schedules but did not list the pending litigation against Pemco as an asset. In January 2001, the Chapter 7 Trustee filed a report of no assets and the bankruptcy court ordered Mr. Billups' debts discharged. Subsequently, Pemco learned of the bankruptcy and filed a motion for summary judgment in the employment discrimination case on the basis that Mr. Billups failed to disclose the existence of the lawsuit in his bankruptcy case and should be judicially estopped from proceeding with the litigation.[6]

The Court in *Burnes* articulated the standard for applying judicial estoppel as "it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding…[and] such inconsistencies must be shown to have been calculated to make a mockery of the judicial system."[7] In addressing the first factor, the Eleventh Circuit held that there was no doubt that the inconsistent positions were taken under oath, so the only question left was one of intent. The Eleventh Circuit reasoned that "calculated to make a mockery of the judicial system" was synonymous with the intentional manipulation of the court.[8] The Court held that whether the manipulation by the debtor was intentional could be inferred by whether the debtor, at the time of the disclosure, knew of the claim or had a motive to conceal it.[9] If the debtor knew of the claim or had a motive for concealing it, then the non-disclosure could not have been inadvertent. With respect to motive for concealment, the Eleventh Circuit said:

> …it is undisputed that [the debtor] stood to gain an advantage by concealing the claims from the bankruptcy court. It is unlikely [the debtor] would have received the benefit of a conversion to Chapter 7 followed by a no asset, complete discharge had his creditors, the trustee, or the bankruptcy court known of a lawsuit claiming millions of dollars in damages.[10]

The Court finally stated that:

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[6] Id.
[7] Id. at 1285.
[8] Id. at 1287.
[9] Id.
[10] Id. at 1288.

> [t]he success of our bankruptcy laws requires a debtor's full and honest disclosure. Allowing [the debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets.[11]

II. *Barger v. City of Cartersville*[12]

One year later, the Eleventh Circuit expanded further on the "intent" requirement of judicial estoppel in *Barger v. City of Cartersville*. In *Barger*, the Plaintiff/Debtor filed a lawsuit against the City of Cartersville alleging discrimination in the course of her employment. Not long after filing the lawsuit, the Plaintiff/Debtor filed a Chapter 7 bankruptcy proceeding.[13] While the bankruptcy estate was still being administered, Ms. Barger amended her complaint against the City of Cartersville and added claims for compensatory and punitive damages (the original complaint only sought reinstatement).[14] Because her lawsuit now sought money damages, Ms. Barger was required to amend her schedules but failed to do so.

The City of Cartersville discovered Ms. Barger's bankruptcy and the non-disclosure of the lawsuit against it and moved for summary judgment. The bankruptcy trustee intervened in that action with the intent of pursuing the claims against the City.[15] Meanwhile, Ms. Barger filed a motion to reopen her case to amend her schedules and add the lawsuit as an asset.[16] The bankruptcy court allowed Ms. Barger to reopen her case and amend her schedules.[17] In allowing her to do so, the bankruptcy court held that the claims against the City were assets of the bankruptcy estate and "the case should be reopened to administer the claim for the benefit of creditors."[18] The bankruptcy court did address the

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[11] Id.
[12] 348 F.3d 1289 (11th Cir. 2003).
[13] Id. at 1290.
[14] Id.
[15] In a Chapter 7 bankruptcy case, the Chapter 7 Trustee becomes the real party in interest in any litigation and should be substituted as the plaintiff.
[16] *In re Barger*, 279 B.R. 900, 901 (Bankr. N.D. Ga. 2002).
[17] Id. at 909.
[18] Id. at 904.

issue of judicial estoppel and concluded that Ms. Barger's failure to disclose the existence of the lawsuit against the City was not intentional and not designed to manipulate the legal system.[19]

Soon thereafter, and with full knowledge of the bankruptcy court's ruling, the district court in the employment litigation granted the City's motion for summary judgment on judicial estoppel grounds.[20] The District Court held that Ms. Barger, in failing to list the lawsuit on her bankruptcy schedules, "intended to manipulate the judicial system."[21]

On appeal, the Eleventh Circuit articulated that:

> The issue here is intent. For purposes of judicial estoppel, intent is a purposeful contradiction, not a simple error or inadvertence. Deliberate or intentional manipulation can be inferred from the record where the debtor has knowledge of the undisclosed claims and has motive for concealment.[22]

In exactly the same manner as the *Burnes* decision, the Eleventh Circuit held that Barger's intent to manipulate the legal system was inferable as a matter of law.[23] Ms. Barger had knowledge of her claims and she had motive to conceal them insofar as by doing so she received a no asset discharge.

Interestingly, the Court made no attempt to distinguish between the Plaintiff/Debtor and the Chapter 7 Trustee. Despite the fact that Ms. Barger deceived the Trustee by not disclosing that she was seeking damages, the Court held that the claims could not be pursued, even by the Trustee.[24]

III. *Parker v. Wendy's International, Inc.*[25]

One year later, the Eleventh Circuit appeared to come to its senses somewhat in *Parker v. Wendy's International, Inc.* However, for a variety of reasons, *Parker* only made things more confusing.

In *Parker*, the Plaintiff/Debtor filed an employment discrimination case against her employer, Wendy's International.[26] Two years after filing the lawsuit, but while the lawsuit was still pending,

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[19] Id. at 908.
[20] *Barger*, 348 F.3d at 1292.
[21] Id.
[22] Id.
[23] Id. at 1293.
[24] Id. at 1296.
[25] 365 F. 3d 1268 (11th Cir. 2004).

Parker filed a petition for bankruptcy protection pursuant to Chapter 7 of the Bankruptcy Code, but did not list the pending lawsuit as an asset.[27] Shortly thereafter, the Bankruptcy Court entered a no-asset discharge in favor of Ms. Parker.

After the no-asset discharge was granted, Parker's attorneys informed the Chapter 7 Trustee of the existence of the pending lawsuit. The Chapter 7 Trustee then moved to re-open the bankruptcy case and simultaneously filed a motion to intervene in the employment discrimination case.[28] Both motions were granted. Wendy's then moved for summary judgment on the grounds that the employment discrimination claims were barred by the holdings in *Burnes* and *Barger*. The district court granted Wendy's motion and held that the case before it was factually indistinguishable from *Burnes*.

The bankruptcy trustee moved for reconsideration and argued that the case could be distinguished from *Burnes* on two grounds. First, the real party in interest in Parker's case was the trustee, acting to benefit her creditors, and not the plaintiff herself. Second, Parker informed the bankruptcy trustee of the existence of the employment litigation and the trustee moved to reopen the bankruptcy case *before* Wendy's filed the motion for summary judgment in the district court litigation. Finally, the trustee argued that preventing the employment discrimination case from moving forward only punished innocent unsecured creditors, who had no knowledge of the lawsuit and had done nothing to warrant a dismissal of claims that would benefit them. The district court denied the motion to reconsider, and the bankruptcy trustee appealed.

Parker was heard by a three-judge panel of the Eleventh Circuit. That panel found determinative that the employment discrimination claim became an asset of the estate at the moment that the bankruptcy case was filed.[29] "Once an asset becomes part of the bankruptcy estate, all rights

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[26] Id. at 1269.
[27] Id. at 1270.
[28] Id.
[29] Id. at 1272. The Court cited to 11 U.S.C. 541(a)(1) which provides that the filing of a bankruptcy petition vests virtually all of the assets of the debtor in the bankruptcy estate.

held by the debtor in the asset are extinguished unless the asset is abandoned back to the debtor."[30] The failure to list an asset on the bankruptcy schedules does not keep that asset away from the estate, and the granting of a discharge does not operate to abandon the asset back to the debtor. As such, as soon as the bankruptcy case was filed, the trustee became the real party in interest in the employment litigation. The trustee never abandoned the asset and never took any inconsistent positions with respect to the asset. Therefore, he could not be estopped from pursuing the claim for the benefit of unsecured creditors.[31]

On its surface, the ruling in *Parker* seems eminently reasonable. Essentially, the Court was agreeing with the chapter 7 trustee that innocent creditors should not be punished by virtue of the debtor's failure to disclose an asset. However, the Court made no effort to distinguish *Parker* from either *Burnes* or *Barger*. This is especially odd given that the *Parker* court cites to both *Burnes* and *Barger* numerous times but chooses to ignore them. Further, the timeline in *Parker* provided an easy avenue for distinguishing it from *Burnes* and *Barger*, because in *Parker* the debtor disclosed the existence of the pending litigation and the trustee moved to reopen the case before Wendy's filed its motion for summary judgment. Such a sequence of events would seem to undermine the "inferred motive" that was so critical to the holdings in *Burnes* and *Barger*. However, the Court in *Parker* did not even mention the timing as being particulary important to the decision. As such, the holding in *Parker* seems directly contrary to the opinions issued in *Burnes* and *Barger* and ever since litigants and judges have been trying to make sense of which law is controlling.

IV. The Aftermath of *Parker*.

The holding in *Parker* has been cited over 200 times by other courts and how those courts treat the *Parker* ruling varies, with some courts treating *Parker* as controlling, while others work to either

[30] Id.
[31] Id.

distinguish the ruling in *Parker* or disregard it entirely. In this next section, I will examine a few of the cases that came after *Parker* and how they handled judicial estoppel issues.

a. *In re Phelps*[32]

In *Phelps*, the Debtor, Hosea Phelps, was injured in an automobile accident on July 24, 2001. On July 15, 2002, Phelps filed a Chapter 7 bankruptcy in the Middle District of Georgia.[33] His schedules did not list the automobile accident as a potential asset of the bankruptcy estate. The case was administered as a no-asset case and Phelps received his discharge on October 24, 2002.[34]

On June 23, 2003, Phelps filed a lawsuit regarding the prior automobile accident. In that lawsuit he alleged damages including medical expenses of $37,000, lost wages of $11,000 and additional damages for pain and suffering. The defendants in the lawsuit eventually moved for summary judgment on the grounds that Phelps should be judicially estopped from pursuing the action as it had not been disclosed in his bankruptcy case.[35]

On November 1, 2004, Phelps filed a motion to reopen his bankruptcy case to amend his schedules to list the automobile accident. Phelps claimed he did not disclose the automobile accident as an asset because his bankruptcy attorney had not asked him about potential lawsuits, although he had given the bankruptcy attorney all of his medical bills.[36]

The bankruptcy court granted the motion to reopen and allowed Phelps to amend his schedules. In doing so, the bankruptcy court relied heavily upon the decision in *Parker*, for the premise that the lawsuit was property of the bankruptcy estate and belonged to the Chapter 7 Trustee, not to Phelps.[37]

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[32] 329 B.R. 904 (Bankr. M.D. Ga. 2005).
[33] Id. at 905.
[34] Id.
[35] Id. at 906.
[36] Id. at 905. Phelps had filed a previous bankruptcy case in 1993 and had listed a pending lawsuit as an asset in that case. However, in the previous bankruptcy case Phelps had been sent to the bankruptcy attorney by his personal injury attorney so it was clear the bankruptcy attorney was aware of the pending cause of action.
[37] Id. at 906.

Importantly, the bankruptcy court discussed the prior holding of the Eleventh Circuit in *Burnes*, but followed the contrary holding *Parker* stating that:

> The effect of *Parker* seems to point to the complete abolition of the application of judicial estoppel to causes of action omitted from a debtor's bankruptcy schedules. Because a trustee cannot be judicially estopped from asserting the claim, there is no way for a debtor to benefit from omitting the asset from the schedules, thereby failing to satisfy an essential element of the defense.[38]

The bankruptcy court went on to state that "*Parker* has not created a new legal concept; it has simply recognized that the doctrine of judicial estoppel **never** was applicable to a bankruptcy trustee."[39]

However, that is directly contrary to the Eleventh Circuit's ruling in *Barger* in which the Court explicitly applied the doctrine of judicial estoppel to bar a Chapter 7 Trustee from pursuing a cause of action. Further, the one distinguishing factor between *Parker* and *Barger*, the fact that in *Parker* the debtor moved to amend prior to any motion for summary judgment being filed, was not present in *Phelps*. In *Phelps*, the defendant in the state court case filed for summary judgment before any attempt was made to reopen the case and amend the schedules. The bankruptcy court in *Phelps* simply ignored *Barger* and followed *Parker*.

b. *Marshall v. Electrolux Home Products*[40]

In *Marshall* the debtor/plaintiff was injured in a lawn mower accident on August 9, 2003. On August 10, 2005, Marshall filed a lawsuit in state court that was ultimately removed to the Middle District of Florida. On August 29, 2005 (not quite 3 weeks after filing the lawsuit) Marshall filed his Chapter 7 bankruptcy petition.[41] He failed to disclose the existence of the lawsuit on both his initial schedules and his amended schedules, which were filed on September 13, 2005. On December 1, 2005, Marshall received a discharge. The defendant in the pending litigation moved for summary judgment on September 25, 2006, on the grounds that Marshall should be judicially estopped from pursuing the

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[38] Id. at 907.
[39] Id. at 908 (emphasis added).
[40] 2006 U.S. Dist. LEXIS 91886; 2006 WL 3756574 (M.D. Fla. 2006).
[41] Id. at *2.

lawsuit against it as he had failed to disclose the suit in his bankruptcy case. Subsequently, the Chapter 7 Trustee moved to reopen the bankruptcy case and moved to intervene in the pending summary judgment in front of the district court.[42]

The district court analyzed both *Burnes* and *Parker* and held that summary judgment was required by the holdings in those cases. The district court focused on the fact that the Chapter 7 Trustee did not move to reopen the bankruptcy case until after the defendant in the pending litigation moved for summary judgment. In other words, the fact pattern was like that in *Burnes*, rather than the one in *Parker*.[43] "Here…it was not until Defendant moved for summary judgment and argued that judicial estoppel barred Plaintiff's claims that the Bankruptcy Trustee moved to intervene. These are appropriate circumstances in which to apply the doctrine of judicial estoppel."[44]

c. *Thompson v. Earthlink Shared Servs., LLC*[45]

By now, the sequence of events should seem familiar: the plaintiff/debtor, Anthony Martin, filed a lawsuit against him employer, Earthlink, on December 26, 2012. Not long thereafter, Martin filed a Chapter 7 bankruptcy petition and ultimately received a discharge. Earthlink filed a motion for summary judgment in the district court case seeking to apply judicial estoppel to bar Martin's claims. Martin opposed the summary judgment motion and filed a motion to have Judith Thompson as Chapter 7 Trustee substituted as the real party in interest.[46] In his response to the motion for summary judgment, Martin argued first that judicial estoppel did not apply to him and also argued, as an alternative, that judicial estoppel should not bar the Chapter 7 Trustee from pursuing the claims.

The district court extensively analyzed both *Burnes* and *Parker* and held that the holding in *Parker* was controlling as to the facts before it. The district court's analysis of *Parker* was akin to the

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[42] Id. at *3.
[43] Id. at *9.
[44] Id.
[45] 956 F. sup. 2d 1317 (N.D. Ala. 2013).
[46] Id. at 1318.

analysis of the bankruptcy court in *Phelps*, "*Parker*…clarified that an exception to the application of the judicial estoppel doctrine occurs when a bankruptcy trustee's interests are actively at stake."[47] The district court was persuaded by the reasoning of *Parker* that the trustee could not be barred because "she has not abandoned Mr. Martin's discrimination claims and…Earthlink has not shown where [she] ever has taken 'an inconsistent position under oath with regard to [Mr. Martin's bankruptcy estate's] claim."[48]

Interestingly, the court in *Thompson* did not mention at all the timeline of events that led up to the filing of the summary judgment and attempt by the Chapter 7 Trustee to bring the asset into the estate. Instead, like *Phelps*, the district court seemed to treat *Parker* as a complete abolition of the doctrine of judicial estoppel as applied to a Chapter 7 trustee. Once again, this seems contrary to the Eleventh Circuit's holding in *Barger*.[49]

d. Chapter 13 – *Coppedge v. SunTrust Banks, Inc.*[50] and *Cain v. Hyundai Motor Mfg. Ala., LLC*[51]

All the cases cited thus far have dealt with the application of judicial estoppel in the context of Chapter 7 bankruptcy proceedings. Two important distinctions exist between Chapter 7 cases and Chapter 13 cases that determine how judicial estoppel is applied. First, in a Chapter 13 bankruptcy case, the debtor generally retains the ability to pursue causes of action for the benefit of both himself and the estate. Second, the cause of action is generally property of the estate even if it comes into existence post-petition.

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[47] Id.

[48] Id.

[49] The court mentions *Barger* in a footnote but states that it finds the holding to be unpersuasive because it dealt with "judicially estopping a debtor as opposed to a trustee." *Id.* at 1321, n. 5. However, the *Barger* decision also dealt with imputing the conduct of the debtor to the trustee, and the trustee had filed a motion to intervene in that case. As such, it seems clear that *Barger* dealt with barring the trustee from bringing claims as well as the debtor.

[50] 2009 U.S. Dist. LEXIS 2363; 2009 WL 111639 (M.D. Ga. 2009).

[51] 2012 U.S. Dist. LEXIS 48697 (M.D. Ala. 2012).

Judicial estoppel is often harsher in the context of a Chapter 13 than in a Chapter 7. Because the debtor remains the real party in interest there is no argument that the failure to disclose should not be imputed on the trustee and the trustee is not typically seeking to intervene in the litigation and "save" the debtor. Additionally, because after-acquired property is property of the estate, the duty to disclose can be ongoing and judicial estoppel can bar a claim even if it did not come into existence until after the filing of the petition and schedules.

In both of the above cases, the courts held that judicial estoppel barred the debtor from pursuing claims that were not disclosed as assets in the bankruptcy case. In both cases, the debtors sought to use the ruling in *Parker* but the courts held that *Parker* was inapplicable in a Chapter 13 case. As such, the debtors were barred from pursuing their respective litigation claims.

V. *Slater v. U.S. Steel Corp*.[52]

In *Slater*, the plaintiff/debtor filed a lawsuit against U.S. Steel and then, twenty-one months later, filed a Chapter 7 bankruptcy petition. Upon learning of the pending bankruptcy, U.S. Steel moved for summary judgment.[53] Slater then amended her bankruptcy schedules to include the lawsuit and filed an opposition to the motion for summary judgment. The district court granted U.S. Steel's motion for summary judgment and held that *Burnes* controlled the decision. The Eleventh Circuit agreed and affirmed the District Court. In doing so, the Eleventh Circuit stated the following:

> We note in passing that [*Parker*] is factually on all fours with *Barger*, but reached the opposite result. In that case, the District Court attributed to the trustee of Parker's bankruptcy estate Parker's failure to disclose a Title VII claim of racial discrimination she had brought against Wendy's and then applied the doctrine of judicial estoppel to bar the trustee's prosecution of the claim. The trustee appealed. We reversed, observing that "the claim against Wendy's belong[ed] to the bankruptcy estate and its representative, the trustee[,]" not Parker, the debtor. "The trustee made no false or inconsistent statement under oath in a prior proceeding and [was] not tainted or burdened by the debtor's misconduct."

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[52] 2016 U.S. App. LEXIS 3225 (11th Cir. 2016)

[53] Id. at *5.

> In contrast, *Barger* held that the trustee was bound by the debtor's failure to disclose in her bankruptcy filings that the claims she was prosecuting were assets of the bankruptcy estate. Under our prior-panel-precedent rule…we are bound to follow *Barger* and to disregard *Parker's* holding to the contrary.[54]

In other words, it appears that the Eleventh Circuit is acknowledging that there is a potential contradiction between *Parker* and the holdings that precede it. However, in the above statement the Eleventh Circuit did not recognize that *Parker* and *Barger* were distinguishable from each other on the basis of the timing of the disclosure. As such, it may not be that *Parker* violates the holding of *Barger*.

In a lengthy concurrence, Judge Tjoflat[55] goes through both the history and purpose behind judicial estoppel. He requests that the Court take the matter on an *en banc* basis to finally resolve the contradictions (whether apparent or real) in the various Eleventh Circuit cases, and urges that the Court take a softer approach to judicial estoppel. As of the date of this writing, that has not happened.

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[54] Id. at *40, n. 20.

[55] Judge Tjoflat was a member of the three judge panel that decided *Parker*.