

It's What You Didn't Say: Preclusion and Estoppel Doctrines In and Out of Bankruptcy

John Rao
National Consumer Law Center¹

I. Whose Lawsuit is this? - The Problem of Standing after Bankruptcy

a. Standing in bankruptcy – what should happen?

Before addressing the debtor's ability to bring certain lawsuits *after* bankruptcy, it is important to understand what should have happened while the debtor was in bankruptcy. Because the rules for chapter 7 and chapter 13 cases are different, we will first discuss bankruptcy standing in the context of chapter 7. By "in bankruptcy" we mean the period of time from the filing of the initial chapter 7 petition for relief up until the bankruptcy case is closed.

When an individual files a bankruptcy petition, the property that the person owns at the time of filing becomes property of a bankruptcy estate.² The Bankruptcy Code defines property of the bankruptcy estate broadly. The estate encompasses any lawsuits in which the debtor is currently a plaintiff. It also includes legal claims and causes of action that the debtor could bring, but has not yet filed. Prepetition legal claims not exempted by the debtor may be administered and liquidated by the trustee.³ The chapter 7 trustee, not the debtor, has exclusive standing to pursue any cause of action that is property of the estate.⁴ The trustee has the right to litigate, settle, or sell the legal claim for the benefit of creditors.

There are two ways for the debtor to gain control over a pre-bankruptcy legal claim and pursue it while in bankruptcy. One way is to exempt the legal claim. In order to claim an exemption, the debtor must list the legal claim as an item of personal property of the debtor (Schedule A/B, Lines 33 or 34) and give it an estimated or "unknown" value. On Schedule C the debtor must designate an available exemption for the legal claim. If the exemption claim is properly asserted no one objects, the exemption is allowed and the debtor has standing to pursue the claim as its legal owner.⁵

Alternatively, the cause of action listed on the debtor's schedules may be "abandoned" by

¹ The author wishes to thank his colleague, Geoff Walsh, for assistance with his article.

² 11 U.S.C. § 541(a) (1).

³ 11 U.S.C. § 704(a) (1).

⁴ 11 U.S.C. § 323. Section 323 of the Code provides that the trustee is the legal "representative of the estate" and is the proper party in interest "to sue and be sued." See *In re Engelbrecht*, 368 B.R. 898 (Bankr. M.D. Fla. 2007) (substitution of trustee for debtor in prepetition state court auto accident action related back to debtor's original filing of the action).

⁵ 11 U.S.C. § 522(l). *Cusano v. Klein*, 264 F.3d 936 (9th Cir. 2001); *In re Adair.*, 253 B.R. 85 (B.A.P. 9th Cir. 2000).

the trustee. Abandonment in a bankruptcy case occurs in one of two ways: (1) if, on request by the trustee or a party in interest and after notice and hearing, the court finds that the property is “burdensome” or of “inconsequential value and benefit to the estate”⁶; or (2) automatically when the bankruptcy case is closed.⁷ Thus, the debtor has the choice of either seeking formal abandonment of the scheduled legal claim by filing a motion while the bankruptcy case is open,⁸ or simply waiting until the case is closed. After the bankruptcy case has been closed, the debtor may pursue any lawsuit that was listed in the bankruptcy schedules and not liquidated by the trustee.⁹

Exemption or abandonment are two ways through which a pre-bankruptcy legal claim ceases to be part of the chapter 7 bankruptcy estate and becomes the debtor’s property. However, neither option can occur if the debtor did not list the prepetition legal claim as an asset in the bankruptcy schedules.¹⁰ It is this “scheduling” of the asset that allows the trustee to make an informed decision about whether to “administer” (i.e., liquidate) the legal claim. The trustee cannot administer an undisclosed asset.

b. What happens if the debtor does not schedule a pre-bankruptcy legal claim?

The post-bankruptcy “standing” problem typically appears when a debtor did not list a pre-bankruptcy legal claim in his or her schedules. The consequences of leaving a legal claim unscheduled in a bankruptcy case can be severe, and often catch debtors and their advocates unawares. The crux of the problem is that when a pre-bankruptcy asset is unscheduled, it is never administered, exempted, or abandoned. Instead, if the bankruptcy case is closed after entry of a discharge, the unscheduled property remains part of the bankruptcy estate. It is not considered property of the debtor. Instead, it rests with the bankruptcy estate in a state of perpetual suspense.¹¹ As the representative of the bankruptcy estate, only the chapter 7 trustee, not the

⁶ 11 U.S.C. § 554(b). *See* Barletta v. Tedeschi, 121 B.R. 669 (N.D.N.Y. 1990) (denying debt collector’s motion to dismiss Fair Debt Collection Practices Act claim based upon consumer’s lack of standing when bankruptcy trustee acknowledged his intention to abandon the consumer’s claim but never formally did so)

⁷ 11 U.S.C. § 554(c).

⁸ *See, e.g.,* Radford v. U.S. Bank Nat’l Assoc., 2011 WL 4054863 (D. Haw. Sept. 9, 2011) (bankruptcy court’s order approving trustee’s request for abandonment gives debtor standing to pursue TILA and other prebankruptcy claims in district court during pendency of bankruptcy).

⁹ *See e.g.* Just Film, Inc. v. Merchant Servs., Inc. 873 F. Supp. 2d 1171, 1176 (N.D. Cal. 2012) (abandonment as a matter of law at closing of case under § 554(c) gives borrower standing to pursue scheduled cause of action).

¹⁰ Typically the “scheduling” will include a description of the cause of action in the listing of the debtor’s personal property (Schedule A/B, Official Form 106B, Line 33: “Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment,” or Line 34: “Other contingent and unliquidated claims of every nature including counterclaims of the debtor and rights to set off claims”), an appropriate exemption claimed on Schedule C (Official Form 106C), and, if applicable, reference to a pending lawsuit in the Schedule of Financial Affairs (Official Form 107, Part 4, Line 9).

¹¹ 11 U.S.C. § 554(d); Tyler v. DH Capital Mgmt., Inc., 736 F.3d 455, 465 (6th Cir. 2013) (unscheduled debt collection claim was not “abandoned” and trustee retained exclusive authority to pursue it); Parker v. Wendy’s Int’l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004) (failure to list an interest in bankruptcy schedules leaves that interest in the bankruptcy estate); *In re* Riazuddin, 363 B.R. 177 (B.A.P. 10th Cir. 2007). *But see* Crawford v. Franklin Credit Management Corp., 758 F.3d 473 (2d Cir. 2014) (effect of

debtor, has standing to pursue the unscheduled legal claim after the bankruptcy case is closed.¹²

Defense counsel in litigation often check to see if plaintiffs have previously filed bankruptcy, and if they have, whether they have identified the legal claims in the bankruptcy schedules. If the claims existed at the time of the bankruptcy filing and the plaintiff did not disclose them, the defendant can move to dismiss the post-bankruptcy lawsuit. Many state and federal courts will grant the dismissal on the theory that the causes of action belong to the estate in the closed bankruptcy case and the individual homeowner-plaintiff lacks standing to enforce the claims. For example, courts have dismissed a variety of foreclosure-related lawsuits due to this bankruptcy standing problem,¹³ including Truth-in-Lending¹⁴ and other debt collection claims.¹⁵ As an alternative to dismissal, the court may allow the bankruptcy trustee to prosecute

dismissal of bankruptcy cases without discharge).

¹² See, e.g., *Biesek v. Soo Line R Co.*, 440 F.3d 410 (7th Cir. 2006) (trustee, not debtor, is real party in interest to prosecute unscheduled prepetition claim); *In re Riazuddin*, 363 B.R. 177 (B.A.P. 10th Cir. 2007) (same).

¹³ See *In re Edwards*, 2011 WL 4485560 (B.A.P. 9th Cir. Aug. 26, 2011) (claims for wrongful foreclosure that occurred prebankruptcy belonged to bankruptcy estate, not debtor); *In re Seymour*, 2013 WL 1736471, at *5-6 (B.A.P. 9th Cir. Apr. 23, 2013) (unpublished) (debtor's unscheduled prepetition claims against mortgagee were property of the bankruptcy estate, doctrine of prudential standing precluded debtor from asserting trustee's rights); *Aniban v. Indymac Bank, F.S.B.*, 2012 WL 292337 (D. Nev. Jan. 31, 2012) (*pro se* consumer's mortgage origination claims dismissed due to failure to schedule them in prior chapter 7 bankruptcy); *Vang Chanthavong v. Aurora Loan Servs., Inc.*, 448 B.R. 789 (E.D. Cal. 2011) (after bankruptcy court refused to reopen case and borrower's claim against mortgage servicer had not been scheduled or formally abandoned by trustee, borrower's post-bankruptcy lawsuit against servicer dismissed).

¹⁴ *Guerpo v. Amresco Residential Mortgage Corp.*, 13 Fed. Appx. 649, 650 (9th Cir. 2010) (debtor's prepetition TILA rescission claims became part of the bankruptcy estate, debtor lacks standing to pursue them); *In re McKenna*, 2013 WL 2321936 (B.A.P. 9th Cir. May 28, 2013) (unpublished) (dismissing debtor's adversary proceeding, including TILA claims, where debtor failed to schedule or exempt claims and had no specific order for abandonment); *In re Seymour*, 2013 WL 1736471, at *5-6 (B.A.P. 9th Cir. Apr. 23, 2013) (unpublished) (debtor's unscheduled prepetition claims against mortgagee were property of the bankruptcy estate, doctrine of prudential standing precluded debtor from asserting trustee's rights); *Davis v. U.S. Bank Nat'l Ass'n*, 2012 WL 6619322, at *3 (C.D. Cal. Dec. 17, 2012) (dismissing unscheduled TILA claims as having accrued prepetition); *Rivera v. Reconstruct Co., N.A.*, 2012 WL 2190710 (D. Nev. June 14, 2012) (dismissing plaintiff's TILA and loan origination claims because not scheduled in prior chapter 7 case); *Krug v. Wells Fargo Bank, N.A.*, 2012 WL 1980860, at *5 n.2 (N.D. Cal. June 1, 2012) (dismissing TILA claim because it belonged to homeowner's bankruptcy estate); *Hernandez v. Downey Sav. & Loan Ass'n*, 2009 WL 704381 (S.D. Cal. Mar. 17, 2009) (denying bankruptcy debtor's motion for injunction based on TILA claim for lack of standing; claim belonged to estate); *Runaj v. Wells Fargo Bank*, 667 F. Supp. 2d 1199 (S.D. Cal. 2009) (dismisses TILA and HOEPA actions because debtor not real party in interest, but grants leave to amend to add trustee as proper plaintiff); *Cobb v. Aurora Loan Servs., L.L.C.*, 408 B.R. 351 (E.D. Cal. 2009) (granting motion to dismiss TILA action because consumer plaintiff is not real party in interest); *Hernandez v. Downey Sav. & Loan Ass'n*, 2009 WL 704381 (S.D. Cal. Mar. 17, 2009) (dismissing TILA claims); *Rowland v. Novus Fin. Corp.*, 949 F. Supp. 1447 (D. Haw. 1996) (absent showing that claim had been exempted or abandoned, consumer lacked standing to pursue TILA rescission action).

¹⁵ *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455 (6th Cir. 2013); *Thompson v. Ocwen Fin. Corp.*, 2013 WL 4522504 (D. Conn. Aug. 27, 2013) (mortgage assignment that was predicate act for FDCPA claim occurred before bankruptcy filing; failure to schedule debt collection claim in bankruptcy precluded

and settle the lawsuit.¹⁶

c. Factors in analyzing bankruptcy standing challenges

Did the borrower actually disclose the claim? This will be evident from looking at Schedule A/B and the Schedule of Financial Affairs filed in the bankruptcy case, as well as any amendments to the initial schedules. In some cases counsel may be able to argue successfully that less than complete scheduling satisfied the basic disclosure requirement.¹⁷ If the adequacy of a disclosure is doubtful, it is probably the best practice to treat this as a non-disclosure and amend the schedules, as discussed below.

Did the borrower's claims really accrue pre-petition? It must be kept in mind that the bankruptcy standing problem does not exist, at least for chapter 7 cases, if the borrower's claims arose *after* the filing of the initial petition for relief. Subject to certain limited exceptions, a legal claim acquired after the date of filing the chapter 7 petition does not belong to the bankruptcy estate. There have been a number of recent cases involving servicer misconduct, which may straddle the pre- and post-petition time periods.¹⁸ Where there are multiple causes of action, certain claims may be post-petition, while others are pre-petition.

consumer's standing to raise claim in later action); Griffith v. Javitch, Block & Rathbone, L.L.P., 358 B.R. 338 (S.D. Ohio 2007); *In re Leslie*, 2007 WL 80806 (Bankr. D. Conn. Jan. 5, 2007) (debtor lacked standing to assert claims which arose prior to the petition).

¹⁶ *In re Goldstein*, 526 B.R. 13 (B.A.P. 9th Cir. 2015) (approving bankruptcy trustee's settlement of debtor's claims against mortgage servicer that included fraud in inducement, breach of contract, and promissory estoppel arising from failure to convert trial modification to permanent modification). See also *Seneca v. First Franklin Fin. Corp.*, 2011 WL 3235647 (S.D. Cal. July 28, 2011) (dismissing borrower's loan origination claims, including TILA claims, that had not been scheduled in prior chapter 7 case, allowing time for substitution of trustee); *Macias v. WMC Mortgage Corp.*, 2010 WL 114006 (S.D. Cal. Jan. 6, 2010) (dismissing debtor's TILA rescission action with leave to amend to substitute trustee or to show bankruptcy estate's exemption or abandonment of claim)

¹⁷ See e.g. *Eun Joo Lee v. Forster & Garbus, L.L.P.*, 926 F. Supp. 2d 482 (E.D.N.Y. 2013) (rejecting standing challenges where debtor disclosed FDCPA claim in bankruptcy schedules, even though one potential defendant's name omitted from description).

¹⁸ *Mahoney v. Bank of America, N.A.*, 2014 WL 2197068 (S.D. Cal. May 27, 2014) (rejecting standing challenge where negligent servicing continued before, during, and after bankruptcy petition filed); *Malfatti v. Mortgage Elec. Registrations Sys., Inc.* 2013 WL 3157868, at *5 (N.D. Cal. June 20, 2013) (borrower's foreclosure-related claims accrued post-petition and were not part of the bankruptcy estate); *McDonald v. IndyMac Mortgage Servs.*, 2013 WL 2252105, at *4 (N.D. Cal. May 22, 2013) *on reconsideration*, 2013 WL 3491051 (N.D. Cal. July 11, 2013), and subsequent decision 2014 WL 3372983 (N.D. Cal. July 9, 2014) (examining borrower's standing to pursue various claims against mortgage lenders, including under FDCPA, RESPA, and TILA, based on whether claims accrued before or after bankruptcy filing, applying delayed discovery rule to allow standing for certain claims); *Vang Chanthavong v. Aurora Loan Servs., Inc.*, 448 B.R. 789 (E.D. Cal. 2011) (dismissing certain claims on standing grounds, but lender did not show borrower's breach of contract loan modification claim accrued pre-petition (claim dismissed on other grounds). See also *Hernandez v. Dyck-O'Neal, Inc.*, 2015 WL 2094263 (M.D. Fla. May 5, 2015) (refusing to dismiss FDCPA claims on standing grounds; claims involved improper deficiency action where foreclosure sale occurred pre-petition, but creditor filed deficiency lawsuit post-petition); *In re Rhinesmith*, 450 B.R. 630, 634-635 (Bankr. W.D. Tex. 2011) (all

In *In re Goldstein*,¹⁹ the homeowners filed a lawsuit in state court raising contract and tort causes of action against their mortgage servicer. They asserted claims that their servicer had acted improperly in failing to convert their trial loan modification to a permanent modification. Shortly after they filed the case, and two years after their chapter 7 discharge, the servicer moved to dismiss based on the plaintiffs' lack of standing because the claims had not been scheduled. The plaintiffs moved to reopen their bankruptcy case to schedule the claims, and the chapter 7 trustee was reappointed. The trustee entered into a settlement of the claims, which provided no relief the plaintiffs. The bankruptcy court approved the settlement, and the Ninth Circuit Bankruptcy Appellate Panel affirmed that this was as a proper outcome.²⁰ On appeal, the plaintiffs argued that no court in the Ninth Circuit (as well as in other Circuits) had recognized the claims they asserted against their servicer at the time the bankruptcy was filed, and therefore they were not property of the estate. In rejecting this argument, the Ninth Circuit B.A.P. held that the courts that first recognized the contract-based cause of action for wrongful conversion to a permanent loan modification "did not create new legal rights," and that the cause of action accrued prepetition.²¹

Was the prior bankruptcy case dismissed? The Second Circuit recently held that the Code provision under which the bankruptcy estate retains unscheduled estate property does not apply to dismissed bankruptcy cases.²² The closing of a bankruptcy without a discharge occurs frequently in chapter 13 cases. However, chapter 7 cases are occasionally dismissed without a discharge as well. This happens, for example, if the debtor failed to file paperwork necessary to proceed to discharge and to the formal closing of a fully administered bankruptcy case.

Reopening a closed bankruptcy case and amending the schedules. This is the option counsel are most likely to consider when the legal claims clearly existed before the chapter 7 bankruptcy filing, the claims were omitted from schedules, and the debtor obtained a discharge. In this situation it is possible to reopen the closed bankruptcy case for the purpose of amending the schedules to add the omitted claims.²³ The bankruptcy court and the trustee have a duty to see that any asset of the estate disclosed for the first time after a case has been closed is

conduct related to FDCPA claim took place post-petition and had no roots in prepetition conduct, claim belonged to debtors and not chapter 7 trustee).

¹⁹ 526 B.R. 13 (B.A.P. 9th Cir. 2015).

²⁰ *In re Goldstein*, 526 B.R. 13 (B.A.P. 9th Cir. 2015).

²¹ *In re Goldstein*, 526 B.R. 13, 23 (B.A.P. 9th Cir. 2015)

²² *Crawford v. Franklin Credit Management Corp.*, 758 F.3d 473 (2d Cir. 2014) (under §349(b)(3) of the Code property of the bankruptcy estate reverts in the debtor upon dismissal of a case; § 554(d) with its provisions keeping unscheduled property in the estate applies only to the closing out of fully administered bankruptcy cases); *Mackall v. JPMorgan Chase Bank, N.A.*, 2014 WL 4459624 * 2 (Colo. App. Sept. 11, 2014) (unpublished decision) ("where a bankruptcy case is dismissed, the Bankruptcy Code seems to unequivocally grant a debtor standing to assert any claim that it possessed before it filed for bankruptcy, regardless of whether it disclosed the claim to the bankruptcy court during the bankruptcy proceedings.").

²³ 11 U.S.C. § 350(b). *See In re Narcisse*, 2013 WL 1316706, at *5-6 (Bankr. E.D.N.Y. Mar. 29, 2013) ("cause" to reopen includes need to amend schedules to add asset or creditor); *Schaefer v. First Source Advantage, L.L.C.*, 2013 WL 509001 (E.D. Mo. Feb. 12, 2013) (denying dismissal of debt collection claim on standing grounds where, after debt collector raised standing issue, debtor reopened bankruptcy case, scheduled claim, and obtained order of abandonment).

administered.²⁴ In reopening the case, the debtor can seek to exempt the legal claim or have the trustee abandon any interest in it.²⁵

In considering the reopening of a bankruptcy case, careful exemption planning is essential. The trustee may seek to liquidate any nonexempt property created by the litigation and distribute the proceeds for the benefit of creditors. Ultimately, once the schedule is amended the trustee decides whether to liquidate the claim for creditors or abandon the estate's interest in the claim. If the claim is abandoned or exempted, the debtor should then be free to pursue it.

There are strong arguments in favor of allowing reopening to amend schedules. To the extent that the claims are a valuable asset, the trustee can provide a benefit for creditors. To the extent that the claims are exempt or have insignificant value for creditors, the initial omission of the claims from bankruptcy schedules did not harm anyone. From a policy perspective reopening and amendment are preferable to use of the bankruptcy standing doctrine to allow the defendants in the post-bankruptcy lawsuit to walk away scot free.

Reopening and amending, however, may not solve all problems for the debtor. Even when a debtor who initially omitted a legal claim from schedules reopens the closed bankruptcy case, adds the claim, and seeks to pursue the claim after abandonment or exemption, courts may still limit the debtor's rights over the claim. For example, a court may consider evidence of the debtor's conduct in initially omitting the claim and deciding to add it belatedly. The court may look at factors such as the timing of the reopening in relation to the appearance of a standing objection, the length of time since the bankruptcy case was closed, and any evidence of deliberate misrepresentation.²⁶ Consideration of equitable factors such as these is not a matter of standing, but involves the courts' broad authority to regulate litigation conduct. The doctrine of judicial estoppel, discussed below, is the remedy courts most often impose to address concerns for fairness and the integrity of the judiciary once the non-disclosure has been corrected.

Allowing the bankruptcy trustee to pursue the claims. If the bankruptcy case is reopened and exemption or abandonment do not restore a prebankruptcy legal claim the debtor, the trustee retains standing to assert the claim. If the lawsuit has already been filed, the trial court should

²⁴ *In re Riazuddin*, 363 B.R. 177 (B.A.P. 10th Cir. 2007) (pursuant to Code §§ 350(b) and 544(c), bankruptcy court has duty to reopen case upon prima facie evidence the case not fully administered; dismissal of lawsuit inappropriate); *In re Lopez*, 283 B.R. 22, 29 (B.A.P. 9th Cir. 2002) (even assuming debtors intentionally misled bankruptcy court in omitting claim from schedules, proper remedy is to reopen bankruptcy case and administer the claim as asset of estate); *Edwards v. Wells Fargo Bank, N.A.*, 2013 WL 3467215 (C.D. Cal. July 9, 2013) (dismissal for lack of standing appropriate because plaintiff omitted wrongful foreclosure claim from prior chapter 7 schedules, but court allows plaintiff opportunity to take corrective action before making a dismissal effective); *In re Arana*, 456 B.R. 161 (Bankr. E.D.N.Y. 2011) (in determining whether to reopen bankruptcy case under 11 U.S.C. § 350(b) to allow scheduling of omitted claim court must give greatest weight to benefit creditors will derive from liquidation of the claim).

²⁵ *Spaine v. Community Contacts, Inc.*, 756 F.3d 542, 546 (7th Cir. 2014) (amendment of schedules and abandonment resolved post-bankruptcy standing problem).

²⁶ *Macauley v. Estate of Nicholas*, 7 F.Supp.3d 468 (E. D. Pa. 2014) (dismissal of mortgagor's fraud claim on bankruptcy standing grounds, court notes could allow substitution but gives significant weight to fact that in several years after bankruptcy while aware of claim debtor did not try to open and amend).

allow the trustee to substitute in as plaintiff.²⁷ The trustee may, with court approval, hire the debtor's attorney to pursue the claim on behalf of the bankruptcy estate.²⁸ The bankruptcy court must approve this representation. The process for approval of counsel to represent the estate is not particularly burdensome, and focuses on disclosure of the fee arrangement. The arrangement should provide that from the proceeds of the action the debtor receives amounts covered by exemptions and any sum left over after payments due creditors. The estate would be entitled to any non-exempt proceeds from the litigation.²⁹

d. The debtor's standing during and after chapter 13

Unlike in chapter 7, the chapter 13 debtor remains in possession of all property of the estate. Normally the debtor has the right to fully control any litigation.³⁰ Therefore most courts have held that a chapter 13 debtor has standing to pursue prepetition causes of action.³¹ The

²⁷ Substitution or joinder of the trustee under Federal Rules of Civil Procedure 17(a), 25(c), or similar rules should accomplish this result. *Flowers v. Wells Fargo Bank, N.A.*, 2011 WL 2748650 (N.D. Cal. July 13, 2011) (as alternative to dismissal of lawsuit against loan servicer for lack of standing, plaintiff ordered to substitute bankruptcy trustee or else show exemption or abandonment of claims); *Runaj v. Wells Fargo Bank*, 667 F. Supp. 2d 1199 (S.D. Cal. 2009) (dismissing TILA and HOEPA actions because debtor not real party in interest, but with leave to amend to substitute trustee under Rule 17); *See generally* *Wieberg v. GTE Southwest, Inc.*, 272 F.3d 302 (5th Cir. 2001) (district court erred in dismissing civil action due to debtor's lack of standing without allowing time for bankruptcy trustee to be substituted as real party in interest under Rule 17).

²⁸ 11 U.S.C. § 327(e). *Jordan v. Paul Fin., L.L.C.*, 285 F.R.D. 435 (N.D. Cal. 2012) (in reopened chapter 7 case, trustee and debtors appropriately entered into stipulation allowing debtors to prosecute unfair lending claims on behalf of bankruptcy estate, subject to debtors' exemption rights). *See also* *Frese v. Empire Fin. Servs.*, 725 F. Supp. 2d 130 (D.D.C. 2010) (chapter 7 trustee to pursue unscheduled prepetition TILA rescission and damages claims unless decides to abandon claims to debtor).

²⁹ *In re Beach*, 447 B.R. 313 (Bankr. D. Idaho 2011) (debtor's interest in the exempt property gives her standing, along with trustee, to pursue TILA recoupment claim relating to debtor's exempt homestead interest). *See also* *Paige v. Waukesha Health Sys., Inc.*, 2013 WL 3560944 (E.D. Wis. July 11, 2013) (debtor retained standing to pursue FDCPA action where claimed \$1000 exemption in the claim valued at total of \$4000 in the bankruptcy schedules); *Miller v. Huntington Nat'l Bank, N.A.*, 2012 WL 4463877, at *3 (S.D. W. Va. Sept. 26, 2012) (transferring loan flipping case to bankruptcy court where case may be re-opened and extent of debtor's exemption in claim determined), *subsequent decision*, 2013 WL 593780, at *3-4 (N.D. W. Va. Feb. 15, 2013) (debtor claimed wildcard exemption of \$20,000, chapter 7 trustee permitted to intervene for bankruptcy estate).

³⁰ 11 U.S.C. §§ 1303, 1306(b); *Foronda v. Wells Fargo Home Mortgage, Inc.*, 2014 WL 6706815 * 4 (N.D. Cal. Nov. 26, 2014) (summarizing decisions). *See also* *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337 (4th Cir. 2013).

³¹ *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337 (4th Cir. 2013) (debtor has standing to bring prepetition claim for violation of Americans with Disabilities Act in the district court while his chapter 13 case is pending); *Smith v. Rockett*, 522 F.3d 1080 (10th Cir. 2008) (chapter 13 debtor can pursue prepetition debt collection case in own name on behalf of estate); *Crosby v. Monroe County*, 394 F.3d 1328 (11th Cir. 2004); *Cable v. Ivy Tech State College*, 200 F.3d 467 (7th Cir. 1999) (after conversion to chapter 13, chapter 7 trustee automatically dropped out of discrimination case and debtor became real party in interest with standing to prosecute case on behalf of the bankruptcy estate); *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513 (2d Cir. 1998); *Barker v. Asset Acceptance, L.L.C.*, 874 F. Supp. 2d 1062, 1065 (D. Kan. 2012) (debtor can pursue scheduled prepetition FDCPA action "in his capacity as a Chapter 13 bankruptcy debtor rather than in his individual capacity"); *Looney v. Hyundai Motor Mfg. Ala., L.L.C.*,

debtor should also have the right to dictate the terms of any settlement of the foreclosure claim, though the bankruptcy court must normally approve the settlement.³² The debtor should advise the chapter 13 trustee of any recovery, which depending upon the terms of the confirmed chapter 13 plan and allowed exemptions, may be distributed in full or in part to creditors.³³

The chapter 13 bankruptcy estate, unlike the chapter 7 counterpart, may include property the debtor acquires after filing the initial petition for relief.³⁴ The plan itself may stipulate otherwise, but the Code provides that upon confirmation of the plan the estate's property vests in the debtor.³⁵ Thus, the debtor should also have standing to pursue legal claims that arise during the three-to-five years that a confirmed chapter 13 plan is in effect. As discussed below, however, some courts have held that a chapter 13 debtor's failure to amend the schedules to disclose postpetition assets may prevent the debtor from pursuing such claims on judicial estoppel grounds.

e. Does the debtor have a duty on a chapter 13 to amend schedules to disclose postpetition assets

Despite the chapter 13 debtor's right to litigate on behalf of the estate, the extent of the debtor's duty to amend schedules to include legal claims acquired while a chapter 13 case is pending is not clear. Bankruptcy Rule 1007(h) requires amended schedules only when "the debtor acquires or becomes entitled to acquire any interest in property" pursuant to section 541(a)(5), which covers inheritances, divorce settlements and insurance proceeds that the debtor becomes entitled to within 180 days of the petition filing date. Bankruptcy Rule 1007(h) does not require the scheduling of property that enters the estate pursuant to section 1306.³⁶ However, some courts, including the Eight Circuit, have held that the debtor is required to amend the schedule of assets to include any legal claim that arises after the filing of the chapter 13 petition and during the pendency of the case.³⁷ The safest course in these situations is to disclose the

330 F. Supp. 2d 1289 (M.D. Ala. 2004) (chapter 13 debtor had standing to litigate employment discrimination action which was property of bankruptcy estate); *In re Simmerman*, 463 B.R. 47 (Bankr. S.D. Ohio 2011) (chapter 13 debtors have standing to bring various consumer claims, including FDCPA claims, on behalf of bankruptcy estate; but FDCPA claims time-barred).

³² See Fed. R. Bankr. P. 9019.

³³ See 11 U.S.C. §§ 1306(a), 1325(c), 1329.

³⁴ 11 U.S.C. § 1306(a).

³⁵ 11 U.S.C. § 1327(b); *In re Jones*, 420 B.R. 506 (B.A.P. 9th Cir. 2009), *aff'd* 657 F.3d 921 (9th Cir. 2011).

³⁶ *In re Adair*, 253 B.R. 85, 90 (B.A.P. 9th Cir. 2000) ("If Congress or the Bankruptcy Rule drafters had intended to impose a broader duty of ongoing disclosure, either could have expressly so provided.").

³⁷ See *Van Horn v. Martin*, 812 F.3d 1180 (8th Cir. 2016) (relying upon *Bob Evans* and finding that chapter 13 debtor had duty to disclose employment discrimination claim); *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1033 (8th Cir. 2016) (chapter 13 debtor had duty under confirmation order entered in his case to amend his schedules to report postpetition cause of action; "a Chapter 13 debtor who does not amend his bankruptcy schedules to reflect a post petition cause of action adopts inconsistent positions in the bankruptcy court and the court where that cause of action is pending"); *In re Flugence*, 738 F.3d 126, 127 (5th Cir. 2013) (*per curiam*); *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008) (bankruptcy judge had discretion to require chapter 13 debtors to amend their schedule of assets to disclose settlement of uninsured motorist claims).

claim and amend the schedules. The debtor should also amend the schedule of exempt property to exempt the claim. The ability to amend schedules after the completion of a chapter 13 case is questionable.³⁸

In chapter 13, as with chapter 7, resolving standing issues does not preclude courts' application of equitable remedies, such as judicial estoppel, when the omission of a claim from schedules was the product of a bad faith intent to conceal. As discussed below, judicial estoppel has been applied to bar claims not disclosed during the pendency of a chapter 13 case, regardless of whether the claims arose before the filing of the petition or during the pendency of the case.

II. Judicial Estoppel

1. What is judicial estoppel?

Judicial estoppel is a different doctrine that courts may apply in situations when a plaintiff is pursuing a legal claim that existed at the time of a prior bankruptcy case, but did not disclose the claim in the schedules filed with the bankruptcy court. Judicial estoppel and lack of standing are related in that both can be consequences of an omission from bankruptcy schedules. However, the concepts are distinct. For example, a plaintiff who overcomes a standing objection and is the proper party to pursue a claim may still be precluded from doing so by judicial estoppel. Courts sometimes apply both doctrines to dismiss a case.³⁹

Judicial estoppel is an equitable doctrine intended to protect the integrity of the court by preventing a party from intentionally changing positions in litigation depending upon the "exigencies of the moment."⁴⁰ Under the doctrine, a party is precluded from asserting a position in a legal proceeding inconsistent with a position the same party adopted in a previous proceeding.

While there is no bright line test to determine when judicial estoppel may be invoked, the Supreme Court has focused on these general considerations: (1) whether the party's later position was clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading the court to accept the earlier position, so that later judicial acceptance would suggest that the first or second court was deliberately misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.⁴¹ Federal courts have imposed judicial estoppel in numerous instances when a party omitted a prepetition legal claim from schedules, then attempted to assert the claim in a postbankruptcy lawsuit.⁴² In the courts' view, the debtor made inconsistent statements about the

³⁸ *In re D'Antignac*, 2013 WL 1084214 (Bankr. S.D. Ga. Feb. 19, 2013) (chapter 13 case cannot be reopened to administer an asset (a lawsuit) because § 1329(d) limits period of plan administration to five years, and seven years passed since commencement of plan).

³⁹ *See, e.g., Johnson v. Deutsche Bank Nat'l Trust Co.*, 2013 WL 3810715 (N.D. Tex. July 23, 2013) (challenge to foreclosure practices asserting various consumer claims, dismissed for bankruptcy-related lack of standing and judicial estoppel).

⁴⁰ *New Hampshire v. Maine*, 532 U.S. 742, 753 (2001).

⁴¹ *New Hampshire v. Maine*, 532 U.S. 742, 750–751 (2001).

⁴² *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001) (debtor judicially estopped from bringing insurance claims when debtor listed insurance losses as liabilities, but did not list claim against

existence of the legal claim in two different proceedings. Courts have applied judicial estoppel in the context of both chapter 13 and chapter 7 cases.⁴³

Judicial estoppel has its place in certain instances where a party made a calculated decision not to disclose a valuable claim to bankruptcy creditors. A paradigm example would be an individual planning to file a tort lawsuit worth hundreds of thousands of dollars. Assume that this person also had a hundred thousand dollars in unsecured debt. Filing a bankruptcy case first would allow the discharge of all the unsecured debt. If the debtor intentionally left the tort claim out of his schedules and later recovered several hundred thousand dollars in the lawsuit, this individual would have misused the bankruptcy system. The unsecured creditors were deprived of recourse to a valuable asset of the debtor that would have paid off the unsecured debts in full. At the other extreme, some bankruptcy debtors do not understand that they have certain types of potential legal claims and may honestly omit them from their bankruptcy schedules.

2. The elements of judicial estoppel in the bankruptcy context

The party's later position is clearly inconsistent with its earlier position. This first criterion is seldom an issue in bankruptcy judicial estoppel litigation. The basic inconsistency alleged is that in one proceeding the debtors signed a sworn declaration that they did not have a legal claim. In raising the claim in the later proceeding, the debtors are saying the opposite - that they do have the legal claim. In some instances plaintiffs successfully avoided judicial estoppel by arguing that the status of the law at the time of the bankruptcy filing did not support the legal claim, and the law later changed or was clarified to allow the claim.⁴⁴ Several decisions have turned on the question of whether the debtors actually disclosed the legal claims in their bankruptcy schedules. There is no hard and fast rule describing how a description of an inchoate

insurer as asset on bankruptcy schedules). *See also* *Moses v. Howard Univ. Hosp.*, 606 F.3d 789 (D.C. Cir. 2010); *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151 (10th Cir. 2007); *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006); *Stallings v. Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598 (5th Cir. 2005); *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003); *Krystal Cadillac Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314 (3d Cir. 2003); *Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc.*, 989 F.2d 570 (1st Cir. 1993).

⁴³ *See, e.g., Kimberline v. Dollar Gen. Corp.*, 520 Fed. Appx. 312 (6th Cir. 2013) (judicial estoppel applied where cause of action accrued during final weeks of five-year chapter 13 plan and debtor did not disclose claim before discharge); *DeLeon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11th Cir. 2003) (judicial estoppel applies in chapter 13 as well as in chapter 7 cases). *But see* *Gilbreath v. Averitt Express, Inc.*, 2010 WL 4554090 (W.D. La. Nov. 3, 2010) (discussing rulings on status of legal claims that accrue after chapter 13 plan confirmation and before discharge; finding application of judicial estoppel inappropriate when claim arose post-confirmation).

⁴⁴ *Meyer v. U.S. Bank Nat. Ass'n*, 530 B.R. 767 (W. D. Wash. Apr. 10, 2015) (judicial estoppel not applied where bankruptcy court did not rely on absence of legal claim in schedules; unsettled issues of state foreclosure law were clarified after bankruptcy and debtors not aware had legal claim at time of bankruptcy); *Balik v. Blitt and Gaines, P.C.*, 2015 WL 764013 (N.D. Ill. Feb. 21, 2015) (judicial estoppel not applicable to FDCPA claim where nature of distant forum violation substantially clarified by post-bankruptcy U.S. court of appeals decision, but case dismissed on other grounds). *But see In re Goldstein*, 526 B.R. 13 (B.AP 9th Cir. 2015) (rejecting debtor's argument that at time of bankruptcy filing in 2010 the law did not yet support fraud, breach of contract, and promissory estoppel claims involving failure to convert a HAMP trial plan).

legal claim must look.⁴⁵ If a less than complete description nevertheless gave reasonable notice to the trustee that the legal claim existed, this should suffice to avoid judicial estoppel.⁴⁶

The party persuaded the earlier court to accept the earlier position. In judicial estoppel rulings there is typically little analysis of whether the omission made any practical difference in the debtor's obtaining a bankruptcy discharge. For example, omission of a claim that would have been exempt had it been scheduled does not have any effect on the debtor's obtaining a discharge. However, many courts would find that this factor, in and of itself, makes little difference in the application of judicial estoppel.⁴⁷

Granting a discharge is the "position" adopted by a bankruptcy court that most often triggers judicial estoppel.⁴⁸ The Eight Circuit refused to apply judicial estoppel, finding no inconsistent position occurred, in a case in which the debtor never received a discharge because the trustee's motion to dismiss the case was granted.⁴⁹

Short of entering the discharge order, it is less clear what other "positions" adopted by the bankruptcy court are sufficient to bring judicial estoppel into play. One issue is whether the imposition of the automatic stay is enough. Defendants have argued that courts should impose judicial estoppel in situations where the debtor benefitted from the automatic stay in a past bankruptcy even though the debtor did not obtain a discharge. The Ninth Circuit in *Hamilton v. State Farm Fire & Cas. Co.* affirmed the imposition of judicial estoppel in a case in which the bankruptcy court had entered a chapter 7 discharge, but later revoked the discharge after a finding of debtor bad faith.⁵⁰ The decision suggests that in certain cases merely benefitting from the automatic stay could suffice as the "position" adopted by the bankruptcy court that justifies judicial estoppel. More recent decisions from California courts have reached different conclusions on this question. This has been true both in the federal courts⁵¹ and in state courts.⁵²

⁴⁵ *In re Mohring*, 142 B.R. 389, 395 (Bankr. E.D. Cal. 1992).

⁴⁶ *Foronda v. Wells Fargo Home Mortgage, Inc.*, 2014 WL 6706815 (N.D. Cal. Nov. 26, 2014) (judicial estoppel not applied where debtor failed to list claim against mortgagee in former schedule B, but listed lawsuit in Statement of Financial Affairs); *Wahlman v. Datasphere Technologies, Inc.*, 2014 WL 794269 * 5 (W.D. Wash. Feb. 27, 2014) (designating what later became employment discrimination lawsuit as "EEOC Claims" in bankruptcy schedules was sufficiently specific to preclude judicial estoppel). *But see* *Bernardi v. Deutsche Bank Nat'l Trust Co. Am.*, 2013 WL 163285 (N.D. Cal. Jan. 15, 2013) (detail in scheduling claim insufficient to preclude judicial estoppel; debtor identified active mortgage litigation generally in schedule of assets, but in Statement of Financial Affairs referenced only one specific case against one of the several entities targeted in lawsuits).

⁴⁷ *But see* *Schneider v. Unum Life Ins. Co. of Amer.*, 2008 WL 109065 * 6 (D. Or. Jan. 8, 2008) (declining to impose judicial estoppel, finding, *inter alia*: "[b]ecause the lawsuit proceeds would be exempt, I find no evidence of prejudice to creditors.").

⁴⁸ *Van Horn v. Martin*, 812 F.3d 1180, 1183 (8th Cir. 2016) ("Bankruptcy court adopted her representation that no claims existed when it discharged \$18,391.49 of her unsecured debt."); *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1032–34 (8th Cir. 2016) (bankruptcy court adopted the debtor's position that his discrimination claim did not exist when it discharged his unsecured debts).

⁴⁹ *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006).

⁵⁰ 270 F.3d 778, 784–85 (9th Cir. 2001).

⁵¹ *Zyla v. American Red Cross Blood Services*, 2014 WL 3868235 (N.D. Cal. Aug. 6, 2014) (where plan amended to add omitted claim and mistake averred, benefit debtor received from automatic stay not sufficient to impose judicial estoppel); *Boatright v. Aurora Loan Servs.*, 2012 WL 2792415 (N.D. Cal.

Debtors who engage in repeat bankruptcy filings to stave off foreclosures with no effort to obtain a discharge are most likely to face judicial estoppel based solely on the benefit of the stay.⁵³ Aside from these repeat-filer cases, it is difficult to see how a temporary, automatic imposition of the bankruptcy stay where no discharge followed should amount to the bankruptcy court's "adoption" of a position based on anything in the debtor's schedules.⁵⁴

Chapter 13 cases often end with a dismissal without entry of a discharge order. Specific questions arise as to what actions by the bankruptcy court, short of granting a discharge, trigger judicial estoppel for chapter 13. Most courts focus on the plan confirmation order.⁵⁵ Debtors are more likely to face judicial estoppel if the court confirmed a plan while a legal claim remained unscheduled than if the chapter 13 case was dismissed before confirmation. As with chapter 7, the benefit of the automatic stay alone may qualify as sufficient court adoption of the content of

July 9, 2012) (mere imposition of automatic stay in prior chapter 13 case without confirmation of plan did not create requisite benefit to debtor to justify imposition of judicial estoppel); *Perez v. Wells Fargo Bank, N.A.*, 2011 WL 3809808 (N.D. Cal. Aug. 29, 2011) (no judicial estoppel of TILA and other consumer claims where chapter 13 plan not confirmed before dismissal of bankruptcy case; mere activation of automatic stay did not create pertinent benefit for debtor). *See also* *Nissim v. Wells Fargo Bank, N.A.*, 2014 WL 4421384 (N. D. Cal., Sept. 5, 2014) (several past bankruptcies involved; refusing judicial estoppel in one chapter 13 case where no discharge or plan confirmation occurred).

⁵² *Gottlieb v. Kest*, 46 Cal. Rptr. 3d 7 (Cal. Ct. App. 2006) (implementation of automatic stay not sufficient to trigger adoption of legal position prong of judicial estoppel test); *Campbell v. Bank of America*, 2013 WL 3833669 (Cal. App. July 24, 2013) (unpublished decision) (implementation of stay in dismissed bankruptcy cases not sufficient to meet requirement for court adoption of position, borrower may pursue loan servicing claims); *Hamilton v. Greenwich Investors XXVI, L.L.C.*, 126 Cal. Rptr. 3d 174 (Cal. Ct. App. 2011) (imposing judicial estoppel, noting benefit of automatic stay and confirmation of chapter 13 plan).

⁵³ *Sharp v. Nationstar Mortgage, LLC*, 2015 WL 106844 (N.D. Cal. Jan. 7, 2015) (judicial estoppel applied where debtor filed four consecutive bankruptcy cases that were dismissed without discharge, delaying foreclosures); *Swendsen v. Ocwen Loan Servicing, LLC*, 2014 WL 1155794 (E.D. Cal. Mar. 21, 2014) (automatic stay in two prior bankruptcies); *HPG Corp. v. Aurora Loan Servs., L.L.C.*, 436 B.R. 569 (E.D. Cal. 2010) (judicial estoppel applied against debtors who did not obtain discharges in prior bankruptcy cases but who obtained benefits of automatic stay in multiple cases).

⁵⁴ *Perez v. Wells Fargo Bank, N.A.*, 2011 WL 3809808 * 12 (N.D. Cal. Aug. 29, 2011) (distinguishing *Hamilton*, rejects argument that judicial estoppel should be predicated solely upon imposition of automatic stay, noting "[a] stay would have been entered in the bankruptcy action regardless of whether [the debtor] listed any claims in her bankruptcy filings.").

⁵⁵ *Sannah v. Wells Fargo Bank BA*, 2012 WL 10423186 * 4 (C.D. Cal. Mar. 19, 2012) (no judicial estoppel where chapter 13 plan never filed before dismissal); *Chancellor v. OneWest Bank*, 2012 WL 1868750 (N.D. Cal. May 22, 2012) (borrower's wrongful foreclosure and RESPA claims not barred by judicial estoppel where chapter 13 plans not confirmed in prior bankruptcies); *Hamilton v. Greenwich Investors XXVI, L.L.C.*, 126 Cal. Rptr. 3d 174 (Cal. Ct. App. 2011) (judicial estoppel barred consumer's lender liability claims where claims not scheduled in debtor's pending chapter 13 case; plan had been confirmed, distinguishing cases in which plans not confirmed). *See also In re Oparaji*, 698 F.3d 231, 238 (5th Cir. 2012) (refusing to apply judicial estoppel to creditor because confirmation of plan did not represent judicial acceptance of a position in a chapter 13 case dismissed without discharge).

the debtor's schedules.⁵⁶

The party would derive an unfair advantage or impose an unfair detriment on the opposing party if it asserts inconsistent positions. This third estoppel criterion refers to two alternative elements: an unfair advantage to the plaintiff or an unfair detriment to the defendant. An omission from bankruptcy schedules may not have any impact on the defendant in the post-bankruptcy litigation. The focus is more often on the plaintiff - whether the plaintiff obtains an “unfair” benefit because of the past omission.

Nearly all courts agree that there would be no unfair advantage for the debtor-plaintiff if the earlier omission resulted from mistake or inadvertence.⁵⁷ Since the defendant can usually establish the major elements of judicial estoppel from court documents and timing, the “mistake or inadvertence” standard becomes the focal point of most litigation over bankruptcy estoppel. Debtors often attempt to argue that valid grounds exist for asserting mistake or inadvertence as the basis for the omission. Courts have formulated presumptions and other procedural barriers that have made it difficult for debtors to present evidence of mistake or inadvertence.

3. Standard for consideration of “mistake or inadvertence” - does it help to amend the schedules?

Under a test commonly applied in federal courts, the omission of a cause of action from bankruptcy schedules is deemed deceitful (i.e., “unfair”) if the debtor had knowledge of the factual basis for the undisclosed claim and had a motive to conceal it.⁵⁸ The requisite “knowledge” is deemed to be the awareness of the general facts associated with the potential claim.⁵⁹ For example, the fact that a homeowner possessed loan documents and was aware of

⁵⁶ Becker v. Wells Fargo Nat'l Ass'n, 2012 WL 5187792 (E.D. Cal. Oct. 18, 2012) (judicial estoppel applied where debtor failed to disclose legal claims related to an improper foreclosure sale that occurred after the bankruptcy petition was filed but before chapter 13 plan confirmed).

⁵⁷ New Hampshire v. Maine, 532 U.S. 742, 753 (2001); Javery v. Lucent Technologies, Inc. Long Term Disability Plan for Management or LBA Employees, 741 F.3d 686, 698 (6th Cir 2014) (failure to disclose a claim in a bankruptcy proceeding may be excused where it occurred by mistake or inadvertence); Ah Quin v. County of Kauai Dept. of Trans., 733 F.3d 267, 276-77 (9th Cir. 2013) (if schedules amended, court must consider evidence of mistake and inadvertence in original omission); Stallings v. Hussmann Corp., 447 F.3d 1041, 1049 (8th Cir. 2006) (“Careless or inadvertent disclosures are not the equivalent of deliberate manipulation.”); Eubanks v. CBSK Fin. Group, Inc., 385 F.3d 894 (6th Cir. 2004) (courts must consider inadvertence, mistake in all judicial estoppel cases); John S. Clark Co. v. Faggert & Frieden, Co., 65 F.3d 26, 29 (4th Cir. 1995) (inappropriate to apply judicial estoppel in case of mistake or inadvertence); Copeland v. Hussmann Corp., 462 F. Supp. 2d 1012, 1020 (E.D. Mo. 2006) (plaintiff did not intend to manipulate the system where he may not have known his employment discrimination claim was viable until he received his right to sue letter after the bankruptcy estate closed).

⁵⁸ Moses v. Howard University Hospital, 606 F.3d 789, 800 (D.C. Cir. 2010); Eastman v. Union Pacific R.R. Co., 493 F.3d 1151, 1157 (10th Cir. 2007); Krystal Cadillac Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314, 321 (3^d Cir. 2003); Barnes v Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002); *In re Coastal Plains*, 179 F.3d 197 (5th Cir. 1999).

⁵⁹ Van Horn v. Martin, 812 F.3d 1180, 1183 (8th Cir. 2016) (the plaintiff/debtor had “knowledge of her claims while her bankruptcy case was pending”); Krystal Cadillac Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 321 (3^d Cir. 2003) (rebuttable inference of bad faith arises when averments in pleadings demonstrate knowledge of a claim and a motive to conceal that claim in the face of an

loan terms could be enough to establish that the homeowner had “knowledge” of a cause of action before filing a bankruptcy petition.⁶⁰ It does not matter that only years later in a conversation with an attorney the homeowner learns that there is a TILA violation buried in the loan documents or that the communications from the lender’s attorney violated the FDCPA.

Many courts imply the intent and motivation to deceive from the combination of a broad view of “knowledge” and from the timing of the bankruptcy filing. The knowledge and timing create a presumption that the debtor left out the claim in order to obtain the benefit of a bankruptcy discharge while retaining a valuable asset.⁶¹ Under certain rulings plaintiffs can face a nearly insurmountable burden in rebutting this presumption. The plaintiff’s burden is not to rebut a specific allegation of bad faith, but instead to prove the absence of all bad faith.⁶²

The harshest aspect of this standard is that it ignores efforts to amend schedules and correct any concrete harm that the omission may have caused to creditors. Judicial estoppel standards developed in the Ninth and Seventh Circuit give significant consideration to a debtor’s efforts to reopen and amend schedules.⁶³ However, other circuits do not share this view.⁶⁴

affirmative duty to disclose); *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999) (debtor’s knowledge of enough information to suggest that it may have a possible cause of action coupled with failure to schedule claim sufficient to support application of judicial estoppel doctrine).

⁶⁰ *See e.g.* *McFarland v. JP Morgan Chase Bank*, 2014 WL 4119399 (C.D. Cal. Aug. 21, 2014) (borrower’s awareness of loan terms before bankruptcy, not legal claims triggered by those terms, sufficient for judicial estoppel).

⁶¹ *Eastman v. Union Pacific R.R. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007); *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003); *In re Coastal Plains*, 179 F.3d 197 (5th Cir. 1999).

⁶² *See e.g.* *Dockery v. Countrywide Home Loans, Inc.*, 2010 WL 2667376 (W.D. Ky. July 1, 2010) (burden of establishing absence of bad faith on debtor when defendant in subsequent action has shown debtor possessed knowledge of the factual basis of the claims in prior bankruptcy and had motive to conceal them from bankruptcy court).

⁶³ *Metrou v. M.A. Mortenson Co.*, 781 F.3d 357, 360 (7th Cir. 2015) (the debtor-plaintiff who amends schedules to list omitted claim presumptively remains eligible to receive non-exempt proceeds remaining after creditors are paid from lawsuit; reversing trial court that set cap on amount recoverable from lawsuit based on amount needed to pay creditors); *Ah Quin v. County of Kauai Dept. of Trans.*, 733 F.3d 267 (9th Cir. 2013).

⁶⁴ *Moses v. Howard University Hospital*, 606 F.3d 789, 800 (D.C. Cir. 2010) (finding debtor’s argument that he reopened bankruptcy case, amended schedules and invited trustee to intervene to be “wholly unpersuasive”); *Eastman v. Union Pacific Rail Co.*, 493 F. 3d 1151, 1160 (10th Cir. 2007) (reopening bankruptcy case, making creditors whole is “inconsequential”); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002) (allowing debtors to reopen and amend to avoid judicial estoppel would discourage truthful initial disclosures); *Robinson v. District of Columbia*, 10 F.Supp.3d 181 (D.D.C. 2014) (because reopening bankruptcy case to schedule omitted debt will have no impact on court’s decision to apply judicial estoppel, court may dismiss employment action without allowing reopening); *Barker v. Asset Acceptance, L.L.C.*, 874 F. Supp. 2d 1062 (D. Kan. 2012) (judicial estoppel barred chapter 13 debtor from pursuing prepetition unfair debt collection action despite amending his schedules to add claim in response to creditor’s motion raising judicial estoppel); *Copeland v. Hussmann Corp.*, 462 F. Supp. 2d 1012, 1020 (E.D. Mo. 2006) (plaintiff’s amended schedules did not negate judicial estoppel argument; however court found that debtor had not intentionally misled the courts).

The Ninth Circuit’s 2013 ruling in *Ah Quin v. County of Jauai Dept. of Transportation* set out a roadmap leading to a fairer consideration of evidence of mistake or inadvertence in judicial estoppel cases.⁶⁵ *Ah Quin* involved the plaintiff in an employment discrimination case. The plaintiff’s lawsuit was already pending when she filed her chapter 7 petition. She did not disclose the lawsuit in her schedules and obtained a discharge. After the defendant in the employment case raised judicial estoppel, the plaintiff reopened her bankruptcy case and amended her schedules. The bankruptcy trustee abandoned any interest in the lawsuit. The trial court then granted summary judgment for the defendant employer. The trial court considered the reopening and amendment irrelevant. Instead the court found an intent to deceive from the straightforward application of the presumption – the plaintiff knew about her legal claim and, like all bankruptcy debtors, she had a motive to conceal the claim from creditors. According to the trial court, the plaintiff’s assertion that she initially omitted the claim out of mistake and inadvertence was insufficient to defeat the formalistic presumption of intent to deceive.

The court of appeals in *Ah Quin* reversed. In doing so the court gave substantial weight to the plaintiff’s reopening and amendment. The court began by agreeing that *absent the reopening and amendment*, application of a presumption of intent would be appropriate.⁶⁶ However, this corrective action effectively removed the “unfair advantage” element necessary for application of judicial estoppel.⁶⁷ Instead, the relevant inquiry became whether the defective filing “was, in fact, inadvertent or mistaken, as those terms are commonly understood.”⁶⁸ This meant consideration of evidence of subjective intent, not reliance on a presumption. According to the appellate court:

Courts must determine whether the omission occurred by accident or was made without intent to conceal. The relevant inquiry is not limited to the plaintiff’s knowledge of the pending claim and the universal motive to conceal a potential asset – though those are certainly factors. The relevant inquiry is, more broadly, the plaintiff’s subjective intent when filling out and signing the bankruptcy schedules.”⁶⁹

Under the *Ah Quin* standard the party defending against judicial estoppel must still present some evidence that the omission was the result of mistake or inadvertence.⁷⁰ For

⁶⁵ *Ah Quin v. County of Kauai Dept. of Trans.*, 733 F.3d 267 (9th Cir. 2013).

⁶⁶ *Id.*, 733 F.3d at 272-73.

⁶⁷ *Id.* at 274.

⁶⁸ *Id.* at 276.

⁶⁹ *Id.* at 276-77.

⁷⁰ *Zyla v. American Red Cross Blood Services*, 2014 WL 3868235 (N.D. Cal. Aug. 6, 2014) (applying *Ah Quin*; after amending chapter 13 plan, debtor may show had no subjective intent to deceive by establishing she had informed her bankruptcy attorney of claim and relied on attorney to complete bankruptcy papers appropriately). *But see* *Dzakula v. McHugh*, 746 F.3d 399 (9th Cir. 2014) (merely amending schedules without offering some evidence of mistake or inadvertence in initial omission does not rebut presumption of deceit for summary judgment purposes). *See also* *Giri v. HSBC Bank USA*, 98 F.Supp.3d 1147 (D. Nev. Jan. 20, 2015) (addressing complaint alleging wrongful foreclosure contrary to SCRA and applying *Ah Quin*, court finds plaintiff subject to presumption of deceit (aware of facts when filed; knowledge equals motive) but if amends schedules court will consider “inadvertence or mistake”

unsophisticated homeowners, however, it should not be difficult to present straightforward evidence of an honest mistake. Significantly, the plaintiff does not bear a generalized burden to prove a negative – an absence of bad faith. Courts in the Seventh Circuit have followed the Ninth Circuit’s analysis and also provide a helpful guide to judicial estoppel issues.⁷¹

The *Ah Quin* ruling is important because it squarely addresses one of the major problems plaintiffs have faced in dealing with judicial estoppel. Defendants tend to raise judicial estoppel at the early stages of a legal proceeding, typically by way of a motion for summary judgment or a motion to dismiss. The presumption of intent to deceive presents a significant barrier to the party responding to one of these motions. The respondent essentially loses the favorable inferences that otherwise apply in defending such a motion. When a presumption is applied, ruling on judicial estoppel in early dispositive motions is particularly inappropriate.⁷² The trial court in *Ah Quin* applied the typical presumption to enter summary judgment for the defendant and did not consider the plaintiff’s evidence of mistake and inadvertence. The court of appeals, on the other hand, held that, given the corrective action that dispelled the presumption, the plaintiff was entitled to have the evidence of mistake and inadvertence in her affidavit in response to summary judgment considered in the light most favorable to her.⁷³

Other defenses: Was it really a pre-petition claim? Judicial estoppel assumes that the undisclosed legal claim at issue was property of the bankruptcy estate and would have been available to pay creditors if it had been disclosed. As was true for the analysis of standing, defendants may err in assuming that the claim belonged to the bankruptcy estate. A claim’s inclusion in the bankruptcy estate depends on when it arose. Judicial estoppel cannot apply if the pertinent events occurred *after* the consumer filed a chapter 7 petition.⁷⁴ Legal claims that the

and subjective intent); *Gonzalez v. County of Yolo*, 2014 WL 5115059 (E.D. Cal. Oct. 10, 2014) (applying *Ah Quin* and allowing depositions of debtor and bankruptcy attorney on subjective intent).

⁷¹ *Spaine v. Community Contacts, Inc.*, 756 F.3d 542 (7th Cir. 2014) (no presumption of intent to deceive arises where debtor amended schedules and provides some evidence had no subjective intent to mislead); *Thompson v. Village of Monee*, 2014 WL 4175915 (N. D. Ill. Aug. 22, 2014) (defendant must meet burden of showing intent to deceive if debtor reopened bankruptcy and amended schedules).

⁷² *Sullivan v. H & M International Transportation, Inc.*, 2015 WL 720988 (N.D. Ill Feb. 13, 2015) (denying judicial estoppel on motion for judgment on pleadings); *Thomas v. Indiana Oxygen Co., Inc.* 32 F.Supp.3d 983 (S.D. Ind. 2014) (judicial estoppel not properly raised by Rule 12(b)(1) motion); *David v. Wal-Mart Stores, Inc.*, 2014 WL 5510986 (N.D. Ill. Oct. 24, 2014) (refusing to apply judicial estoppel on Rule 12(b)(6) motion); *Jackson v. WellSpan Health*, 2014 WL 414251 * 6-7 (M.D. Pa. Feb. 4, 2014) (courts should be reluctant to approve judicial estoppel at pleading stage; the party to be judicially estopped must be given a meaningful opportunity to explain its position). *See also In re Simmerman*, 463 B.R. 47, 56 (Bankr. S.D. Ohio 2011) (denying motion to dismiss debt collection claims based on judicial estoppel, “the court cannot determine, based solely on allegations in the complaint, whether any failure to disclose in the prior case was inadvertent or without motive”; but finds FDCPA claims time-barred); *Schreiber v. Ocwen Loan Servicing, L.L.C.*, 2011 WL 6055425 (M.D. Fla. Oct. 17, 2011) (because judicial estoppel focuses on party’s intent in earlier omission of consumer claims from bankruptcy schedules, court will not decide judicial estoppel issue on motion to dismiss), *adopted by* 2011 WL 6055417 (M.D. Fla. Dec. 6, 2011).

⁷³ *Ah Quin v. County of Kauai Dept. of Trans.*, 733 F.3d 267, 278 (9th Cir. 2013).

⁷⁴ *Garcia v. Receivables Performance Management, LLC*, 2014 WL 5543885 (N.D. Ill. Nov. 3, 2014) (FDCPA claims arose after conversion of bankruptcy case to chapter 7 and therefore debtor had no duty

debtor acquires after filing the chapter 7 petition do not belong to the bankruptcy estate and there is no duty to disclose them. For example, in *Moreno v. Wells Fargo Home Mortg.*,⁷⁵ the U.S. district court for the Eastern District of California denied judicial estoppel where the debtors had filed bankruptcy in reliance on a servicer's promise to consider them for a loan modification if they got rid of their unsecured debts. After the debtors filed their bankruptcy petition, the servicer refused to consider them for a modification - because they had filed for bankruptcy. Although the servicer's promise occurred before the bankruptcy filing, the debtors' legal claim arose post-petition. There was no obligation to list this claim in their chapter 7 schedules.

The issues surrounding composition of the bankruptcy estate are different in chapter 13. The duty to disclose continues until a chapter 13 plan is confirmed. Some courts follow the view that the confirmation of the chapter 13 plan vests property of the bankruptcy estate in the debtor, as § 1327(b) of the Bankruptcy Code provides.⁷⁶ However, plan terms can vary this rule. In addition, many courts recognize a general duty to disclose legal claims the debtor acquires during the entire pendency of a chapter 13 case, before and after confirmation, as discussed in the standing discussion above.⁷⁷ Therefore, the safest course is to disclose legal claims acquired post-confirmation while a chapter 13 case is pending.

Does judicial estoppel apply to the trustee? Most courts have held that judicial estoppel does not apply to a bankruptcy trustee.⁷⁸ The trustee may hire the consumer's counsel to

to disclose and schedule claims; fact that underlying debt arose pre-bankruptcy not determinative); *In re Rivera*, 2014 WL 287517 (Bankr. E.D. Va. Jan. 27, 2014) (rejecting creditor's standing and judicial estoppel claims; while the creditor's promise to modify loan occurred pre-petition, the foreclosure sale that was the subject of complaint occurred after chapter 7 filing; debt collection claims dismissed on other grounds); *See also In re Rivera*, 2014 WL 287517 (Bankr. E.D. Va. Jan. 27, 2014) (because debtor's major claims related to a foreclosure that occurred post-petition and not to origination issues, judicial estoppel not applicable); *Famatiga v. Mortgage Elec. Registration Sys., Inc.*, 2011 WL 3320480 (E.D. Mich. Aug. 2, 2011) (no judicial estoppel where major part of borrower's claim related to a wrongful foreclosure that occurred after the bankruptcy filing); *Doran v. Wells Fargo Bank*, 2011 WL 2160643 (D. Haw. May 31, 2011) (judicial estoppel applied to one claim related to series of foreclosure actions lender took against borrower, but not to other claims related to misconduct that occurred postpetition). *But cf.* *Clementson v. Countrywide Fin. Corp.*, 464 Fed. Appx. 706 (10th Cir. 2012) (unreported) (borrower's efforts to modify mortgage loan were rooted in lender's prebankruptcy pattern of conduct so that failure to schedule legal claims against lender triggered judicial estoppel).

⁷⁵ 2014 WL 5934722 (E. D. Cal. Nov. 12, 2014).

⁷⁶ 11 U.S.C. § 1327(b); *In re Jones*, 420 B.R. 506 (B.A.P. 9th Cir. 2009), *aff'd* 657 F.3d 921 (9th Cir. 2011). *Compare In re Flugence*, 738 F. 3d 126 (5th Cir. 2013) (imposing judicial estoppel to bar debtor from litigating undisclosed claim that arose during chapter 13 case after confirmation of plan).

⁷⁷ *See* II. 4, *supra*.

⁷⁸ *Stephenson v. Malloy*, 700 F.3d 265 (6th Cir. 2012) (chapter 7 trustee can pursue prepetition legal claim despite debtor's inadvertent omission of claim from schedules); *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011) (en banc) (application of judicial estoppel to a bankruptcy trustee is inconsistent with purpose of the bankruptcy law to preserve assets for distribution to estate's innocent creditors); *Coplan v. Techtronics Industries Co., Ltd.*, 95 F.Supp.3d 1230 (S. D. Cal. Mar. 27, 2015) (judicial estoppel inapplicable to trustee who has been substituted as party plaintiff); *Lupian v. Central Valley Builders*, 2014 WL 465445 (S.D. Cal. Feb. 5, 2014) (showing of mistake/inadvertence not necessary for trustee to pursue claim); *Coble v. DeRosia*, 823 F. Supp. 2d 1048 (E.D. Cal. 2011) (judicial estoppel not applicable to trustee).

prosecute the claim on behalf of the bankruptcy estate. The debtor should remain eligible to receive any proceeds from the litigation subject to exemptions and any amounts left over after the appropriate distribution to creditors. If a court finds that the debtor's initial non-disclosure of the legal claim was intentional, the court could potentially limit the debtor's access to proceeds from a lawsuit. However, such a sanction should be issued only after a finding of intentional misconduct. The bankruptcy court, not the trial court hearing the post-bankruptcy lawsuit, should make this determination.⁷⁹

In response to an assertion of judicial estoppel debtor's counsel should emphasize that strict application of the doctrine provides an undeserved windfall to a defendant and does nothing to promote the interests of bankruptcy creditors. Many courts have criticized strict application of judicial estoppel on these grounds.⁸⁰ The bankruptcy courts have their own options for sanctioning debtors who deliberately misrepresent their financial affairs. Advocates should always emphasize the equitable nature of judicial estoppel.⁸¹ Application of the doctrine is

⁷⁹ See, e. g. *Metrou v. M.A. Mortenson Co.*, 781 F.3d 357, 360 (7th Cir. 2015) (reversing trial court that had placed cap on plaintiff's recovery based on amount needed to pay off bankruptcy creditors: "a debtor who errs in good faith, and tries to set things right by surrendering the asset to the Trustee, remains entitled to any surplus after creditors have been paid, just as would have occurred had the claim been disclosed on the bankruptcy schedules."). *But compare Cannata v. Wyndham Worldwide Corp.*, 798 F. Supp. 2d 1165 (D. Nev. 2011) (allowing bankruptcy trustee to proceed with debtor's employment discrimination action, but limits recovery to amounts needed to pay creditors and disallows any recovery for plaintiff) and *Kurchack v. Life Ins. Co. of N. Am.*, 725 F. Supp. 2d 855 (D. Ariz. 2010) (debtor gains no benefit from omitting exempt claim from schedules; after discharge debtor may amend schedules to claim exemption for lawsuit proceeds).

⁸⁰ *Slater v. U.S. Steel Corp.*, 2016 WL 723012 (11th Cir. Feb. 24, 2016) (J. Toflat, concurring opinion, discussing harmful effect of judicial estoppel on administration of bankruptcy cases); *Ah Quin v. County of Kauai Dept. of Trans.*, 733 F.3d 267, 275-76 (9th Cir. 2013) (same); *In re An-Tze Cheng*, 308 B.R. 448, 459 (B.A.P. 9th Cir. 2004), *aff'd*, 160 Fed. Appx. 644 (9th Cir. 2005) ("Commentators are beginning to perceive problems inherent in the nature of bankruptcy as a collective proceeding that may make the remedy [of judicial estoppel] worse than the disease."). See also *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006) (courts should apply the doctrine only as an extraordinary remedy when a party's inconsistent behavior will result in a miscarriage of justice); *Biesek v. Soo Line R. Co.*, 440 F.3d 410 (7th Cir. 2006) (noting harm to creditors from application of judicial estoppel; permitting trustee to go ahead with claim is the more appropriate option); *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004) (approving trustee's standing to reopen bankruptcy case to allow trustee to administer claim is a more appropriate remedy than dismissal of action through judicial estoppel); *Pavelka v. Allstate Property and Cas. Ins. Co.*, 2015 WL 1221393 * 3 (E.D. Mich. Mar. 18, 2015) (judicial estoppel is a "powerful defense" and "should be applied with caution"); *United Fire & Cas. Co. v. Thompson*, 949 F. Supp. 2d 922 (E.D. Mo. 2013) (rejecting judicial estoppel, noting harm to creditors and windfall to defendants if doctrine applied); *Williams v. Republic Recovery Servs.*, 2010 WL 2195519, at *2 (N.D. Ill. May 27, 2010) (a strictly enforced judicial estoppel rule would "needlessly punish those debtors who fail to disclose claims due to mistake, misunderstanding or ignorance of the law").

⁸¹ *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001); *Ah Quin v. County of Kauai Dept. of Trans.*, 733 F.3d 267, 272 (9th Cir. 2013); *In re An-Tze Cheng*, 308 B.R. 448, 459 (B.A.P. 9th Cir. 2004), *aff'd*, 160 Fed. Appx. 644 (9th Cir. 2005).

discretionary even when all elements are present.⁸² The purpose of judicial estoppel is to protect innocent parties from severe prejudice and uphold respect for the judicial process. The purpose is not to create a shield for offensive creditor practices. If a debtor's omission of a claim from bankruptcy schedules had no tangible negative impact on any party or the bankruptcy system, judicial estoppel serves no purpose.

4. Judicial Estoppel and Claims for Equitable Relief and Recoupment

The unfair practice that judicial estoppel is designed to prevent is the concealment of assets that could have been liquidated to pay creditors. A debtor's legal claims that did not seek monetary relief do not fit this description. Therefore, courts should not apply judicial estoppel to claims for equitable relief, even when those claims were not listed in a debtor's bankruptcy schedules.⁸³ Occasionally claims for monetary damages and injunctive relief arose from the same set of facts. In these situations a court may apply judicial estoppel to some of the claims, but not to others. The court can direct the bankruptcy trustee to pursue the monetary claims while allowing the debtor to pursue the claims for injunctive relief.⁸⁴ For example, in employment litigation a plaintiff may seek job reinstatement and monetary damages in the same lawsuit. When defendants attempted to use judicial estoppel to dismiss these employment cases, courts have allowed the plaintiff to proceed with the reinstatement claim while the committing the monetary claims to the bankruptcy trustee.⁸⁵

This exception for claims for equitable relief has ramifications for limiting judicial estoppel in the context of enforcement of deeds of trust and mortgages. Many forms of relief that borrowers seek in opposing foreclosure can fairly be characterized as equitable in nature. For example, judicial estoppel should not apply to the borrower's claims for rescission, even if

⁸² *Ah Quin v. County of Kauai Dept. of Trans.*, 733 F.3d 267, 272 (9th Cir. 2013) (court not bound to apply judicial estoppel if inadvertence or mistake shown, even though all elements of judicial estoppel otherwise present).

⁸³ *Barger v. City of Cartersville*, 348 F.3d 1289, 1297 (11th Cir. 2003) (debtor's injunctive relief claim for reinstatement "would have added nothing of value to the bankruptcy estate even if she properly disclosed it"); *Grillo v. JPMorgan Chase & Co.*, 2014 WL 2442534 * 5-6 (D. Colo. May 30, 2014) (judicial estoppel does not apply to equitable actions); *Hardee-Guerra v. Shire Pharms.*, 737 F. Supp. 2d 318, 331-332 (E. D. Pa. 2010) (plaintiff's claims for injunctive and declaratory relief had no value to bankruptcy estate, judicial estoppel applied only to claims for compensatory damages). Note that the broad definition of "property of the estate" in bankruptcy includes "all legal *or equitable* interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (emphasis added). Arguably, debtors should have to list claims for equitable relief in their bankruptcy schedules.

⁸⁴ *Rouben v. Parkview Hosp., Inc.* 2013 WL 359649, at *3-4 (N.D. Ind. Jan. 30, 2013) (under judicial estoppel trustee takes over monetary claims and debtor retains claims for declaratory and injunctive relief); *Wheeler v. Florida Dep't of Corrections*, 2006 WL 2321114 (M.D. Fla. 2006) (rejecting judicial estoppel; trustee can pursue debtor's monetary claims, debtor can pursue claims for injunctive relief).

⁸⁵ *Matthews v. Potter*, 316 Fed. Appx. 518, 524 (7th Cir. 2009) (judicial estoppel does not bar party from pursuing job reinstatement claim); *Barger v. City of Cartersville*, 348 F.3d 1289, 1297 (11th Cir. 2003); *McKenna v. Healthtease, Inc.*, 2013 WL 1702639, at *6 (E.D. Pa. Apr. 19, 2013) (damages claim in employment action dismissed because plaintiff failed to substitute trustee, but allowing plaintiff to proceed with claims for injunctive relief); *Pace v. Hurst Boiler & Welding Co.*, 2011 WL 97244, at *4 (M.D. Ga. Jan. 12, 2011) (judicial estoppel applied to plaintiff's monetary claims in employment action, but not to claims for injunctive relief).

estoppel applies to other affirmative monetary claims raised in the same action.⁸⁶

Recoupment is an equitable remedy. To the extent that a borrower brings claims defensively, such as in challenging a lender's proof of claim in bankruptcy or as defendant in a proceeding brought by the lender, judicial estoppel should not apply unless the borrower's monetary claims exceed the amount of the debt.

5. Judicial Estoppel Based on the Debtor's Affirmative Statements in Bankruptcy Schedules

Efforts to impose judicial estoppel appear most often when the debtor omitted something from bankruptcy schedules. The usual target is a cause of action that had arguably accrued when the debtor filled out the schedules but neglected to mention. In addition, creditors have attempted to impose judicial estoppel based on other content of bankruptcy schedules, including the debtor's affirmative statements. Bankruptcy schedules require that debtors identify creditors, describe the nature of their debts, state the amounts owed, and indicate whether the debts are "disputed."⁸⁷ In the mortgage context, lenders and servicers have pointed to all of these types of statements in bankruptcy schedules in their attempts to use judicial estoppel against borrower's claims.⁸⁸

The moral is that bankruptcy debtors need to be careful about identifying creditors and amounts owed in schedules of debts, as well as designating lender claims as "undisputed." Listing a mortgage or deed of trust debt on the form schedules as secured without any qualification may result in judicial estoppel of a rescission claim. A debtor contemplating rescission or other challenge to the validity of a security agreement should at a minimum list the secured status of the claim as "disputed" or specify that it is subject to a rescission claim.

⁸⁶ Frese v. Empire Fin. Servs., 725 F. Supp. 2d 130 (D.D.C. 2010).

⁸⁷ Bankruptcy Official Form 106D.

⁸⁸ Ward v. ANS Servicing, LLC, 606 Fed.Appx. 506 (11th Cir. 2015) (debtor stipulated to amount of monthly mortgage payment in bankruptcy filing, judicial estoppel bars debt collection action asserting creditor should be claiming different amount); Haddad v. Randall S. Miller Associates PC, 587 Fed. Appx. 959 (6th Cir. 2014) (judicial estoppel applied to FDCPA claim asserting attempt to enforce invalid mortgage where in prior bankruptcy schedules debtor "admitted" validity of same mortgage); Cordero v. America's Wholesale Lender, 2012 WL 4895869, at *11 (D. Idaho Oct. 15, 2012) (inconsistent statements in schedules leading to judicial estoppel included that lender held secured interest in property and that debtor intended to "surrender the property to the bank"); Bullard v. Indymac Bank F.S.B., 2012 WL 4134839, at *7 (E.D. Mich. Sept. 18, 2012), *aff'd on other grounds*, 539 Fed. Appx. 665 (6th Cir. 2013) (judicial estoppel bars borrower's postbankruptcy challenge to validity of mortgage; borrower aware of claim during pendency of bankruptcy, did not schedule claim as asset, and listed property as subject to valid mortgage). *But see* Hymas v. Deutsche Bank National Trust Co., 2015 WL 273615 (D. Nev. Jan. 22, 2015) (naming wrong party as noteholder in bankruptcy schedules was not misuse of bankruptcy and does not preclude a post-bankruptcy challenge to authority to foreclose).

A few courts have also incorrectly applied a judicial estoppel analysis when the debtor indicated “surrender” on the chapter 7 Statement of Intention.⁸⁹ An essential element of judicial estoppel is that the party have taken inconsistent positions in two different legal proceedings.⁹⁰ When the proper meaning of “surrender” under § 521(a)(2)(A) is used, there is nothing inconsistent about stating an intention to surrender interests in collateral property to the bankruptcy trustee for purposes of case administration and later, after bankruptcy, raising legal claims and defenses under nonbankruptcy law with respect to the same property interests.

III. Issue and Claim Preclusion Based on Bankruptcy Events

1. Effect of Plan Confirmation

Basic concepts of claim and issue preclusion apply in the bankruptcy context. Thus, the failure to object to a lender’s proof of claim in a chapter 13 case could have claim preclusion consequences. This will be particularly true when the debtor actually litigates over aspects of the claim while in bankruptcy, has a chapter 13 plan confirmed, and pays on the claim over time. Similarly, a debtor’s attacks on a party’s authority to enforce the loan or a debtor’s challenges to the amount owed on a claim while in bankruptcy can lead to conclusive determination on these issues. The California Court of Appeal recently addressed one of these situations in *Boyce v. T.D. Service Co.*⁹¹ The court affirmed the trial court’s dismissal of the plaintiff’s challenges to a party’s authority to foreclose because the plaintiff had raised similar arguments in the context of a failed challenge to the creditor’s proof of claim in bankruptcy. The court gave preclusive effect to the bankruptcy court’s determination of the validity of the creditor’s right to enforce the loan.

Whether claim and issue preclusion will apply to certain determinations in bankruptcy depends on the nature of the action. Most courts hold, for example, that the bankruptcy court’s granting of a motion for relief from the stay to allow a lender to proceed with a foreclosure under state law has no preclusive effect.⁹² Decisions on allowance or disallowance of a creditor’s proof of claim are more likely to have preclusive effect.⁹³ A bankruptcy court’s order confirming a chapter 13 plan is entitled to *res judicata* treatment like any federal court judgment. Thus, if the confirmed plan provided for treatment of a prepetition debt in a certain way, the debtor may face judicial estoppel and *res judicata* problems if the debtor later brings an action that poses a contrary legal theory about the status of the debt at the time of plan confirmation.⁹⁴ The Fourth

⁸⁹ *Ibanez v. U.S. Bank Nat’l Ass’n*, 856 F. Supp. 2d 273 (D. Mass. 2012); *Souza v. Bank of America Nat’l Ass’n*, 2013 WL 3457185 (D. Mass. July 8, 2013).

⁹⁰ *New Hampshire v. Maine*, 532 U.S. 742 (2001).

⁹¹ 235 Cal. App. 4th 429, 185 Cal. Rptr. 3d 356 (2015).

⁹² *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26 (1st Cir. 1994); *In re Veal*, 450 B.R. 897, 914 (B.A.P. 9th Cir. 2011).

⁹³ *Siegel v. Federal Nat’l Mortg. Ass’n*, 143 F.3d 525, 529 (9th Cir. 1998); *In re Veal*, 450 B.R. 897, 918 (B.A.P. 9th Cir. 2011).

⁹⁴ *Covert v. LVNV Funding, LLC*, 779 F.3d 242 (4th Cir. 2015) (res judicata applied to bar plaintiffs’ FDCPA and state debt collection law claims asserting unlicensed debt buyer had attempted to collect debts it had no right to collect; plaintiffs had not objected to the debt buyer’s claims in prior chapter 13 cases in which plans were confirmed); *Bullard v. Indymac Bank F.S.B.*, 2012 WL 4134839, at *7 (E.D.

Circuit in *Covert v. LVNV Funding, LLC*⁹⁵ has extended this concept by holding that confirmation of the debtor's plan is a final judgment on the merits of any cause of action the debtor has that is related to a claim filed in the case, when no objection to the claim has been filed. If a chapter 13 debtor wishes to bring suit post-confirmation on claims against creditors treated under the plan, the debtor should reserve the right to do so in the chapter 13 plan.⁹⁶

2. Effect of indicating “surrender” on Statement of Intention

A few courts have wrongly decided that the filing of a Statement of Intention⁹⁷ by the debtor in a chapter 7 case indicating that the debtor's home is being surrendered somehow precludes the debtor from asserting defenses to foreclosure in a state court proceeding.⁹⁸ These courts ignore the purpose of the Statement of Intention, which is merely to serve as a notice requirement.⁹⁹ The statutory language does not place substantive requirements on the debtor in choosing whether to retain or surrender secured property, or in effectuating the debtor's ultimate choice. It merely requires that the debtor provide notice of his or her intention. In fact, section 521(a)(2) expressly provides that nothing in the provision “shall alter the debtor's or the trustee's rights with regard to such property under this title,” except with respect to relief from the automatic stay for certain personal property secured loans as provided in section 362(h).¹⁰⁰

Mich. Sept. 18, 2012), *aff'd on other grounds*, 539 Fed. Appx. 665 (6th Cir. 2013) (judicial estoppel bars borrower's postbankruptcy challenge to validity of mortgage; borrower aware of claim during pendency of bankruptcy, did not schedule legal claim as asset, and listed property as subject to valid mortgage). *Cf. In re Lewis*, 875 F.2d 53 (3d Cir. 1989) (confirmation does not necessarily preclude challenge to proof of claim); *In re Fryer*, 172 B.R. 1020 (Bankr. S.D. Ga. 1994) (confirmation did not bar Truth in Lending objection to claim, because objection did not implicate validity of any plan provision).

⁹⁵ 779 F.3d 242 (4th Cir. 2015).

⁹⁶ *In re Harling*, 541 B.R. 330 (Bankr. D.S.C. 2015) (approving narrowly drafted reservation of rights clause in debtors' confirmed chapter 13 plan); *Russo-Chestnut v. Wells Fargo Home Mortg.* (*In re Russo-Chestnut*), 522 B.R. 148 (Bankr. D.S.C. 2014) (debtor permitted to bring proceeding after confirmation because plan language reserved right to do so); *Halm v. Ohio Valley Bank* (*In re Halm*), 2013 Bankr. LEXIS 1101 (Bankr. S.D. Ohio Mar. 11, 2013) (debtor permitted to challenge nature and extent of mortgage lien because plan provided that they could bring such a proceeding)

⁹⁷ 11 U.S.C. § 521(a)(2)(A) requires that the chapter 7 debtor file a statement of intent with regard to estate property that is secured by debts that the debtor has scheduled. Official Form 108 lists options for surrender, redemption, reaffirmation, and exemption. The debtor is to file the statement within thirty days of filing a chapter 7 petition. The debtor is to “perform” the intention within thirty days of the first date set for the meeting of creditors. 11 U.S.C. § 521(a)(2)(B).

⁹⁸ *See, e.g., In re Failla*, 529 B.R. 786 (S.D. Fla. 2014) (debtors are not permitted to defend or oppose the foreclosure or sale of the property in state court); *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. May 13, 2015); *In re Dolan*, 2015 WL 3462430 (Bankr. S.D. Fla. Apr 13, 2015) (order to show cause issued as to why debtors should not be sanctioned for contesting state court foreclosure after filing statement of intention indicating surrender). *See also In re Calzadilla*, 2015 WL 3791446 (Bankr. S.D. Fla. Jun 17, 2015) (in chapter 13 case, after unsuccessfully participating in court's mediation program and failing to obtain loan modification, plan shall be modified to provide for surrender of property, which means that debtors cannot return to state court and contest creditor's right to complete its foreclosure). *But see In re Elkouby*, 2016 WL 798177 (Bankr. S.D. Fla. Feb. 29, 2016).

⁹⁹ *See In re Boodrow*, 126 F.3d 43, 51 (2d Cir. 1997) (provision “appears to serve primarily a notice function”); *In re Theobald*, 218 B.R. 133 (B.A.P. 10th Cir. 1998).

¹⁰⁰ This statement is found in the unnumbered sentence at the end of 11 U.S.C. § 521(a)(2).

Stating an intention to surrender does not compel the debtor to physically turn over the property or transfer title to the property by executing and delivering a deed to the creditor.¹⁰¹ Likewise, the filing in the bankruptcy case of a statement of the borrower's intention to surrender does not affect the borrower's substantive rights in the property outside bankruptcy after the bankruptcy is concluded, or the creditor's *in rem* rights to enforce its lien.¹⁰² If a chapter 7 trustee does not administer surrendered real property, the property is abandoned to the debtor.¹⁰³

The results in several of these cases may have been influenced by the fact that the debtors had not listed the mortgage debt as disputed in their bankruptcy schedules and had not claimed an exemption in the home.¹⁰⁴ Where possible, bankruptcy counsel should take care to prepare the bankruptcy schedules so as to avoid these concerns. Moreover, in judicial districts in which options other than surrender are available to debtors who do not wish to reaffirm a home mortgage, these other home retention options, where applicable and consistent with debtors' intentions, should be listed on the Statement of Intention. For example, debtors in such districts can check the box on the form indicating that the property will be "retained," and the box under retention for "other," noting that the debtor intends to: "continue making payments," or "submit (or seek decision on) loan modification application."

¹⁰¹ See *In re Pratt*, 462 F.3d 14 (1st Cir. 2006) ("surrender" does not contemplate that debtor physically transfer the collateral to the secured creditor); *Main Street Bank v. Hull*, 2008 WL 783772 (E.D. Mich. Mar 20, 2008); *In re Theobald*, 218 B.R. 133 (B.A.P. 10th Cir. 1998) (surrender option does not alter nonbankruptcy law to require debtor to deliver title to manufactured home to lienholder); *In re Plummer*, 513 B.R. 135 (Bankr. M.D. Fla. 2014) (debtors may retain possession until property is foreclosed); *In re Steinhaus*, 349 B.R. 694 (Bankr. D. Idaho 2006) (creditor not entitled to order directing that debtor turn over vehicle; rather, creditor left only with state law rights); *In re Donnell*, 234 B.R. 567 (Bankr. D.N.H. 1999) (denying injunctive relief to enforce security interest and refusing to deny discharge of debt or dismiss case); *In re Weir*, 173 B.R. 682 (Bankr. E.D. Cal. 1994).

¹⁰² *In re Steinberg*, 498 B.R. 391, *2 (B.A.P. 10th Cir. 2013) ("We view § 521(a)(2) as principally a notice statute, and not as one that alters the nonbankruptcy law rights of either the debtor or the lienholder.") (unpublished opinion); *Main Street Bank v. Hull*, 2008 WL 783772, *3 (E.D. Mich. Mar 20, 2008) ("[b]y providing notice of intent as to her secured real property, [debtor] did not 'surrender' any substantive rights provided by state law as to that secured real property. Secured creditors cannot use the bankruptcy laws to circumvent a debtor's substantive rights under state law."); *In re Kasper*, 309 B.R. 82 (Bankr. D. Dist. Col. 2004); *In re Lair*, 235 B.R. 1, 9 (Bankr. M.D. La. 1999) (debtors retain their prebankruptcy state law rights in the loan agreements and property; surrender does not mean that the "debtor has legally rolled over and died regarding residual state law rights (under the contracts, regarding the right to state law due process, etc.), or even certain federal law rights (again, the right to federal Constitutional due process), that might be applicable after the close of the bankruptcy process because of the terms of the bankruptcy process itself").

¹⁰³ *In re Elkouby*, 2016 WL 798177 (Bankr. S.D. Fla. Feb. 29, 2016)

¹⁰⁴ See, e.g., *In re Failla*, 529 B.R. 786 (S.D. Fla. 2014).