

No Cake for You: The Fifth Circuit Extends Judicial Estoppel to Bankruptcy Trustees

by Hon. Harlin D. Hale & Bendel Carr, Jr.ⁱ

Introduction

Judicial estoppel, a common law doctrine, arises when a party represents to a court any position, and subsequently takes an adverse, inconsistent position in another proceeding. The doctrine prevents litigants from playing “fast and loose” with courts and making a mockery of the judicial system.ⁱⁱ Adopting conflicting positions at the convenience of litigants is abhorred by courts because it allows parties to “have their cake, and eat it too.”ⁱⁱⁱ

Bankruptcy cases can present somewhat unique opportunities in which the doctrine of judicial estoppel can arise. For example, judicial estoppel can arise in a debtor’s initial filings with the bankruptcy court. Debtors must list all their assets on the initial petition, schedules, and statement of affairs. Such disclosure is presented as a sworn representation to the court, and the bankruptcy judge and the parties in interest rely upon such representations.^{iv} Judicial estoppel may arise from the schedules, which require the listing of any claim or cause of action the debtor holds at the time of filing. A debtor who knowingly omits from his bankruptcy filings a claim or cause of action, and subsequently pursues that action has taken inconsistent positions. Thus, judicial estoppel may preclude the debtor’s pursuing the claim. Importantly, after a recent decision of the Fifth Circuit, this preclusion could extend to the trustee and the bankruptcy estate.

A prominent case on judicial estoppel arising in a bankruptcy context is *In re Coastal Plains, Inc.*^v In that case, the Fifth Circuit identified the three main elements of judicial estoppel as: the party is judicially estopped only if its position is clearly inconsistent with the previous one; the court must have accepted the previous position; and the non-disclosure must not have been inadvertent.^{vi} Recently the Fifth Circuit revisited judicial estoppel and, relying on *Coastal Plains*, made clear that judicial estoppel can preclude even the trustee from bringing the unsecured cause of action.^{vii}

In re Superior Crewboats^{viii}

Factual and procedural background

Arthur Hudspeath was allegedly injured while disembarking from the Stacey D, a Superior Crewboats vessel, in August 1999. He and his wife filed a Chapter 13 bankruptcy petition in the Eastern District of Louisiana a little more than a year later. The Hudspeaths’ schedules represented that they had no pending or potential lawsuits.^{ix} However, on January 18, 2001, they filed a lawsuit against Superior in state court, based on Mr. Hudspeath’s injury.^x

The Hudspeaths’ Chapter 13 case was converted to Chapter 7 in May 2001, and a trustee was appointed. In July 2001, at the creditors meeting in the converted case, Mrs. Hudspeath told the trustee about the claim against Superior, but she represented that it was barred by Louisiana’s one-year prescriptive period for tort

claims.^{xi} Neither of the debtors revealed they had requested service of process in the injury suit just a month earlier.^{xii}

Shortly after the debtors revealed the existence of the claim, the Chapter 7 trustee filed a disclaimer and abandonment concerning the suit.^{xiii} Thereafter, on October 1, 2001, the bankruptcy court granted the debtors’ discharge and closed the Chapter 7 case as a “no asset” case.^{xiv}

On July 31, 2002 Superior Crewboats informed the Chapter 7 trustee that the debtors were continuing the litigation of the prepetition claim. On August 28 (two days after the applicable three-year statute of limitations had run), the trustee moved to reopen the Hudspeaths’ bankruptcy case. The debtors then amended their schedules filed with the bankruptcy court, Superior Crewboats moved to dismiss the litigation, and the Chapter 7 trustee moved to be substituted for the Hudspeaths as plaintiff in their tort case against Superior. The district court denied Superior’s motion to dismiss.^{xv}

Rationale and holding

The Fifth Circuit set out the three required elements for judicial estoppel. The first requirement, inconsistent opinions in different proceedings, was disposed of rather easily by the court. The court relied on its earlier *Coastal Plains* opinion, holding that debtors in bankruptcy have an express affirmative duty to disclose even unliquidated and contingent claims and that this

duty of disclosure is continuous.^{xvi} The court went on to say that the Hudspeaths' failure to list the claim was "tantamount" to a representation by the debtors that no such claim existed.^{xvii} Thus the first prong of judicial estoppel, inconsistent positions, was satisfied.

The court addressed the second prong of judicial estoppel almost as succinctly. It held that the trustee's abandonment of the claim and the bankruptcy court's issuance of the Hudspeaths' discharge and closing the Chapter 7 case as a "no asset" case satisfied the element of the court adopting the prior inconsistent position.^{xviii} According to the appeals court, the adoption need not be a part of a formal judgment.^{xix}

Finally, the court addressed the third prong of judicial estoppel, the requirement of non-inadvertence. Citing *Coastal Plains*, the court noted that a "debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claim or has no motive for their concealment."^{xx} The court noted that, having filed suit against Superior, the Hudspeaths certainly had knowledge of the claim. Their alleged confusion over the limitations period did not "evinced a lack of knowledge" sufficient to excuse them.^{xxi} Finally, the court pointed out that the Hudspeaths had the requisite motivation to conceal the claim as they "would certainly reap a windfall had they been able to recover on the undisclosed claim without having disclosed it to the creditors."^{xxii}

The court concluded "that judicial estoppel barred the personal injury suit as a matter of law."^{xxiii} The Hudspeaths were not allowed to re-open their bankruptcy case to amend their schedules, and the matter was remanded to the district court with instructions to dismiss

the Hudspeaths' claim against Superior.

Most of court's discussion in *Superior Crewboats* focused on the ability of the debtors to bring the action and only tangentially addresses the ability of the trustee to bring it. However, the fact that the court was extending the holding of judicial estoppel to the trustee is clear. The court specifically held that the trustee's motion to substitute for the Hudspeaths as plaintiff was moot in light of the ruling that the claim was barred by judicial estoppel and dismissed the suit.^{xxiv}

The result in *Superior* seems rather harsh on the trustee, the estate, and creditors, and perhaps unduly merciful on Superior, the alleged tortfeasor. However, judicial estoppel is intended to protect the judicial process alone and not the litigants. Hence, neither protection of tortfeasors nor injustice to creditors are factors the Fifth Circuit considers when applying judicial estoppel.

Conclusion

In the Fifth Circuit, a debtor's dereliction of the duty to disclose may invoke judicial estoppel, and such invocation may extend to the trustee and the bankruptcy estate, regardless of fault of the trustee or the effect on the creditors. If judicial estoppel applies, the debtor does not get to "have his cake and eat it too," and trustees and creditors may get no cake either.^{xxv}

ⁱ Judge Hale is a Bankruptcy Judge for the Northern District of Texas; Bendel Carr is a second year student at the Paul M. Hebert Law Center on the LSU Campus, who has served as an extern for Judge Hale.

ⁱⁱ *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 1999).

ⁱⁱⁱ *MV Stacey D v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 333 (5th Cir. 2004).

^{iv} For example, the listing of no assets on a Chapter 7 petition or schedules will likely give rise to the closing of the bankruptcy as a "no-asset" case and the discharge of the debtor.

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

^{vi} 179 F.3d at 206.

^{vii} *MV Stacey D v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330 (5th Cir. 2004).

^{viii} *Id.*

^{ix} 374 F.3d at 333.

^x *Id.*

^{xi} Debtor informed creditors that the suit had prescribed based on a belief that the action was governed by Louisiana's one-year prescription for torts. The action is governed by maritime law and the correct prescription is three years. 374 F.3d at 333 n.1.

^{xii} 374 F.3d at 333.

^{xiii} *Id.*

^{xiv} 374 F.3d at 333-34.

^{xv} 374 F.3d at 334.

^{xvi} 374 F.3d at 335.

^{xviii} *Id.*

^{xix} *Id.*

^{xx} *Id.* The rationale for this should be prescription does not preclude the claim but only provides for an affirmative defense that must be raised.

^{xxi} *Id.*

^{xxii} 374 F.3d at 336.

^{xxiii} *Id.*

^{xxiv} *Id.*

^{xxv} 374 F.3d at 333.