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Eleventh Circuit Narrows Application of Judicial Estoppel

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The Eleventh Circuit has revisited the question of when a debtor may be judicially estopped from pursuing a civil lawsuit due to his or her failure to disclose the claims forming the basis of the lawsuit in their bankruptcy. Judicial estoppel is an equitable doctrine intended to protect courts against parties who seek to manipulate the judicial process by changing their legal positions to suit the exigencies of the moment. In the context of a bankruptcy, judicial estoppel arises when a party takes two inconsistent positions under oath: one in their civil lawsuit swearing that they possess a valid claim, and one in their bankruptcy swearing that they do not have any such claims. Judicial estoppel also requires that those inconsistent positions are made with an intent to make a mockery of the judicial system. This situation arose in *Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017), where former employee Slater brought a sex and race discrimination case against her former employer, United States Steel. Slater later filed a chapter 7 bankruptcy petition in which she failed to disclose her lawsuit against U.S. Steel.

In her civil action before the United States District Court for the Northern District of Alabama, *Slater v. U.S. Steel Corp.*, No. CV-09-BE-1732-S, 2012 WL 4478981, at *1 (N.D. Ala. Sept. 25, 2012), Slater argued that her failure to disclose the lawsuit in her bankruptcy was inadvertent. Citing prior Eleventh Circuit law, the district court observed that "inadvertence" only occurs, in general, when "the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Id.* at *6, citing *Barger v. City of Cartersville*, 348 F.3d 1289, 1295–96 (11th Cir.2003). Looking at Slater's motive at the time of the concealment, the Court found that Slater had intended to make a mockery of the judicial system, and could not later remedy the omission and avoid the application of judicial estoppel by disclosing the lawsuit after her adversary discovered and exposed the concealment. *Id.* at *7. The district court entered judgment in favor of U.S. Steel. *Id.*

The Eleventh Circuit initially reviewed the *Slater* decision in *Slater v. U.S. Steel Corp.*, 820 F.3d 1193 (11th Cir. 2016), which was subsequently heard by the court *en banc*, *Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017). In an opinion by Judge Jill Pryor, the circuit court held that in order to determine if a debtor intended to make a mockery of the judicial system by concealing an asset (such as civil claims), the district court must first consider all facts and circumstances of a case - including the litigant's level of sophistication, their explanation for the omission, whether the omission was subsequently corrected, and any actions taken by the bankruptcy court concerning the nondisclosure. *Id.* at 1186. Next, a district court must examine any actions by the bankruptcy court that would help determine whether a debtor intentionally misled the court and creditors. *Id.* Third, a district court should adopt a non-mechanical and flexible position in reaching its determination, noting that "this approach reduces the likelihood that an otherwise liable civil defendant will receive an unjustified windfall or that innocent creditors will be harmed." *Id.* at 1187. The Eleventh Circuit

concluded by remanding case to the initial panel for a determination about whether the district court abused its discretion in light of the newly stated standard.

Under the *Slater* opinion, the standard for obtaining dismissal of civil actions on the grounds of judicial estoppel is severely limited. There remains one area where a civil defendant can make an argument in favor of judicial estoppel. In a footnote to the opinion, the circuit court noted that a "district court may determine that a plaintiff's testimony that he misunderstood the disclosure obligations is not credible." *Id.* at *1186, n.12. If a civil defendant is able to call a debtor/plaintiff's credibility into question, a court may still reach a determination that any concealment of assets was done with the intent to make a mockery of the judicial system and judicial estoppel may apply.

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