JUDICIAL ESTOPPEL
AND THE MILLION-DOLLAR SANCTION

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TABLE OF CONTENTS

Page

I.
INTRODUCTION

In the last 15 years, the doctrine of judicial estoppel has emerged as a powerful weapon in a judge's arsenal to enforce disclosure requirements in bankruptcy cases, deter those who might attempt to conceal valuable assets from the courts, and punish those who do. Stated generally, the doctrine of judicial estoppel operates to bar a litigant from deliberately taking a position inconsistent with an earlier position that was "accepted" by the same or another court. When a debtor deliberately conceals the existence of a valuable cause of action by failing to disclose it in his *Schedules of Asset and Liabilities* or *Statement of Financial Affairs*,[1] that concealment—or nondisclosure—is effectively a statement by the debtor that no such claim exists. When the debtor thereafter proceeds to litigate the undisclosed cause of action, the pursuit of that claim is to a statement that it *does* exist. In such cases, the doctrine of judicial estoppel may be invoked by the court to bar the further prosecution of that claim and thereby "'to protect the integrity of the judicial process' by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'"[2]

But is that the right answer? Consider the following hypothetical:

> A debtor files a voluntary petition for relief under the Bankruptcy Code,[3] and dutifully files schedules of assets and liabilities identifying (almost) all of his real and personal property. Missing from the schedules is any mention of a small burlap sack filled with $300,000 in gold Krugerrand—well in excess of the amount necessary to repay the approximately $100,000 in legitimate claims against him. The existence of the sack of gold is subsequently brought to light, and the debtor's schedules and statements are amended to disclose it. The debtor's discharge is denied pursuant to § 727 (or revoked, if already granted). The sack of Krugerrand is liquidated by the trustee and the proceeds distributed to creditors, with any remaining surplus returned to the debtor in accordance with § 726.[4]

With the exception of the Krugerrand detail, these are the essential facts of *Estate of Perlbinder v. Dubrowsky (In re Dubrowsky)*, 244 B.R. 560 (E.D.N.Y. 1997), which affirmed the bankruptcy court's denial of discharge and imposition of a $5,000 sanction for the debtor's deliberate concealment of more than $300,000 in cash and other assets.

Now change one fact in the above hypothetical: Replace the sack of gold with a claim for damages arising from a personal injury suffered by the debtor as a result of the alleged negligence of a third party. The matter is brought to the court's attention by the tortfeasor defendant, who has filed a motion requesting dismissal of the lawsuit on the grounds of judicial

[1] For convenience, these are referred to generally herein as a debtor's "schedules and statements."

[2] *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal citations omitted).

[3] Title 11, United States Code. Unless otherwise noted, section (§) references herein are to the Bankruptcy Code.

[4] 11 U.S.C. § 726(a)(6) ("[P]roperty of the estate shall be distributed…sixth, to the debtor.").

estoppel, and the schedules are again amended to properly disclose the existence of the personal injury claim. Agreeing with the defendant, and following the majority rule established in nearly every circuit (including the Fifth Circuit), the court dismisses the personal injury suit with prejudice—in the words of the Seventh Circuit, "vaporizing assets that could be used for the creditors' benefit."[5] Creditors go unpaid, the defendant escapes any liability for his negligence, and the debtor is effectively sanctioned an amount equal to the value of the barred claim for having violating his duty of disclosure to the court.

Why is this so? The "crime" of concealment is functionally identical in both scenarios and, economically speaking, the impact to the estate is indistinguishable. The failure to disclose an intangible lawsuit threatens the integrity of the judicial process, yet concealment of a *tangible* asset is merely grounds for denial of discharge. How did this distinction arise? What purpose does it serve? By exploring the historical antecedents and modern usage of the doctrine in the unique context of "concealed claims" in bankruptcy,[6] this article attempts to answer these questions and, perhaps more importantly, to offer several "best practices" to assist attorneys and their clients to avoid the worst of its impact.

II.
THE MILLION-DOLLAR SANCTION

These are the essential facts of *Queen v. TA Operating, LLC*, in which the Tenth Circuit recently affirmed the dismissal of a $1,500,000 personal injury suit on the basis of judicial estoppel, finding that the prosecution of the lawsuit was inconsistent with the debtor's disclosure of the lawsuit in his schedules with a "current value" of only $400,000.[7] Although the facts of the case are striking, they are not particularly unique.

The Scene. After suffering a personal injury in a slip-and-fall on the ice at a Wyoming gas station, Richard Queen and his wife filed a lawsuit against the owner for damages, including past and future medical expenses, and lost wages and such. In responding to an interrogatory in the lawsuit, they estimated lost earnings of approximately $1.5 million. While the suit was pending, the Queens filed for chapter 7 bankruptcy protection. They did not, however, list the pending lawsuit among their assets on Schedule B—Personal Property. The trustee declared it a no-asset case.

The Discovery. Subsequently, the defendant in the pending lawsuit learned of the bankruptcy and notified the trustee of the pending lawsuit. The trustee instructed the Queens to amend their schedules. The Queens complied, and filed amended schedules listing a "Personal Injury Claim" with a "current value"[8] of $400,000 and claiming the lawsuit as exempt under applicable state law. Neither the trustee nor any creditor objected to the estimated value or the

[5] *Biesek v. Soo Line R.R.*, 440 F.3d 410, 413 (7th Cir. 2006).

[6] This article occasionally refers to the context in which judicial estoppel is raised as either "traditional" or "concealed claim." As the phrase is used herein, "concealed claim" judicial estoppel refers to cases in which judicial estoppel is applied to bar a cause of action that was not properly disclosed by a debtor in his bankruptcy schedules and statements. "Traditional" judicial estoppel refers to all other cases.

[7] *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1087 (10th Cir. 2013).

[8] Schedule B requires a debtor to list, for each asset, the "current value" of such asset.

claimed exemption, the trustee again declared it a no-asset case, and the Queens received their discharge.

The Ruling. After the discharge was granted, the defendant filed a motion for summary judgment arguing for dismissal of the lawsuit as barred by the doctrine of judicial estoppel. The district court granted the motion, finding that the prosecution of the lawsuit was inconsistent with the statement in the original schedules that no such lawsuit existed and dismissing the personal injury suit with prejudice. On appeal, the Tenth Circuit concluded that the debtor's amended schedules actually *cured* the initial inconsistency. Nevertheless, the court rejected the debtor's contention that $400,000 was "simply an estimated value of the Queens' claims" the Tenth Circuit affirmed the dismissal of the claim, holding that the debtor's disclosure of the claim with a "current value" of only $400,000 was inconsistent with the fact that the Queens were actually seeking over $1.5 million in damages. Assuming the validity of the estopped personal injury claim, the ruling had the practical effect of sanctioning the Queens upwards of $1.5 million as a result of the nondisclosure.[9]

Although the record in *Queen v. TA Operating* says nothing of the aftermath of the Tenth Circuit's decision, it's not hard to imagine the "call the carrier" moment the Queens' counsel may have experienced when the decision was rendered. According to the record of the dispute, the debtors claimed to have "disclosed the lawsuit's existence to their attorney and intended for it to be included in their filings."[10] Moreover, the questionnaire the debtors filled out at the § 341 meeting of creditors did reference the existence of a pending lawsuit—in direct conflict with the *Statement of Financial Affairs* they filed that identified no such lawsuit. At the very least, therefore, the attorney may have been placed on inquiry notice, prompting a duty to investigate further. Finally, when the schedules were finally amended to disclose the existence of the lawsuit, the published decision admits of no attempt by the debtor to explain the basis of the $400,000 "current value" provided for the lawsuit, nor to reconcile that amount with the fact that the debtors were actually claiming over $1,500,000 in damages in the lawsuit itself. Call the carrier, indeed.

III.
THE HISTORICAL ANTECEDENTS OF MODERN JUDICIAL ESTOPPEL

A. "Traditional" Judicial Estoppel Doctrine

In traditional American jurisprudence, the doctrine of judicial estoppel finds its roots in *Davis v. Wakelee*, which articulates the basic contours of the doctrine.[11] In that case, the appellant, Davis, who had executed six promissory notes in favor of Wakelee, was adjudicated a bankrupt on his own petition. When Davis petitioned for discharge of his debts, Wakelee filed

[9] We may never know if the Queens' personal injury claim was actually worth the $1.5 million they claimed, or if the Tenth Circuit had any opinion as to its value. However, had the Tenth Circuit believed the claim worthless or, at best, worth no more than the $400,000 value ascribed to it in the Queens' schedules, it stands to reason there would have been no "inconsistent statement" and, thus, no basis for judicial estoppel. Instead, it was enough that the Queens "provid[ed] a significantly lower estimated value to the bankruptcy court…while their position in the district court placed a much higher value on the lawsuit…" *Queen v. TA Operating*, 734 F.3d at 1090.

[10] *Queen v. TA Operating*, 734 F.3d at 1093.

[11] 156 U.S. 680 (1895).

specifications of opposition thereto, which Davis opposed on the ground that Wakelee's claim had been reduced to a judgment that remained in force and would be unaffected by the discharge. The court, adopting Davis's position, overruled the objection and granted Davis his discharge. When Wakelee sought to enforce the judgment, Davis claimed the judgment was void for want of jurisdiction of the court that entered the judgment.

Rejecting Davis's position, the Supreme Court observed that "Davis procured the dismissal of Wakelee's specifications of opposition to his discharge, upon the ground that he had a valid judgment against him."[12] Thus, the Supreme Court held, Davis, who acknowledged the *validity* of Wakelee's judgment as grounds to prevail in his petition for discharge, could not now claim in a subsequent proceeding that the same judgment was *invalid*.[13] To permit such an outcome, said the Court, would be "contrary to the first principles of justice."[14] Instead, the Court opined,

> [i]t may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.[15]

Although not specifically employing the term "judicial estoppel," *Davis v. Wakelee* nevertheless laid down the basic articulation of the modern doctrine: that a litigant, having successfully maintained one position in a legal proceeding, cannot thereafter attempt to succeed on the basis of a contrary position.

After *Davis*, the Supreme Court did not substantively address the doctrine of judicial estoppel again for over a hundred years until a decades-long battle between the New Hampshire and Maine brought the doctrine back before the Court.[16] The case arose out of a longstanding dispute between the two states over the precise location within the Piscataqua River of the common marine boundary between the two states.[17] Although the states concurred that the boundary was fixed in 1740 by decree of King George II of England, which placed the marine boundary "thro the Mouth of the Piscataqua Harbour and up the Middle of the River," they quarreled over the meaning those terms "essential to delineating the lateral marine boundary.[18]

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[12] *Davis v. Wakelee*, 156 U.S. at 689.

[13] *Id.* at 691.

[14] *Id.*

[15] *Id.* at 689.

[16] *New Hampshire v. Maine*, 532 U.S. 742 (2001).

[17] In particular, the dispute centered on the ownership of Seavey Island, which is home to the Portsmouth Naval Shipyard.

[18] *New Hampshire*, 532 U.S. at 746; *see also New Hampshire v. Maine*, 426 U.S. 363, 366-67 (1976) (summarizing the history of the interstate dispute).

In 1976, the two states proposed a consent decree in which they agreed that the "Middle of the River" referred to the middle of the Piscataqua River's main channel of navigation.[19] Concluding that the proposed consent decree fell outside the prohibitions of the Compact Clause of the United States Constitution, the Supreme Court accepted the two states' agreed position and entered the consent decree.[20] Twenty-four years later, New Hampshire filed suit against Maine in the Supreme Court, claiming ownership of Seavey Island on the ground that the Piscataqua River boundary between the two states runs along the Maine Shore.[21]

Citing the equitable rule laid down in *Davis v. Wakelee*, the Court concluded that the "discrete doctrine, judicial estoppel, best fits the controversy."[22] Although it had not had "not had occasion to discuss the rule elaborately," the Supreme Court observed that "other courts have uniformly recognized that its purpose is 'to protect the integrity of the judicial process.'"[23] Judicial estoppel, observed the Court, functions "'to protect the integrity of the judicial process' by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'"[24] "Because the rule is intended to prevent 'improper use of judicial machinery,' judicial estoppel "is an equitable doctrine invoked by a court at its discretion."[25]

The Court declined the opportunity to establish "inflexible prerequisites or an exhaustive formula," explaining instead that, while "several factors typically inform the decision," these factors "firmly tip the balance of equities."[26]

> *First*, a party's later position must be "clearly inconsistent" with its earlier position. *Second*, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A *third* consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[27]

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[19] *New Hampshire*, 532 U.S. at 747.

[20] *New Hampshire*, 426 U.S. at 369-70.

[21] *New Hampshire*, 532 U.S. at 748-49.

[22] *Id.* at 749 (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.")).

[23] *New Hampshire v. Maine*, 532 U.S. at 749.

[24] *Id.* at 749-50 (internal citations omitted).

[25] *Id.* at 750 (internal citations omitted).

[26] *Id.* at 751.

[27] *Id.* at 750-51 (internal citations omitted) (emphasis added).

The Court also hinted at the relevance of a party's motive or intent, conceding that "it may be appropriate to resist application of judicial estoppel where a party's prior position was based on inadvertence or mistake."[28]

Thus resolved, the Supreme Court made quick work of the facts before it. On the first factor, the Supreme Court observed that New Hampshire's new claim was "clearly inconsistent with its interpretation of the words 'Middle of the River' during the 1970's litigation," and that the Court "accepted New Hampshire's agreement with Maine that 'Middle of the River' means middle of the main navigable channel."[29] The Court did not dwell on the third factor, but observed briefly that to permit New Hampshire to assert this new, contrary position would allow it "to gain an additional advantage at Maine's expense."[30] Thus, concluded the Court, the phrase "Middle of the River" could not be interpreted "to mean two different things along the same boundary line without undermining the integrity of the judicial process."[31]

The Supreme Court thus formally recognized judicial estoppel as a necessary remedy to prevent a litigant from playing "playing 'fast and loose with the courts,'"[32] by "prohibiting parties from deliberately changing positions according to the exigencies of the moment."[33]

B. The Omitted Property Rule

At the same time the Supreme Court was lending strength to the equitable doctrine of judicial estoppel in the traditional context (*i.e.*, to prevent a litigant from arguing "X" after having previously prevailed in arguing "not X"), the notion of judicial estoppel as a means to bar the pursuit of a claim previously undisclosed in the claimant's bankruptcy case was beginning to form, too.

In *First National Bank of Jacksboro v. Lasater*, the Supreme Court first articulated the notion that a debtor, having withheld an asset from his bankruptcy estate, could not thereafter be permitted to lay claim to the undisclosed asset.[34] The *Lasater* case involved a debtor, Lasater, who petitioned for bankruptcy relief and subsequently received a discharge of his debts.[35] The debtor, however, failed to disclose a claim for usury against the bank, which he thereafter asserted against the bank after receiving his discharge.

The Court rejected the lower court's conclusion that the claim, having been concealed from the trustee, was transferred back to the debtor at the conclusion of the bankruptcy. The Court explained—

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[28] *Id.* at 753.

[29] *Id*. at 751.

[30] *Id.* at 754.

[31] *Id.*, at 755.

[32] *Id.* at 750 (quoting *Scarano v. Central R. Co.*, 203 F.3d 510, 513 (3d Cir. 1953)) (internal citations omitted).

[33] *New Hampshire*, 532 U.S. at 750 (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

[34] *First National Bank Of Jacksboro v. Lasater*, 196 U.S. 115 (1905).

[35] *Id.* at 117.

> It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value…it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.[36]

This rule, which came to be known as the "omitted property rule," was later codified in § 554(d), which states that "unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate."[37]

In hindsight, this was a striking development in the evolution of the modern doctrine of judicial estoppel in bankruptcy cases. Whereas the modern consensus among courts is that judicial estoppel operates to bar a debtor who deliberately conceals a claim from the court from thereafter pursuing it, the Supreme Court—when originally faced with the same basic scenario—seemed to view the matter differently. Rather than look to concealment as a sanctionable assault on the integrity of the judicial process, the *Lasater* court simply observed that the debtor's act of concealment could not be construed so as to deprive the trustee the opportunity to evaluate the asset to determine its value to creditors. Indeed, the absence of any mention whatsoever in *Lasater* of either the *Davis* decision or its ultimate holding raises the interesting question whether that the Supreme Court considered it—and its prohibition against the assertion of contrary positions in successive lawsuits—irrelevant to the facts presented in *Lasater*. Whatever the Court's views on the relationship between judicial estoppel and the omitted property rule, the *Lasater* case at least suggests that the Supreme Court historically viewed the doctrine of judicial estoppel as inapposite to the question of whether the concealment of a claim by a bankrupt debtor barred that debtor from pursing enforcement of the claim.

IV.
"CONCEALED CLAIM" JUDICIAL ESTOPPEL

The Supreme Court identified two basic requirements for the doctrine of judicial estoppel to apply: First, the party must be asserting a position inconsistent with his earlier position. Second, the party against whom judicial estoppel is sought must have succeeded in persuading a court to accept the earlier position, "so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was

[36] *Id.* at 119.

[37] 11 U.S.C. § 554(d).

misled.'"[38] Whether viewed as an additional requirement or as an exception to the basic rule, the courts then look for evidence that the inconsistency was deliberate, and not based on inadvertence or mistake. Given that the question of inadvertence is largely a function of intent (*i.e.*, did the debtor *intend* to conceal the asset and thereby deceive the court?), it is no surprise that much of the resulting litigation—and the majority of the circuit-level decisions to more comprehensively address the doctrine—has focused on this third attribute.[39]

A. Prior Inconsistent Position

Some courts characterize it as "clearly" inconsistent,[40] while others require evidence of an "irreconcilably" inconsistent position.[41] Others still simply observe that judicial estoppel operates to bar a party from asserting a position that is contrary to the one the party has asserted under oath in a prior proceeding."[42] Regardless of the precise terminology used, the basic question remains the same: Has the party against whom judicial estoppel is sought formally taken a position in court that lies in direct conflict with an earlier position taken in the same or another proceeding? In the "concealed claim" context in bankruptcy cases, the requisite inconsistency is typically found in the prosecution of an undisclosed claim by the debtor, which is inconsistent with the debtor's statement under oath in his schedules or statement of financial affairs that no such claimed exists.

These cases nevertheless differ in an important respect from those cases in which the doctrine of judicial estoppel first evolved. In the *New Hampshire* decision, for example, the State of New Hampshire took the affirmative position that the phrase "Middle of the River" meant the Maine shore, which was tantamount to asserting that the phrase did *not* mean the middle of the river's navigable channel. One of the earliest cases to apply judicial estoppel in a modern (post-1978) bankruptcy context, *In re Galerie Des Monnaies of Geneva, Ltd.*, similarly turned on an *affirmative* statement by the debtor that conflicted with a prior statement.[43] In *In re Galerie*, the bankruptcy court invoked judicial estoppel to bar the debtor from pursuing preference claims against a prepetition creditor, concluding that the pursue of such claim lay in direct conflict with the debtor's *affirmative* representation in the disclosure statement that

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[38] *New Hampshire*, 532 U.S. at 750-51; *see also Ah Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013); *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1087 (10th Cir. 2013); *Guay v. Burack*, 677 F.3d 10, 16 (1st Cir. 2012) (identifying two "generally-agreed upon conditions" for the application of judicial estoppel); *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc) (citing *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010); *White v. Wyndham Vacation Ownership, Inc.*, 617 F.2d 472, 478 (6th Cir. 2010); *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007); *Montrose Medical Grp. Participating Svg. Plan v. Bulger*, 243 F.3d 773, 779 (3d Cir. 2001) (internal citations omitted).

[39] *See, e.g.*, *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 267 (5th Cir. 2012) (noting that the debtor did not take issue with the first two prongs of judicial estoppel, "focusing instead on the inadvertence prong").

[40] *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. at 750; *Queen v. TA Operating*, 734 F.3d at 1087; *Moses v. Howard Univ. Hosp.*, 606 F.3d at 798 (citing *New Hampshire*); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999).

[41] *See, e.g.*, *In re Kane*, 628 F.3d 631, 638 (3d Cir. 2010); *Montrose Medical Grp. v. Bulger*, 243 F.3d at 779.

[42] *White v. Wyndham*, 617 F.3d at 478; *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002).

[43] *Galerie Des Monnaies of Geneva, Ltd. v. Deutsche Bank, A.G. (In re Galerie Des Monnaies of Geneva, Ltd.)*, 55 B.R. 253 (Bankr. S.D.N.Y. 1985), *aff'd* 62 B.R. 224 (Bankr. S.D.N.Y.1986).

"management does not believe any preferences or fraudulent transfers have occurred."[44] In such cases, the doctrine of judicial estoppel is triggered by an affirmative statement made by a party that lies in direct—and irreconcilable—conflict with an earlier affirmative statement made by the same party.

By contrast, the inconsistent statement that lies at the heart of cases of "concealed claim" judicial estoppel is more in the nature of a statement *by omission*. That is, the debtor never affirmatively represents that it will *not* assert the claim; rather, it simply fails to disclose its existence. The subsequent pursuit of that claim is not so much a statement to the court as it is an inconsistent act. In these cases, the debtor who fails to disclose the existence of an asset is *deemed* to have affirmatively stated that no such claim exists—thus setting up the inconsistency when the debtor later presses the claim. Strikingly, therefore, the finding of inconsistency relies on the existence of an affirmative statement not *per se* made by the debtor, but interpreted by his actions.[45] A distinction without a difference, perhaps, but a distinction nonetheless that begins to display the awkward fit of judicial estoppel in this context.

That is, the debtors in these "concealed claim" cases do not affirmatively state—as the debtor did in *Galerie*—that no claim exists; rather, the claim is simply undisclosed. At least one appellate court has highlighted this distinction, expressly declining to find that "[the debtor's] prior silence is equivalent to an acknowledgment that it does not have a claim against the bank."[46] Nevertheless, that and other courts have ultimately concluded that, despite this subtle distinction, the existence of even an arguably "passive" inconsistency is sufficient to satisfy the first basic prerequisite of judicial estoppel.[47]

B. Acceptance by the Court

The second basic prerequisite for judicial estoppel follows from the first, and looks to whether the party against whom the doctrine is asserted "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled."[48] This is a key requirement, as "[a]bsent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent determinations.'"[49]

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[44] *In re Galerie*, 55 B.R. at 259.

[45] *Compare Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 423 (3d Cir. 1988) (Stapleton, dissenting) ("Moreover, this case stands in marked contrast to the circumstances under which estoppel has traditionally been invoked. Here, Oneida never represented that it would not press a claim against the bank. On the contrary, starting with its initial disclosure statement … Oneida made clear that it thought it had been mistreated by the bank.") *with In re Galerie Des Monnaies of Geneva Ltd.*, 55 B.R. 253 (Bankr. S.D.N.Y. 1985).

[46] *Oneida Motor Freight v. United Jersey Bank*, 848 F.2d at 419.

[47] *Queen v. TA Operating*, 734 F.3d at 1094-95 (finding an inconsistent statement to warrant judicial estoppel where debtor disclosed claim with a value of $400,000 despite seeking damages in the lawsuit of approximately $1.5 million); *Oneida Motor Freight v. United Jersey Bank*, 848 F.2d at 419 (concluding nevertheless that "its current suit speaks to a position clearly contrary to its Chapter 11 treatment of the bank's claim as undisputed").

[48] *New Hampshire*, 532 U.S. at 750.

[49] *New Hampshire*, 532 U.S. at 751 (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982)).

It also serves to reconcile the doctrine of judicial estoppel with the Federal Rules of Civil Procedure, which expressly contemplate—and permit—the pleading of potentially inconsistent claims or defenses. Rule 8(d) allows a party to plead multiple claims or defenses, or multiple statements of a particular claim or defense, "regardless of consistency."[50] Such alternative pleading is not barred by judicial estoppel as the potential harm identified by the Supreme Court—the risk of inconsistent determinations—has not yet arisen.[51] Moreover, the threat of judicial estoppel is not necessary as a deterrent to regulate the permissive nature of Rule 8; instead, Rule 11 operates as a natural governor on a party's ability to plead alternate or inconsistent claims and defenses. The pleader must still aver that each claim or defense is not presented for an improper purpose, is warranted by existing law or a nonfrivolous argument for the extension, modification or reversal of existing law, and has (or is believed to have) evidentiary support.[52]

Only when the court accepts a party's position—whether by rendering judgment for the party on the basis of a claim asserted or granting a debtor's discharge on the basis of disclosures made—does the risk of inconsistency arise.[53] The majority of circuits embrace the Supreme Court's articulation of this factor,[54] although in the Sixth Circuit it may be sufficient for the court to adopt a party's earlier contrary position either "as a preliminary matter or as part of a final disposition."[55]

In cases where the prior inconsistent statement lies in the debtor's failure to disclose the existence of a particular claim or cause of action, the court's "acceptance" of the statement (that no such claim exists) is generally found to occur in the subsequent grant of a discharge to the

[50] Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."); *see also* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements or a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones.").

[51] *See, e.g., Carroll v. Prosser (In re Prosser)*, 534 Fed. Appx. 126, 130 (3d Cir. 2013) ("Such alternative pleading, which is explicitly permitted by Federal Rule of Civil Procedure 8(d), is not barred by judicial estoppel."); *Peterson v. McGladrey & Pullen, LLP*, 676 F.3d 594, 597 (7th Cir. 2012) (observing that the requirements of judicial estoppel are unmet where a party has not yet prevailed on an earlier position alleged to be inconsistent with a later asserted position).

[52] Fed. R. Civ. P. 11(b).

[53] *Continental Illinois Corp. v. C.I.R.*, 998 F.2d 513, 518 (7th Cir. 1993) ("A party can argue inconsistent positions in the alternative, but once it has sold one to the court it cannot turn around and repudiate it in order to have a second victory.").

[54] *Ah Quin v. County of Kauai*, 733 F.3d at 270 (quoting *New Hampshire*). *Guay v. Burack*, 677 F.3d at 16; *Reed v. City of Arlington*, 650 F.3d at 574; *Moses v. Howard Univ. Hosp.*, 606 F.3d at 798 (quoting *New Hampshire*); *Eastman v. Union Pac. R.R.*, 493 F.3d at 1156 (quoting *New Hampshire*); *Zinkand v. Brown*, 478 F.3d at 638.

[55] *White v. Wyndham*, 617 F.3d at 478; *see also Browning v. Levy*, 283 F.3d at 775 ("The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position 'either as a preliminary matter or as part of a final disposition.'") (quoting *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990)).

debtor.[56] This basic rule of thumb arguably overstates the court's involvement, as—particularly in no-asset chapter 7 cases—the discharge is granted almost automatically following the issuance of the trustee's report and without involving any substantive judicial involvement. While there is some truth to the suggestion that many chapter 7 cases result in a discharge without any direct court involvement, that elevates form over substance. The relative lack of judicial involvement in many consumer cases is a product of procedures—both formal and informal—aimed at ensuring the prompt and efficient adjudication of a sizeable consumer docket. Indeed, it is the very expectation that the debtor will make a full and frank disclosure of assets and liabilities that renders more direct court involvement unnecessary in many cases. The fact that a court's "acceptance" of a debtor's bankruptcy disclosures may be more tacit than explicit should not provide a loophole for those who would deliberately deceive the court.

C. Inadvertence/Motive

In *New Hampshire v. Maine*, the Supreme Court suggested that the third consideration that may inform the decision to apply judicial estoppel is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Post-*New Hampshire*, many circuit courts have focused instead on the Supreme Court's later observation that the application of judicial estoppel may be inappropriate where a party's prior position was based on inadvertence or mistake.[57]

Given its plain meaning, an action is "inadvertent" if it is "an accidental oversight [or] a result of carelessness."[58] Earlier judicial estoppel cases appear to more closely hew to this construction of the term.[59] In more recent years, however, courts have held that "the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor

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[56] *See, e.g.*, *Ah Quin v. County of Kauai*, 733 F.3d at 271 (observing that courts have developed "a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action."); *Guay v. Burack*, 677 F.3d at 18 ("A bankruptcy court "accepts" a position taken in the form of omissions from bankruptcy schedules when it grants the debtor relief, such as discharge, on the basis of those filings"); *Biesek v. Soo Line R.R.*, 440 F.3d at 412 ("Plenty of authority supports the district judge's conclusion that a debtor in bankruptcy who receives a discharge (and thus a personal financial benefit) by representing that he has no valuable choses in action cannot turn around after the bankruptcy ends and recover on a supposedly nonexistent claim."). *Compare In re DiVittorio*, 430 B.R. 26, 48 (Bankr. D. Mass. 2010), aff'd, 670 F.3d 273 (1st Cir. 2012) (concluding that it had not yet "accepted" the debtor's representation that no cause of action existed because it had not yet granted the debtor a discharge on the basis of that representation).

[57] *See, e.g.*, *Guay v. Burack*, 677 F.3d at 16 ("We have generally not required a showing of unfair advantage.").

[58] BLACK'S LAW DICTIONARY 877 (10th ed. 2014). *Compare* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1140 (1984) ("1: not turning the mind to a matter: HEEDLESS, NEGLIGENT, INATTENTIVE 2: UNINTENTIONAL").

[59] *See, e.g., Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996) (holding that judicial estoppel "does not apply when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court" and "must be attributable to intentional wrongdoing"); *Johnson v. Oregon Dept. of Human Resources*, 141 F.3d 1361, 1369 (9th Cir. 1988) ("If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply."); *Johnson Serv. Co. v. Transamerica ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973) (observing that, based on Texas law, the judicial estoppel doctrine "looks toward cold manipulation and not an unthinking or confused blunder").

either lacks knowledge of the undisclosed claims *or* has no motive for their concealment." [60] As a result, the concept of inadvertence has emerged as the *de facto* third consideration for courts faced with the question of whether the doctrine of judicial estoppel should apply to bar a previously undisclosed claim.

The "knowledge" requirement is generally satisfied if the debtor was aware of the facts underlying the claim.[61] This is a relatively low bar to overcome, as "'[t]he debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information…to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed.'"[62]

The second consideration, motive, "in this context is self-evident because of the potential financial benefit resulting from the nondisclosure."[63] Put another way, courts consistently hold that a debtor inherently has motive to conceal a claim from the bankruptcy court and the trustee because the claim, if disclosed, would then be available to the creditors.[64] Dissenting views, however, have pointed out that this is not necessarily consistent with § 554(d), which provides that all property of a debtor—whether disclosed or not—belongs to his estate and remains so until either administered or abandoned in accordance with the Bankruptcy Code.[65]

Not surprisingly, the narrow construction of the inadvertence exception based on an assessment only of a debtor's "knowledge" and "motive" has steadily transformed the application of judicial estoppel in the particular context of a concealed claim. Despite the

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[60] *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d at 210; *see also Ah Quin v. County of Kauai*, 733 F.3d at 271; *Love v. Tyson Foods, Inc.*, 677 F.3d at 262 (affirming that the failure to disclose is inadvertent "only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment"); *White v. Wyndham*, 617 F.2d at 478 ("In determining whether [the debtor's] conduct resulted from mistake or inadvertence, this court considers whether: (1) she lacked knowledge of the factual basis of the undisclosed claims; (2) she had a motive for concealment; and (3) the evidence indicates an absence of bad faith."); *Eastman v. Union Pac. R.R.*, 493 F.3d at 1157 (quoting *Coastal Plains*, 179 F.3d at 210); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d at 1287; *Browning v. Levy*, 283 F.3d at 776 (adopting *Coastal Plains* requirements of knowledge and motive for a finding of inadvertence).

[61] *See, e.g.*, *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 785 (9th Cir. 2001) ("Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset."); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.2d at 212 (finding the debtor failed to demonstrate that nondisclosure was inadvertent where it "knew of the facts giving rise to its inconsistent positions"); *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.3d 555, 557 (9th Cir. 1992) (noting that, while all facts giving rise to the existence of the claim may not have been known to the debtor at the time of the bankruptcy filing, sufficient facts were known to the debtor to require disclosure of the existence of the potential claim).

[62] *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d at 208.

[63] *Love v. Tyson Foods, Inc.*, 677 F.2d at 262 (quoting *Thompson v. Sanderson Farms, Inc.*, 2006 BR 64654, at *12-13 (S.D. Miss. May 31, 2006)).

[64] *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d at 131 (emphasizing that, in light of the debtor's knowledge of the existence of her claim and a debtor's inherent motive to conceal it, her ignorance of the fundamental duty to disclose was irrelevant).

[65] *See* 11 U.S.C. § 554(d) ("Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate."). *See also Love v. Tyson Foods*, 677 F.3d at 269 ("Even if Love had not disclosed the claim, that asset would belong to the estate under 11 U.S.C. § 554(c)-(d)—at least unless his recovery is greater than all his debts.").

Supreme Court's characterization of judicial estoppel as a doctrine resistant to "any general formulation of principle," a basic default rule has instead emerged: "If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action."[66]

Moreover, the focus on a debtor's knowledge and motive—both of which are invariably present based on the established tests—has effectively shifted the burden of proof away from party seeking to invoke the doctrine, who might otherwise be expected to present at least some quantum of evidence to demonstrate that the debtor's nondisclosure was not merely "an accidental oversight [or] a result of carelessness" before shifting the burden to the debtor for rebuttal. Rather than place the burden on the party requesting application of judicial estoppel, therefore, courts have established what amounts to a virtual presumption of intent.

V.
CRITICISM OF "CONCEALED CLAIM" JUDICIAL ESTOPPEL

Despite a steady trend of cases toward a "basic default rule" the imposition of judicial estoppel to bar any claim not disclosed by a bankrupt debtor, the use of judicial estoppel in the "concealed claim" context has its dissenters. Most notably, the Ninth Circuit has rejected the contention that a district court is bound to preclude a debtor-plaintiff from proceeding to litigate an undisclosed claim, characterizing that view as "mistaken and fundamentally at odds with equitable principles."[67] In *Ah Quin v. County of Kauai*, the Ninth Circuit observed that the alleged motive for concealment, "keeping any potential proceeds from creditors," is present in practically all bankruptcy cases.[68] Thus, where the evidence showed the debtor had subsequently reopened the bankruptcy case and filed amended schedules disclosing the claim, the Ninth Circuit concluded that "a presumption of deceit no longer comports with *New Hampshire*."[69]

> [R]ather than applying a presumption of deceit, judicial estoppel requires an inquiry into whether the plaintiffs' bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood … The relevant inquiry is not limited to the plaintiffs' 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 plaintiffs' subjective intent when filling out and signing the bankruptcy schedules.[70]

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[66] *Ah Quin v. County of Kauai*, 733 F.3d at 271 (observing that, "[i]n the bankruptcy context, "the federal courts have developed a basic default rule"); *see also Guay v. Burack*, 677 F.3d at 17 ("Finally, it is well-established that a failure to identify a claim as an asset in a bankruptcy proceeding is a prior inconsistent position that may serve as the basis for application of judicial estoppel, barring the debtor from pursuing the claim in a later proceeding."); *Moses v. Howard Univ. Hosp.*, 606 F.3d at 798 (observing that "every circuit that has addressed the issue has found that judicial estoppel is justified to bar a debtor from pursuing a cause of action in district court where that debtor deliberately fails to disclose the pending suit in a bankruptcy case").

[67] *Ah Quin v. County of Kauai*, 733 F.3d at 272.

[68] *Id.* at 272.

[69] *Id.* at 273.

[70] *Id.* at 276-77.

Other judges, too, have argued in dissenting opinions that such an approach to the questions of the debtor's knowledge and motive is overly formulaic, especially in cases where the debtor subsequently amended their schedules or took other corrective measures to disclose the previously undisclosed claim.

In her dissent in *Love v. Tyson Foods, Inc.*, Judge Haynes took the majority to task for applying the traditional elements of judicial estoppel in a way that improperly shifted the burden of proof.[71] The debtor in *Love* failed to disclose claims for racial discrimination and retaliatory discharge against his former employer in his initial chapter 13 petition and schedules. As is common in these cases, the defendant (his former employer) moved for summary judgment in the pending lawsuit, asserting judicial estoppel as an affirmative defense and arguing that the undisclosed claims should be barred as a matter of law. The debtor thereafter filed an amended schedule in his chapter 13 case disclosing the claims, but district court granted summary judgment in favor of the defendant and dismissed the debtor's claims. The Fifth Circuit affirmed, observing that the debtor had failed to demonstrate the existence of a material fact issue on the question of inadvertence.[72]

Judge Haynes observed that the defendant's only evidence of motive—the basic presumption that any recovery the debtor might receive on an undisclosed claim would go to the debtor, and not to creditors—was untrue as a matter of law and could not serve to shift the burden of proof to the debtor to prove inadvertence.[73] To the contrary, the claim and any recovery the debtor might obtain were property of the estate by operation of §§ 541(a) and 554(d) and the terms of the debtor's chapter 13 plan.[74] As the Fifth Circuit ascribes knowledge of the bankruptcy laws to a debtor's detriment, Judge Haynes argued, "we should also assess the debtor's 'motive' in light of the 'knowledge' that he would not take 'free and clear' if he lied in his schedules."[75] Absent a more tempered approach to the doctrine, the effect of the majority's approach would render the doctrine of judicial estoppel "virtually mandatory in all cases of non-disclosure where a party could be said to 'know the facts of his claim,' and essentially concludes that any debtor who fails to disclose a claim a nefarious motive to do so."[76]

The Sixth Circuit has also seen a equally vigorous dissent emerge in response to the mechanistic application of judicial estoppel in the "concealed claim" context.[77] In *White v. Wyndham Vacation Ownership*, a chapter 13 debtor failed to disclose a claim against her former employer for sexual harassment. When the defendant sought dismissal of the claim, asserting that judicial estoppel barred its pursuit, the debtor amended her statement of financial affairs to disclose the harassment claim. The district court dismissed the claim, and the Sixth Circuit affirmed, noting that "if the harassment claim became a part of [the] estate, then the proceeds from it could go toward paying [her] creditors," thus demonstrating the debtor's motive for

[71] *Love v. Tyson Foods*, 677 F.3d at 266. (Haynes, J., dissenting) ("The majority opinion improperly places the summary judgment burden of this affirmative defense on [the debtor].").

[72] *Id.* at 263.

[73] *Id.* at 268.

[74] *Id.* at 268-9.

[75] *Id.* at 268.

[76] *Id.* at 271.

[77] *White v. Wyndham*, 617 F.3d 472 (6th Cir. 2010).

concealment.[78] The Sixth Circuit also concluded that the timing of the debtor's corrective measures in disclosing the claim was significant, and that such efforts taken before the defendant raises the issue are more significant than those taken after.[79]

In his dissent, Judge Clay called attention to "the absurdity of the result," noting that because of the initial failure of disclosure, blameless creditors would not be paid and the defendant—accused of repeated acts of sexual harassment—got off scot free.[80] Significantly, he observed that the defendant suffered no prejudice as a result of the debtor's initial failure to disclose the claim, and thus the majority's formulaic application of judicial estoppel ignored the third consideration that the Supreme Court found relevant the *New Hampshire* decision.[81] Like the dissent in *Love v. Tyson Foods*, Judge Clay also observed that the court appeared to resolve all disputed issues of material fact in favor of the defendant, despite the traditional rule in summary judgment proceedings that such questions are resolved in favor of the nonmovant (*i.e.*, the debtor).[82]

VI.
WHAT'S A LAWYER TO DO?

Although a small but growing minority is pushing back against the aggressive use of judicial estoppel in "concealed claim" cases, the great majority of courts still embrace a strict liability approach to a debtor's failure to properly and timely disclose a known cause of action. Anecdotal evidence, including the significant number of "concealed claim" judicial estoppel cases to reach the circuit courts, further suggests that defendants are increasingly looking to judicial estoppel as a potential "silver bullet" to defeat liability on what amounts to a procedural technicality unrelated to the merits of the underlying action.

As the cases discussed above illustrate, the most contentious litigation over the applicability of the judicial estoppel doctrine to bar concealed claims rests on the "inadvertence" exception, which the prevailing view holds may excuse the omission of an asset from the debtor's schedules and statements if the debtor had no knowledge of the claim or no motive to conceal it.

The process of preparing and filing for protection under the Bankruptcy Code can be an admittedly complicated process, particularly for an unsophisticated debtor. As a result, debtors often rely heavily on the advice and experience of counsel to help them assemble the necessary information, prepare the necessary forms, and otherwise navigate the bankruptcy process from petition to discharge. It is therefore unsurprising that some debtors, in an effort to demonstrate their inadvertence (at least as that term is more generally defined), have looked to their attorney for shelter, blaming the omission "on advice of counsel."

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[78] *Id.* at 479.

[79] *Id.* at 480-81 ("We will not consider favorably the fact that [the debtor] updated her initial filings after the motion to dismiss was filed. To do so would encourage gamesmanship.").

[80] *Id.* at 485.

[81] *Id.* at 485.

[82] *Id.* at 487 ("[T]he majority inexplicably resolves all disputed issues of material fact in favor of Defendant. The majority places the entire burden on Plaintiff to show an absence of bad faith and places little or no burden on Defendant to show the existence of bad faith.").

The circuit courts to consider the question, however, have consistently held that the fact that a debtor relied on the advice of counsel in electing what to disclose (or not disclose) in his schedules and statements is no defense.[83] Rather, "the remedy for bad legal advice rests in malpractice litigation."[84] That is cold comfort to a debtor facing the dismissal of his claim based on judicial estoppel, and even colder comfort to his attorney on whom these courts have squarely placed the bull's-eye.

As unlikely as it may seem that any attorney would counsel her client *not* to disclose a known asset, the cases indicate that such allegations (whether truthful or not) are made nonetheless. Unfortunately, such disputes can potentially break down into classic cases of "he said, she said." It is therefore imperative for the attorney to take certain steps prior to and during the case both to protect the client from the potential effects of judicial estoppel, and to minimize the risk that a subsequent omission will give rise to a colorable claim of malpractice.

A. "Ask."

Before the case is filed, the most important thing an attorney can do to protect her client (and herself) from the effect of an adverse ruling on judicial estoppel is to gather information. In the initial intake interview and in other meetings with the debtor, the lawyer should make a point of asking questions designed to elicit information about the existence of any pending *or potential* claims or causes of action the debtor may have. Recalling that even "knowledge of the factual basis of the undisclosed claims" can be sufficient to trigger a debtor's disclosure obligations, any such interviews should probe well beyond such basic questions as "*Are you involved in any pending litigation?*" Explore whether the debtor has been recently injured, involved in a contract dispute, or other fact scenario of the sort from which litigation can potentially emerge. Affirmatively advise the debtor that any and all such claims must be disclosed—whether the debtor intends to pursue them. If the debtor maintains that no such claims exist, document it clearly.

If the debtor reveals the existence of a claim, or facts that could potentially give rise to a claim, it should be listed on Schedule B, Item 21 together with an estimated value of the claim. More than other assets, contingent and unliquidated claims of the sort that must be disclosed in Schedule B-21 are inherently difficult—if not impossible—to accurately value. The case law generally implies some leniency may be permitted in this requirement, however, and most courts (the Tenth Circuit's decision in *TA Operating* notwithstanding) seem to recognize inherent difficulty in valuing a cause of action. If the value is unknown, a simple statement to that effect

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[83] *Queen v. TA Operating, LLC*, 734 F.3d at 1094 (citing with approval the Tenth Circuit's prior holding that "a client is bound by the acts of her attorney and the remedy for bad legal advice rests in malpractice litigation"); *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d at 130 (holding that "[the debtor's] representation that she did not know she had to disclose—and that she relied on the advice of her attorney—is unavailing on [the inadvertence] prong of the test as well.); *White v. Wyndham*, 617 F.3d at 484 (declining to deviate "from the general rule…that litigants are bound by the actions of their attorneys"); *Cannon-Stokes v. Potter*, 453 F.3d at 449 ("Yet bad advice does not relieve the client of the consequences of her own acts. A lawyer is the client's agent, and the client is bound by the consequences of advice that the client chooses to follow.").

[84] *Queen v. TA Operating, LLC*, 734 F.3d at 1094; *see also Cannon-Stokes v. Potter*, 453 F.3d at 449 ("The remedy for bad legal advice lies in malpractice litigation against the offending lawyer.").

may suffice.[85] Others have concluded that the debtor must assign each claim "an estimate of the current value they deem that particular claim is worth."[86] Recognizing the inherent difficulty in assigning a value to a legal claim, one court suggested that "the best guide for establishing the current value of a particular cause of action (legal claim) is to find out the monetary awards that the state courts have awarded to similar legal claims (causes of action) in the past."[87]

Another approach—apparently preferred by the Tenth Circuit—equates the "value" of a claim with the total calculable damages sought by the plaintiff.[88] Using the *TA Operating* case described above as an example, the debtor might have listed the "value" of the personal injury suit as "Gross Damages Sought: $1,500,000," in which case the trustee and the court would have had little cause for complaint as to the adequacy of the disclosure provided. This approach has been found acceptable in other cases where a debtor assigned a current market value of "zero" while simultaneously disclosing that the claim could yield damages in a greater amount.[89]

Whichever method is used, the attorney should specifically document the methodology and basis for the value provided in the Schedules. In some cases, it may be valuable to highlight for the trustee or the court any variance between the total damages alleged by a debtor in any pending or contemplated lawsuit and the "value" of that claim as enumerated in the debtor's schedules.[90]

B. "Amend."

Despite an attorney's best efforts to ensure that any potential claim or cause of action accruing to the client is properly disclosed in the client's bankruptcy case, the attorney may later

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[85] *In re Wenande*, 107 B.R. 770, 772 (Bankr. D. Wyo. 1989) ("Naturally, value is the type of information that is not always available on the date a petition is filed. Where it is not, an estimation, so designated, may serve the purpose of the B-4 Schedule, e.g., 'approximately $1,500.' If the value is unknown, a simple statement to that effect serves the purpose of the B-4 Schedule.").

[86] *In re Fuentes*, 504 B.R. 731, 737 (Bankr. D. P.R. 2014); *see also Sparkman v. Swicker & Assocs., P.C.*, 374 F.Supp.2d 293, 300 (E.D.N.Y. 2005) (concluding that listing the current market value of a claim as zero dollars "is not tantamount to taking a position that the claim is worthless" for purposes of judicial estoppel analysis). *Compare Cohen v. Latorre (In re Latorre)*, 164 B.R. 692, 696 (Bankr. M.D. Fla. 1994) (concluding that debtor did not improperly understate the value of stock in a partnership holding $1.8 million in receivables by valuing the stock at $350,000, where collectability of the receivables was uncertain).

[87] *In re Fuentes*, 504 B.R. at 737.

[88] *See Queen v. TA Operating*, 734 F.3d at 1090 ("By providing a significantly lower estimated value to the bankruptcy court that they asserted was entirely exempt, while their position in the district court placed a much higher value on the lawsuit and indicated that it would not be entirely exempt, the Queens took a clearly inconsistent position in the bankruptcy court.").

[89] *Adair v. Vasquez*, 253 B.R. 85 (9th Cir. B.A.P. 2000) (finding that debtor's schedules, which stated that lawsuit recovery was "uncertain" and provided valuation of $20,000 "for exemption purposes only" was not misleading, and did not warrant revocation of abandonment when debtor subsequently settled claim for $430,000); *Sparkman v. Swicker & Assocs., P.C.*, 374 F.Supp.2d 293, 300 (E.D.N.Y. 2005) (debtor described claim on Schedule B-21 as having "Maximum statutory damages of $1,000," while assigning a current market value of "$0.00").

[90] *Cf. Queen v. TA Operating*, 734 F.3d at 1092 (observing that the trustee relied on the debtor's misrepresentations in determining there were no assets available for distribution to creditors). Under the circumstances, it is fair to ask at what point the burden shifts to the trustee to investigate assets once disclosed by the debtor, and to what extent a debtor should be entitled to rely on a trustee's (presumably informed) decision to abandon an asset. That inquiry, however, could be the subject of its own paper.

discover a claim that went undisclosed in the case. Whether the failure of disclosure was truly inadvertent or the result of a deliberate act of concealment on the part of the debtor, the case law is clear that swift and affirmative action to cure the faulty disclosure and bring the claim to the court's and trustee's attention as soon as possible is the best (although by no means certain) defense.

> [Judicial estoppel's] underlying rationale is that a party should not be allowed to convince unconscionably one judicial body to adopt factual contentions, only to tell another judicial body that those contentions were false. It follows that judicial estoppel should not be applied if no judicial body has been led astray.[91]

Bankruptcy Rule 1009 permits a debtor to amend his schedules or statement "as a matter of course at any time before the case is closed" although amendment may not be permitted "if there is a showing of the debtor's bad faith or of prejudice to the creditors."[92]

Particularly in chapter 7 cases, this may necessitate petitioning to reopen the case to permit the debtor to amend his schedules and the trustee to administer or abandon the newly-disclosed asset.[93] As the Seventh Circuit observed, if a debtor "were really making an honest attempt to pay her debts, then as soon as she realized that it had been omitted, she should have filed amended schedules and moved to reopen the bankruptcy, so that the creditors could benefit from any recovery."[94]

On the question of *ex post* disclosure, however, several courts have emphasized post-*New Hampshire* that both the extent of the subsequent disclosures—and the timing of the disclosure—may be significant to the judicial estoppel analysis.[95] Thus, for example, the Sixth Circuit in one case declined to apply judicial estoppel where the debtor took numerous corrective measures to correct the initial omission, but applied judicial estoppel to bar the claim in another where the debtor's corrective measures were both less substantial in nature and took place only *after* the defendant moved for dismissal of the claim on the basis of judicial estoppel.[96] The Ninth Circuit, by contrast, takes a more practical view of such corrective measures, observing that "where, as here, the plaintiff-debtor reopens bankruptcy proceedings, corrects her initial error, and allows the bankruptcy court to re-process the bankruptcy with the full and correct

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[91] *Konstantinidis v. Chen*, 626 F.2d 933, 939-40 (D.C. Cir. 1980) (internal citations omitted).

[92] *Unruh v. Tow (In re Unruh*), 265 F.App'x 148, 150 (5th Cir. 2008) (quoting *Stinson v. Williamson (In re Williamson*), 804 F.2d 1355, 1358 (5th Cir. 1986)).

[93] In a no-asset chapter 7 case, the discharge is often granted within a matter of weeks after the petition date. In chapter 13 cases, by contrast, the debtor does not receive his discharge until all payments required under the plan are made—typically a five-year period.

[94] *Cannon-Stokes v. Potter*, 453 F.3d at 448 (applying judicial estoppel to bar the debtor's claim, noting that no effort had been made to amend the schedules to cure the prior defect).

[95] *White v. Wyndham*, 617 F.3d at 480 ("[T]he extent of these efforts, together with their effectiveness, is important. Furthermore, since judicial estoppel seeks to prevent parties from abusing the judicial process through cynical gamesmanship, the timing of White's effort is also significant.").

[96] *Compare Eubanks v. CBSK Financial Group, Inc.*, 385 F.3d 894, 898-99 (6th Cir. 2004), *with White v. Wyndham*, 617 F.3d at 481-82.

information, a presumption of deceit no longer comports with *New Hampshire*."[97] Indeed, even the Tenth Circuit, before concluding that the debtor's amended schedules still presented an inconsistent statement that warranted the application of judicial estoppel, criticized the district court as "incorrect in focusing on whether the district court accepted an inconsistent position based on the *original* filings."[98]

C. "Argue."

Even if steps are taken to disclose the previously undisclosed cause of action and otherwise assist the trustee to administer the cause of action as property of the estate, a court may still grant the defendant's request to dismiss the claim based on the doctrine of judicial estoppel. Setting aside the underlying question whether judicial estoppel is a particularly well-suited remedy to address the nondisclosure by a debtor of a potential cause of action,[99] it cannot be denied that the doctrine is firmly established as a legitimate remedy to protect the "integrity of the judicial process" against any debtor's failure to properly disclose a prepetition cause of action in his schedules.

As discussed above in Part V, there are compelling arguments that the "basic default rule" for applying judicial estoppel in "concealed claim" cases should be rejected in favor of an approach that rejects a presumption of motive that is often disproved by the plain language of the Bankruptcy Code and restores the burden of the proof to the movant. Moreover, an anecdotal survey of cases at the trial level suggests that bankruptcy courts—taking advantage of the highly fact-specific nature of the inquiry—may take a broader view of the "inadvertence" test than that articulated by the appellate courts. At the circuit level, however, that broader view remains in the minority.

In terms of its impact to the litigants, the use of judicial estoppel to bar a concealed claim is tantamount to a "death penalty" sanction,[100] such as that authorized by Civil Rule 37 to

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[97] *Ah Quin v. County of Kauai*, 733 F.3d at 273 (holding that "once a plaintiff-debtor has amended his or her bankruptcy schedules and the bankruptcy court has processed or re-processed the bankruptcy with full information, two of the three primary *New Hampshire* factors are no longer met").

[98] *Queen v. TA Operating LLC*, 734 F.3d at 1091 (emphasis in original).

[99] *Compare Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005) ("[J]udicial estoppel is particularly appropriate where…a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset."), *with Ah Quin v. County of Kauai*, 733 F.3d at 275 (observing that "the only 'winner' in this scenario is the alleged bad actor in the estopped lawsuit") *and White v. Wyndham*, 617 F.3d at 484 (calling attention to the "the absurdity of the result" of the majority's application of judicial estoppel) (Clay, J., dissenting).

[100] A "death penalty" sanction is—

> A court's order dismissing the suit or entering a default judgment in favor of the plaintiff because of extreme discovery abuses by a party or because of a party's action or inaction that shows an unwillingness to participate in the case…usu[ally] preceded by orders of a lesser sanction that have not been complied with or that have not remedied the problem.

BLACK'S LAW DICTIONARY 1542 (10th ed. 2014).

sanction a party's failure to obey an order to provide or permit discovery.[101] Ordinarily, however, "the drastic measure is only to be employed where a lesser sanction would not substantially achieve the desired effect."[102] By contrast, the application of judicial estoppel in "traditional" cases (*e.g.*, *New Hampshire v. Maine*) does not outright bar a plaintiff's cause of action, but merely denies them the opportunity to base that claim on assertions inconsistent with a position taken in a prior proceeding.

In affirming the courts' inherent power to "fashion an appropriate sanction for conduct which abuses the judicial process," the Supreme Court has held that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power."[103] Bankruptcy courts, faced with a debtor who has deliberately omitted an asset from their statutorily-mandated disclosures, have a panoply of powers, remedies, and sanctions at their disposal to both punish the malfeasant debtor and to deter others from attempting the same, including sanctions under Fed. R. Bankr. P. 9011, conversion (of a chapter 11 or 13 case) to chapter 7, dismissal, denial or revocation of discharge, and even referral for criminal prosecution.

The substitution of these remedies in place of judicial estoppel results in a more uniform treatment of the underlying deceit. Rather than emphasizing the asset concealed by the debtor—real estate, gold Krugerrand, or cause of action—this restores the focus of the analysis to the nature and materiality of the *deceit* itself. The application of judicial estoppel in lieu of another, more precisely tailored, remedy to punish and deter the nondisclosure of lawsuits results in an artificial classification scheme that dissociates the punishment from the crime.

The purpose in highlighting these alternative remedies and sanctions is not necessarily to recommend—or even suggest—that a debtor or his counsel should offer them up in lieu of a finding of judicial estoppel. Indeed, in some cases the debtor may distinctly prefer to see the concealed claim barred than face these alternatives (certainly criminal prosecution would tend to fall in that category). Nevertheless, the *existence* of these *legal* remedies and sanctions tends to

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[101] *See* Fed. R. Civ. P. 37(b)(2)(iii), (v), (vi) (granting a court authority to strike pleadings, dismiss the proceeding, or render default judgment against a party who fails to obey an order to provide or permit discovery). *See also Kipperman v. Onex Corp.*, 260 F.R.D. 682 (N.D. Ga. 2009) (imposing $1,022,700 sanction under Fed. R. Civ. P. 37 for discovery abuses in an amount equal to opposing side's costs).

[102] *United States v. $49,000 Currency*, 330 F.3d 371, 376 (5th Cir. 2003) (affirming entry of default judgment under Fed. R. Civ. P. 37(b)(2) based on appellants' "lengthy delays and their obstructive behavior as exemplified by their evasive and incomplete responses"); *see also Phillips v. Cohen*, 400 F.3d 388, 402 (6th Cir. 2005) (holding that dismissal as a sanction under Rule 37(b) requires consideration of "(1) evidence of willfulness or bad faith; (2) prejudice to the adversary; (3) whether the violating party had notice of the potential sanction; and (4) whether less drastic sanctions have been imposed or ordered"); *Montrose Medical Grp. Participating Svg. Plan v. Bulger*, 243 F.3d 773, 779 (3d Cir. 2001) ("[A] district court may not employ judicial estoppel unless it is tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's misconduct."); *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993) ("[T]he severe sanction of . . . default judgment is appropriate only as a last resort, when less drastic sanctions would not ensure compliance with the court's orders."); *Batson v. Neal Spelce Assocs.*, 765 F.2d 511, 514 (5th Cir. 1985) (concluding that dismissal under Rule 37 is warranted "only when the failure to comply with the court's order results from willfulness or bad faith, and not from the inability to comply…and where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions.").

[103] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 50 (1991).

contradict the notion that a court must resort to the *equitable* remedy of judicial estoppel to punish the deceitful debtor and deter others from the same path.[104]

Rule 11 Sanctions. Bankruptcy Rule 9011 authorizes the imposition of sanctions against a party, including against a debtor for providing false statements in the schedules and statement of financial affairs.[105] Pursuant to Rule 9011(c)(2), however, "[a] sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[106] The application of judicial estoppel to bar a previously undisclosed claim results in a sanction that may bear no relation in amount to the magnitude or severity of the concealment. Thus, for example, in *In re Dubrowsky*, the debtor was sanctioned under Rule 9011(c) in the amount of $5,000 for deliberately concealing in excess of $300,000 in cash and other assets[107] This stands in stark contrast to the result in *Queen v. TA Operating, LLC*, in which the court—by imposing judicial estoppel to bar the debtor's undisclosed $1.5 million personal injury claim—effectively sanctioned the debtor in an amount up to $1.5 million.

Denial/Revocation of Discharge. In a chapter 7 case, § 727(a) bars the court from granting a discharge to a debtor who, *inter alia*, conceals property of the estate or "knowingly and fraudulently" makes a false oath in a case.[108] Where the omission is discovered after the discharge has been granted, § 727(d) authorizes the revocation of a discharge "obtained through the fraud of the debtor."[109] In chapter 11 cases, a debtor's discharge may be denied or revoked

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[104] *See, e.g., Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d at 423 (observing that "[s]ection 1141(d)(3), which authorizes denial of discharge under certain conditions, provides additional deterrence, as does 18 U.S.C. § 152, which makes it a crime, among other things, to 'knowingly and fraudulently [conceal]…any property belonging to the estate of a debtor'") (Stapleton, J., dissenting); *In re Griner*, 240 B.R. 432, 439 (Bankr. S.D. Ala. 1999) ("A bankruptcy court has ample powers to punish debtors who wrongfully conceal assets, *i.e.*, sanctions under Fed. R. Bankr. P. 9011, conversion of the case to chapter 7 (§ 1307(c)), revocation of discharge (§ 1328(e)), referral for criminal charges (18 U.S.C. § 152(1) , (2) , (3) , (7)).."); *Love v. Tyson Foods, Inc.*, 677 F.3d at 274 (acknowledged the existence of other "avenues for discouraging potentially deviant bankruptcy litigants," including revocation or denial of discharge and referral for criminal prosecution.) (Haynes, J., dissenting); *Ah Quin v. County of Kauai*, 733 F.3d at 275 (concluding that "the bankruptcy system already provides plenty of protections," including the availability of sanctions under Fed. R. Civ. P. 11, denial of the debtors' discharge, or referral for criminal prosecution).

[105] *See, e.g., United States v. Thomas*, 342 B.R. 758, 762 (S.D. Tex. 2005) (concluding that a debtor's schedules are subject to the same standard under Fed. R. Bankr. P. 9011 as other pleadings); *Estate of Perlbinder v. Dubrowsky (In re Dubrowsky)*, 206 B.R. 30, 37 (Bankr. E.D.N.Y. 1997) (imposing sanctions under Fed. R. Bankr. P. 9011 for "material omissions and false statements, ostensibly to conceal assets and transfers of assets").

[106] Fed. R. Bankr. P. 9011(c)(2).

[107] *Estate of Perlbinder v. Dubrowsky (In re Dubrowsky)*, 206 B.R. at 37.

[108] 11 U.S.C. § 727(a)(2), (4). *See, e.g., Tow v. Henley (In re Henley)*, 480 B.R. 708 (Bankr. S.D. Tex. 2012) (denial of discharge for failure to disclose numerous assets); *Walsh v. Hendrickson (In re Hendrickson)*, 156 B.R. 19 (Bankr. W.D. Pa. 1993) (denial of discharge for concealment of nearly $40,000 from the estate); *Davis v. Davenport (In re Davenport)*, 147 B.R. 172, 181 (Bankr. E.D. Mo. 1992) (denial of discharge for failure to disclose $339,000 transfer to debtor's sons); *Holder v. Bennett (In re Bennett)*, 126 B.R. 869 (Bankr. N.D. Tex. 1991) (revocation of discharge for failure to disclose numerous assets); *Van Roy v. Watkins (In re Watkins)*, 84 B.R. 246, 250 (Bankr. S.D. Fla. 1988) ("Accordingly, a knowing and fraudulent omission from a sworn statement of affairs, or schedules, may constitute a false oath sufficient to bar discharge in bankruptcy").

[109] 11 U.S.C. § 727(d)(1).

based on the subsequent discovery that the discharge was "procured by fraud," as well.[110] Chapter 12 and 13 similarly authorize a court to revoke a debtor's discharge where that discharge was obtained "through fraud."[111]

Denial or revocation of a debtor's discharge is a harsh remedy, yet for a variety of reasons presents a more fitting response to remedy and deter the very harm for which the doctrine of judicial estoppel exists. First, as articulated above, it refocuses the court's power to both penalize and deter the concealment of assets on the nature of the concealment itself, rather than the nature of the asset, and restores some predictability to the process. Full disclosure by a debtor lies at the very heart of the fundamental compact bankruptcy offers, and the debtor who deliberately fails to live up to his end of the bargain is rightly denied the *quid pro quo* of a discharge. That being said, it is the materiality of the deceit that warrants such punishment, and not the character of the asset itself.[112] Moreover, "[t]he revocation of the Debtors' discharge has no effect on the administration of the Debtors' estate other than denying them the benefits of the discharge."[113] Denying a debtor his discharge as penalty for failure to fully meet the disclosure requirements of the bankruptcy process therefore denies the debtor the benefit of bankruptcy without arbitrarily imposing an additional sanction based the value of the undisclosed asset that may bear no rational relationship to the nature and severity of the underlying concealment.

Moreover, judicial estoppel at its most basic requires the presence of an "inconsistent statement" that has been "accepted" by a court. In the context of a debtor who fails to disclose the existence of a cause of action in his schedules, that "acceptance" occurs upon the court's grant of a discharge to that debtor. Where that discharge is instead denied (or revoked) by the court upon discovery of the inconsistency, the second necessary condition for judicial estoppel is effectively negated. By denying the debtor its discharge, the court has in fact "rejected" the false statement made in the schedules.[114]

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[110] 11 U.S.C. § 1141(d)(3)(C) ("The confirmation of a plan does not discharge a debtor if…the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title."); 11 U.S.C. § 1144 (authorizing a court to revoke an order of confirmation and the corresponding discharge "if such order was procured by fraud").

[111] 11 U.S.C. §§ 1228(d)(1), 1328(e)(1). Additionally, §§ 1230 and 1330 authorize a court to revoke an order confirming a chapter 12 or 13 plan, respectively, in which event the statute directs the court to dispose of the case (*i.e.*, by conversion to chapter 7 or dismissal) in accordance with §§ 1207 and 1307, respectively. *See, e.g.*, *Standiferd v. U.S. Trustee (In re Standiferd)*, 641 F.3d 1209, 1211 (10th Cir. 2011) (affirming denial of debtor's denial of discharge following conversion of case from chapter 13 to chapter 7), *Pisculli v. T.S. Haulers, Inc. (In re Pisculli)*, 426 B.R. 52 (E.D.N.Y. 2010) (affirming denial of debtor's discharge following conversion of case from chapter 13 to chapter 7 based on debtor's active concealment of property of the estate).

[112] It would be equally bizarre to treat a debtor's failure to disclose an interest in real property differently from the failure to disclose an interest in personalty.

[113] *Holder v. Bennett (In re Bennett)*, 126 B.R. 869, 876 (Bankr. N.D. Tex. 1991); *see also Stewart v. Black (In re Black)*, 19 B.R. 468, 471 (Bankr. M.D. Tenn. 1982) ("The court's revocation of the debtor's discharge has no effect on the administration of the debtor's estate other than denying the debtor the benefits of the discharge.")

[114] *See, e.g., In re DiVittorio*, 430 B.R. 26, 48 (Bankr. D. Mass. 2010), *aff'd* 670 F.3d 273 (1st Cir. 2010) (concluding that the court had not yet "accepted" the position advanced by the debtor—*i.e.*, the nonexistence of the claim—because it had not yet granted the debtor a discharge or other relief); *but see Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197 (finding the "acceptance" prong satisfied in the court's grant of relief from the automatic stay based on the debtor's inconsistent statement); *Donaldson v. Bernstein*, 104 F.3d 547, 555-56 (3rd Cir. 1997) (finding the "acceptance" satisfied by confirmation of the debtor's plan of reorganization).

As most courts find "acceptance" of the debtor's position in the act of granting a discharge, the denial or revocation of that discharge may effectively eliminate the second requirement of judicial estoppel and punishes the debtor's conduct all in a single blow. In cases where the concealed claim is valuable—even enough to render the debtor solvent—a debtor may find the loss of the benefits of the discharge far preferable to the outright loss of the claim.

Dismissal. Dismissal of the case, too, may accomplish much the same thing as denial or revocation of the debtor's discharge, expelling the debtor from the sanctuary of bankruptcy with all his prepetition debts still extant. In cases where the outcome of the undisclosed cause of action could impact the debtor's ultimately solvency, dismissal or denial of discharge may be a far preferable to the outright loss of the claim based on judicial estoppel. Moreover, the use of these measures to punish the debtor's misconduct effects a more precisely targeted sanction that properly punishes the debtor for the failure to disclose an asset without triggering the collateral damage to creditors from "vaporizing" a potentially valuable asset and producing a windfall to an otherwise undeserving defendant.

Denial of Exemption. In some instances, a debtor may be entitled to claim a litigation claim—and the proceeds from that claim—as exempt under state or federal law. For example, § 522(d)(11) exempts various types of awards, including damages arising from a crime victim's reparation law, certain wrongful death and personal injury claims, or for loss of future earnings.[115] Exemptions are not sacrosanct, however, and a debtor's claim of exemption for a particular asset may be denied by the court based on the debtor's intentional concealment of that asset from the court.[116] Such denials are granted without regard to the *nature* of the asset, and courts have denied claims of exemption for lawsuits and litigation proceeds just as they have for other forms of real and personal property.[117]

Criminal Prosecution. In addition to the foregoing, a person who knowingly "conceals…any property belonging to the estate of a debtor," "makes a false oath or account in or in relation to any case under title 11," or "makes a false declaration…or statement under penalty of perjury" can be charged with a bankruptcy crime under 18 U.S.C. § 152 and, if convicted, imprisoned for up to 5 years.[118] In certain instances, the concealment of a potential claim by filing schedules—signed by the debtor under penalty of perjury—certainly falls within the scope of § 152. This is not to say that a debtor would prefer (or his counsel would recommend) criminal prosecution to a civil sanction based upon judicial estoppel. Nevertheless,

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[115] 11 U.S.C. § 522(d)(11)(A), (B), (D), (E). Similar exemptions exist under state law in most jurisdictions.

[116] *See, e.g., Kaelin v. Bassett (In re Kaelin)*, 308 F.3d 885, 889 (8th Cir. 2002) ("[T]he policy of freely allowing amendment, while the case is still open, is not an absolute and can be tempered by the actions of the debtor or the consequences to the creditors."); *In re Yonikus*, 996 F.2d 866, 868 (7th Cir. 1993) (denying claimed exemption for personal injury claim proceedings, holding that "fraudulent concealment of an asset works as a forfeiture of exemption rights"); *Matter of Doan*, 672 F.2d 831, 833 (11th Cir.1982) ("[C]oncealment of an asset will bar exemption of that asset.").

[117] *See, e.g., In re Evinger*, 354 B.R. 850 (Bankr. W.D. Ark. 2006) (denial of claimed exemption for undisclosed cash, jewelry, and other personalty); *In re Robinson*, 292 B.R. 599 (Bankr. S.D. Ohio 2003) (denial of claimed exemption for undisclosed personal injury claim); *In re Santaella*, 298 B.R. 793 (Bankr. S.D. Fla. 2002) (denial of claimed exemption for undisclosed artwork and other assets); *In re St. Angelo*, 189 B.R. 24, 27-28 (Bankr. D.R.I. 1995) (denial of claimed exemption for undisclosed personal injury claim).

[118] 18 U.S.C. § 152(1), (2), (3).

the mere possibility that the concealment of an asset or the making of a false oath could lead to criminal prosecution is strong evidence that the application of judicial estoppel is not necessary "to discourage inconsistent positions by future litigants."[119]

VII.
CONCLUSION

Despite the frightening spectre posed by the doctrine of judicial estoppel, there is cause for optimism. The icy harshness of the judicial estoppel doctrine as applied in "concealed claim" cases appears to be slowly thawing, and there are compelling arguments to limit its application in all but those rare instances where no other statutory or rule-based remedy exists to more precisely sanction the offender and deter others from attempting the same. Notwithstanding the important role the doctrine plays in safeguarding the integrity of the judicial process, the Bankruptcy Code and related statutes and rules provide ample alternative deterrents and sanctions to both punish and deter malfeasant debtors who would conceal an asset from the estate in the hopes of hoarding its value for themselves.

In the meantime, the threat posed by the offensive use of the judicial estoppel doctrine to bar an otherwise valid cause of action can be mitigated through the proactive efforts of informed counsel. *Ask* detailed questions in the interview phase to discover any pending litigation or any facts that could give rise to a possible cause of action. If discovery comes after the fact, move aggressively to *amend* the necessary filings and alert the trustee. And, if all else fails, *argue* the doctrine. Judicial estoppel is at its core an equitable doctrine, and some courts—presented with the reality of its impact and a array of more precisely-tempered statutory remedies—may find themselves hard-pressed to impose the "million-dollar sanction."

[119] *Ah Quin v. County of Kauai*, 733 F.3d at 275 (observing that "the bankruptcy system already provides plenty of protections"); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d at 423 (observing that "[s]ection 1141(d)(3), which authorizes denial of discharge under certain conditions, provides additional deterrence, as does 18 U.S.C. § 152, which makes it a crime, among other things, to 'knowingly and fraudulently [conceal]…any property belonging to the estate of a debtor'") (Stapleton, J., dissenting).

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