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The Last Estop: Why Judicial Estoppel Should Be a Court's Last Resort for Undisclosed Lawsuits from Bankruptcy

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THE LAST ESTOP: WHY JUDICIAL ESTOPPEL SHOULD BE A COURT'S LAST RESORT FOR UNDISCLOSED LAWSUITS FROM BANKRUPTCY[†]

ABSTRACT

This Comment analyzes federal and state courts' application of judicial estoppel to a lawsuit that a consumer debtor failed to disclose in a prior bankruptcy case. Federal courts are split on most aspects of the judicial estoppel doctrine when applied to an undisclosed lawsuit from bankruptcy. Not all state courts recognize the doctrine of judicial estoppel, and those that do recognize it may apply the federal judicial estoppel doctrine or their own doctrine. Confusion throughout the federal circuits and state courts regarding judicial estoppel has harmed debtors, creditors, and the federal bankruptcy court system.

This Comment argues that non-bankruptcy courts should not apply the judicial estoppel doctrine to undisclosed lawsuits from bankruptcy. Application of judicial estoppel in this context is both inequitable and contrary to provisions of the Bankruptcy Code. The continued effect of the automatic stay on property of the bankruptcy estate makes all non-bankruptcy court judgments dismissing undisclosed lawsuits void. Defendants who seek to assert judicial estoppel against an undisclosed lawsuit must first petition the bankruptcy court to reopen the debtor's bankruptcy case to request relief from the automatic stay. The bankruptcy court may then appoint a trustee who can either abandon the claim or pursue the claim for the benefit of the creditors. This approach is both equitable and conforms to the Bankruptcy Code. This Comment concludes that judicial estoppel should not and may not be applied to undisclosed lawsuits from bankruptcy until the bankruptcy court grants relief from the automatic stay.

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INTRODUCTION

The notion that plaintiffs are entitled to their day in court is a fundamental characteristic of the United States judicial system.¹ However, plaintiffs are routinely denied their day in court when they have previously filed for bankruptcy but failed to disclose a potential lawsuit.² In bankruptcy, a potential lawsuit is an asset that the debtor must disclose to the bankruptcy court.³ When a debtor fails to disclose a potential lawsuit on her bankruptcy schedules and later pursues that lawsuit in a non-bankruptcy court, the non-bankruptcy court may determine that the debtor has taken inconsistent positions in an attempt to manipulate the judicial system.⁴ Courts approach this issue in different ways, but the majority of courts apply the doctrine of judicial estoppel.⁵

Judicial estoppel is an equitable doctrine that is meant to protect the integrity of the court system.⁶ Judicial estoppel allows a court to dismiss⁷ a plaintiff's claim if the plaintiff has taken inconsistent positions in different court proceedings to manipulate the judicial system and gain an advantage.⁸ Federal courts and many state courts have applied judicial estoppel when a debtor-turned-plaintiff fails to disclose a lawsuit in bankruptcy.⁹

The following examples will better illustrate the role of judicial estoppel in the undisclosed lawsuit context. Consider the stories of Jane and John. Jane's situation represents the case of the debtor who is unaware of her claim and whose nondisclosure was due to an innocent mistake. John's situation represents the

¹ *Terrell v. Allison*, 88 U.S. (21 Wall.) 289, 292 (1874) (“It is a rule old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in court; that is, without being duly cited to answer respecting them, and being heard or having opportunity of being heard thereon.”).

² *See* *Ibok v. SIAC-Sector Inc.*, 470 F. App'x 27, 28 (2d Cir. 2012) (noting that judicial estoppel “is commonly applied in order ‘to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy’” (quoting *Coffaro v. Crespo*, 721 F. Supp. 2d 141, 148 (E.D.N.Y. 2010))).

³ *See infra* Part I.A.

⁴ *See infra* notes 51–55 and accompanying text.

⁵ *See infra* Parts II.B–C.

⁶ *Edwards v. Aetna Life Ins.*, 690 F.2d 595, 598 (6th Cir. 1982).

⁷ Defendants typically move for summary judgment on the basis of judicial estoppel in this context. *See, e.g., Johnson v. Lewis Cass Intermediate Sch. Dist. (In re Johnson)*, 345 B.R. 816, 818 (Bankr. W.D. Mich. 2006) (moving for summary judgment on the basis of judicial estoppel). The effect of granting a defendant's motion for summary judgment on this issue is ultimately a dismissal of the plaintiff's claim. *See Barger v. City of Cartersville*, 348 F.3d 1289, 1292 (11th Cir. 2003) (“[T]he District court dismissed Barger's discrimination case by entering summary judgment against her.”).

⁸ *See infra* Part II.A.

⁹ *See infra* Part II.B–C.

case of the debtor attempting to take advantage of the courts and get an unfair benefit from the judicial process.

Jane is a single mother who works at a restaurant in California. For years, Jane has always felt uncomfortable with the way her manager interacts with her, but she continues to work there because the job pays well. Unfortunately, Jane's manager fires her because she constantly refuses his romantic advances. Jane is unable to find comparable work and has to settle for a job that pays much less. After a few months of struggling to pay her bills, Jane decides to file a petition for relief under Chapter 7 of the Bankruptcy Code. She files without an attorney, receives a discharge, and comes out of bankruptcy with a fresh start. Six months after receiving her discharge, Jane realizes that she may have a wrongful termination claim against the restaurant that fired her. Jane hires a lawyer and files a complaint against the restaurant in federal court.

John runs a successful business in Vermont. Despite his success, John lives such a lavish lifestyle that he is unable to pay all of his debts. John decides to file a petition for relief under Chapter 7 and hires an attorney. John's attorney asks him if he has any potential or pending lawsuits. John knows he has a claim against a business associate, but decides not to tell his attorney. John is granted a discharge in his bankruptcy case. Six months later, John files a lawsuit against his business associate in Vermont state court.

In an ideal system, judicial estoppel would prevent debtors like John from taking advantage of the judicial system and would forgive Jane for her innocent mistake. However, the development of judicial estoppel has been far from ideal. Debtors similar to Jane are estopped in some jurisdictions,¹⁰ and debtors like John may bring their claims without fear of being estopped in other jurisdictions.¹¹

The stories of Jane and John represent two possible outcomes when a debtor fails to disclose a lawsuit in bankruptcy. Despite the varying circumstances underlying Jane's and John's stories, the same basic elements are present: something bad happened, resulting in their potentially bringing a lawsuit; they

¹⁰ See *Granados v. Supervalu, Inc.*, No. LA CV11-10175 JAK (MANx), 2012 WL 3562521, at *4 (C.D. Cal. Aug. 16, 2012) ("The issue . . . with respect to estoppel is not whether Plaintiff acted in good faith[.] . . . [but] is instead whether Plaintiff had sufficient factual knowledge about the conditions of his employment to know that a potential cause of action existed during the pendency of his bankruptcy." (emphasis omitted)).

¹¹ The Supreme Court of Vermont has not adopted the doctrine of judicial estoppel. *In re Chittenden Solid Waste Dist.*, 928 A.2d 1183, 1192 (Vt. 2007) (noting that the Supreme Court has "not affirmatively adopted judicial estoppel").

later ended up in financial distress and sought relief from the bankruptcy court; they received relief from the bankruptcy court; they pursued the lawsuit; and then the defendant raised the affirmative defense of judicial estoppel. Jane and John's stories diverge on one important issue: forum choice. Jane had a federal claim that she brought in federal court. John had a state law claim that he brought in state court. There are other forum possibilities that may arise in this context.

The undisclosed lawsuit journey always begins in a bankruptcy court, but may end up in state or federal court under state or federal law. A plaintiff may file a federal claim in state court¹² or federal court.¹³ If the plaintiff chooses to file in state court, the defendant may remove the lawsuit to federal court.¹⁴ A plaintiff may file a state law claim in state court or in federal court if she can meet the requirements for diversity jurisdiction.¹⁵ If the plaintiff's claim meets the requirements for diversity jurisdiction, and the plaintiff files in state court, the defendant may still remove the case to federal court.¹⁶

In the undisclosed lawsuit context, forum choice has become a deciding factor when judicial estoppel arises because federal and state courts do not apply judicial estoppel uniformly.¹⁷ Federal circuits are also split on choice of law issues for judicial estoppel when sitting in diversity jurisdiction.¹⁸ Moreover, undisclosed lawsuits from bankruptcy create jurisdictional issues that are different for state courts and non-bankruptcy federal courts.¹⁹ The inherent variability of judicial estoppel as a discretionary, common-law doctrine, combined with the various forum and choice of law possibilities, has created extreme confusion and inconsistency throughout the court systems.²⁰ This inconsistency has led to inequitable results from the perspective of debtors, creditors, and the bankruptcy court system—resulting in a need for a more

¹² See *Consumer Crusade, Inc. v. Affordable Health Care Sols., Inc.*, 121 P.3d 350, 353 (Colo. App. 2005) (“[S]tate courts of general jurisdiction are presumed to have jurisdiction over federal claims. This presumption can only be rebutted ‘by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.’” (citations omitted)).

¹³ See *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (“In this case, judicial estoppel is raised in the context of a bankruptcy proceeding and a federal employment discrimination case . . .”).

¹⁴ See 28 U.S.C. § 1441(a) (2012); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (“A civil action filed in a state court may be removed to federal court if the claim is one ‘arising under’ federal law.”).

¹⁵ See 28 U.S.C. § 1332 (2012) (providing the requirements for diversity jurisdiction).

¹⁶ See 28 U.S.C. § 1441(b) (providing the requirements for removal based on diversity of citizenship).

¹⁷ See *infra* Part II.B–C.

¹⁸ See *infra* notes 155–67 and accompanying text.

¹⁹ See *infra* Part IV.B.

²⁰ See *infra* Part II.B–C.

uniform and equitable approach that judicial estoppel is not equipped to solve on its own.²¹

Judicial estoppel's inequitable results in this context have led the Eleventh Circuit to reconsider its judicial estoppel doctrine *en banc*.²² In *Slater v. U.S. Steel Corp.*, the Eleventh Circuit judicially estopped debtor-plaintiff Sandra Slater's employment discrimination lawsuit for failing to disclose the lawsuit on her bankruptcy schedules.²³ Judge Tjoflat concurred in the judgment but wrote specially to identify the equitable issues that judicial estoppel creates in the undisclosed lawsuit context.²⁴ Other federal and state courts may soon question judicial estoppel's inequitable effects in this context as well, and those courts should consider the goals of the bankruptcy system and all applicable provisions of the Bankruptcy Code.

Courts should use judicial estoppel as a last resort when a debtor fails to disclose a lawsuit in her bankruptcy case and later brings that lawsuit in a non-bankruptcy court. In this context, judicial estoppel has failed to achieve its main goal of protecting the integrity of the court system.²⁵ Even in an ideal system—where judicial estoppel is applied uniformly to prevent debtor-plaintiffs like John from misleading the courts—creditors are harmed.²⁶ As a stand-alone doctrine, judicial estoppel is inadequate to protect creditors, the bankruptcy court, and the goals of the federal bankruptcy system.²⁷ In addition, non-bankruptcy courts have failed to properly apply the Bankruptcy Code in this context, affecting bankruptcy courts' ability to adequately administer property of bankruptcy estates.²⁸

This Comment proposes that non-bankruptcy courts should require the parties involved in an undisclosed lawsuit to return to the bankruptcy court. Returning to the bankruptcy court is required due to the continued effect of the automatic stay.²⁹ The bankruptcy court is the only court that may grant relief

²¹ See *infra* Part IV.A.

²² *Slater v. U.S. Steel Corp.*, 820 F.3d 1193 (11th Cir. 2016), *reh'g en banc granted, opinion vacated* (Aug. 30, 2016).

²³ *Id.* at 1199.

²⁴ *Id.* at 1210 (Tjoflat, J., specially concurring) (arguing that, as a result of the Eleventh Circuit's decision, "U.S. Steel is granted a windfall, Slater's creditors are deprived of an asset, and the Bankruptcy Court is stripped of its discretion").

²⁵ See *infra* Part IV.A.

²⁶ See *infra* Part IV.A.

²⁷ See *infra* Part IV.A.

²⁸ See *infra* Part IV.B.

²⁹ See *infra* Part IV.B.

from the automatic stay.³⁰ When the bankruptcy case is reopened, the bankruptcy court may provide a more equitable solution from the perspective of the courts as well as the debtor and creditors. Both courts will also be substantially protected from manipulation if the bankruptcy court is allowed the opportunity to rule on the judicial estoppel issue when necessary.³¹

This Comment proceeds in four Parts. Part I provides background on the provisions of the Bankruptcy Code and the bankruptcy court's jurisdictional grant as they relate to judicial estoppel in the undisclosed lawsuit context. Part II discusses state and federal courts' inequitable use of judicial estoppel in this context. Part III analyzes two alternatives to judicial estoppel that some courts have employed to avoid inequitable results. Part III also discusses how those alternatives create the same inequitable results as judicial estoppel in the undisclosed lawsuit context. Part IV analyzes the equitable and statutory concerns created by judicial estoppel in the undisclosed lawsuit context and provides an equitable framework for undisclosed lawsuits that incorporates necessary provisions of the Bankruptcy Code.

I. BACKGROUND OF RELEVANT BANKRUPTCY PROVISIONS

Judicial estoppel is an equitable doctrine that reflects the principle that a litigant should not be allowed to benefit by taking inconsistent positions in different legal proceedings when attempting to mislead the courts.³² Courts that have applied judicial estoppel to undisclosed lawsuits from bankruptcy have incorporated provisions of the Bankruptcy Code into the judicial estoppel analysis.³³ This Part discusses relevant provisions of the Bankruptcy Code, the bankruptcy court's jurisdictional grant, and how those provisions relate to judicial estoppel in the undisclosed lawsuit context. This Part first analyzes the

³⁰ See *In re Dominguez*, 312 B.R. 499, 505 (Bankr. S.D.N.Y. 2004) ("Congress has declared that actions to 'terminate, annul, or modify' the automatic stay are core bankruptcy proceedings. . . . Consequently, it is undisputed that *only* a bankruptcy court has jurisdiction to terminate, annul or modify the automatic stay." (citation omitted)).

³¹ See *infra* Part II.A.

³² *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); William Houston Brown, Lundy Carpenter & Donna T. Snow, *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197, 200 (2001) [hereinafter *Debtors' Counsel Beware*] ("The doctrine's underlying theory is that a party should not be permitted to take one position under oath, which was in some manner accepted by one court, and to then alter that position in a subsequent judicial proceeding, resulting in a second court being misled in some manner . . .").

³³ See, e.g., *Guay v. Burack*, 677 F.3d 10, 17 (1st Cir. 2012) (applying judicial estoppel to an undisclosed lawsuit from bankruptcy and discussing property of the estate, § 541(a)(1) of the Bankruptcy Code, and the debtor's duty to disclose, § 521(a)(1) of the Bankruptcy Code).

broad definition of property of the bankruptcy estate, which encompasses undisclosed lawsuits, and the debtor's duty to disclose undisclosed lawsuits. It then discusses the automatic stay, which has largely been ignored by non-bankruptcy courts in this context. This Part ends by discussing the bankruptcy court's exclusive jurisdiction over property of the estate.

A. Property of the Estate and the Debtor's Duty to Disclose

When a debtor files a petition for relief under the Bankruptcy Code, the filing of the petition creates the bankruptcy estate, which consists of "all legal or equitable interests of the debtor in property as of the commencement of the case."³⁴ Section 541 of the Bankruptcy Code defines the bankruptcy estate for all bankruptcy cases.³⁵ Congress intended for the scope of § 541 to be broad.³⁶ This broad definition of the bankruptcy estate encompasses nearly all of a debtor's prepetition assets (assets that exist before the debtor files for bankruptcy),³⁷ including potential lawsuits belonging to the debtor.³⁸

The Bankruptcy Code provides debtors different options for dealing with their indebtedness.³⁹ This Comment focuses on individuals filing petitions for relief under Chapter 7 of the Bankruptcy Code.⁴⁰ Filing a petition for relief under Chapter 7 "authorizes a discharge of prepetition debts following the liquidation of the debtor's assets by a bankruptcy trustee, who then distributes the proceeds

³⁴ 11 U.S.C. § 541(a)(1) (2012).

³⁵ See 11 U.S.C. § 541(a) ("The commencement of a case under . . . this title creates an estate.").

³⁶ S. REP. NO. 95-989, at 82 (1978) ("The scope of [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, [and] causes of action . . ."), as reprinted in 1978 U.S.C.C.A.N. 5787, 5868.

³⁷ See *Harris v. Viegelahn*, 135 S. Ct. 1829, 1835 (2015) ("[W]hile a Chapter 7 debtor must forfeit virtually all his prepetition property, he is able to make a 'fresh start' by shielding from creditors his postpetition earnings and acquisitions."); *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004) (discussing property of the estate and noting that "[s]uch property includes causes of action belonging to the debtor at the commencement of the bankruptcy case").

³⁸ See *Parker*, 365 F.3d at 1272 (describing that the bankruptcy estate "includes causes of action belonging to the debtor at the commencement of the bankruptcy case"); *supra* note 34 and accompanying text.

³⁹ See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (discussing the differences between filing under Chapter 7 and Chapter 13 of the Bankruptcy Code).

⁴⁰ For the purposes of judicial estoppel, the main difference between Chapter 7 cases and Chapter 13 cases concerns the scope of property of the estate. When an individual debtor files a petition for relief under Chapter 13, the bankruptcy estate includes the debtor's prepetition assets as well as all property acquired after the debtor files for bankruptcy and before the bankruptcy case closes. See 11 U.S.C. § 1306 (2012); *Harris*, 135 S. Ct. at 1835 ("[T]he Chapter 13 estate from which creditors may be paid includes both the debtor's property at the time of his bankruptcy petition, and any wages and property acquired after filing."). Because this Comment focuses on judicial estoppel's application to prepetition assets, discussing differences between Chapter 7 and Chapter 13 cases is beyond the scope of this Comment.

to creditors.”⁴¹ In a Chapter 7 bankruptcy case, the trustee controls the bankruptcy estate.⁴² A Chapter 7 debtor no longer has any property rights in assets belonging to the bankruptcy estate as long as the asset remains part of the bankruptcy estate.⁴³ An asset only returns to the debtor in the event such asset is abandoned pursuant to § 554 of the Bankruptcy Code⁴⁴ or the bankruptcy court dismisses the debtor’s bankruptcy case.⁴⁵ If the debtor’s bankruptcy case is not dismissed and the asset is not abandoned or administered in the bankruptcy case, the asset remains a part of the bankruptcy estate indefinitely.⁴⁶ Thus, when a debtor fails to disclose a lawsuit in a Chapter 7 bankruptcy case that is not dismissed, the undisclosed lawsuit remains part of the bankruptcy estate indefinitely because the Chapter 7 trustee neither administered nor abandoned the lawsuit.⁴⁷

Debtors have a duty to disclose all of their assets and liabilities.⁴⁸ The debtor’s assets include all “[c]laims against third parties whether or not [the debtor] has filed a lawsuit or made a demand for payment.”⁴⁹ The debtor must disclose all assets so that they are available for distribution to creditors.⁵⁰ When a debtor fails to disclose a potential lawsuit on her schedule of assets, the debtor violates her statutory duties.⁵¹ The debtor’s failure to disclose an asset decreases

⁴¹ *Marrama*, 549 U.S. at 367.

⁴² *See Harris*, 135 S. Ct. at 1835 (“A Chapter 7 trustee is then charged with selling the property in the estate and distributing the proceeds to the debtor’s creditors.” (citations omitted)).

⁴³ *See Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 795 (D.C. Cir. 2010) (“The commencement of Chapter 7 bankruptcy extinguishes a debtor’s legal rights and interests in any pending litigation, and transfers those rights to the trustee, acting on behalf of the bankruptcy estate.”); Jay L. Gottlieb & Brian E. Greer, *The Doctrines of Standing and Judicial Estoppel: How Actions or Omissions in Bankruptcy Proceedings May Preclude the Assertion of Claims by a Debtor in a Subsequent Action*, 9 J. BANKR. L. & PRAC. 487, 488 (2000) (“[O]nce an asset becomes part of the bankruptcy estate, all rights held by the debtor in the asset are extinguished . . .”)

⁴⁴ 11 U.S.C. § 554 (2012).

⁴⁵ 11 U.S.C. § 349(b)(3) (2012) (providing that dismissal of a bankruptcy case “revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title”).

⁴⁶ *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.”); *Parker v. Wendy’s Int’l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004) (“Failure to list an interest on a bankruptcy schedule leaves that interest in the bankruptcy estate.”).

⁴⁷ *See* sources cited *supra* note 46.

⁴⁸ 11 U.S.C. § 521(a)(1)(B)(i) (2012) (“The debtor shall . . . file . . . a schedule of assets and liabilities . . .”); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (“The Code imposes on debtors an affirmative duty of full disclosure.”).

⁴⁹ OFFICIAL BANKR. FORMS, FORM B 106A/B, ¶ 33.

⁵⁰ *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416 (3d Cir. 1988) (“A long-standing tenet of bankruptcy law requires one seeking benefits under its terms to satisfy a companion duty to schedule, for the benefit of creditors, all his interests and property rights.”).

⁵¹ *Ryan Operations G.P.*, 81 F.3d at 362.

the amount available for distribution to creditors and ultimately harms creditors.⁵² The debtor's disclosure requirements are an essential element of the bankruptcy system.⁵³ The bankruptcy court relies on these disclosures and "the importance of full and honest disclosure cannot be overstated."⁵⁴ If a debtor later pursues an undisclosed lawsuit in a post-bankruptcy proceeding, the non-bankruptcy court could interpret the debtor-plaintiff's actions as being inconsistent—giving rise to judicial estoppel as a potential defense.⁵⁵ When judicial estoppel arises in this context, the non-bankruptcy court must determine whether the lawsuit is property of the bankruptcy estate under state law and the Bankruptcy Code.

As in many other areas of law, timing in bankruptcy is everything. The bankruptcy estate is created the moment the debtor files a bankruptcy petition.⁵⁶ When a debtor files a petition for relief under Chapter 7, the distinction between prepetition property and postpetition property is essential to determining what property becomes property of the estate.⁵⁷ This distinction also becomes essential for a judicial estoppel analysis because the application of judicial estoppel is predicated on the fact that the undisclosed lawsuit should have been disclosed and is part of the bankruptcy estate.⁵⁸ Only lawsuits that accrue prepetition become property of the estate.⁵⁹ Although state law is important in determining the accrual date of a lawsuit, the Bankruptcy Code "is not restricted by state law concepts such as when a cause of action ripens or a statute of limitations begins to run, and 'property of the estate' may include claims that were inchoate on the petition date."⁶⁰ To determine if a lawsuit is part of the bankruptcy estate, a court must find that the lawsuit has "sufficient roots in the

⁵² See *Williams v. Hainje*, 375 F. App'x 625, 628 (7th Cir. 2010) (noting "the bankruptcy law's goal of unearthing all assets for the benefit of creditors").

⁵³ *Ryan Operations G.P.*, 81 F.3d at 362.

⁵⁴ *Id.*

⁵⁵ *Debtors' Counsel Beware*, *supra* note 32, at 204.

⁵⁶ See *supra* note 34 and accompanying text; see also *Winick & Reich, P.C. v. Strada Design Assocs.* (*In re Strada Design Assocs.*), 326 B.R. 229, 235 (Bankr. S.D.N.Y. 2005) ("[T]he filing of a bankruptcy petition creates an estate . . .").

⁵⁷ See *Ceja-Corona v. CVS Pharmacy, Inc.*, No. 1:12-CV-01703-AWI-SAB, 2014 WL 1679410, at *10 (E.D. Cal. Apr. 28, 2014) ("[I]n Chapter 7 actions, the bankruptcy estate only includes causes of action which existed as of the date the petition was filed—causes of action which accrued post-petition are not part of a Chapter 7 estate.")

⁵⁸ See *id.* at *11 (finding that some of the plaintiff's claims accrued prepetition and others accrued post-petition and only applying judicial estoppel to the plaintiff's prepetition claims).

⁵⁹ See *In re Strada Design Assocs.*, 326 B.R. at 235 ("Without doubt, causes of action that accrue under state law prior to the filing of a bankruptcy petition become 'property of the estate.'").

⁶⁰ *Id.* at 236.

debtor's pre-bankruptcy activities and is not entangled with the debtor's 'fresh start,' regardless of when the claim accrues under state law or the statute of limitations begins to run."⁶¹

When a Chapter 7 debtor fails to disclose a post-petition lawsuit, the lawsuit is not property of the bankruptcy estate, and judicial estoppel is not an applicable ground for dismissal.⁶² However, when a Chapter 7 debtor fails to disclose a *prepetition* lawsuit, the lawsuit is property of the estate and remains part of the estate indefinitely. Therefore, if a debtor then pursues an undisclosed lawsuit in a post-bankruptcy proceeding, the lawsuit may be subject to dismissal under a judicial estoppel analysis.⁶³

B. *The Automatic Stay*

The automatic stay has a broad scope and "plays a vital and fundamental role in bankruptcy."⁶⁴ When a debtor files a petition for relief, the act of filing the petition puts the automatic stay into effect under § 362(a) of the Bankruptcy Code.⁶⁵ The automatic stay acts as a legislative injunction prohibiting certain actions against the debtor, property of the debtor, and property of the bankruptcy estate.⁶⁶ The automatic stay also "ensures that all claims against the debtor will be brought in a single forum, the bankruptcy court."⁶⁷

The automatic stay protects the interests of debtors and creditors. One purpose of the automatic stay is to provide the debtor protection from creditors' collection efforts.⁶⁸ Another purpose is to protect "creditors as a class from the

⁶¹ *Id.*

⁶² *See supra* note 58 and accompanying text.

⁶³ *See supra* note 58 and accompanying text.

⁶⁴ *Hillis Motors, Inc. v. Haw. Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir. 1993). The stay is "designed to effect an immediate freeze of the status quo by precluding and nullifying post-petition actions, judicial or nonjudicial, in nonbankruptcy fora against the debtor or affecting the property of the estate." *Id.* (emphasis omitted). As a result, "[t]he stay ensures that all claims against the debtor will be brought in a single forum, the bankruptcy court." *Id.*

⁶⁵ 11 U.S.C. § 362(a) (2012); *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 975 (1st Cir. 1997) ("The stay springs into being immediately upon the filing of a bankruptcy petition . . .").

⁶⁶ *See* 11 U.S.C. § 362(a) (listing actions that would violate the stay). The stay "is intended to give the debtor breathing room by 'stop[ping] all collection efforts, all harassment, and all foreclosure actions.'" *In re Soares*, 107 F.3d at 975 (quoting H.R. REP. NO. 95-595, at 340 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97).

⁶⁷ *Hillis Motors*, 997 F.2d at 585.

⁶⁸ *See In re Killmer*, 501 B.R. 208, 212 (Bankr. S.D.N.Y. 2013) ("[T]he automatic stay is often viewed as a benefit to debtors since it provides a 'breathing spell' from collection efforts . . ."; *see also In re Soares*, 107 F.3d at 975 ("The automatic stay is among the most basic of debtor protections under bankruptcy law.")).

possibility that one creditor will obtain payment on its claims to the detriment of all others.”⁶⁹ A creditor or other party in interest may request relief from the automatic stay for cause,⁷⁰ and only the bankruptcy court may grant relief from the automatic stay.⁷¹ The debtor has no power to waive the automatic stay because the stay is designed to protect both creditors and debtors.⁷² If an act violates the automatic stay, such acts are ordinarily deemed void *ab initio*.⁷³

The automatic stay goes into effect upon filing a bankruptcy petition and stays in effect against property of the estate “until such property is no longer property of the estate.”⁷⁴ Normally, property of the estate ceases to be property of the estate if the trustee abandons the property, the bankruptcy case is dismissed, or the trustee administers the property.⁷⁵ However, undisclosed lawsuits remain part of the bankruptcy estate indefinitely.⁷⁶ As a result, even after a debtor’s bankruptcy case is closed, the automatic stay continues to be in effect against undisclosed lawsuits because they remain property of the estate indefinitely.⁷⁷

⁶⁹ *Hillis Motors*, 997 F.2d at 585; *see also* *Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106, 114 (1st Cir. 1994) (“The automatic stay . . . prevent[s] different creditors from bringing different proceedings in different courts, thereby setting in motion a free-for-all in which opposing interests maneuver to capture the lion’s share of the debtor’s assets.”).

⁷⁰ *See* 11 U.S.C. § 362(d) (“On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . for cause . . .”).

⁷¹ *See supra* note 30 and accompanying text.

⁷² *See* *Commerzanstalt v. Telewideo Sys., Inc.*, 790 F.2d 206, 207 (2d Cir. 1986) (per curiam) (“Since the purpose of the stay is to protect creditors as well as the debtor, the debtor may not waive the automatic stay.”); *see also supra* notes 68–69 and accompanying text.

⁷³ *See In re Enyedi*, 371 B.R. 327, 334 (Bankr. N.D. Ill. 2007) (“It is well established in case law that acts taken in violation of the automatic stay imposed under section 362(a) of the Bankruptcy Code are deemed void *ab initio* and lack effect.”); *see also In re Killmer*, 501 B.R. at 212 (“[A]n act entered in violation of the stay is void whether or not a party makes a motion to declare it so.”).

⁷⁴ 11 U.S.C. § 362(c)(1).

⁷⁵ *See supra* notes 44–45 and accompanying text.

⁷⁶ *See supra* note 46 and accompanying text.

⁷⁷ *See* 11 U.S.C. § 362(c)(1); *Lopez v. Specialty Rests. Corp. (In re Lopez)*, 283 B.R. 22, 32 (B.A.P. 9th Cir. 2002) (Klein, J., concurring) (“[The] difficulty with the judicial estoppel defense is that the automatic stay remains in effect to protect property of the estate so long as it is property of the estate, even after the bankruptcy case is closed.”).

C. Jurisdiction of Bankruptcy Courts

Bankruptcy courts are Article I courts that serve as adjuncts to the district courts.⁷⁸ When Congress drafted the 1978 Bankruptcy Code, one of the goals was “to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the . . . dichotomy between summary and plenary jurisdiction.”⁷⁹ Congress granted federal district courts “original and exclusive jurisdiction of all cases under title 11.”⁸⁰ Under 28 U.S.C. § 157(a), “[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”⁸¹ All federal districts have adopted a local rule or standing order referring cases under Title 11 to the bankruptcy courts.⁸²

Congress also granted the federal district courts where a bankruptcy case is commenced or is pending “exclusive jurisdiction” over “all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.”⁸³ This broad grant of exclusive jurisdiction includes determinations of what property becomes property of the estate.⁸⁴ Because an undisclosed lawsuit is property of the bankruptcy estate, the federal district court and, by referral, the bankruptcy court have exclusive jurisdiction over undisclosed lawsuits while the bankruptcy case is open.⁸⁵

⁷⁸ See 28 U.S.C. § 151 (2012) (“In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district.”); BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (*In re* BP RE, L.P.), 735 F.3d 279, 281 (5th Cir. 2013).

⁷⁹ Noletto v. Nationsbanc Mortgage Corp. (*In re* Noletto), 244 B.R. 845, 853 (Bankr. S.D. Ala. 2000) (quoting S. REP. NO. 95-989, at 17–18 (1978)).

⁸⁰ 28 U.S.C. § 1334(a) (2012).

⁸¹ 28 U.S.C. § 157(a) (2012).

⁸² See *Schulman v. Cal. State Water Res. Control Bd.* (*In re* Lazar), 200 B.R. 358, 366 (Bankr. C.D. Cal. 1996) (“[E]ach district is authorized to adopt a general order of reference to send all bankruptcy cases to the bankruptcy judges for the district, and in fact all districts (including this district) have so ordered.”). For an example of a local rule, see D. ARIZ. R. BANKR. P. 5011-1 (“Pursuant to 28 U.S.C. § 157(a), the district court refers to the bankruptcy court for this District all cases under Title 11 and all proceedings under Title 11 or arising in or related to a case under Title 11.”).

⁸³ 28 U.S.C. § 1334(e). “The broad jurisdictional grant of 28 U.S.C. § 1334 is designed to centralize proceedings in the bankruptcy court” *Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106, 114 (1st Cir. 1994).

⁸⁴ *Rivera v. Rivera* (*In re* Rivera), BAP No. OR-04-1596-MORK, 2005 WL 6960197, at *8 (B.A.P. 9th Cir. Sept. 14, 2005) (“Congress has given the bankruptcy court exclusive jurisdiction to determine what is property of the estate.”); *In re* Becker, 136 B.R. 113, 116 (Bankr. D.N.J. 1992) (“[T]he question of what constitutes property of a bankruptcy estate is ultimately a federal question.”).

⁸⁵ See *supra* notes 81–83 and accompanying text.

A bankruptcy court's jurisdiction is divided into core and non-core proceedings.⁸⁶ Bankruptcy courts may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11."⁸⁷ Section 157(b)(2) of Title 28 provides sixteen non-exhaustive examples of core proceedings, including "matters concerning the administration of the estate" and "motions to terminate, annul, or modify the automatic stay."⁸⁸ In non-core proceedings, bankruptcy courts may only "submit proposed findings of fact and conclusions of law to the district court," and the district court judge must enter the final order or judgment.⁸⁹ Because an undisclosed lawsuit is property of the bankruptcy estate, administering the lawsuit is a core proceeding and bankruptcy judges may enter a final order or judgment.⁹⁰

The statutory provisions defining property of the estate, the automatic stay, and the bankruptcy court's jurisdiction work in tandem to ensure that the bankruptcy court can adequately protect the interests of debtors and creditors. Because undisclosed lawsuits are property of the estate, consideration of each of these provisions is necessary to properly address the role of judicial estoppel in the undisclosed lawsuit context.

II. THE DEVELOPMENT OF THE JUDICIAL ESTOPPEL DOCTRINE

The judicial estoppel doctrine can be traced back to the Tennessee Supreme Court's 1857 decision in *Hamilton v. Zimmerman*.⁹¹ The majority of federal and state courts have since adopted judicial estoppel⁹² with the aim of "protect[ing] the integrity of the judicial process."⁹³ When a court applies

⁸⁶ See 28 U.S.C. § 157(b)(3) ("The bankruptcy judge shall determine . . . whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11.").

⁸⁷ 28 U.S.C. § 157(b)(1); *Stern v. Marshall*, 564 U.S. 462, 471 (2011).

⁸⁸ 28 U.S.C. § 157(b)(2); *Stern*, 564 U.S. at 474.

⁸⁹ 28 U.S.C. § 157(c)(1).

⁹⁰ See *Johnson v. Lewis* Cass Intermediate Sch. Dist. (*In re Johnson*), 345 B.R. 816, 818 (Bankr. W.D. Mich. 2006). In *In re Johnson*, the district court referred a debtor's wrongful discharge claim to the bankruptcy court after the defendant had filed for summary judgment on the basis of judicial estoppel. *Id.* at 818–19. The bankruptcy court found that the adversary proceeding was a core proceeding because it involved "the administration of the debtor's estate and affect[ed] the liquidation of the assets of the estate and the debtor-creditor relationships." *Id.* at 818 (citations omitted).

⁹¹ See 37 Tenn. (5 Sneed) 39, 49 (1857) (dismissing a case because the plaintiff had made inconsistent statements); Brian A. Dodd, *Intent and the Application of Judicial Estoppel: Equitable Shield or Judicial Heartbreak?*, 22 AM. J. TRIAL ADVOC. 481, 481 (1998) (discussing the development of judicial estoppel).

⁹² See Dodd, *supra* note 91 (discussing the application of judicial estoppel in state and federal courts).

⁹³ *Edwards v. Aetna Life Ins.*, 690 F.2d 595, 598 (6th Cir. 1982). "The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery." *Id.* at 599. The underlying policy considerations behind judicial

judicial estoppel, it does so to prevent a party from misleading the courts.⁹⁴ Although judicial estoppel is an equitable doctrine, its application can prove harsh when used against a litigant who had no intention of undermining the integrity of the courts or gaining an advantage.⁹⁵ The extent to which a court considers the litigant's intent has caused "great division among the jurisdictions."⁹⁶ This Part first discusses the goals of judicial estoppel and the judicial estoppel factors delineated by the Supreme Court in *New Hampshire v. Maine*.⁹⁷ It then analyzes how federal courts apply judicial estoppel and identifies the resulting inequities and inconsistencies. This Part concludes by discussing issues that arise when state courts apply judicial estoppel in the undisclosed lawsuit context.

A. *The Judicial Estoppel Doctrine and Its Goals*

Courts emphasize different purposes in applying the judicial estoppel doctrine,⁹⁸ and they also recognize that judicial estoppel cannot be reduced to a strict formula.⁹⁹ In 2001, the Supreme Court of the United States elaborated on the judicial estoppel doctrine for the first time in *New Hampshire v. Maine*.¹⁰⁰ The Court determined that the predominant purpose of judicial estoppel is "to protect the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment."¹⁰¹

The Court identified three factors that "typically inform the decision whether to apply the doctrine in a particular case."¹⁰² The first factor is whether "a party's later position [is] 'clearly inconsistent' with its earlier position."¹⁰³ The second factor is "whether the party has succeeded in persuading a court to accept that

estoppel include upholding the "sanctity of the oath," preserving "the public confidence in the purity and efficiency of judicial proceedings," and preventing "a party from playing "fast and loose with the courts." *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980).

⁹⁴ See *supra* note 93.

⁹⁵ See *Dodd*, *supra* note 91, at 481 ("Though founded on principles of equity and justice, the assertion of judicial estoppel may potentially render a result that is both harsh and conceivably inequitable when levied against an unwary litigant.").

⁹⁶ *Id.*

⁹⁷ 532 U.S. 742, 750–51 (2001).

⁹⁸ CHARLES ALAN WRIGHT ET AL., 18B FEDERAL PRACTICE AND PROCEDURE § 4477 (2d ed. 2016) ("A variety of purposes are pursued under the judicial estoppel banner . . .").

⁹⁹ *New Hampshire*, 532 U.S. at 750.

¹⁰⁰ *Id.* at 749 (noting that the Court had "not had occasion to discuss the doctrine elaborately" before *New Hampshire v. Maine*).

¹⁰¹ *Id.* at 749–50 (citations omitted).

¹⁰² *Id.* at 750.

¹⁰³ *Id.*

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."¹⁰⁴ The third factor 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."¹⁰⁵ The Supreme Court noted that these factors are not meant to "establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel."¹⁰⁶ Every federal circuit and some state courts apply the *Maine* factors.¹⁰⁷

The Supreme Court's decision in *New Hampshire v. Maine* was a starting point for clarifying the doctrine of judicial estoppel. However, the Court left many issues untouched and open to interpretation by the lower courts, including the issue of the litigant's intent.¹⁰⁸ Judicial estoppel has continued to evolve in federal and state courts, resulting in varied interpretations that reflect the doctrine's flexible standard and origin as a common-law doctrine that courts may invoke at their discretion.¹⁰⁹ The court applying judicial estoppel must decide whether the judicial estoppel factors are met by interpreting circumstances from litigation in the first court, which leads to increased variability and possible error.¹¹⁰

Some courts have recognized that judicial estoppel is a harsh doctrine that should be used only in extraordinary circumstances.¹¹¹ Despite this recognition, non-bankruptcy courts regularly apply judicial estoppel to undisclosed lawsuits

¹⁰⁴ *Id.* (quoting *Edwards v. Aetna Life Ins.*, 690 F.2d 595, 599 (6th Cir. 1982)).

¹⁰⁵ *Id.* at 751.

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g.*, *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010) (applying the *Maine* factors); *Ex parte First Ala. Bank*, 883 So. 2d 1236, 1244–45 (Ala. 2003) (adopting the *Maine* factors).

¹⁰⁸ *See* WRIGHT ET AL., *supra* note 98, § 4477 ("Judicial estoppel is not so much a single doctrine as a set of doctrines that have not matured into fully coherent theory."); *see also New Hampshire*, 532 U.S. at 751 ("Additional considerations may inform the doctrine's application in specific factual contexts."). The Supreme Court noted in *New Hampshire v. Maine* that "it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.'" *Id.* at 753.

¹⁰⁹ *See infra* Part II.B–C.

¹¹⁰ *See Debtors' Counsel Beware*, *supra* note 32, at 202 (noting that when two different courts are involved, "there is room for interpretation, perhaps error, as to whether the position taken in the original court was actually, or sufficiently, adopted, so as to justify the doctrine's use").

¹¹¹ *E.g.*, *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 784 (3d Cir. 2001) ("Judicial estoppel 'is an 'extraordinary remedy' that should be employed only 'when a party's inconsistent behavior would otherwise result in a miscarriage of justice.'" . . . [J]udicial estoppel 'is often the harshest remedy' that a court can impose for inequitable conduct . . ." (citations omitted) (emphasis added)); *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996) ("Because of the harsh results attendant with precluding a party from asserting a position that would normally be available to the party, judicial estoppel must be applied with caution.").

from bankruptcy¹¹² without considering other options.¹¹³ Non-bankruptcy courts may be attracted to judicial estoppel because it offers a simple solution to a complicated legal situation.¹¹⁴ What is evident is that the use of judicial estoppel in the undisclosed lawsuit context has resulted in inequitable decisions¹¹⁵ as well as discord throughout federal and state jurisdictions.¹¹⁶

B. Federal Courts' Application of Judicial Estoppel

Every federal court of appeals that has addressed the application of judicial estoppel to an undisclosed lawsuit from bankruptcy 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.”¹¹⁷ However, the circuits split on three important issues involving judicial estoppel: the appropriate standard of review, application of the *Maine* factors, and whether state or federal law applies when sitting in diversity.

1. The Appropriate Standard of Review

To begin, the courts of appeals do not agree on the standard of review when reviewing a grant of summary judgment decided on judicial estoppel grounds.¹¹⁸ Although a grant of summary judgment is usually reviewed *de novo*,¹¹⁹ the First, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits apply the abuse

¹¹² See William H. Burgess, *Dismissing Bankruptcy-Debtor Plaintiffs' Cases on Judicial Estoppel Grounds*, FED. LAW., May 2015, at 54, 55. (“This issue—whether to judicially estop a plaintiff from continuing to prosecute a lawsuit that was not disclosed in bankruptcy—appears to arise several times each week in the federal and state courts.”); see also Christopher Klein, Lawrence Ponoroff & Sarah Borrey, *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 AM. BANKR. L.J. 839, 884 (2005) (commenting on the “beguiling lure of judicial estoppel” in the undisclosed lawsuit context and noting that “succumb[ing] to the allure of this position . . . has usually led to a dismissal of the action in a manner that contradicts the maxim that equity will not do inequity—the resulting inequity being that creditors are punished for the debtor’s omission”).

¹¹³ See, e.g., *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 474, 484 (6th Cir. 2010) (affirming the application of judicial estoppel to an undisclosed lawsuit without considering any alternatives).

¹¹⁴ See Klein, Ponoroff & Borrey, *supra* note 112, at 884.

¹¹⁵ *Id.* (noting that judicial estoppel harms innocent creditors).

¹¹⁶ See *infra* Part II.B–C.

¹¹⁷ *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010) (discussing the federal circuits’ application of judicial estoppel to undisclosed lawsuits).

¹¹⁸ See *Lia v. Saporito*, 541 F. App’x 71, 72 n.1 (2d Cir. 2013) (“[C]ircuits are split as to whether dismissal on grounds of judicial estoppel should be reviewed *de novo* . . .”), *cert. denied*, 134 S. Ct. 2305 (2014); see also *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1046 (8th Cir. 2006) (applying the abuse of discretion standard). *But see* *United States v. Hook*, 195 F.3d 299, 305 (7th Cir. 1999) (applying *de novo* standard of review).

¹¹⁹ See *Dunn v. Advanced Med. Specialties, Inc.*, 556 F. App’x 785, 788 (11th Cir. 2014) (“[A]n order granting summary judgment typically is subject to *de novo* review . . .”).

of discretion standard when reviewing a grant of summary judgment based on judicial estoppel.¹²⁰ The Second, Sixth, Seventh, and D.C. Circuits apply a de novo standard of review when reviewing a grant of summary judgment based on judicial estoppel.¹²¹

2. Applying the Maine Factors in the Undisclosed Lawsuit Context

Federal courts also disagree on how to apply the *Maine* factors. Following the Supreme Court's decision in *New Hampshire v. Maine*, federal courts began attempting to apply the factors according to the Court's instruction that the factors "do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel."¹²² Despite this explicit instruction, some federal courts apply the *Maine* factors to undisclosed lawsuits from bankruptcy in a strict, formulaic way.¹²³

The *Maine* factors are often satisfied in a typical case involving an undisclosed lawsuit.¹²⁴ The first *Maine* factor focuses on whether the debtor has taken inconsistent positions.¹²⁵ In reviewing the first factor, courts often find that factor is satisfied because the debtor failed to disclose a prepetition lawsuit.¹²⁶ In *EEOC v. CRST Van Expedited, Inc.*, the Eighth Circuit reviewed a district court's application of the *Maine* factors to a debtor's failure to disclose an employment discrimination claim.¹²⁷ The Eighth Circuit found that "[i]n the bankruptcy context, a party may be judicially estopped from asserting a cause of

¹²⁰ See *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013); *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012); *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1273 (11th Cir. 2010); *Eastman v. Union Pac. R.R.*, 493 F.3d 1151, 1156 (10th Cir. 2007); *Stallings*, 447 F.3d at 1046; *Nat'l Union Fire Ins. Co. of Pittsburgh v. Mfrs. & Traders Trust Co.*, 137 F. App'x 529, 530 (4th Cir. 2005); *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 30 (1st Cir. 2004); *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 616–17 (3d Cir. 1996).

¹²¹ See, e.g., *Lia*, 541 F. App'x at 72 n.1; *Solomon v. Vilsack*, 628 F.3d 555, 561 (D.C. Cir. 2010); *Eubanks v. CBSK Fin. Grp.*, 385 F.3d 894, 897 (6th Cir. 2004); *Hook*, 195 F.3d at 305.

¹²² *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001); see also, e.g., *Ah Quin*, 733 F.3d at 270 (applying the *Maine* factors); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 679 (8th Cir.) (applying the *Maine* factors), *reh'g denied* (8th Cir. 2012); *Robinson*, 595 F.3d at 1273 (applying the *Maine* factors).

¹²³ See *Ah Quin*, 733 F.3d at 271 ("In the bankruptcy context, the federal 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." (emphasis added)).

¹²⁴ See, e.g., *Ibok v. SIAC-Sector Inc.*, 470 F. App'x 27, 28 (2d Cir. 2012) (noting that judicial estoppel "is commonly applied in order 'to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy'"); *Love*, 677 F.3d at 261–62 (noting that that judicial estoppel is "particularly appropriate" in the undisclosed lawsuit from bankruptcy context).

¹²⁵ *New Hampshire*, 532 U.S. at 750.

¹²⁶ *CRST Van Expedited, Inc.*, 679 F.3d at 679.

¹²⁷ *Id.* at 679–80.

action’ . . . because ‘a debtor’s failure to list a claim in the mandatory bankruptcy filings is tantamount to a representation that no such claim existed.’”¹²⁸

The second *Maine* factor focuses on whether the bankruptcy court accepted the debtor’s inconsistent position.¹²⁹ Courts may find that the second factor is satisfied when a Chapter 7 debtor receives a full discharge in bankruptcy.¹³⁰ In *CRST Van Expedited, Inc.*, the Eighth Circuit found that the second factor “might be satisfied ‘where the bankruptcy court issues a “no asset” discharge,’ thereby evidencing that ‘the bankruptcy court has effectively adopted the debtor’s position.’”¹³¹

The third *Maine* factor focuses on whether the debtor gains an unfair advantage.¹³² Under this third factor, courts often conclude that not disclosing a claim in bankruptcy gives the debtor an unfair advantage over his creditors.¹³³ In *Moses v. Howard University Hospital*, the D.C. Circuit found that by filing a lawsuit “without disclosing it in his bankruptcy proceedings, [the debtor] set up a situation in which he could gain an advantage over his creditors.”¹³⁴

In addition to the *Maine* factors, federal courts may consider the debtor’s motive in concealing the claim by determining whether the debtor’s failure to disclose the lawsuit was a result of inadvertence or mistake.¹³⁵ The federal courts discuss the issue of a good-faith mistake either under the third *Maine* factor¹³⁶ or as a separate consideration.¹³⁷ In *CRST Van Expedited, Inc.*, the Eighth Circuit stressed that “a district court should not judicially estop a debtor whose prior

¹²⁸ *Id.*

¹²⁹ *New Hampshire*, 532 U.S. at 750.

¹³⁰ *E.g.*, *CRST Van Expedited, Inc.*, 679 F.3d at 679.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *E.g.*, *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 799 (D.C. Cir. 2010). The First Circuit does not require a showing of unfair advantage; however, where courts find an unfair advantage, the First Circuit considers this a strong factor in favor of applying judicial estoppel. *Guay v. Burack*, 677 F.3d 10, 16–17 (1st Cir. 2012).

¹³⁴ *Moses*, 606 F.3d at 799.

¹³⁵ *E.g.*, *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012). The Supreme Court recognized that “it may be appropriate to resist application of judicial estoppel ‘when a party’s prior position was based on inadvertence or mistake.’” *New Hampshire*, 532 U.S. at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)). Courts also discuss the debtor’s mistake in not disclosing a claim in terms of good or bad faith. *CRST Van Expedited, Inc.*, 679 F.3d at 680 (finding “no evidence of any such good-faith error or omission”).

¹³⁶ *E.g.*, *CRST Van Expedited, Inc.*, 679 F.3d at 680.

¹³⁷ *E.g.*, *Ah Quin v. Cty. of Kauai Dep’t of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013) (discussing the debtor’s inadvertence or mistake separate from the three *Maine* factors).

inconsistent position was attributable to ‘a good-faith mistake rather than as part of a scheme to mislead the court.’”¹³⁸

In addressing whether the mistake was made in good faith, some circuits apply a presumption of intentional manipulation when a debtor fails to disclose a claim in his bankruptcy case.¹³⁹ The Tenth Circuit reasoned that there is an “ever present motive to conceal legal claims and reap the financial rewards,” which “undoubtedly is why so many of the cases applying judicial estoppel involve debtors-turned-plaintiffs who have failed to disclose such claims in bankruptcy.”¹⁴⁰ The Ninth Circuit recognizes this presumption and allows a “narrow exception for good faith” when the debtor has not reopened his bankruptcy case to amend his schedules.¹⁴¹ The Fifth Circuit has similarly found that debtors have a motive to conceal because they stand to receive a windfall by not disclosing the claim in bankruptcy.¹⁴² The Tenth Circuit has agreed with this presumption and found that a debtor’s failure to disclose a claim in bankruptcy can only be deemed a mistake when the debtor has no knowledge of the claim or has no motive to conceal the claim.¹⁴³

Federal courts’ application of the *Maine* factors and other considerations often results in reducing judicial estoppel to a checklist or default rule when the

¹³⁸ *CRST Van Expedited, Inc.*, 679 F.3d at 680 (quoting *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006)) (finding that there was no evidence that the debtor’s mistake was made in good faith and holding that the district court did not abuse its discretion in judicially estopping the debtors’ claims).

¹³⁹ *E.g., Ah Quin*, 733 F.3d at 272–73 (9th Cir. 2013) (“In sum, given the strong need for full disclosure in bankruptcy proceedings and the fact that the plaintiff-debtor received an unfair advantage in the bankruptcy court, it makes sense to apply a presumption of deliberate manipulation.”); *Love*, 677 F.3d at 262; *Eastman v. Union Pac. R.R.*, 493 F.3d 1151, 1159 (10th Cir. 2007). The Ninth Circuit in *Ah Quin* distinguished the situation where the debtor had successfully reopened her bankruptcy case and amended her bankruptcy schedules because in such a situation, “two of the three primary *New Hampshire* factors are no longer met.” 733 F.3d at 274. Accordingly, when a debtor reopens her bankruptcy case and amends her schedules, the Ninth Circuit does not apply “a presumption of deceit.” *Id.* at 276 (emphasis omitted). It instead “requires an inquiry into whether the plaintiff’s bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood.” *Id.*

¹⁴⁰ *Eastman*, 493 F.3d at 1159.

¹⁴¹ *Ah Quin*, 733 F.3d at 272.

¹⁴² *Love*, 677 F.3d at 262 (“[T]he motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court. Motivation in this context is self-evident because of potential financial benefit resulting from the nondisclosure.” (quoting *Thompson v. Sanderson Farms, Inc.*, No. 3:04CV837-WHB-JCS, 2006 WL 7089989, at *4 (S.D. Miss. May 31, 2006))).

¹⁴³ *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1093–94 (10th Cir. 2013) (“[I]t was to [the debtors’] benefit to conceal the claim so that they could receive a full discharge in bankruptcy before proceeding with the lawsuit, because this would allow them to pursue an award for damages without the risk that any of the award would go to their creditors.”).

case involves an undisclosed lawsuit from bankruptcy.¹⁴⁴ Some federal courts have recognized alternatives to judicial estoppel in the undisclosed lawsuit context.¹⁴⁵ For example, in *Willless v. United States*, the Tenth Circuit found that the trustee was the real party in interest and did not dismiss the debtor-plaintiff's lawsuit on judicial estoppel grounds.¹⁴⁶ However, other federal courts continue to apply judicial estoppel without regard to possible alternatives.¹⁴⁷

Some circuits that apply judicial estoppel strictly now face dissenting opinions on this issue.¹⁴⁸ In *Robinson v. District of Columbia*, a district court within the D.C. Circuit recently recognized that “alternative mechanisms exist to more equitably protect the integrity of the bankruptcy system (and prevent undue benefit to the debtor) than the harsh rule imposed by judicial estoppel as generally construed.”¹⁴⁹ However, the Court could not adopt this approach because it was bound by precedent.¹⁵⁰ In *Robinson v. Tyson Foods*, Judge Anderson expressed concern over the Eleventh Circuit's test for judicial estoppel, fearing that the Circuit had “created an inflexible formula for ‘inadvertence’ that prevents courts from thoroughly examining all of the circumstances of a particular case.”¹⁵¹ Judge Anderson concurred in the judgment because he “believe[d] [he was] bound to do so by precedent.”¹⁵² Most

¹⁴⁴ See *Ah Quin*, 733 F.3d at 271 (9th Cir. 2013) (noting that “the federal courts have developed a basic default rule” in the undisclosed lawsuit context); see also *Lupian v. Cent. Valley Residential Builders, L.P.*, No. 10CV2270-LAB (WVG), 2014 WL 465445, at *4 (S.D. Cal. Feb. 5, 2014) (“There’s no doubt that, as a general rule, a debtor who neglects to disclose a contingent and unliquidated claim in a bankruptcy petition is judicially estopped from pursuing that claim after being discharged from bankruptcy.”); *Rivera v. JP Morgan Chase Bank (In re Rivera)*, No. 13-14351-BFK, 2014 WL 287517, at *4 (Bankr. E.D. Va. Jan. 27, 2014) (“Where a debtor fails to list a potential claim, and fails to amend her Schedules when the claim becomes known, the first three elements of judicial estoppel are generally met.”).

¹⁴⁵ See *Willless v. United States*, 560 F. App'x 762, 764 (10th Cir.) (finding that the trustee of the bankruptcy estate is the real party in interest and that the debtor lacks standing to bring the claim), *cert. denied*, 135 S. Ct. 202, *and reh'g denied*, 135 S. Ct. 746 (2014); *Gallagher v. Makowski*, No. 13-1103 (JEI/AMD), 2014 WL 1296431, at *5 (D.N.J. Mar. 28, 2014) (finding that judicial estoppel was not appropriate and that “[t]he Trustee may elect to pursue this claim or he may not,” but “[i]f the Trustee chooses to abandon the claim, then [the plaintiff] may continue to pursue the claim in her own right”).

¹⁴⁶ *Willless*, 560 F. App'x at 764.

¹⁴⁷ See, e.g., *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 474, 484 (6th Cir. 2010) (affirming the application of judicial estoppel to an undisclosed lawsuit without considering any alternatives). In *White*, Judge Clay noted “[t]he majority’s approach to this case fails to appreciate the absurdity of the result of its erroneous application of judicial estoppel.” *Id.* at 484 (Clay, J., dissenting).

¹⁴⁸ See, e.g., *supra* note 147.

¹⁴⁹ *Robinson v. District of Columbia*, 10 F. Supp. 3d 181, 190 n.9 (D.D.C. 2014).

¹⁵⁰ See *id.* (noting that the Court could not hold that reopening the bankruptcy proceeding would cure the debtor’s wrongful non-disclosure due to precedent).

¹⁵¹ *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1277 (11th Cir. 2010) (Anderson, J., concurring).

¹⁵² *Id.* at 1278 (Anderson, J., concurring).

recently, in *Slater v. U.S. Steel Corp.*, Judge Tjoflat wrote a lengthy concurrence encouraging the Eleventh Circuit to reconsider en banc its judicial estoppel doctrine in the undisclosed lawsuit context.¹⁵³

3. Choice of Law when Sitting in Diversity

The federal circuits also disagree on whether to apply state or federal judicial estoppel standards when sitting in diversity.¹⁵⁴ In cases involving an undisclosed lawsuit from bankruptcy, some cases are heard in federal court based on federal question jurisdiction,¹⁵⁵ and other cases are based on diversity jurisdiction.¹⁵⁶ The Eighth and Eleventh Circuits apply state standards of judicial estoppel when the jurisdiction of the case is based on diversity.¹⁵⁷ The Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits apply federal judicial estoppel standards when the jurisdiction of the case is based on diversity.¹⁵⁸ The First and Second Circuits have not decided whether to apply federal or state standards of judicial estoppel, but district courts in both circuits have applied federal law.¹⁵⁹

¹⁵³ *Supra* note 24 and accompanying text.

¹⁵⁴ See *G-I Holdings, Inc. v. Reliance Ins.*, 586 F.3d 247, 261 (3d Cir. 2009) (applying federal judicial estoppel standards in a diversity case); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 602–04 (9th Cir. 1996) (discussing whether federal circuits apply state or federal judicial estoppel standards in a diversity case); *Monterey Dev. Corp. v. Lawyer’s Title Ins.*, 4 F.3d 605, 608 (8th Cir. 1993) (applying state judicial estoppel standards in a diversity case).

¹⁵⁵ See, e.g., *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 664 (8th Cir. 2012) (hearing a claim arising under federal law).

¹⁵⁶ See, e.g., *G-I Holdings, Inc.*, 586 F.3d at 253 (“The District Court had diversity jurisdiction pursuant to 28 U.S.C. § 1332 . . .”).

¹⁵⁷ *E.g.*, *Spencer v. Annett Holdings, Inc.*, 757 F.3d 790, 797 (8th Cir. 2014); *Original Appalachian Artworks, Inc. v. S. Diamond Assocs.*, 44 F.3d 925, 930 (11th Cir. 1995).

¹⁵⁸ *E.g.*, *Watkins v. Bailey*, 484 F. App’x 18, 20 n.1 (6th Cir. 2012); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 797–98 (D.C. Cir. 2010); *G-I Holdings, Inc.*, 586 F.3d at 261; *Eastman v. Union Pac. R.R.*, 493 F.3d 1151, 1156 (10th Cir. 2007); *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 914 (7th Cir. 2005); *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 395 (5th Cir. 2003); *Rissetto*, 94 F.3d at 603–04; *Guinness PLC v. Ward*, 955 F.2d 875, 899 n.20 (4th Cir. 1992).

¹⁵⁹ See, e.g., *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 32 (1st Cir. 2004). In *Alternative Sys. Concepts*, the First Circuit applied federal standards of judicial estoppel because the parties agreed about what law to apply, but also noted that it “would likely reach this same conclusion even without the parties’ acquiescent behavior.” *Id.* The First Circuit noted that “[i]t has long been held that federal courts may bypass conflicting state rules of decision in favor of federal standards when positive considerations, such as the presence of a strong federal policy, militate in favor of employing federal standards.” *Id.* District courts in the Second Circuit have applied federal judicial estoppel law under the impression that the Second Circuit Court of Appeals had previously ruled on the matter. See, e.g., *Laskowski v. Liberty Mut. Fire Ins.*, No. 5:11-CV-340 (GLS/ATB), 2012 WL 2120089, at *3 n.6 (N.D.N.Y. June 11, 2012) (citing *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber*, 407 F.3d 34, 45 (2d Cir. 2005)) (finding that the Second Circuit “has endorsed the application of the federal judicial estoppel doctrine to diversity cases”).

The circuits that apply federal law often do so because judicial estoppel is meant to protect the integrity of the judicial system, and “federal courts must be free to develop principles that most adequately serve their institutional interests.”¹⁶⁰ The circuits applying federal law also find that “the interests of the second court are uniquely implicated and threatened by the taking of an incompatible position,” which is “quite [a] strong ‘affirmative countervailing consideration’ of federal policy weighing in favor of the application of federal law.”¹⁶¹ When a federal court sitting in diversity applies judicial estoppel in the undisclosed lawsuit context, federal policies weigh heavily in favor of applying federal law because both courts implicated in the analysis are federal.¹⁶²

Although federal courts that apply federal law have supported their position, the circuits that apply state law have done so without much explanation.¹⁶³ The Eighth Circuit first applied state judicial estoppel standards in *Monterey Development Corp. v. Lawyer’s Title Insurance*, finding that because the court was sitting in diversity, “[it] must apply the substantive law of Missouri.”¹⁶⁴ The Eighth Circuit continues to follow its precedent in *Monterey Development Corp.* without elaborating on its decision to use state judicial estoppel standards.¹⁶⁵ In the Eleventh Circuit, the application of state law judicial estoppel standards has

¹⁶⁰ *Edwards v. Aetna Life Ins.*, 690 F.2d 595, 598 n.4 (6th Cir.1982); *see also* *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 n.2 (3d Cir. 1996) (“A federal court’s ability to protect itself from manipulation by litigants should not vary according to the law of the state in which the underlying dispute arose.”).

¹⁶¹ *Rissetto*, 94 F.3d at 604 (quoting *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958)). The federal court “is the court where the judicial estoppel defense arises” and also “the court interested in protecting its process.” *Eastman*, 493 F.3d at 1156.

¹⁶² *See Alternative Sys. Concepts, Inc.*, 374 F.3d at 32 (“Where . . . both the putatively estopping conduct and the putatively estopped conduct occur in a federal case, a federal court has a powerful institutional interest in applying federally-developed principles to protect itself against cynical manipulations.”); *Hall*, 327 F.3d at 395–96 (“[T]he application of federal law concerning judicial estoppel is appropriate in this case because both suits filed by Hall ended up in federal court and it is the federal court that is subject to manipulation and in need of protection.”).

¹⁶³ *See Original Appalachian Artworks, Inc. v. S. Diamond Assocs.*, 44 F.3d 925, 930 (11th Cir. 1995) (stating without explanation that when sitting in diversity, “the application of the doctrine of judicial estoppel is governed by state law”); *Monterey Dev. Corp. v. Lawyer’s Title Ins.*, 4 F.3d 605, 608 (8th Cir. 1993).

¹⁶⁴ *See Monterey Dev. Corp.*, 4 F.3d at 608.

¹⁶⁵ *See Occidental Fire & Cas. Co. v. Soczynski*, 765 F.3d 931, 935 n.3 (8th Cir. 2014) (citing *Monterey Dev. Corp.*, 4 F.3d at 608–09) (“Courts in our circuit are bound to apply state law elements of judicial estoppel in a diversity case.”); *Spencer v. Annett Holdings, Inc.*, 757 F.3d 790, 797 (8th Cir. 2014) (citing *Monterey Dev. Corp.*, 4 F.3d at 608–09) (finding that the Eighth Circuit’s “precedent calls for the application of state law elements of judicial estoppel in diversity cases”).

caused even more confusion because Georgia state courts find that federal law governs when applying judicial estoppel in the undisclosed lawsuit context.¹⁶⁶

C. State Courts' Application of Judicial Estoppel

The application of judicial estoppel to undisclosed lawsuits from bankruptcy has become more popular in state courts over the past fifteen years. Before 2001, courts in twenty-five states had applied judicial estoppel in the undisclosed lawsuit context.¹⁶⁷ Since 2001, thirteen additional states and the District of Columbia have applied judicial estoppel in this context.¹⁶⁸ Despite the growing popularity, Vermont state courts do not recognize the doctrine of judicial estoppel in any context.¹⁶⁹ This section first discusses the varying judicial estoppel doctrines adopted by state courts and the choice of law issue in the undisclosed lawsuit context. It then analyzes the jurisdictional issue that arises if the debtor-plaintiff's bankruptcy case is pending.

1. Judicial Estoppel and Choice of Law

Although most state courts have their own doctrine of judicial estoppel,¹⁷⁰ many of those state courts' judicial estoppel doctrines are informed by federal

¹⁶⁶ See *Thompson v. Quarles*, 392 B.R. 517, 526 n.10 (S.D. Ga. 2008). In *Thompson*, the District Court for the Southern District of Georgia noted that it was "in something of a legal quandary regarding the application of the judicial estoppel doctrine" because "in cases involving debtors with unscheduled causes of action, the Georgia state courts take the view that judicial estoppel is a federal doctrine." *Id.*

¹⁶⁷ See *Debtors' Counsel Beware*, *supra* note 32, at 228–42 (surveying state courts' application of judicial estoppel).

¹⁶⁸ See *Verde Valley Plaza, LLC v. Stoneking*, No. 1 CA-CV 14-0160, 2015 WL 5084111, at *4 (Ariz. Ct. App. Aug. 27, 2015); *Dupwe v. Wallace*, 140 S.W.3d 464, 471 (Ark. 2004); *Darden v. New Castle Motors, Inc.*, No. CV N12C-01-219 FSS, 2014 WL 1392969, at *1 (Del. Super. Ct. Mar. 27, 2014), *aff'd*, 103 A.3d 515 (Del. 2014); *Atkins v. 4940 Wisconsin, LLC*, 93 A.3d 1286, 1291 (D.C. 2014); *A & J Constr. Co. v. Wood*, 116 P.3d 12, 18 (Idaho 2005); *Miller v. Conagra, Inc.*, 991 So. 2d 445, 452 (La. 2008); *Spohn v. Van Dyke Pub. Sch.*, 822 N.W.2d 239, 252 (Mich. Ct. App. 2012); *Kirk v. Pope*, 973 So. 2d 981, 992 (Miss. 2007); *Strable v. Union Pac. R.R.*, 396 S.W.3d 417, 423 (Mo. Ct. App. 2013); *Pack v. Ryan*, 238 P.3d 844 (Nev. 2008); *Marquez v. Drew*, No. A-0171-08T2, 2009 WL 3460682, at *1 (N.J. Super. Ct. App. Div. Oct. 21, 2009); *Something More, LLC v. Weatherford News, Inc.*, 310 P.3d 1106, 1108 (Okla. Civ. App.), *reh'g denied* (Okla. Civ. App. 2013); *Bentley Funding Grp. v. SK & R Grp.*, 609 S.E.2d 49, 54 (Va. 2005); *Omegbu v. Nicholson*, 698 N.W.2d 132, ¶ 12, (Wis. 2005).

¹⁶⁹ See *supra* note 11.

¹⁷⁰ See, e.g., *Dupwe*, 140 S.W.3d at 471. After a detailed discussion of the doctrine of judicial estoppel, the Supreme Court of Arkansas found that the doctrine was "merely a continuation of existing law previously set out under the doctrine against inconsistent positions." *Id.*

law.¹⁷¹ For example, in *Ex parte First Alabama Bank*, the Supreme Court of Alabama “embrace[d] the factors set forth in *New Hampshire v. Maine* and join[ed] the mainstream of jurisprudence in dealing with the doctrine of judicial estoppel.”¹⁷²

Most state courts apply their state law doctrine of judicial estoppel in the undisclosed lawsuit context.¹⁷³ When state courts apply judicial estoppel to federal claims, they confront similar issues that federal courts face when sitting in diversity and handling state law claims.¹⁷⁴ Like the majority of federal circuits, the Supreme Court of Alabama found that state law should govern because “[t]he primary purpose of the doctrine of judicial estoppel is to protect the integrity of [the state’s] judicial system.”¹⁷⁵ Only five state courts have explicitly applied federal law in the undisclosed lawsuit context.¹⁷⁶

2. Jurisdictional Issue in the Undisclosed Lawsuit Context

A potential issue with state courts applying judicial estoppel in the undisclosed lawsuit context is one of jurisdiction.¹⁷⁷ Under 28 U.S.C. § 1334(e)(1), the federal district court and, by referral, the bankruptcy court, have exclusive jurisdiction over property of the debtor and property of the

¹⁷¹ See *Vincent v. First Ala. Bank (Ex parte First Ala. Bank)*, 883 So. 2d 1236, 1244 (Ala. 2003) (applying the *Maine* factors); see also *Ass’n Res., Inc. v. Wall*, 2 A.3d 873, 890–91 (Conn. 2010) (turning “for guidance to the significant body of federal case law addressing this doctrine”).

¹⁷² *Ex parte First Ala. Bank*, 883 So. 2d at 1246.

¹⁷³ See, e.g., *Verde Valley Plaza, LLC*, 2015 WL 5084111, at *4 (applying the Arizona judicial estoppel doctrine in the undisclosed lawsuit context); *Gottlieb v. Kest*, 46 Cal. Rptr. 3d 7, 19 (Cal Ct. App.) (applying the California judicial estoppel doctrine in the omitted asset context), *review denied* (Cal. 2006).

¹⁷⁴ See *Middleton v. Caterpillar Indus.*, 979 So. 2d 53, 58 (Ala. 2007). The Supreme Court of Alabama noted that “[t]he issue whether the doctrine of judicial estoppel is substantive or procedural in nature has arisen most often in cases where federal courts have applied state law under the *Erie* doctrine.” *Id.*

¹⁷⁵ *Id.* at 60.

¹⁷⁶ See *IBF Participating Income Fund v. Dillard-Winecoff, LLC*, 573 S.E.2d 58, 59 (Ga. 2002) (“Georgia appellate courts historically have striven to apply the ‘federal’ doctrine of judicial estoppel, in an effort ‘to afford the judgment of the bankruptcy court the same effect here as would result in the court where that judgment was rendered.’” (quoting *Southmark Corp. v. Trotter, Smith & Jacobs*, 442 S.E.2d 265, 266 (Ga. Ct. App. 1994))); *Miller v. Conagra, Inc.*, 991 So. 2d 445, 452 (La. 2008); *Kirk v. Pope*, 973 So. 2d 981, 991 (Miss. 2007); *Dallas Sales Co. v. Carlisle Silver Co.*, 134 S.W.3d 928, 931 (Tex. App. 2004) (“[T]he federal law of judicial estoppel applies in a case in which the prior proceeding was in federal bankruptcy court.”); *Omegbu v. Nicholson*, 698 N.W.2d 132, ¶ 11 (Wis. 2005) (“[B]ecause the argument for judicial estoppel arose in the context of Omegbu’s bankruptcy petition, federal law presumably applies.”).

¹⁷⁷ See *Debtors’ Counsel Beware*, *supra* note 32, at 215 (“[S]tate court practices raise a question regarding whether those state courts strictly applying judicial estoppel have the authority to determine whether a claim of the debtor is property of the bankruptcy estate. Although determinations of estate property often turn upon state law issues, typically it is the bankruptcy court that decides what comprises property of the bankruptcy estate.” (footnote omitted)).

estate.¹⁷⁸ Although “[s]tate law normally determines the extent of the debtor’s interest in property[;] . . . [b]ankruptcy law determines whether that interest is property of the estate.”¹⁷⁹ When courts apply judicial estoppel in the undisclosed lawsuit context, their application of the doctrine is predicated on the fact that the undisclosed lawsuit is property of the estate.¹⁸⁰ In the event that the debtor’s bankruptcy case is still pending or has been reopened, the state court lacks subject matter jurisdiction to determine whether a claim is property of a bankruptcy estate.¹⁸¹ Moreover, if a bankruptcy case is open or pending, state courts lack jurisdiction over assets that are property of the estate; therefore, state courts may not dismiss a lawsuit that is property of the estate on any ground—including judicial estoppel.¹⁸²

III. ALTERNATIVES TO JUDICIAL ESTOPPEL

Non-bankruptcy courts do not always turn to judicial estoppel in the undisclosed lawsuit context. This Part considers alternative approaches to judicial estoppel in the undisclosed lawsuit context and how they may create the same inequitable results as judicial estoppel. First, this Part discusses the issue of a debtor-plaintiff’s lack of standing to pursue a lawsuit not disclosed in bankruptcy. This Part then explores the option of reopening a debtor-plaintiff’s bankruptcy case to amend her bankruptcy schedules.

¹⁷⁸ See 28 U.S.C. § 1334(e)(1) (2012) (“The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate”); *Probulk Inc. v. North of Eng. Protecting & Indem. Ass’n* (*In re Probulk Inc.*), 407 B.R. 56, 61 (Bankr. S.D.N.Y. 2009) (discussing the scope of 28 U.S.C. § 1334(e)(1)).

¹⁷⁹ *Winick & Rich, P.C. v. Strada Design Assocs.* (*In re Strada Design Assocs.*), 326 B.R. 229, 235 (Bankr. S.D.N.Y. 2005) (citations omitted); see also *Coben v. Lebrun* (*In re Golden Plan of Cal., Inc.*), 37 B.R. 167, 169 (Bankr. E.D. Cal. 1984) (“[F]ederal bankruptcy law dictates if the interest is property of the estate.”).

¹⁸⁰ See, e.g., *Haley v. Dow Lewis Motors, Inc.*, 85 Cal. Rptr. 2d 352, 358 (Cal. Ct. App. 1999) (considering whether the undisclosed lawsuit was property of the estate before applying judicial estoppel).

¹⁸¹ See *John Knox Vill. v. Fortis Constr. Co.*, 449 S.W.3d 68, 75 (Mo. Ct. App.), *reh’g denied, transfer denied* (Mo. Ct. App. 2014). In *John Knox Village*, the appellants asked a Missouri court of appeals to determine that the appellee’s claim was property of a bankruptcy estate. *Id.* The court found that it had “no authority to make such a finding” because “the bankruptcy court ‘has exclusive jurisdiction to decide whether certain property is property of the bankruptcy estate.’” *Id.* (quoting *True v. True* (*In re True*), 285 B.R. 405, 412 (Bankr. W.D. Mo. 2002) (emphasis omitted)).

¹⁸² See 28 U.S.C. § 1334(e)(1) (granting federal courts “exclusive jurisdiction” over property of the estate); see also *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 698 (Mo. 2010) (en banc) (“[N]o state . . . can grant subject matter jurisdiction to its courts to hear matters that federal law places under the ‘exclusive’ jurisdiction of the federal courts.”).

A. *The Debtor Is Not the Real Party in Interest*

Standing “is the threshold question in every federal case, determining the power of the court to entertain the suit.”¹⁸³ Standing is a jurisdictional requirement that can be reviewed at any time throughout the litigation of a claim.¹⁸⁴ To meet this requirement, a plaintiff “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”¹⁸⁵ Related to standing is the question of who may bring a lawsuit in federal court. Federal Rule of Civil Procedure 17(a) provides that “[a]n action must be prosecuted in the name of the real party in interest.”¹⁸⁶ In this context, some courts have concluded that the Chapter 7 trustee, not the debtor-plaintiff, is the real party in interest.¹⁸⁷ Defendants have argued for dismissal under both the judicial estoppel doctrine and the debtor-plaintiff’s lack of standing.¹⁸⁸

The Chapter 7 trustee is the real party in interest in the undisclosed lawsuit context. Section 541 of the Bankruptcy Code provides that nearly all of a debtor’s prepetition assets vest in the bankruptcy estate as of the commencement of a case.¹⁸⁹ Any undisclosed lawsuit becomes part of the bankruptcy estate and remains a part of the bankruptcy estate post-bankruptcy.¹⁹⁰ When an asset becomes part of the bankruptcy estate, the debtor no longer has rights in that asset unless the asset is abandoned under § 554 of the Bankruptcy Code or the case is dismissed.¹⁹¹ Section 323 of the Bankruptcy Code confers upon the trustee, as “the representative of the estate,”¹⁹² the power “to sue and be sued.”¹⁹³ Thus, the debtor is not the real party in interest to pursue an undisclosed

¹⁸³ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

¹⁸⁴ *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994).

¹⁸⁵ *Warth*, 422 U.S. at 499.

¹⁸⁶ FED. R. CIV. P. 17(a).

¹⁸⁷ *E.g.*, *Parker v. Wendy’s Int’l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004).

¹⁸⁸ *See, e.g.*, *Longaker v. Boston Sci. Corp.*, 715 F.3d 658, 660 (8th Cir. 2013) (“Boston Scientific moved to dismiss Longaker’s complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), arguing that Longaker lacked standing to bring either claim, [and] that judicial estoppel barred the breach of contract claim . . .”).

¹⁸⁹ *See Parker*, 365 F.3d at 1272 (“Section 541 of the Bankruptcy Code provides that virtually all of a debtor’s assets, both tangible and intangible, vest in the bankruptcy estate upon the filing of a bankruptcy petition.”).

¹⁹⁰ *See supra* notes 43–46 and accompanying text.

¹⁹¹ *See supra* notes 44–45 and accompanying text.

¹⁹² 11 U.S.C. § 323(a) (2012).

¹⁹³ 11 U.S.C. § 323(b).

lawsuit¹⁹⁴ because the trustee “is the proper party in interest, and is the only party with standing to prosecute causes of action belonging to the estate.”¹⁹⁵

Under this rationale, courts have determined that the debtor-plaintiff “lacks standing” to bring the lawsuit¹⁹⁶ and dismissal for lack of subject matter jurisdiction is the appropriate solution.¹⁹⁷ Because courts have characterized this dismissal as a dismissal for lack of standing,¹⁹⁸ courts have also overlooked the inherent protection of Federal Rule 17 in preventing dismissal of the claim if the real party in interest has not been given an opportunity to intervene.¹⁹⁹ Federal Rule 17(a)(3) provides that a “court *may not dismiss an action* for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.”²⁰⁰ Where a debtor-plaintiff’s bankruptcy case has been closed, the debtor must move the bankruptcy court to reopen her bankruptcy case and then request that the court appoint a trustee who could then intervene in the lawsuit. However, if the non-bankruptcy court dismisses the action before the debtor-plaintiff can petition the bankruptcy court, the debtor-plaintiff may never return to the bankruptcy court.

Even where a non-bankruptcy court determines that the debtor-plaintiff has standing but is not the real party in interest, the court may use its discretion to dismiss the case without substituting the real party in interest. In *Feist v. Consolidated Freightways*, the District Court for the Eastern District of Pennsylvania recognized that the debtor-plaintiff had standing, but was not the

¹⁹⁴ *Parker*, 365 F.3d at 1272 (“Generally speaking, a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it.”); Klein, Ponoroff & Borrey, *supra* note 112, at 884 (“[T]he real problem is that the debtor is not the real party in interest and lacks standing to prosecute an action that is property of the estate.”).

¹⁹⁵ *Parker*, 365 F.3d at 1272.

¹⁹⁶ *E.g., id.*

¹⁹⁷ *See, e.g., Longaker v. Boston Sci. Corp.*, 715 F.3d 658, 659–60, 663 (8th Cir. 2013) (affirming the district court’s dismissal of the debtor-plaintiff’s claim under Federal Rule 12(b)(1) on the ground that the debtor-plaintiff lacked standing).

¹⁹⁸ There is disagreement as to whether the issue is the debtor-plaintiff’s standing. In *Longaker*, Judge Bye dissented, finding that the majority opinion’s conclusion regarding the debtor-plaintiff’s standing “erroneously conflates standing with the validity of Longaker’s cause of action.” *Id.* at 664 (Bye, J., concurring in part and dissenting in part). Judge Bye would have found that the debtor-plaintiff adequately “show[ed] an ‘injury in fact’ that is ‘fairly . . . trace[able] to the challenged action of the defendant’ and likely to be ‘redressed by a favorable decision.’” *Id.* at 663 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). If the debtor-plaintiff has standing but is not the real party in interest, the appropriate action by the non-bankruptcy court would be following Federal Rule 17(a)(3). *See* FED. R. CIV. P. 17(a)(3).

¹⁹⁹ *See, e.g., Longaker*, 715 F.3d 658.

²⁰⁰ FED. R. CIV. P. 17(a)(3) (emphasis added).

real party in interest under Federal Rule 17.²⁰¹ Before substituting the real party in interest (the Chapter 7 trustee), the court found that it should consider the debtor-plaintiff's good faith in filing the lawsuit.²⁰² Even after the trustee argued that the creditors would be the ones to suffer from a dismissal,²⁰³ the court found that it should dismiss the lawsuit due to the debtor-plaintiff's failure to prove that not disclosing his lawsuit in his bankruptcy case was an honest mistake.²⁰⁴ The actions of this district court further highlight non-bankruptcy courts' misguided reliance on debtor-plaintiffs' good faith at the expense of the bankruptcy system's goal of ensuring a fair distribution of a debtor's assets to creditors.²⁰⁵

Dismissing a debtor-plaintiff's lawsuit because she lacks standing or is not the real party in interest can have the same harsh and inequitable outcome as applying judicial estoppel.²⁰⁶ The harsh outcome clearly results where the trustee is not permitted to intervene. It also results where the bankruptcy court does not receive notice regarding the undisclosed lawsuit. If the bankruptcy court is unaware of the lawsuit, the court cannot appoint a trustee to pursue the lawsuit for the benefit of the creditors.²⁰⁷ This issue of notice is also relevant when a non-bankruptcy court dismisses a debtor-plaintiff's lawsuit based on judicial estoppel. The debtor-plaintiff may not see the incentive of providing notice to the bankruptcy court or petitioning the bankruptcy court to reopen the bankruptcy case because the bankruptcy court could prevent her from receiving

²⁰¹ 100 F. Supp. 2d 273, 275 (E.D. Pa. 1999), *aff'd*, 216 F.3d 1075 (3d Cir. 2000).

²⁰² *See id.* at 276 ("If Plaintiff did not make an honest and understandable mistake when he filed this action in his own name, this Court will not allow substitution of the real party in interest.")

²⁰³ *See id.* at 280 ("[I]f substitution is not permitted in this case, it is Plaintiff's creditors who will suffer most, as they received nothing during his original bankruptcy case and could receive nothing now.")

²⁰⁴ *Id.*

²⁰⁵ *Id.* ("This Court will not come to the aid of a plaintiff under circumstances such as this where plaintiff cannot prove that his prior actions were done in good faith."). In balancing the interests of the creditors with the court's interest in preventing the debtor-plaintiff from benefitting from his bad faith actions, the court found that the interest of the "creditors in recovering some of the debts owed to them is not sufficient to justify substitution of the bankruptcy trustee as the real party in interest in this case." *Id.*

²⁰⁶ *See supra* Part II.B.

²⁰⁷ *See infra* note 217 and accompanying text. Another issue that arises is whether a non-bankruptcy court could also estop the trustee from bringing the claim. The federal courts of appeals are split on this issue. *Compare* Reed v. City of Arlington, 650 F.3d 571, 579 (5th Cir. 2011) ("[A]n innocent bankruptcy trustee may pursue for the benefit of creditors a judgment or cause of action that the debtor—having concealed that asset during bankruptcy—is himself estopped from pursuing."), *with* Barger v. City of Cartersville, 348 F.3d 1289, 1293 (11th Cir. 2003) (allowing the trustee to replace the debtor-plaintiff as the real party in interest, but still estopping the monetary claims).

any of the monetary benefit.²⁰⁸ Moreover, a debtor petitioning to reopen her bankruptcy case must consider other possible negative consequences. For failing to disclose a potential lawsuit in bankruptcy, the bankruptcy court can sanction the debtor²⁰⁹ or revoke the debtor's discharge.²¹⁰ Thus, the debtor-plaintiff may not voluntarily return to the bankruptcy court in either context, harming the creditors and disrupting the functions of the bankruptcy court.²¹¹

B. Reopening the Debtor's Bankruptcy Case

Despite the potential negative consequences, some debtor-plaintiffs petition the bankruptcy court to reopen the bankruptcy case²¹² and thereby request that the court appoint a new trustee.²¹³ The debtor-plaintiffs then seek to have the trustee intervene in the lawsuit.²¹⁴

Bankruptcy courts have discretion to reopen a bankruptcy case.²¹⁵ After an estate has been fully administered, the court discharges the trustee and closes the case.²¹⁶ After the court closes a case, the case may be reopened in the same court to "administer assets, to accord relief to the debtor, or for other cause."²¹⁷

²⁰⁸ See *Lopez v. Specialty Rests. Corp. (In re Lopez)*, 283 B.R. 22, 30 (B.A.P. 9th Cir. 2002) ("If a debtor shows bad faith, or if third parties are prejudiced by nondisclosure of an asset, then the bankruptcy court can exercise its discretion to disallow any claimed exemption in the asset, in whole or in part."). At least one court has found that the issue of whether a debtor-plaintiff's "damages should be limited to the amount owed to his creditors in his bankruptcy case is an issue within the jurisdiction of the bankruptcy court." *Korti v. A.W. Holdings, LLC*, No. 1:13-CV-63, 2014 WL 793360, at *6 (N.D. Ind. Feb. 26, 2014).

²⁰⁹ See *Travelers Indem. Co. v. Griner (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 . . .").

²¹⁰ See 11 U.S.C. § 727(d)(2) (2012) ("[T]he court shall revoke a discharge . . . if . . . the debtor acquired property that is property of the estate . . . and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee . . .").

²¹¹ See *infra* Part IV.A.

²¹² See, e.g., *Barger*, 348 F.3d at 1291-92 (discussing the actions of a debtor-plaintiff who moved to reopen her bankruptcy case after the defendant in the lawsuit raised the judicial estoppel defense).

²¹³ See, e.g., *In re Lopez*, 283 B.R. at 32 ("If the purpose of the reopening is to deal with unsecured assets as property of the estate, then it is per se an abuse of discretion not to order appointment of a trustee").

²¹⁴ See, e.g., *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1270 (11th Cir. 2004) ("[The trustee] moved to intervene in this case or, alternatively, for substitution as the real party in interest").

²¹⁵ See *Debtors' Counsel Beware*, *supra* note 32, at 206 ("Reopening of closed cases is discretionary with the bankruptcy court . . ."); see also 11 U.S.C. § 350(b) (2012) ("A case may be reopened in the court in which such case was closed . . .").

²¹⁶ See 11 U.S.C. § 350(a) ("After an estate is fully administered and the court has discharged the trustee, the court shall close the case.").

²¹⁷ 11 U.S.C. § 350(b); see also FED. R. BANKR. P. 5010 ("A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.").

Because reopening a bankruptcy case is discretionary, some courts may consider the debtor's failure to schedule a potential lawsuit as bad faith and deny the request.²¹⁸ The bankruptcy court may also consider whether the creditors would benefit by reopening the bankruptcy case and pursuing the lawsuit.²¹⁹ In *In re Maloy*, the bankruptcy court denied a debtor's motion to reopen his bankruptcy case because the debtor's exemption claim likely exceeded the value of the lawsuit, leaving no benefit for the creditors.²²⁰ Alternatively, some courts find that reopening the bankruptcy case to administer an asset is required "where 'assets of such probability, administrability, and substance' appear to exist as to make it unreasonable under all the circumstances for the court not to deal with them."²²¹

Allowing the debtor to reopen her bankruptcy case does not prevent the court hearing her lawsuit from applying judicial estoppel, regardless of the disposition of the bankruptcy case.²²² In *Barger v. City of Cartersville*, the district court dismissed Barger's lawsuit on grounds of judicial estoppel.²²³ One week prior to the district court's order, Barger had successfully reopened her bankruptcy case.²²⁴ One week after the district court's order, the bankruptcy court issued a written order finding that Barger's failure to disclose the lawsuit "was caused by her bankruptcy attorney's 'inadvertence' and had no substantive effect on the bankruptcy petition."²²⁵ On appeal, the Eleventh Circuit found that Barger's failure to disclose the lawsuit "could not in any event be considered

²¹⁸ See *In re Lopez*, 283 B.R. at 25. The bankruptcy court in *In re Lopez* denied the debtor's motion to reopen and on appeal, the Appellate Panel found that the court "appeared to be motivated in part by a desire to sanction [the debtor] for not previously disclosing the Action." *Id.* at 29. The Appellate Panel found that although a motion to reopen is addressed to the sound discretion of the bankruptcy court, "the court has the duty to reopen an estate whenever prima facie proof is made that it has not been fully administered." *Id.* at 27 (quoting *Kozman v. Herzig (In re Herzig)*, 96 B.R. 264, 266 (B.A.P. 9th Cir. 1989)).

²¹⁹ See *In re Lopez*, 283 B.R. at 29 (noting that situations may exist where creditors would not benefit from the reopening of a bankruptcy case).

²²⁰ See *In re Maloy*, 195 B.R. 517, 521 (Bankr. M.D. Ga. 1996) (denying the debtor's motion to reopen the bankruptcy case).

²²¹ *In re Lopez*, 283 B.R. at 27 (quoting *In re Herzig*, 96 B.R. at 266); see also *In re Maloy*, 195 B.R. at 521 (concluding that the debtor should be allowed "to continue his claim in the District Court, subject to encumbrances, if any, which might have attached as a result of his failure to timely list the asset during the pendency of the bankruptcy case").

²²² See, e.g., *Barger v. City of Cartersville*, 348 F.3d 1289, 1292 (11th Cir. 2003) (where reopening the bankruptcy case did not preclude the district court from applying judicial estoppel to the debtor's lawsuit).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

inadvertent”²²⁶ and affirmed the district court’s order estopping the debtor-plaintiff’s claims for money damages.²²⁷ Not only does *Barger* illustrate the inequity caused by judicial estoppel with regard to the debtor-plaintiff and the debtor-plaintiff’s creditors, it also demonstrates judicial estoppel’s failure to protect the bankruptcy court’s interests.

IV. AN EQUITABLE FRAMEWORK BASED ON THE BANKRUPTCY CODE

As early as 1905, the U.S. Supreme Court recognized that in dealing with undisclosed assets from bankruptcy, the proper framework requires a consideration of equitable concerns from the standpoint of the courts, the debtor, and the creditors.²²⁸ The proper framework also requires a holistic incorporation of the Bankruptcy Code’s fundamental provisions. This Part first discusses how judicial estoppel has failed to address these concerns. This Part concludes with a proposed framework that acts in accordance with the Bankruptcy Code and equitable considerations.

A. *Application of Judicial Estoppel Thwarts the Goals of Judicial Estoppel and the Bankruptcy System*

One of the goals of the bankruptcy system is ensuring a fair distribution of the debtor’s assets for the benefit of creditors.²²⁹ When courts use judicial estoppel to dismiss a debtor-plaintiff’s lawsuit, the debtor-plaintiff is not the

²²⁶ *Id.* at 1295. Ignoring the potential benefit to the bankruptcy estate and the creditors, the court in *Barger* instead focused on punishing the debtor-plaintiff. The court reiterated its reasoning from a previous case, finding that allowing the debtor-plaintiff to reopen her bankruptcy case “suggests that a debtor should consider disclosing potential assets only if he is caught concealing them,” and “would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtor’s assets.” *Id.* at 1297 (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002)).

²²⁷ *Id.* at 1297. Although the court in *Barger* allowed the debtor-plaintiff to proceed on her injunctive relief claims, *id.*, estopping the claims for money damages that could potentially benefit the bankruptcy estate is what ultimately harms creditors and the bankruptcy system.

²²⁸ See *First Nat’l Bank of Jacksboro v. Lasater*, 196 U.S. 115, 119 (1905) (“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 (as certainly this claim was, according to the judgment below) 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.”).

²²⁹ See Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 413–15 (2005) (discussing the equality principle as a goal of bankruptcy that “accords procedural relief to creditors in the form of an orderly, collective process that administers the assets of a debtor to its creditors as a response to the common pool problem that arises when a debtor has insufficient assets to repay his or her debts”).

only affected party; any creditor who is not paid in full in the debtor-plaintiff's bankruptcy case is harmed by the initial failure to schedule the lawsuit and further harmed by the non-bankruptcy court's decision to estop the debtor's lawsuit if that lawsuit could have been pursued to benefit the creditors.²³⁰ This is true regardless of whether the debtor-plaintiff's failure to schedule the lawsuit was intentional or inadvertent.²³¹ In *Love v. Tyson Foods, Inc.*, even though the Fifth Circuit acknowledged that "the effect of judicial estoppel on creditors is a consideration that could discourage courts from applying the doctrine," the court upheld the district court's decision applying judicial estoppel to an undisclosed lawsuit.²³² The optimal course of action would allow a newly appointed trustee to weigh the considerations and decide whether to pursue the claim for the benefit of creditors or abandon the claim to the debtor.²³³

Due to the nature of the undisclosed lawsuit situation, the judicial estoppel defense arises in both federal and state courts.²³⁴ This fact is not unique to this context; however, the lack of uniformity is a more important problem because all undisclosed lawsuits subject to judicial estoppel arise out of bankruptcy cases.²³⁵ Congress granted the federal district courts original and exclusive jurisdiction over all bankruptcy cases.²³⁶ Congress went even further to grant federal courts exclusive jurisdiction over all the property of the debtor and property of the estate.²³⁷ However, state and federal courts have both been deciding judicial estoppel cases that involve an undisclosed lawsuit from a

²³⁰ See *Lopez v. Specialty Rests. Corp. (In re Lopez)*, 283 B.R. 22, 28 (B.A.P. 9th Cir. 2002) ("[I]f the Action has any value then creditors stand to benefit . . .").

²³¹ See *In re Dewberry*, 266 B.R. 916, 921 (Bankr. S.D. Ga. 2001) ("[W]hen reopening of the case is sought for the purpose of administering a previously undisclosed asset, the question of debtor's good faith is irrelevant.").

²³² 677 F.3d 258, 266 (5th Cir. 2012).

²³³ See *In re Lopez*, 283 B.R. at 28. In *In re Lopez*, the Bankruptcy Appellate Panel found that "[i]f the [bankruptcy] case is reopened a chapter 7 trustee can be appointed, investigate whether the Action has value, and then prosecute it, settle it, abandon it, or arrange for [the debtor] to prosecute it in exchange for the estate receiving a share of the proceeds." *Id.* Moreover, "[t]he chapter 7 trustee can also notify creditors to file claims if it appears the estate may have any assets, and can make distributions on those claims out of any eventual recovery." *Id.*

²³⁴ See *supra* Part II.B–C.

²³⁵ See *MSR Expl., Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 915 (9th Cir. 1996) ("It is true that in many circumstances state courts can, and do, resolve questions of federal law 'with no difficulty.' Nevertheless, the unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone." (citation omitted)); see also *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929) ("The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount.").

²³⁶ See *supra* note 83 and accompanying text.

²³⁷ See *supra* note 83 and accompanying text.

debtor's bankruptcy case.²³⁸ This issue is problematic at the most fundamental level because all federal courts recognize the same doctrine of judicial estoppel,²³⁹ but not all states apply the same doctrine.²⁴⁰ As a result, similarly situated debtors are treated differently based on their choice of forum.²⁴¹ By enacting comprehensive federal bankruptcy legislation, Congress intended to prevent this lack of uniformity.²⁴² The lack of uniformity in state courts is only the beginning of the problem in the undisclosed lawsuit context.

The lack of uniformity issue is exacerbated by the discord within federal circuits in applying judicial estoppel.²⁴³ Even if state courts wanted to follow the federal judicial estoppel doctrine with respect to undisclosed lawsuits from bankruptcy, there is no coherent federal judicial estoppel doctrine for them to follow.²⁴⁴ In the undisclosed lawsuit context, the federal circuits apply the *Maine* factors differently, use different standards of review, apply different alternatives to judicial estoppel, and apply different law when sitting in diversity.²⁴⁵

The lack of cohesion throughout the courts might have developed because judicial estoppel is not equipped to deal with the unique circumstance of the undisclosed lawsuit context.²⁴⁶ Judicial estoppel is an equitable doctrine meant to protect the integrity of the judicial system, but in this context, it causes harm to debtors, creditors, and the bankruptcy court system. An undisclosed lawsuit is part of the bankruptcy estate,²⁴⁷ and had the lawsuit been properly scheduled, it might have been pursued for the benefit of the creditors.²⁴⁸ Estopping a debtor without allowing a trustee the opportunity to review the asset undermines the bankruptcy system's goal of having a fair distribution of the debtor's assets for the benefit of the creditors.²⁴⁹ Barring a debtor's claim on the basis of judicial

²³⁸ See *supra* Part II.B–C.

²³⁹ See *supra* Part II.B.

²⁴⁰ See *supra* Part II.B.

²⁴¹ See *supra* Part II.B–C.

²⁴² See *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929) (finding that in the context of federal bankruptcy law, “[t]he national purpose to establish uniformity necessarily excludes state regulation”); see also *In re Ross*, 18 B.R. 364, 367 (N.D.N.Y.) (“[S]tates are prohibited from interfering with the uniform nature of bankruptcy law.”), *aff'd sub nom. Regan v. Ross*, 691 F.2d 81 (2d Cir. 1982).

²⁴³ See *supra* Part II.B.

²⁴⁴ See *supra* Part II.B.

²⁴⁵ See *supra* Part II.B.

²⁴⁶ See *WRIGHT ET AL.*, *supra* note 98, §4477 (“Specific areas of federal law may carry with them special needs of substance or judicial administration that support development of special rules of judicial estoppel that reflect those needs. Bankruptcy proceedings furnish a good illustration.”).

²⁴⁷ See *supra* note 46 and accompanying text.

²⁴⁸ See *supra* note 50.

²⁴⁹ See *supra* note 50.

estoppel also provides a windfall to the defendant.²⁵⁰ The non-bankruptcy courts ignore a defendant's supposed wrongdoing based on the debtor's mistake in her bankruptcy case and not on the actual merits of the lawsuit.²⁵¹ When the debtor's mistake is inadvertent, denying the debtor her day in court is hardly justifiable. Judicial estoppel is an equitable doctrine, but its application in this context creates inequitable results.²⁵²

In addition to the equitable concerns of applying judicial estoppel are the statutory concerns. Many courts fail to incorporate fundamental provisions of the Bankruptcy Code when applying judicial estoppel to an undisclosed asset.²⁵³ A cohesive interpretation of the Bankruptcy Code reveals a framework for the undisclosed lawsuit context that is free of the statutory concerns created by judicial estoppel as well as the equitable concerns.

B. An Equitable, Statutory Framework

The broad scope of the Bankruptcy Code's provisions defining property of the estate and the automatic stay and the bankruptcy court's broad jurisdictional grant work in tandem to ensure the debtor's affairs are centralized in a single forum—the bankruptcy court.²⁵⁴ This centralization prevents conflicting judgments from non-bankruptcy courts and harmonizes the interests of creditors.²⁵⁵ Non-bankruptcy courts have recognized that undisclosed lawsuits are property of the estate, but the same courts have failed to recognize the applicability of the automatic stay and the bankruptcy court's exclusive jurisdiction. The automatic stay and the bankruptcy court's broad jurisdictional grant are essential to the proper functioning of the bankruptcy system and cannot

²⁵⁰ See *Lopez v. Specialty Rests. Corp. (In re Lopez)*, 283 B.R. 22, 27 n.9 (B.A.P. 9th Cir. 2002) (noting that the defendant's "possible judicial estoppel defense is a windfall that would bar what might be a successful claim for sexual harassment").

²⁵¹ See *id.*

²⁵² See *Travelers Indem. Co. v. Griner (In re Griner)*, 240 B.R. 432, 439 (Bankr. S.D. Ala. 1999) (finding that the application of judicial estoppel to the debtor-plaintiff's undisclosed lawsuit was "overly harsh and inequitable as well," and that "[e]veryone . . . loses under its theory").

²⁵³ See *In re Lopez*, 283 B.R. at 31 (Klein, J., concurring) (writing "separately to emphasize salient practice points about the problem of unscheduled causes of action that is increasingly a headache for nonbankruptcy courts and litigants"). In *In re Lopez*, Judge Klein argued that "the judicial estoppel defense to the basic unscheduled cause of action is meretricious and potentially inexpedient in two respects." *Id.* First, "the trustee is the real party in interest and the more correct defenses are that the action is not being prosecuted by the real party in interest and that the debtor lacks standing." *Id.* at 32. Second, "dismissing the action probably violates the automatic stay." *Id.*

²⁵⁴ *Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106, 114 (1st Cir. 1994).

²⁵⁵ *Id.*

be ignored in this context.²⁵⁶ This section first details the correct application of the automatic stay to undisclosed lawsuits from bankruptcy that necessitates returning to the bankruptcy court. It then discusses the resulting jurisdictional issues that arise when a bankruptcy case is pending. This section concludes by providing an example of equitable treatment of an undisclosed lawsuit that properly considers the goals of the bankruptcy system.

1. *The Automatic Stay Continues to Act Against Undisclosed Lawsuits*

The scope of the automatic stay is intentionally broad.²⁵⁷ The automatic stay protects the interests of both debtors and creditors.²⁵⁸ It goes into effect immediately upon the filing of a bankruptcy petition²⁵⁹ and is essential to the goals of the bankruptcy system.²⁶⁰ Despite all of this, nearly all courts applying judicial estoppel have failed to consider the impact of the automatic stay on an undisclosed lawsuit. Although courts applying judicial estoppel in this context rely on the Bankruptcy Code's broad definition of property of the estate, the same courts completely ignore the role of the automatic stay. This piecemeal approach to incorporating the Bankruptcy Code's provisions into the judicial estoppel analysis has led courts down a path of inconsistency and inequity.

The Bankruptcy Code dictates how undisclosed lawsuits should be handled prior to any consideration of dismissal based on judicial estoppel. Filing a bankruptcy petition automatically creates an estate that is comprised of nearly all of the debtor's property²⁶¹ and also triggers the automatic stay, which prevents nearly all acts against the debtor, property of the debtor, and property of the estate.²⁶² If a debtor has a lawsuit that should be part of the bankruptcy estate when she files for bankruptcy, that lawsuit becomes property of the estate upon filing, regardless of whether the debtor correctly schedules the cause of action.²⁶³ When the debtor's bankruptcy case is closed, property of the estate

²⁵⁶ See *supra* note 64 and accompanying text; see also *Clark v. United States (In re Clark)*, 207 B.R. 559, 565 (Bankr. S.D. Ohio 1997) ("Congress placed the court at the vortex of bankruptcy proceedings and the provisions of the automatic stay are designed as the initial channels that regulate the flow of economic consequences, which, if left unchecked or diverted by extra judicial determinations, would drown a debtor's opportunity for a fresh start and destroy a creditor's opportunity to receive payments . . .").

²⁵⁷ *In re Elrod*, 523 B.R. 790, 796 (Bankr. W.D. Tenn. 2015).

²⁵⁸ See *supra* notes 68–69 and accompanying text.

²⁵⁹ See *supra* note 65 and accompanying text.

²⁶⁰ See *supra* note 64 and accompanying text.

²⁶¹ See *supra* note 37 and accompanying text.

²⁶² See *supra* note 66 and accompanying text.

²⁶³ See *supra* note 38 and accompanying text; see also *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 465 (6th Cir. 2013) (finding that the district court had given "undue significance" to the bankruptcy scheduling

that has been scheduled and not administered is abandoned back to the debtor and deemed administered.²⁶⁴ Property that is not administered or abandoned under § 554 of the Bankruptcy Code “remains property of the estate.”²⁶⁵ Property that is not scheduled remains property of the estate indefinitely after the bankruptcy case is closed.²⁶⁶ Under § 362 of the Bankruptcy Code, the automatic stay continues to act against property of the estate “until such property is no longer property of the estate.”²⁶⁷ Thus, the automatic stay continues to act against undisclosed lawsuits indefinitely.²⁶⁸

Section 362 acts as a stay against “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.”²⁶⁹ Dismissing a debtor-plaintiff’s claim that is property of the estate constitutes “exercis[ing] control over property of the estate” in violation of the automatic stay.²⁷⁰ The bankruptcy court is the only court that can “terminate, annul or modify the automatic stay.”²⁷¹ Accordingly, parties must return to the bankruptcy court to get relief from the automatic stay before taking any act that may qualify as exercising control over an undisclosed lawsuit.

process and further noting that “[s]ection 541 is the beginning and end of the analysis of whether a cause of action is property of the estate”).

²⁶⁴ See *supra* note 44 and accompanying text.

²⁶⁵ 11 U.S.C. § 554(d) (2012); see also *supra* note 46 and accompanying text.

²⁶⁶ See *supra* note 46 and accompanying text.

²⁶⁷ 11 U.S.C. § 362(c)(1) (2012).

²⁶⁸ See *Lopez v. Specialty Rests. Co. (In re Lopez)*, 283 B.R. 22, 32 (B.A.P. 9th Cir. 2002) (Klein, J., concurring) (noting that because “the automatic stay remains in effect to protect property of the estate so long as it is property of the estate, even after the bankruptcy case is closed[,] dismissing the action probably violates the automatic stay” (citation omitted)); see also *Slater v. U.S. Steel Corp.*, 820 F.3d 1193, 1245 (11th Cir.) (Tjoflat, J., specially concurring), *reh’g en banc granted, opinion vacated* (11th Cir. 2016).

²⁶⁹ 11 U.S.C. § 362(a)(3).

²⁷⁰ See *Acands, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 259 (3d Cir. 2006) (finding that the automatic stay applied to an arbitration “once it became apparent that proceeding further could negatively impact the bankruptcy estate” and noting that “Section 362(a)(3) . . . applies to actions against third parties as well as actions against the debtor”); see also Klein, Ponoroff & Borrey, *supra* note 112, at 884 (“The continued applicability of the automatic stay casts doubt on the ability of the nonbankruptcy court to dismiss the action.”); *supra* note 268 and accompanying text; cf. *Slater*, 820 F.3d at 1225 n.84 (Tjoflat, J., specially concurring) (proposing that when a party opposes a debtor-plaintiff’s motion to reopen her bankruptcy case, the party is “engaging in an ‘act to obtain possession of property of the estate’” in violation of the automatic stay); *Montoya v. Daniel O’Connell’s Sons, Inc.*, No. 15-CV-01580 (ALC) (KNF), 2017 WL 1167336, at *4 (S.D.N.Y. Mar. 28, 2017) (noting that the debtor-plaintiff’s decision to bring an undisclosed lawsuit “without declaring his interest in it to the bankruptcy court likely violated § 362(a)(3)’s proscription against ‘any act to obtain . . . or to exercise control over property of the estate’”).

²⁷¹ *In re Dominguez*, 312 B.R. 499, 505 (Bankr. S.D.N.Y. 2004) (“[I]t is undisputed that only a bankruptcy court has jurisdiction to terminate, annul or modify the automatic stay.” (emphasis omitted)); see also 28 U.S.C. § 157(b)(2)(G) (2012).

Failure to return to the bankruptcy court in this context has a significant implication: judgments that are ordered in violation of the automatic stay are void in the majority of jurisdictions.²⁷² Void judgments do not have claim preclusive effect.²⁷³ If the statute of limitations on a debtor-plaintiff's claim has not run, she should be able to pursue her claim under this argument.

For a non-bankruptcy court to proceed with a lawsuit where the defendant has raised the defense of judicial estoppel or the debtor's lack of standing, this Comment argues that the lawsuit must be stayed so the parties can petition the bankruptcy court to reopen the bankruptcy case to request relief from the automatic stay and permit the bankruptcy court to properly administer the asset.²⁷⁴ The continued application of the automatic stay necessitates this action.²⁷⁵ Moreover, this action ensures the involvement of the bankruptcy court and eliminates the issue of notice discussed in Part III. If the bankruptcy court reopens the case, the bankruptcy court may then appoint a bankruptcy trustee who "has authority to act for the benefit of the estate and may sell the cause of action, prosecute it in nonbankruptcy court, settle it, or abandon it to the debtor as of inconsequential value to the estate."²⁷⁶ The trustee's decision in administering the claim will depend on the specific facts of the bankruptcy case and the lawsuit.

2. *The Bankruptcy Court's Exclusive Jurisdiction over Undisclosed Lawsuits*

The continued effect of the automatic stay in the undisclosed lawsuit context necessitates reopening the bankruptcy case, which in turn creates a jurisdictional issue in both federal and state courts. When a bankruptcy case is open, the federal district court, and by referral the bankruptcy court, has exclusive

²⁷² See *LaBarge v. Vierkant (In re Vierkant)*, 240 B.R. 317, 322 (B.A.P. 8th Cir. 1999) ("The overwhelming majority of the circuits hold that an action in violation of the automatic stay is void *ab initio*." (emphasis added)).

²⁷³ See *In re Vierkant*, 240 B.R. at 325 ("[A]n action taken in violation of the automatic stay is void ab initio, . . . [and] as a matter of law, a void default judgment cannot be given collateral estoppel effect . . .").

²⁷⁴ See *Lopez v. Specialty Rests. Corp. (In re Lopez)*, 283 B.R. 22, 32 (Klein, J., concurring) ("The expedient solution to [the undisclosed lawsuit] dilemma is to require the parties to return to bankruptcy court for reopening so that a trustee can be appointed to deal with the cause of action that is property of the estate."). Staying the lawsuit and moving the bankruptcy court to reopen the case and appoint a trustee would also help satisfy Federal Rule 17(a)(3)'s mandate that the court may not dismiss the lawsuit until the real party in interest is given a reasonable time to intervene. See *supra* notes 198–200 and accompanying text.

²⁷⁵ See Klein, Ponoroff & Borrey, *supra* note 112, at 884.

²⁷⁶ *In re Lopez*, 283 B.R. at 32–33 (Klein, J., concurring) (footnote omitted); see also *Montoya v. Daniel O'Connell's Sons, Inc.*, No. 15-CV-01580 (ALC) (KNF), 2017 WL 1167336, at *4 (S.D.N.Y. Mar. 28, 2017) (finding that the trustee pursuing the undisclosed lawsuit as the real party in interest "is not precluded by [the automatic stay], as this section 'does not address actions . . . which would inure to the benefit of the bankruptcy estate'" (quoting *In re Abreu*, 527 B.R. 570, 579 (Bankr. E.D.N.Y. 2015))).

jurisdiction over property of the estate.²⁷⁷ Under 28 U.S.C. § 157(a), “[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”²⁷⁸ Under § 157(c), “bankruptcy judge[s] may hear a proceeding . . . that is otherwise related to a case under title 11.”²⁷⁹

An undisclosed lawsuit that is property of the estate is arguably related to the bankruptcy case and must be referred to the bankruptcy court.²⁸⁰ All federal districts have a local rule or standing order referring cases under Title 11 to the bankruptcy court.²⁸¹ The Eastern District of Missouri’s local rule refers all cases under Title 11 as well as *all* proceedings related to a case under Title 11.²⁸² The language of the local rule creates a mandatory referral and not a discretionary one.²⁸³ In the Eastern District of Missouri and any other district with a mandatory referral rule, any lawsuit that is brought in a federal district court that is related to a bankruptcy case must be referred to the bankruptcy court.²⁸⁴ In a district

²⁷⁷ See 28 U.S.C. § 1334(e) (2012) (granting “exclusive jurisdiction” over property of the estate to the “district court in which a case under title 11 is commenced or is pending”); *In re Baker*, No. 11-12703, 2015 WL 628257, at *12 (Bankr. W.D. Tenn. Jan. 14, 2015) (“The determination of ‘what constitutes property of the estate and what actions are permitted or prohibited by the stay’ falls under the exclusive jurisdiction of the bankruptcy court.” (quoting *Clark v. United States (In re Clark)*, 207 B.R. 559, 564–65 (Bankr. S.D. Ohio 1997))).

²⁷⁸ 28 U.S.C. § 157(a) (2012).

²⁷⁹ 28 U.S.C. § 157(c)(1).

²⁸⁰ See *Richardson v. United Parcel Serv.*, 195 B.R. 737, 740 (E.D. Mo. 1996) (finding that the debtor-plaintiff’s claim was related to the bankruptcy case because “it could conceivably have an effect on the estate”). The Bankruptcy Court for the Western District of Michigan found that administering a referred undisclosed lawsuit was a core proceeding. *Johnson v. Lewis Cass Intermediate Sch. Dist. (In re Johnson)*, 345 B.R. 816, 818 (Bankr. W.D. Mich. 2006) (“This adversary proceeding is a core proceeding because it involves the administration of the debtor’s estate and affects the liquidation of the assets of the estate and the debtor-creditor relationships.” (citations omitted)).

²⁸¹ See *supra* note 82 and accompanying text.

²⁸² E.D. MO. R. BANKR. P. 81-9.01(B)(1) (“All cases under Title 11 of the United States Code, and *all* proceedings arising under Title 11 or arising in or *related* to a case under Title 11, are referred to the bankruptcy judges for this district, who shall exercise the full extent of the authority conferred upon them.” (emphasis added)).

²⁸³ See *Richardson*, 195 B.R. at 740 (applying the Eastern District of Missouri’s local rule and finding that “the Court *must* refer this case to the Bankruptcy Court for further proceedings” because the “[p]laintiff’s employment discrimination case [was] related to the bankruptcy as it could conceivably have an effect on the estate being administered in the bankruptcy” (emphasis added)).

²⁸⁴ See *id.*; see also Bruce H. White, *Maneuvering a “Related to” Case from State Court to Bankruptcy Court in Another Jurisdiction*, 16 AM. BANKR. INST. J., May 1997, at 30, 30 (“The district courts in many jurisdictions have adopted local rules whereby matters such as those in § 157(a) are automatically referred to the bankruptcy court for the district.”). If an undisclosed lawsuit is in a different federal district than the district in which the debtor-plaintiff filed for bankruptcy, the lawsuit would first have to be transferred to the appropriate district court under 28 U.S.C. § 1412, which provides that “[a] district court may transfer a case or proceeding

where referral to the bankruptcy court is not mandatory, the district court may voluntarily refer the lawsuit to the bankruptcy court.²⁸⁵

State courts lack jurisdiction over property of the estate once a bankruptcy case is reopened.²⁸⁶ However, moving a lawsuit from state court to the bankruptcy court is a more complicated matter.²⁸⁷ Generally, the lawsuit may not be removed from state court directly to the bankruptcy court.²⁸⁸ Instead, the lawsuit must first be removed to the district court and then may be transferred to the bankruptcy court by referral.²⁸⁹ In some federal districts, referral to the bankruptcy court may occur automatically once a notice of removal is filed.²⁹⁰ Although this process may be cumbersome, “it is the method by which jurisdictional pitfalls can be avoided.”²⁹¹

3. *Equitable Treatment of Undisclosed Lawsuits*

The following case provides an example of what may happen if a debtor-plaintiff’s undisclosed lawsuit is referred to the bankruptcy court. In *Richardson v. United Parcel Service*, the debtor-plaintiff brought an employment discrimination claim in the district court for the Eastern District of Missouri.²⁹² The defendant filed a motion to dismiss on the ground that the debtor-plaintiff

under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.” 28 U.S.C. § 1412 (2012); *see also* White, *supra*, at 30.

²⁸⁵ *See, e.g., In re Johnson*, 345 B.R. at 821 (entering an order referring the proceeding to the bankruptcy court to decide the defendant’s motion for summary judgment on a theory of judicial estoppel).

²⁸⁶ *See* 28 U.S.C. § 1334(e) (2012) (granting “exclusive jurisdiction” over property of the estate to the “district court in which a case under title 11 is commenced or is pending”).

²⁸⁷ *See generally* White, *supra* note 284 (discussing the issues involved to move a claim from a state court to a bankruptcy court).

²⁸⁸ *See Berger v. Schuler (In re Schuler)*, 45 B.R. 684, 686 (Bankr. D.N.D. 1985) (“28 U.S.C. § 1452 . . . clearly provides that removal of claims related to bankruptcy cases shall be to the district court. No mention is made of the bankruptcy court. The bankruptcy court achieves jurisdiction only by referral of cases and proceedings to it pursuant to 28 U.S.C. § 157.”).

²⁸⁹ *Id.* This process is further complicated if the state court is not in the same state as the bankruptcy court. In this situation, the claim could not be removed directly to the district where the bankruptcy case is pending. *See* White, *supra* note 284 (“[Section 1452] does not permit removal of an action directly to a district court or bankruptcy court in another state or jurisdiction.”). The claim would have to be removed “to the district court for the district where such civil action is pending.” 28 U.S.C. § 1452(a) (2012). Then the claim could be transferred to the appropriate federal district court and, by referral, the bankruptcy court. *See* White, *supra* note 284.

²⁹⁰ *See, e.g., Jeffries v. Bar J. Forest Prods., Inc. (In re Jeffries)*, 191 B.R. 861, 863 (Bankr. D. Or. 1995) (“In Oregon, the notice of removal is automatically referred to the bankruptcy court by the federal district court pursuant to standing orders issued under 28 U.S.C. § 157(a).”).

²⁹¹ White, *supra* note 284, at 31.

²⁹² 195 B.R. 737, 738 (E.D. Mo. 1996).

lacked standing to pursue the claim because he had failed to schedule the claim in his bankruptcy petition.²⁹³ The defendant also argued for dismissal based on judicial estoppel.²⁹⁴ The district court in *Richardson* found that it must refer the debtor-plaintiff's case to the bankruptcy court because the case was related to the debtor-plaintiff's bankruptcy "as it could conceivably have an effect on the estate being administered in the bankruptcy."²⁹⁵ The court denied the defendant's motions to dismiss without prejudice and referred the case to the bankruptcy court for further proceedings.²⁹⁶ Following the referral to the bankruptcy court, the defendant filed another motion to dismiss on the ground of judicial estoppel,²⁹⁷ and the trustee intervened in the proceeding.²⁹⁸ The bankruptcy court denied the defendant's motion,²⁹⁹ and the trustee settled the proceeding for \$1500 for the benefit of the bankruptcy estate.³⁰⁰

Once a bankruptcy case is reopened and the undisclosed lawsuit is referred to the bankruptcy court, there are many possible outcomes that will not violate the automatic stay or other provisions of the Bankruptcy Code. The outcome in *Richardson* is what may happen if a trustee finds that pursuing the undisclosed lawsuit would be beneficial to the bankruptcy estate. Referring the lawsuit to the bankruptcy court does not eliminate the judicial estoppel defense. If the bankruptcy court applies judicial estoppel, it will be bound by the same precedents as federal district courts.³⁰¹ However, the bankruptcy court is better situated to determine whether the debtor-plaintiff's lawsuit should be estopped based on the *Maine* factors and other important considerations that should be weighed in the bankruptcy context.³⁰² For example, the bankruptcy court may use its discretion to invoke other statutorily created options for penalizing a

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 740.

²⁹⁶ *Id.*

²⁹⁷ Defendant's Motion to Dismiss, *Richardson v. United Parcel Serv.*, No. 96-ap-04255 (Bankr. E.D. Mo. July 10, 1996), ECF No. 4.

²⁹⁸ Motion to Intervene, *Richardson v. United Parcel Serv.*, No. 96-ap-04255 (Bankr. E.D. Mo. July 26, 1996), ECF No. 9.

²⁹⁹ Order Denying Defendant's Motion to Dismiss, *Richardson v. United Parcel Serv.*, No. 96-ap-04255 (Bankr. E.D. Mo. Aug. 1, 1996), ECF No. 12.

³⁰⁰ Stipulation and Order Dismissing Complaint as Settled, *Richardson v. United Parcel Serv.*, No. 96-ap-04255 (Bankr. E.D. Mo. Nov. 13, 1996), ECF No. 13.

³⁰¹ *See, e.g., Johnson v. Lewis Cass Intermediate Sch. Dist. (In re Johnson)*, 345 B.R. 816, 822–24 (Bankr. W.D. Mich. 2006) (applying judicial estoppel under the Sixth Circuit's precedents).

³⁰² *See WRIGHT ET AL., supra* note 98, § 4477 ("Specific areas of federal law may carry with them special needs of substance or judicial administration that support development of special rules of judicial estoppel that reflect those needs. Bankruptcy proceedings furnish a good illustration.").

debtor who acted in bad faith to avoid further harm to creditors.³⁰³ By invoking statutorily prescribed penalties for debtor misconduct when necessary—instead of judicial estoppel—bankruptcy courts can issue orders that protect the judicial system without creating inequitable results for creditors.

The Supreme Court developed flexible factors for judicial estoppel because the doctrine should be applied on a case-by-case basis.³⁰⁴ The application of judicial estoppel should not undermine the goals of bankruptcy or violate the Bankruptcy Code. When a debtor fails to disclose a lawsuit in bankruptcy, the bankruptcy court is in the best position to weigh the necessary considerations and issue orders that are equitable and uphold the goals of the bankruptcy system.³⁰⁵

CONCLUSION

This Comment analyzes the application of judicial estoppel to undisclosed lawsuits from bankruptcy. Although non-bankruptcy courts have been issuing orders based on judicial estoppel in this context for years, this Comment argues that non-bankruptcy courts violate the automatic stay by issuing such orders. The continued effect of the automatic stay on property of the estate necessitates the reopening of the debtor's bankruptcy case so that the undisclosed lawsuit may be properly administered.

Further, this Comment demonstrates that the bankruptcy court is in the best position to determine whether to judicially estop a debtor-plaintiff's lawsuit. Although the variance throughout the circuits regarding judicial estoppel does not disappear simply because the bankruptcy court is applying judicial estoppel, the bankruptcy court is in a position to make a more equitable ruling because of its familiarity with the debtor, the debtor's bankruptcy case, and the creditors. Most importantly, returning to the bankruptcy court will accomplish judicial estoppel's goal of protecting the integrity of the courts by allowing bankruptcy

³⁰³ See, e.g., *supra* notes 208–10.

³⁰⁴ See *supra* note 106 and accompanying text.

³⁰⁵ *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1046 (8th Cir. 2006) (“[D]etermining whether a litigant is playing fast and loose with the courts has a subjective element [and] [i]ts resolution draws upon the trier’s intimate knowledge of the case at bar and his or her first-hand observations of the lawyers and their litigation strategies.” (quoting *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 31 (1st Cir. 2004))).

courts to properly uphold the goals of the bankruptcy system while not violating the Bankruptcy Code or the jurisdictional grant of bankruptcy courts.

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