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STOP RIGHT THERE: LIMITING JUDICIAL ESTOPPEL IN THE BANKRUPTCY CONTEXT

ABSTRACT

Although judicial estoppel is a doctrine of equity, it has often produced inequitable results in the context of bankruptcy cases. The purpose of judicial estoppel is to protect the integrity of the judicial process by preventing a party from asserting inconsistent positions in different judicial proceedings. When one of the judicial proceedings is a bankruptcy case, a court invokes judicial estoppel at the request of a defendant who discovers that the plaintiff previously filed for bankruptcy but failed to schedule the potential or pending lawsuit as part of the plaintiff-debtor's estate.

Despite directives from the Supreme Court that the doctrine should be invoked at a court's discretion, the majority of courts use a strict estoppel rule where a plaintiff has omitted a cause of action from her bankruptcy schedules. The majority of courts take the position that, if a plaintiff-debtor knew of a potential or pending lawsuit but failed to list it in the bankruptcy case, the plaintiff-debtor should be categorically estopped from pursuing the cause of action against the defendant. However, judicial estoppel produces an inequitable result where the plaintiff-debtor omitted a lawsuit from the bankruptcy case because of a mistake. In that case, the alleged wrongdoer prevails regardless of the strength of the plaintiff's claim or the plaintiff's culpability excluding the potential or pending lawsuit from the bankruptcy filings.

This Comment will argue that using a subjective inquiry to determine when to invoke judicial estoppel would better serve the objectives of bankruptcy law and maintain the integrity of the judicial process. This subjective inquiry focuses on whether the debtor's omission was the result of inadvertence or mistake. It proposes five factors that courts should consider as part of this inquiry.

INTRODUCTION

In 1992, Lawrence Hamilton purchased a new home and insured it with State Farm.¹ Four years later, he completed an expensive remodeling project on his house and rented it to a family.² The next year, the family experienced financial setbacks and eventually stopped paying rent.³ After three months of no payments, Hamilton instituted eviction proceedings and the family vacated the home.⁴ The next day, Hamilton toured the home with a sheriff's deputy, and, finding everything in good condition, reclaimed possession. This was to be short-lived. Partial flooding in the house caused by disconnected water lines triggered the security alarm the next day. Claiming that the evicted renters had burglarized and vandalized the property, Hamilton filed a homeowner's insurance claim with State Farm with losses of over \$160,000.⁵

State Farm was suspicious of Hamilton's claim, and it opened an investigation.⁶ As State Farm's investigation was ongoing, Hamilton incurred increasing financial difficulties.⁷ Hamilton risked losing his home because he was behind on mortgage payments, so he desperately needed money from his State Farm claim.⁸ Hamilton retained several lawyers to pressure State Farm to pay out his claim.⁹ At the conclusion of State Farm's investigation, it denied payment of Hamilton's claim based on its belief that Hamilton was responsible for the vandalism and his violation of the concealment and fraud provision listed in Hamilton's home insurance policy.¹⁰ Around the time that State Farm denied Hamilton's claim, he filed for chapter 7 liquidation bankruptcy.¹¹

¹ Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 780 (9th Cir. 2001).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 780–81. Specifically, Hamilton made a claim to State Farm for water damage to his home as well as a claim for expensive items he alleges were stolen (four Viking and Sub-Zero brand appliances, marble countertops, and four valuable chandeliers). *Id.* at 780.

⁶ *Id.* at 780–81 (“[T]he investigation of the circumstances surrounding [Hamilton’s] claim had convinced State Farm that Hamilton was probably responsible for the vandalism and theft . . .”).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 781.

¹⁰ *Id.* (stating that State Farm denied Hamilton's claim based on a violation of the policy's concealment or fraud provision since State Farm found that Hamilton was probably responsible for the damage done to his home).

¹¹ *Id.*

In his bankruptcy petition, Hamilton claimed a \$160,000 residential vandalism loss against his estate.¹² However, he failed to list any corresponding claims against State Farm as assets on those same schedules.¹³ The bankruptcy trustee assigned to Hamilton's case noticed the discrepancy and reached out to Hamilton.¹⁴ Despite several attempts by the trustee to substantiate Hamilton's financial disclosures, Hamilton did not provide the requested documentation.¹⁵ One year following his bankruptcy case, Hamilton filed a lawsuit against State Farm alleging breach of contract and breach of the covenant of good faith.¹⁶ In response, State Farm filed a motion arguing that Hamilton's claim should be barred by judicial estoppel.¹⁷ The district court and the Ninth Circuit Court of Appeals agreed. Because Hamilton failed to list his contract and bad faith claims against State Farm in his bankruptcy case, he could not later pursue those claims as valid causes of action.¹⁸

While the outcome in *Hamilton* seems just, the application of judicial estoppel in other cases suggests that something is missing from the courts' analysis. In *Barger v. City of Cartersville*, the plaintiff in a discrimination lawsuit tried repeatedly to disclose that lawsuit in later bankruptcy proceedings. However, despite making repeated attempts to make a full disclosure, she was later estopped from pursuing her discrimination claim.¹⁹ Although she told the attorney in her bankruptcy case about her pending discrimination suit, he failed to list it in her bankruptcy schedules.²⁰ After

¹² *Id.* A debtor who files for bankruptcy protection must file both a statement of financial affairs and a schedule of assets and liabilities. 11 U.S.C. § 521(a)(1)(B)(i), (iii) (2012). The Statement of Financial Affairs summarizes the debtor's financial history, including extensive information relating to the debtor's income, recent creditor payments, information about pending lawsuits, gifts, recent losses, and recent transfers. Instructions, Statement of Financial Affairs, Official Bankruptcy Form 7 (Dec. 1, 2009) [hereinafter Form 7 Instructions], available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Bk%20Forms%20Dir%201209/Form_7_Stmt_Financial_Affairs_INSTRUCTIONS_1209.pdf. The schedule of assets and liabilities, which is submitted on a form entitled Schedule B, must list all of the debtor's current assets and current liabilities. Statement of Financial Affairs, Official Form 7 (Apr. 2013) [hereinafter Form 7], available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_007.pdf; see Schedule B - Personal Property, Official Bankruptcy Form 6B (Dec. 2007) [hereinafter Schedule B], available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006B_1207f.pdf.

¹³ *Hamilton*, 270 F.3d at 781.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Hamilton v. State Farm Fire & Cas. Ins. Co.*, No. CV 99-440 VAP, 2000 U.S. Dist. LEXIS 2564, at *4 (C.D. Cal. Feb. 18, 2000), *aff'd*, 270 F.3d 778 (9th Cir. 2001).

¹⁸ *Hamilton*, 270 F.3d at 784-85; *Hamilton*, 2000 U.S. Dist. LEXIS 2564, at *26-27.

¹⁹ 348 F.3d 1289, 1297 (11th Cir. 2003).

²⁰ *Id.* at 1295.

Barger received a no-asset discharge in her bankruptcy proceeding, her employer moved for summary judgment in the employment discrimination suit because Barger excluded her pending lawsuit from her bankruptcy case.²¹ The district court granted summary judgment in favor of her employer based on judicial estoppel, and the Eleventh Circuit Court of Appeals affirmed.²² It was undisputed that the plaintiff-debtor informed her attorney and her creditors that she had an employment discrimination suit pending against her employer.²³ Barger's attorney admitted that his failure to list the suit was a mistake and an oversight on his part.²⁴ Despite the fact that Barger made several attempts to disclose her pending discrimination suit, she was later estopped from pursuing her claim.²⁵

The dichotomy between the two cases discussed above illustrates the main problem with the current majority approach to judicial estoppel in bankruptcy—many courts' rigid application of judicial estoppel leads to inequitable results.²⁶ This Comment explores the problems with the current approaches to judicial estoppel in the bankruptcy context. This Comment will show that current approaches vary widely among circuits. Not only does this Comment review the current problems with the varying approaches to judicial estoppel, but it also suggests a new approach that courts should take when deciding to invoke judicial estoppel after a plaintiff-debtor failed to list a pending cause of action in the bankruptcy case.

The new approach is a two-step test, based on subjective considerations that balance the objectives of bankruptcy law with the purpose and policy of judicial estoppel. In deciding whether to apply judicial estoppel, a court must first consider whether the plaintiff-debtor's creditors could benefit from a pending or potential cause of action that the plaintiff-debtor omitted from the

²¹ *Id.* at 1291.

²² *Id.* at 1292, 1297.

²³ *Id.* at 1295.

²⁴ *Id.* at 1297 (Barkett, J., dissenting). In fact, Barger told her creditors about her pending discrimination suit at an open meeting of creditors. *Id.* at 1291.

²⁵ *See id.* at 1289, 1295, 1297. "Barger not only revealed her pending lawsuit to her bankruptcy attorney, who admitted he simply neglected to list the suit on Barger's bankruptcy schedule due to an oversight, but she also specifically announced the suit at an open creditors' meeting to the bankruptcy trustee." *Id.* at 1297 (Barkett, J., dissenting). The Eleventh Circuit Court of Appeals recently affirmed its decision in *Barger* when it decided *Dunn v. Advanced Medical Specialties*. *See Dunn v. Advanced Med. Specialties Inc. (In re Tronge-Knoepffler)*, 556 Fed. App'x 785, 789 (11th Cir. 2014).

²⁶ *See, e.g., Barger*, 348 F.3d at 1297 (despite plaintiff's repeated attempts to inform her bankruptcy lawyer that she had a discrimination suit pending against her employer, plaintiff was estopped from pursuing her claim).

bankruptcy case.²⁷ If so, the court should refrain from invoking judicial estoppel. If the creditors will not benefit from pursuing the cause of action, the court must engage in a subjective analysis to determine if the plaintiff-debtor should be permitted to pursue the cause of action as part of his fresh start following bankruptcy.²⁸ If the court is convinced that the omission of the potential or pending claim in the bankruptcy case was inadvertent, it should refrain from applying judicial estoppel.²⁹

Part I.A of this Comment explains the reasons that courts may decide to invoke judicial estoppel, both in bankruptcy-related cases and outside of the bankruptcy context. Part I.B compares and contrasts the strict approach to judicial estoppel in the bankruptcy context taken by the majority of courts to those approaches recently adopted in the Sixth and Ninth Circuits. In Part II, the Comment outlines multiple factors courts should consider in determining whether to refrain from invoking judicial estoppel in the context of bankruptcy-related cases.

I. BACKGROUND

A. *Judicial Estoppel Is a Modern Doctrine of Equity*

Judicial estoppel is the rule that “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.”³⁰ This rule was confirmed by the Supreme Court in *New Hampshire v. Maine*, in which the Court used the doctrine of judicial estoppel to equitably bar the state of New Hampshire from asserting a position contrary to a position it took in prior litigation.³¹ The Court in *New Hampshire* established factors that could be considered when deciding whether to invoke the doctrine of judicial estoppel. It also emphasized that courts should ensure that an equitable result occurs any time judicial estoppel is invoked. The Court in *New Hampshire* emphasized that the use of judicial

²⁷ See, e.g., *Parker v. Wendy’s Int’l*, 365 F.3d 1268, 1269 (11th Cir. 2004).

²⁸ The plaintiff-debtor’s creditors would not benefit from pursuing the lawsuit when, for example, the trustee abandons the pending or potential claim. E.g., *Parker*, 365 F.3d at 1269.

²⁹ *New Hampshire v. Maine*, 532 U.S. 742, 753 (2001) (quoting *John S. Clark Co. v. Faggert & Frieden*, P.C., 65 F.3d 26, 29 (4th. Cir. 1995)).

³⁰ *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000), quoted in *New Hampshire*, 532 U.S. at 749.

³¹ 532 U.S. at 749. In *New Hampshire v. Maine*, New Hampshire asserted sovereignty over the entire Piscataqua River. However, in earlier litigation in the 1970’s, New Hampshire entered a consent decree with Maine in which it agreed that it would have sovereignty over only the southern portion of the river.

estoppel should not be governed by “inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel.”³²

In discussing the history of the application of judicial estoppel, the Court in *New Hampshire v. Maine* agreed with several lower court decisions that a party should not “be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.”³³ The Court acknowledged the importance of the doctrine of judicial estoppel and reaffirmed the policy behind it, which is to protect the integrity of the courts and the judicial process.³⁴ Judicial estoppel should prohibit parties “from deliberately changing positions according to the exigencies of the moment.”³⁵ For example, a plaintiff cannot sue an employer based on the assertion that she is permanently unable to work, and then later seek damages from the same employer that refuses to reinstate the employee’s job.³⁶

The Court also acknowledged that judicial estoppel can be invoked in varying circumstances that are “not reducible to any general formulation of principle.”³⁷ Notably, the Court stated that it might be appropriate to “resist application of judicial estoppel when a party’s prior position was based on inadvertence or mistake.”³⁸ Thus, in all cases where the defendant invokes the equitable doctrine of judicial estoppel, the court should consider whether a party’s prior position was based on inadvertence or mistake. Furthermore, courts should consider and balance equities when deciding whether to invoke judicial estoppel in all cases. The law and policy behind the doctrine of judicial estoppel establishes a flexible approach to invoking the doctrine that should be applied consistently across all types of cases.

³² *Id.* at 751. Rather than establishing inflexible prerequisites, the Court stated that these factors “firmly tip the balance of equities in favor of barring” one of the inconsistent positions. *Id.*

³³ *Id.* at 749 (quoting 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 4477 (1981)) (citing *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982); *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990)).

³⁴ See *New Hampshire*, 532 U.S. at 750.

³⁵ *Id.*

³⁶ See, e.g., *Scarano v. Central R.R. Co.*, 203 F.2d 510, 511–12 (3d Cir. 1953) (estopping the plaintiff from pursuing a lawsuit seeking reinstatement of his job when the former employer settled a prior lawsuit for an amount based on the plaintiff’s assertion that he could never work again).

³⁷ *New Hampshire*, 532 U.S. at 750 (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)).

³⁸ *Id.* at 751 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)) (internal quotation marks omitted).

B. Judicial Estoppel in the Context of Bankruptcy Cases

Bankruptcy courts have applied judicial estoppel to prevent plaintiff-debtors from recovering property (usually in the form of a potential or pending lawsuit) after a plaintiff-debtor fails to list that property on her bankruptcy schedules or statement of financial affairs.³⁹ In bankruptcy cases, courts invoke judicial estoppel to prevent the plaintiff-debtor from getting a windfall (benefitting from a pending cause of action) while her creditors were not given the opportunity to pursue that cause of action.

When a person files for bankruptcy, the Bankruptcy Code (the “Code”) requires her to list all of her property, including potential and pending lawsuits, on her bankruptcy schedules.⁴⁰ Causes of action are a potential asset of the debtor and, as such, become property of the estate under 11 U.S.C. § 541(a)(1),⁴¹ which creates a bankruptcy estate comprising “all legal or equitable interests of the debtor in property as of the commencement of the case.”⁴² A debtor’s claim for personal injury, disability, or discrimination becomes property of the estate as of the commencement of a bankruptcy case.⁴³ The lawsuit then remains property of the estate unless the debtor can claim it as an exemption under the Code.⁴⁴

Even if the plaintiff-debtor has not yet filed a charge or complaint “in any forum, the claim must be disclosed through the bankruptcy court.”⁴⁵ If a plaintiff-debtor has not yet filed a claim but has a potential lawsuit that she can pursue in the future, she may be required to list it as an asset on the Schedule B form.⁴⁶ If a plaintiff-debtor has already filed a claim that is pending, the debtor

³⁹ Christopher Klein et al., *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 AM. BANKR. L.J. 839, 865 (2005); see also *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 780 (9th Cir. 2001).

⁴⁰ 11 U.S.C. § 521(a)(1)(B)(i) (2012) (requiring the debtor to file a schedule of assets and liabilities).

⁴¹ See *id.* § 541(a)(1); see *Parker v. Wendy’s Int’l*, 365 F.3d 1268, 1272 (11th Cir. 2004) (“[A] prepetition cause of action is the property of the . . . estate.”).

⁴² See 11 U.S.C. § 541(a)(1).

⁴³ See *Bronner v. Gill (In re Bronner)*, 135 B.R. 645, 647 (B.A.P. 9th Cir. 1992).

⁴⁴ 11 U.S.C. § 522.

⁴⁵ Linda M. Correia, *The Plaintiff Employment Lawyer’s Response to Bankruptcy Bumps in the Road 2* (Apr. 5, 2013), available at http://www.americanbar.org/content/dam/aba/events/labor_law/2013/04/nat-conf-equal-empl-opp-law/23_correia.authcheckdam.pdf. The inquiry to determine if a cause of action exists at the time of the bankruptcy filing is to determine whom the plaintiff-debtor could sue. Christopher B. Lega, *Estop That Lawsuit: Judicial Estoppel and the Bankruptcy Debtor-Turned-Plaintiff*, 99 ILL. B.J. 250, 250 (2011).

⁴⁶ See 11 U.S.C. § 521(a)(1)(B)(i); Form 7 Instructions, *supra* note 12; Schedule B, *supra* note 12; see also *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 479 (6th Cir. 2010) (“[D]ebtor [has an] affirmative duty to disclose all of her assets to the bankruptcy court” (citing 11 U.S.C. §§ 521(a)(1), 541(a)(7))); Form 7, *supra* note 12.

must list the claim on the Statement of Financial Affairs Form as well as Schedule B (“the schedules”).⁴⁷ However, in many jurisdictions, the instructions for filing for bankruptcy can be unclear. It is not usually obvious (especially for individuals) that lawsuits should be listed as an asset on the schedules. What happens to the claim after the debtor files the schedules is up to the trustee. If a claim is already pending, the trustee can: (1) litigate the claim and distribute the recovered amount to creditors;⁴⁸ (2) settle the claim and distribute the settled amount to creditors;⁴⁹ or (3) abandon the claim to the plaintiff-debtor if the trustee believes the claim will have little value to creditors.⁵⁰

There are three approaches that courts use to determine whether judicial estoppel is appropriate in the bankruptcy context: the strict majority approach, the flexible Sixth Circuit approach, and the flexible Ninth Circuit approach. The approaches vary in how much they consider the subjective motivations of the debtor.

1. The Majority Approach to Applying Judicial Estoppel in Bankruptcy Cases

The starting point for all three approaches is the rule of judicial estoppel laid out in *New Hampshire*. After a plaintiff-debtor fails to list a claim on a statement of financial affairs or bankruptcy schedules, a court analyzes each of the three main factors established in *New Hampshire*. The first factor is that a party must have asserted a position that is clearly inconsistent with an earlier position.⁵¹ In bankruptcy cases, the first factor is satisfied when a plaintiff-debtor fails to list a pending or potential cause of action in her bankruptcy case and later tries to pursue that claim.⁵² The plaintiff-debtor’s position in bankruptcy and her position in later litigation are inconsistent because the plaintiff-debtor first asserts that a claim does not exist and later asserts that the claim did exist.⁵³

⁴⁷ See 11 U.S.C. § 521(a)(1)(B)(i) (2012). See generally *White*, 617 F.3d at 472.

⁴⁸ 11 U.S.C. §§ 323(b), 704; *Spiritos v. One San Bernardino Cnty.* Super. Ct. Case Numbered SPR 0221, 443 F.3d 1172, 1176 (9th Cir. 2006).

⁴⁹ 11 U.S.C. §§ 323(a), 704 (appointing the trustee as the representative of the estate and requiring the trustee to “collect and reduce to money the property of the estate”); e.g., *In re Ball*, 201 B.R. 210 (Bankr. N.D. Ill. 1996).

⁵⁰ 11 U.S.C. § 554(a).

⁵¹ *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001).

⁵² *Eastman v. Union Pac. R.R.*, 493 F.3d 1151, 1159 (10th Cir. 2007).

⁵³ *Ah Quin v. Cnty. of Kauai Dep’t of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013).

The second factor established in *New Hampshire* is that the party must have been successful in persuading a court to accept its earlier position.⁵⁴ In bankruptcy cases, the second factor is satisfied when a plaintiff-debtor has succeeded in getting the first court (i.e., the bankruptcy court) to accept the first position that there was not a potential or pending cause of action that should have been listed on the statement of financial affairs.⁵⁵

The third factor in determining whether to invoke judicial estoppel is that the party pursuing the cause of action will obtain an “unfair advantage” if not estopped. The third factor is satisfied if a plaintiff-debtor obtains a discharge or plan confirmation without allowing the creditors to learn of a potential or pending lawsuit.⁵⁶ In that case, a plaintiff-debtor could derive an unfair advantage by being able to pursue the claim that was previously omitted from the bankruptcy case if not estopped.⁵⁷

Of particular importance in bankruptcy, the Court in *New Hampshire* emphasized that, even if the factors for invoking judicial estoppel are satisfied, its application should be limited where a party’s prior position was based on inadvertence or mistake.⁵⁸ However, in the context of bankruptcy cases, the majority of courts take a strict approach that failure to list a potential or pending lawsuit on the schedules and statement of financial affairs is inadvertent only “when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.”⁵⁹ Furthermore, to determine whether the debtor had motive to conceal a claim, the strict approach of the majority applies an “objective test for motive.”⁶⁰ For example,

⁵⁴ *New Hampshire*, 532 U.S. at 750.

⁵⁵ Furthermore, judicial estoppel is not limited to full trials or even litigation. The court can invoke judicial estoppel when the initial assertion is made in an administrative proceeding, or when the plaintiff-debtor submits schedules and a statement of financial affairs which are signed under penalty of perjury. *Smith v. Montgomery Ward & Co.*, 388 F.2d 291, 292 (6th Cir. 1968).

⁵⁶ *Ah Quin*, 733 F.3d at 271.

⁵⁷ *Id.* at 272.

⁵⁸ *See New Hampshire*, 532 U.S. at 753 (the Court stated that “additional considerations may inform the doctrine’s application in specific factual contexts,” and intended to “simply observe that the factors” could “tip the balance of equities in favor of barring [a] complaint”).

⁵⁹ *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 210 (5th Cir. 1999).

⁶⁰ *Fifth Circuit Applies Judicial Estoppel Doctrine*, NAT’L CONSUMER BANKR. RTS. CENTER BLOG (Oct. 8, 2013), <http://www.ncbrc.org/blog/2013/10/08/fifth-circuit-applies-judicial-estoppel-doctrine/>. Although this Comment focuses on judicial estoppel within federal district and appellate courts in the context of bankruptcy cases, there is also a split on how judicial estoppel should be applied to bankruptcy cases in state courts. *See Benjamin J. Vernia*, Annotation, *Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding*, 85 A.L.R. 5th 353, 363 (2001) (listing Alabama, Alaska, California, Georgia, Illinois, New York, Ohio, Oregon, Texas, and Wyoming as states that have

in *In Re Flugence*, the plaintiff-debtor was barred from pursuing her personal injury claim by an application of judicial estoppel.⁶¹ The court did not accord any weight to the plaintiff-debtor's explanation that she did not understand that she was required to disclose her personal injury claim.⁶² Because the strict majority approach presumes that a plaintiff-debtor's motive to conceal a claim from the bankruptcy court is "nearly always present,"⁶³ the majority of courts do not consider the plaintiff-debtor's intent to determine whether to invoke judicial estoppel.⁶⁴

Some courts that traditionally followed the strict majority approach in bankruptcy cases have begun carving out exceptions to the strict approach.⁶⁵ In fact, most courts now limit the application of judicial estoppel to cases in which the party pursuing the case is not the plaintiff-debtor but instead is the bankruptcy trustee.⁶⁶ As stated in *Parker v. Wendy's International Inc.*, the central factor in refusing to apply judicial estoppel in this context is that the bankruptcy trustee "did not make any inconsistent statements to the courts."⁶⁷

traditionally applied judicial estoppel to bar plaintiff-debtors from pursuing a cause of action that was omitted from the bankruptcy case).

⁶¹ *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 130–31 (5th Cir. 2013).

⁶² *Id.* at 131.

⁶³ *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013) (citing *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 601 (5th Cir. 2005)).

⁶⁴ The circuits that currently follow the majority approach are the First Circuit, the Fifth Circuit, the Seventh Circuit, the Tenth Circuit, the Eleventh Circuit, and the District of Columbia Circuit. *See, e.g.*, *Dunn v. Advanced Med. Specialties Inc. (In re Tronge-Knoepffler)*, 556 Fed. App'x 785, 788–89 (11th Cir. 2014); *Flugence*, 738 F.3d at 128–29; *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1094 (10th Cir. 2013); *Kimble v. Donahoe*, 511 Fed. App'x 573, 575 (7th Cir. 2013); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 799 (D.C. Cir. 2010); *Payless Wholesale Distribs. Inc. v. Alberto Culver, Inc.*, 989 F.2d 570, 571 (1st Cir. 1993). While the Second Circuit Court of Appeals has not decided a case directly on this point, district courts in the Second Circuit suggest that judicial estoppel applies even when the plaintiff-debtor admitted the potential or pending cause of action from the bankruptcy case. *See, e.g.*, *Whitehurst v. 230 Fifth, Inc.*, 998 F. Supp. 2d 233, 249 (S.D.N.Y. 2014).

⁶⁵ There seems to be a current trend away from applying judicial estoppel based on an objective test as many courts are altering the majority approach. In fact, circuits that apply some modification or exception to the default objective rule include the Third Circuit, the Fourth Circuit, the Sixth Circuit, the Eighth Circuit, and the Ninth Circuit. *See Whitten v. Fred's, Inc.*, 601 F.3d 231, 242 (4th Cir. 2010) ("bad faith is 'the determinative factor' of a judicial-estoppel analysis"); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006) (judicial estoppel should not be applied in the case of a "good faith mistake"); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (deciding that "judicial estoppel would be inappropriate" where there "was no evidence of bad faith").

⁶⁶ *Parker v. Wendy's Int'l*, 365 F.3d 1268, 1269 (11th Cir. 2004).

⁶⁷ *Id.* As most courts have acknowledged, a bankruptcy trustee who does not have knowledge of the potential claim has not engaged in "contradictory litigation tactics." *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006).

Similarly, if it is clear that a plaintiff-debtor's creditors will benefit from pursuing the cause of action, many courts refuse to invoke judicial estoppel.⁶⁸

2. *The Sixth Circuit's Flexible Approach*

Compared with strict majority approach, the Sixth Circuit uses a more flexible approach when deciding whether to apply judicial estoppel in the bankruptcy context.⁶⁹ The Sixth Circuit approach differs from that of the majority because the Sixth Circuit will not estop the plaintiff from pursuing a claim, even when she asserts contradictory positions, if the plaintiff's omission resulted from "mistake or inadvertence."⁷⁰ In determining whether the plaintiff omitted a claim from a bankruptcy schedule based on mistake or inadvertence, the Sixth Circuit considers whether (1) the plaintiff did not have "knowledge of the factual basis of the undisclosed claims; (2) [the plaintiff] had a motive for concealment; and (3) . . . absence of bad faith."⁷¹

In allowing a plaintiff-debtor to show an "absence of bad faith" when that plaintiff-debtor fails to disclose a cause of action in the bankruptcy case and later tries to pursue that cause of action,⁷² the Sixth Circuit looks to see whether a plaintiff-debtor attempted to advise the bankruptcy court of the previously omitted claim.⁷³ More specifically, under the Sixth Circuit approach, courts often consider the timing of the correction of the omission.⁷⁴ A plaintiff-debtor may be unable to show an absence of bad faith if she makes an attempt to correct an omission *after* a defendant files a motion to dismiss based on judicial estoppel.⁷⁵ Nonetheless, if she is able to show that she did not act in bad faith, a court will not invoke the doctrine of judicial estoppel and will allow the plaintiff-debtor to pursue the claim.⁷⁶

⁶⁸ See *In re Arana*, 456 B.R. 161, 171 (Bankr. E.D.N.Y. 2011). The court in *In re Arana* chose not to invoke the doctrine of judicial estoppel after plaintiff-debtor failed to list a medical malpractice action on her statement of financial affairs because creditors could benefit from the cause of action. It noted that the debtor's entitlement to the claim might be estopped to the extent surplus funds were available after creditor claims are paid. *Id.*

⁶⁹ See *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 895 (6th Cir. 2004).

⁷⁰ *Browning v. Levy*, 284 F.3d 761, 776 (6th Cir. 2002).

⁷¹ *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 478 (6th Cir. 2010).

⁷² *Eubanks*, 385 F.3d at 895.

⁷³ *White*, 617 F.3d at 476.

⁷⁴ *Id.*

⁷⁵ See *id.*

⁷⁶ *Id.* (quoting *Eubanks*, 385 F.3d at 895). The Sixth Circuit Court of Appeals' approach to judicial estoppel was also recently confirmed. *Javery v. Lucent Techs. Inc. Long Term Disability Plan for Mgmt. or LBA Emps.*, 741 F.3d 686, 688 (6th Cir. 2014). In *Javery*, the Sixth Circuit Court of Appeals refused to apply judicial estoppel to bar a plaintiff-debtor from pursuing a disability benefits claim that the plaintiff-debtor

The Sixth Circuit approach to the application of judicial estoppel in bankruptcy cases better aligns with the directives in *New Hampshire* than the strict approach applied by the majority of courts. The Sixth Circuit has acknowledged that, even in bankruptcy cases, the “application of judicial estoppel [can] be an inappropriate resolution, rather than a necessary judicial measure to protect the court’s interest” where there is a lack of bad faith on the part of the plaintiff-debtor.⁷⁷

3. *The Ninth Circuit’s Flexible Approach*

The Ninth Circuit recently rejected the traditional strict approach to judicial estoppel in favor of a subjective analysis based on the plaintiff-debtor’s actual intent in *Ah Quin v. County of Kauai Department of Transportation*.⁷⁸ After *Ah Quin*, a court considering the application of judicial estoppel should refrain from invoking the doctrine where there is evidence that the plaintiff-debtor inadvertently or mistakenly excluded a cause of action in her bankruptcy case.⁷⁹

In *Ah Quin*, the plaintiff-debtor filed a gender discrimination suit against her employer.⁸⁰ A year and a half later, a different lawyer represented her when she filed for bankruptcy in April of 2009.⁸¹ In her bankruptcy case, the plaintiff-debtor stated that she was not a party to any pending “suits and administrative proceedings.”⁸² A few months later, the plaintiff-debtor received a chapter 7 discharge.⁸³ The same year at a settlement conference for

excluded from his chapter 13 bankruptcy case. The plaintiff-debtor submitted an affidavit that showed that his wife prepared most of his bankruptcy filings, and the court affirmed the district court’s holding that “any non-disclosure was at best inadvertent,” and therefore the application of judicial estoppel would be inappropriate. *Id.* at 698 (citing *Javery v. Lucent Techs. Inc. Long Term Disability Plan for Mgmt. or LBA Emps.*, No. 2:09-CV-00008, 2010 WL 654010, at *3 (S.D. Ohio Feb. 18, 2010)).

⁷⁷ *Eubanks*, 385 F.3d at 898.

⁷⁸ 733 F.3d 267, 271 (9th Cir. 2013).

⁷⁹ Five months after the Ninth Circuit decided *Ah Quin*, it decided *Dzakula v. McHugh*. *Dzakula v. McHugh*, 746 F.3d 399, 402 (9th Cir. 2014). The Court ruled in favor of the defendant on the grounds of judicial estoppel. However, the court distinguished *Dzakula* from *Ah Quin* because the court believed that there was no evidence that the omission was due to the plaintiff-debtor’s inadvertence or mistake. *Id.* Specifically, the court stated that the plaintiff-debtor did not “provide[] any explanation whatsoever as to why the pending action” was not originally included in her bankruptcy schedules. *Id.*

⁸⁰ 733 F.3d at 269; *see also* *Ah Quin v. Cnty. of Kauai Dep’t of Transp.*, 433 B.R. 320, 321 (D. Haw. 2010), *vacated*, 733 F.3d 267 (9th Cir. 2013). The plaintiff-debtor claimed damages of \$800,000 in the discrimination suit against the County of Kauai.

⁸¹ *Ah Quin*, 733 F.3d at 269.

⁸² *Id.*

⁸³ *Id.*

her gender discrimination suit, the plaintiff-debtor's lawyer in her discrimination suit informed the defendant that the plaintiff-debtor had received a discharge in bankruptcy.⁸⁴ The defendant moved to dismiss the discrimination suit based on the doctrine of judicial estoppel.⁸⁵ The plaintiff-debtor moved to reopen her bankruptcy case and amended her bankruptcy schedules to include her pending discrimination suit.⁸⁶ However, the district court invoked judicial estoppel and granted summary judgment in favor of the defendant.⁸⁷

On appeal, the Ninth Circuit Court of Appeals remanded the case to the district court for further factual findings on whether the plaintiff-debtor left the claim off of her bankruptcy schedules out of "mistake and inadvertence, or of deceit."⁸⁸ The appellate court stated that where a "bankruptcy omission was mistaken, the application of judicial estoppel would do nothing to protect the integrity of the courts."⁸⁹ The court relied on language from *New Hampshire*, where the Supreme Court stated that there should be no question that "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake."⁹⁰ The court suggested that "rather than applying a *presumption* of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood."⁹¹

While the approaches of the Sixth and Ninth Circuits are an improvement over the strict approach of the majority, they should be expanded and developed. The next part of this Comment proposes a test that considers the objectives of bankruptcy law and the interest of protecting the integrity of the courts. Under the proposed test, courts must consider the specific facts of a case when deciding whether to invoke judicial estoppel, a step missing from current approaches.⁹² While many circuits have made inroads towards limiting the application of judicial estoppel, a new and consistent standard should be

⁸⁴ *Id.*

⁸⁵ *Id.* at 270.

⁸⁶ *Id.*

⁸⁷ *Id.* In contrast to the strict approach adopted by the majority of courts, Ninth Circuit courts do not presume that all plaintiff-debtors have a motive to conceal a separate cause of action.

⁸⁸ *Id.* at 277.

⁸⁹ *Id.* at 276.

⁹⁰ *Id.* at 271 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 753 (2001) (internal quotation marks omitted)).

⁹¹ *Id.* at 276. Inadvertence is defined as "an accidental oversight; a result of carelessness." BLACK'S LAW DICTIONARY 877 (10th ed. 2014). A mistake is an "error, misconception, or misunderstanding." *Id.* at 1153.

⁹² *New Hampshire*, 532 U.S. at 751.

established across circuits. A clearer standard is needed to provide guidance for courts in determining when they should limit using the equitable doctrine in the context of bankruptcy cases.

II. WHEN SHOULD COURTS REFRAIN FROM INVOKING JUDICIAL ESTOPPEL? BENEFIT TO THE CREDITORS AND OMISSION DUE TO INADVERTENCE OR MISTAKE

A. *Balance the Objectives of Bankruptcy Law with the Objectives of Judicial Estoppel*

The strict approach to determining when to invoke judicial estoppel puts the objectives of bankruptcy in tension with the traditional concerns about the integrity of the judicial process. The two primary objective of bankruptcy are: (1) distributions to the plaintiff-debtor's creditors and (2) the protection of the debtor's fresh start.⁹³ A policy of considering the subjective intent of the plaintiff-debtor promotes both of these interests by allowing a plaintiff-debtor's creditor's to pursue any cause of action to which they are entitled and allowing a plaintiff-debtor to pursue any cause of action that the plaintiff-debtor's creditors do not wish to pursue. On the other hand, judicial estoppel has historically been concerned with the integrity of the judicial process. Many courts are concerned that allowing debtors to take inconsistent positions in their bankruptcy case and subsequent civil litigation would undermine this process. However, these concerns are largely unfounded when the inconsistent position is due to the plaintiff-debtor's inadvertence or mistake.

As previously discussed, in most circumstances, judicial estoppel is applied at the trial judge's discretion.⁹⁴ However, 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."⁹⁵ The bankruptcy application of judicial estoppel may cause unfair or inequitable results when the plaintiff-debtor's omission was due to inadvertence of

⁹³ See Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 60 (1986); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 729 (1991) (recognizing that maximizing returns to creditors as a group is a principle mechanism of bankruptcy law).

⁹⁴ *New Hampshire*, 532 U.S. at 750.

⁹⁵ *Ah Quin*, 733 F.3d at 271 (citing *Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc.*, 989 F.2d 570, 571 (1st Cir. 1993)).

mistake. Therefore, when deciding to invoke the equitable doctrine of judicial estoppel, courts should use a test that balances the purposes and objectives of bankruptcy law with the need to protect the integrity of the courts.

1. Limiting Judicial Estoppel Serves the First Objective of Bankruptcy Law: Establishing a Fair Distribution for Creditors

Courts should limit the application of judicial estoppel when invoking it would harm a plaintiff-debtor's creditors.⁹⁶ Even if a plaintiff-debtor intentionally fails to list a pending or potential cause of action in a bankruptcy case, his creditors should not be estopped from pursuing that claim.

Despite the sensibility of abstaining from exercising judicial estoppel when it would harm creditors, some courts continue to invoke it in this context.⁹⁷ However, many of these courts also acknowledge that judicial estoppel can lead to a windfall for defendants.⁹⁸ Because applying judicial estoppel prevents both the debtor and anyone else from pursuing the claim, limiting judicial estoppel would allow the "purportedly [wrongdoing] defendant to escape without answering at all for the allegations" against it based on a defense that emerged from a proceeding in which that defendant is not even involved.⁹⁹ For that reason, even if a plaintiff-debtor intentionally excluded a cause of action in his bankruptcy case, innocent creditors should not lose out in favor of alleged bad actors.

The First Circuit has invoked judicial estoppel even where a plaintiff-debtor's creditors might benefit from a plaintiff-debtor's potential cause of action.¹⁰⁰ For example, in *Payless Wholesale Distributors, Inc. v. Alberto Culver, Inc.*, the First Circuit invoked the doctrine of judicial estoppel to affirm a lower court's decision dismissing the plaintiff-debtor's claims.¹⁰¹ The court

⁹⁶ See Korobkin, *supra* note 93 (recognizing that maximizing returns to creditors as a group is a principle policy of bankruptcy law).

⁹⁷ See *Payless Wholesale Distribs., Inc.*, 989 F.2d at 571 (the court invoked the doctrine of judicial estoppel without considering whether the plaintiff-debtor's creditors could have benefitted from the pending cause of action).

⁹⁸ See James D. Walker, Jr. & Amber Nickell, *Judicial Estoppel and the Eleventh Circuit Consumer Bankruptcy Debtor*, 56 MERCER L. REV., 1115, 1126-27 (2005); see also *Payless Wholesale Distribs., Inc.*, 989 F.2d at 571.

⁹⁹ Pamala Foohey, *Recent Developments in Judicial Estoppel and Dismissal of Employment Discrimination Suits*, AM. BANKR. INST. J., Dec./Jan. 2011, at 20, 20.

¹⁰⁰ See *Payless v. Wholesale Distribs., Inc.*, 989 F.2d at 571 (the court rendered an opinion that did not consider or explain the outcome from the viewpoint of the plaintiff-debtor's creditors).

¹⁰¹ *Id.*

found that the plaintiff-debtor corporation intentionally omitted causes of action from its schedules when it filed for chapter 11 bankruptcy.¹⁰² In invoking judicial estoppel to bar the claims, the court ignored the possibility of appointing a trustee to pursue those claims, totaling over \$150 million, for the benefit of the corporation's creditors.¹⁰³ Although the court in *Payless* acknowledged that "defendants may have a windfall," it insisted on invoking the doctrine of judicial estoppel because the plaintiff-debtor corporation had engaged in an "unacceptable abuse of judicial proceedings."¹⁰⁴

Other circuits have followed similar approaches. The Third Circuit applied judicial estoppel to prevent creditors from vindicating the plaintiff-debtor's claims for breach of contract and fraudulent misrepresentation against a bank.¹⁰⁵ The dissent summed up the result aptly because "the only real winner in the suit was the defendant, who was discharged of the responsibility of justifying its allegedly improper behavior."¹⁰⁶ Despite its ruling in *Ah Quin*, the Ninth Circuit has also applied judicial estoppel to block claims that would have benefited creditors.¹⁰⁷ In *Dzakula v. McHugh*, the district court applied judicial estoppel and the Ninth Circuit affirmed, both without mentioning the possible benefit to the plaintiff-debtor's creditors of allowing the claim to move forward.¹⁰⁸

The approach discussed above is clearly contrary to one of the main objectives of bankruptcy law: fair distribution to creditors. Therefore, a court should limit invoking judicial estoppel in the bankruptcy context where it would harm the plaintiff-debtor's creditors. An alleged wrongdoer should not

¹⁰² *Id.* ("Even a cursory examination of the claims shows that defendants should have figured in both aspects of the Chapter 11 proceedings, and that [the plaintiff-debtor corporation] could not have thought otherwise.")

¹⁰³ *Id.* The plaintiff-debtor's creditors also have the option of moving to reopen the bankruptcy case if the creditors want to pursue a claim for their benefit. 11 U.S.C. § 350(b) (2012).

¹⁰⁴ *Payless Wholesale Distribs., Inc.* 989 F.2d at 571.

¹⁰⁵ *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 415–16 (3d Cir. 1988).

¹⁰⁶ *Id.* at 422 (Stapleton, J., dissenting).

¹⁰⁷ *See Dzakula v. McHugh*, 746 F.3d 399, 402 (9th Cir. 2014).

¹⁰⁸ *See id.*; *Dzakula v. McHugh*, No. 14, 2011 WL 1807241 (N.D. Cal. 2013). In *Dzakula*, the Ninth Circuit Court of Appeals' disregard for the possible benefit to the plaintiff-debtor's creditors differs from its earlier reasoning in *Ah Quin*. The court in *Ah Quin* noted that the bankruptcy trustee decided not to pursue the plaintiff-debtor's case, and the plaintiff-debtor's creditors did not object to that decision. The court stated that "[a]lthough the creditors may not receive any benefit from [the plaintiff-debtor's action], that was the choice of the creditors and the trustee." *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 276 n.8 (9th Cir. 2013). The court further noted that the creditors could possibly move to reopen the bankruptcy case and pursue the lawsuit for their benefit. *Id.*

benefit at the expense of those creditors because a court chose to apply judicial estoppel to a plaintiff-debtor's potential or pending cause of action.

2. *Limiting Judicial Estoppel Can Also Establish a Fresh Start for the Debtor*

Courts should limit the application of judicial estoppel to further the second goal of bankruptcy law, which is to create a fresh start for the debtor.¹⁰⁹ Instead of a default rule that does not consider the plaintiff-debtor's intentions, courts should engage in a subjective analysis to determine whether the plaintiff-debtor excluded the pending cause of action because of inadvertence or mistake. If the court finds that a plaintiff-debtor made an honest mistake, the mistake should not jeopardize her fresh start. The plaintiff-debtor should be able to recover on the claim to the extent there are funds remaining after the distribution to creditors.¹¹⁰ Similarly, where a trustee or the plaintiff-debtor's creditors abandon a debtor's cause of action,¹¹¹ the court should determine whether the plaintiff-debtor should be estopped based on a subjective test of the state of mind of the debtor in omitting the cause of action. If the court finds that the omission was the result of inadvertence or mistake, it should not invoke judicial estoppel.

3. *Integrity of the Courts*

One of the main arguments that courts use when applying judicial estoppel in bankruptcy is to protect the integrity of the courts.¹¹² However, refusing to apply judicial estoppel when the debtor omitted the claim due to inadvertence or mistake does not impinge the integrity of the courts. And even if a plaintiff-debtor *intentionally* excludes a cause of action from his bankruptcy case, the integrity of the courts will not be compromised if the plaintiff-debtor's

¹⁰⁹ See William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt-Out" as Child of the First and Parent of the Second*, 71 AM. BANKR. L.J. 149, 152 (1997) (stating that bankruptcy laws promote a fresh start for the debtor).

¹¹⁰ As discussed above, where the bankruptcy trustee wishes to pursue the claim on behalf of the plaintiff-debtor's creditors, a plaintiff-debtor should only recover after distributions are made to those creditors. While it may be rare for a plaintiff-debtor to benefit from a pending suit after distribution is made to creditors, it is not unheard of. See, e.g., *In re Arana*, 456 B.R. 161, 176 (Bankr. E.D.N.Y. 2011).

¹¹¹ E.g., *Ah Quin*, 733 F.3d at 276 & n. 8.

¹¹² E.g., *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 785 (9th Cir. 2001) ("In this case, we must invoke judicial estoppel to protect the integrity of the bankruptcy process."); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988); see also *Arana*, 456 B.R. at 173 (refusing to apply judicial estoppel because the debtors' actions did not "imperil[] the integrity of [the] court or the bankruptcy process").

creditors are given the opportunity to pursue that cause of action.¹¹³ Some circuits now allow the trustee to reopen the case and pursue a cause of action for the benefit of creditors.¹¹⁴ For example, in *In re Arana*, a debtor did not list a pending medical malpractice action in her bankruptcy case.¹¹⁵ Although the court acknowledged that “[f]ull and honest disclosure in a bankruptcy case is crucial to the effective functioning of the bankruptcy system,”¹¹⁶ the court refused to invoke the doctrine of judicial estoppel at the expense of the plaintiff-debtor’s creditors.¹¹⁷ According to the court, “The prospect of a benefit to creditors is the most important consideration in determining whether to reopen a bankruptcy case to add an undisclosed asset.”¹¹⁸ To protect the interests of creditors, the court appointed a trustee to administer the malpractice claim and distribute potential earnings to creditors.¹¹⁹ The judicial process will not be compromised if a plaintiff-debtor’s creditors, who committed no wrongdoing, are able to pursue a plaintiff-debtor’s claim for their own benefit.

B. The Application of Judicial Estoppel in Bankruptcy Should Mirror the Application of the Doctrine in Non-Bankruptcy Cases

A court is never required to apply judicial estoppel, but instead it *may* be invoked at the court’s discretion.¹²⁰ If a court applies judicial estoppel based on a default presumption of deceit¹²¹ and does not use its discretion to determine if a plaintiff-debtor excluded a cause of action inadvertently, it acts contrary to the directives of the Supreme Court in *New Hampshire v. Maine*.

Outside of the bankruptcy context, courts limit the application of judicial estoppel through judicial discretion and contextual analysis of the facts of each

¹¹³ *Oneida Motor Freight, Inc.*, 848 F.2d at 421–22 (Stapleton, J., dissenting).

¹¹⁴ See Blake H. Bailey, *Survey Article: Bankruptcy*, 45 TEX. TECH L. REV. 603, 605 (2013) (“[J]udicial estoppel [will] not prevent an innocent bankruptcy trustee from pursuing a cause of action that the debtor failed to schedule.”) (citing *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011); *Parker v. Wendy’s Int’l*, 365 F.3d 1268, 1272 (11th Cir. 2004)); see also 11 U.S.C. § 350(b) (2012) (allowing the court to reopen bankruptcy cases).

¹¹⁵ 456 B.R. at 165.

¹¹⁶ *Id.* at 169 (quoting *In re Lowery*, 398 B.R. 512, 515 (Bankr. E.D.N.Y. 2008)).

¹¹⁷ *Id.* at 175.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 177–78.

¹²⁰ *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

¹²¹ *Ah Quin v. Cnty. of Kauai Dep’t of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013).

case.¹²² As discussed, in *New Hampshire* the Supreme Court enumerated three non-exclusive factors that courts should consider before applying judicial estoppel: (1) whether the two positions were “clearly inconsistent”; (2) whether a court has accepted either position, such that a later inconsistent ruling would imply that one of the courts was misled; and (3) whether the party asserting the contradictory positions would gain an “unfair advantage or imposed an unfair detriment on the opposing party.”¹²³

Many courts do not apply the doctrine where the inconsistency between two contradicting statements is slight or inadvertent, but instead “carefully consider the contexts in which apparently contradictory statements are made to determine if there is, in fact, direct and irreconcilable contradiction.”¹²⁴ Those courts only apply judicial estoppel to cases where the danger of inconsistent results would negatively impact judicial integrity.¹²⁵ For example, in *DeRosa v. National Envelope Corp.*, the plaintiff sued his former employer for employment discrimination after previously applying for Social Security Disability Insurance based on an inability to work.¹²⁶ The court refused to apply judicial estoppel because “the mere fact that a plaintiff files for social security benefits . . . does not create a presumption that [he] is unable to perform the essential functions of [a] job.”¹²⁷ The court emphasized that the plaintiff made one statement in response to a question about social activities, while the other statement referred to the work-effect of his disabilities.¹²⁸ The court held that judicial estoppel was inappropriate because the “risk of inconsistent results with its impact on judicial integrity” was not certain.¹²⁹ The court reconciled the inconsistencies on the two forms by emphasizing the importance of the “context in which a statement is made.”¹³⁰

Courts should take similar considerations into account in the bankruptcy context as compared to the non-bankruptcy context when deciding whether to invoke the doctrine of judicial estoppel. After a plaintiff-debtor excludes a

¹²² *E.g.*, *New Hampshire*, 532 U.S. at 751; *DeRosa v. Nat’l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010).

¹²³ *New Hampshire*, 532 U.S. at 750–51.

¹²⁴ *Rodal v. Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 119 (2nd Cir. 2004).

¹²⁵ *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005) (quoting *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72 (2d Cir. 1997)) (internal quotation marks omitted).

¹²⁶ 595 F.3d at 101–02.

¹²⁷ *Id.* at 103 (citing *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 802–03 (1999)).

¹²⁸ *Id.* at 104.

¹²⁹ *Id.* at 103 (quoting *Uzdavines*, 418 F.3d at 148).

¹³⁰ *Id.* at 103 (citing *Rodal v. Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 119 (2d Cir. 2004)).

potential or pending lawsuit from his schedules or statement of financial affairs, courts should similarly limit invoking the doctrine of judicial estoppel based on the facts of each specific case. More specifically, a plaintiff-debtor may not have acted with a motive to conceal if that plaintiff-debtor did not understand that she was required to disclose a pending cause of action. Furthermore, when a plaintiff-debtor suffers an injury after her bankruptcy case has been confirmed, she may not have a reason to believe she is required to disclose that injury to the bankruptcy court.

In the case where a plaintiff-debtor's creditors may be able to benefit from pursuing the cause of action, a court should exercise caution in applying judicial estoppel. Even where a plaintiff-debtor's creditors will not benefit from a potential or pending cause of action but the plaintiff-debtor has shown that she made an honest mistake or an inadvertent omission, the risk of inconsistent results with an impact on judicial integrity is not certain. In fact, judicial integrity would be preserved as long as the plaintiff-debtor did not intentionally try to hide a potential or pending cause of action.

While the Supreme Court in *New Hampshire* recognized the importance of applying judicial estoppel when the integrity of the courts is at stake, it also emphasized that it did not seek to establish "inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel."¹³¹ The Supreme Court did not qualify its decision on the viability of judicial estoppel based on the type of case at issue, and did not suggest that the possibility of an inadvertent or mistaken omission would be precluded in the bankruptcy context.

A uniform approach must be established to determine when to invoke judicial estoppel where a plaintiff-debtor excludes a pending or potential cause of action from the schedules or the statement of financial affairs. While the Ninth Circuit's decision in *Ah Quin* reaches an equitable result by advocating that courts look to the subjective intent of the debtor, the court's decision

¹³¹ *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001). It is noteworthy that the Supreme Court cited bankruptcy-related cases when it discussed the creating of the factors a court should consider when deciding to invoke judicial estoppel, which suggests judicial discretion should be used in the bankruptcy context similarly to other cases. The Court cited *In re Coastal Plains* when discussing the first factor of judicial estoppel—whether the positions are “clearly inconsistent”. *Id.* at 750 (citing *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999)). The fact that the Supreme Court cited bankruptcy-related decisions in its decision on how to apply judicial estoppel, but did not qualify its decisions to suggest that a plaintiff-debtor's omission in a bankruptcy case could never be inadvertent or mistaken, suggests that a subjective test in the context of bankruptcy cases could be applied.

disrupts precedent and “deprives lower courts and litigants of any predictability” for the application of judicial estoppel in bankruptcy cases.¹³² A clearer rule should be established so that judges can more consistently determine when to invoke judicial estoppel when a plaintiff-debtor has failed to list a cause of action in the bankruptcy case.

III. APPLYING THE SUBJECTIVE INTENT TEST

While the policies behind bankruptcy law and judicial estoppel suggest that courts should assess the debtor’s objective intent, this raises the question of how a court should perform this inquiry. One possibility could be to engage in a five factor test to determine the state of mind of the debtor, or whether a plaintiff-debtor excluded a cause of action from his schedules because of inadvertence. Courts could consider five factors: (1) the type of plaintiff-debtor; (2) the plaintiff-debtor’s subsequent attempts to disclose a pending claim; (3) whether the claim was a prepetition or postpetition cause of action; (4) whether the plaintiff-debtor could have exempted any of the pending claim; and (5) whether the plaintiff-debtor offset a liability with an asset on the bankruptcy schedules.¹³³ Courts should look at all of these factors as part of an analysis of the totality of the circumstances of the case; no factor is meant to be dispositive and every factor will not be present in all cases. A court can use these factors as a workable framework to decide whether to invoke the doctrine of judicial estoppel to bar a plaintiff-debtor from recovering from a cause of action.

A. *The Type of Plaintiff-Debtor Who Files for Bankruptcy*

In deciding whether to invoke judicial estoppel, courts should consider the type of debtor who filed for bankruptcy, whether a corporate entity or an individual. This inquiry would provide an important insight for the court in determining whether a cause of action was inadvertently omitted from the bankruptcy case. For example, a corporation that files for chapter 11 protection will likely retain experienced bankruptcy counsel to help them through the reorganization process. In contrast, an individual debtor may be represented by an inexpensive bankruptcy attorney who is minimally involved with the individual’s case or not be represented at all. As compared to individuals,

¹³² Ah Quin v. Cnty. of Kauai Dep’t of Transp., 733 F.3d 267, 283 (9th Cir. 2013) (Bybee, J., dissenting).

¹³³ See Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 781 (9th Cir. 2001) (describing the debtor who listed a vandalism loss as a liability on his bankruptcy schedule and simultaneously omitted a claim against State Farm as an asset on those schedules).

courts should be less trusting of corporations that claim an omission during a bankruptcy filing was due to a mistake. This Part examines cases that have addressed three types of debtors: corporations, represented individuals, and pro se individuals.

1. *A Corporation Filing for Chapter 11 Reorganization*

Some courts have suggested that corporations that have large legal teams working on chapter 11 reorganizations can be held to higher standards as compared to individual plaintiff-debtors in terms of what they are expected to disclose in their bankruptcy schedules.¹³⁴ In *Payless Wholesale Distributors, Inc. v. Alberto Culver, Inc.*, Payless filed for bankruptcy but failed to list pending lawsuits in its bankruptcy case.¹³⁵ The court found that Payless intentionally excluded its pending lawsuits from the statement of financial affairs and upheld summary judgment for the defendants by invoking judicial estoppel.¹³⁶ Implicit in the court's opinion was the idea that a corporation that planned to sue another corporation should know better than to exclude a pending cause of action from its bankruptcy case.¹³⁷

Similarly, in *Browning Manufacturing v. Mims (In re Coastal Plains, Inc.)*, the court applied judicial estoppel to bar the plaintiff-debtor corporation from recovering from a suit it had omitted from its bankruptcy schedules.¹³⁸ In that case, the CEO of the bankrupt company failed to list a \$10 million claim against a prior supplier on a sworn bankruptcy schedule.¹³⁹ The evidence showed that at the time the CEO signed the corporation's bankruptcy schedules he knew about the potential claim.¹⁴⁰ The plaintiff-debtor's attorney later conceded that the claims should have been listed, but did not provide an explanation of why he omitted those claims from the schedules and statement

¹³⁴ See *H.R.P. Auto Ctr., Inc. v. State of Ohio Dep't of Taxation (In re H.R.P. Auto Ctr., Inc.)*, 130 B.R. 247, 254 (Bankr. N.D. Ohio 1991) (the plaintiff-debtor corporation was judicially estopped because it was "aware of the potential claim during pendency of reorganization," but omitted that claim from its schedules).

¹³⁵ 989 F.2d 570, 571 (1st Cir. 1993).

¹³⁶ *Id.* The court called Payless' failure to list these causes of action brazen and that it created "palpable fraud."

¹³⁷ See *id.* ("Payless, having obtained relief on the representation that no claims existed, can not now resurrect them and obtain relief on the opposite basis.")

¹³⁸ 179 F.3d 197, 213 (5th Cir. 1999).

¹³⁹ *Id.* at 203.

¹⁴⁰ *Id.*

of financial affairs.¹⁴¹ The courts in *Payless* and *In re Coastal Plains* barred corporations from pursuing potential claims as part of their fresh start.¹⁴²

Conversely, the Third Circuit Court of Appeals allowed a corporate plaintiff-debtor to proceed with a claim that was excluded from the corporation's bankruptcy schedules. In *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, the defendant made a motion to have a suit dismissed based on judicial estoppel because the plaintiff-debtor had omitted the potential suit from its bankruptcy schedules.¹⁴³ The Third Circuit reversed the district court's application of judicial estoppel.¹⁴⁴ The court stated that judicial estoppel should not apply when a plaintiff-debtor takes an earlier position because of a mistake that is in good faith, instead of as a deliberate plan to mislead the court.¹⁴⁵ Unlike the debtors in *Payless* and *In re Coastal Plains*, in this case the record showed that the plaintiff-debtor disclosed its potential suit during the bankruptcy proceedings.¹⁴⁶ In deciding not to invoke judicial estoppel, the Third Circuit took the position that "judicial estoppel is an *extraordinary* remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice," even in the context of a corporate debtor filing for chapter 11 reorganization.¹⁴⁷

The corporations in *Payless* and *In re Coastal Plains* omitted multi-million dollar claims from their bankruptcy schedules that they later tried to pursue. In fact, one of the claims that *Payless* left off its schedules was a claim alleging millions of dollars in damages for attempting to drive *Payless* out of business.¹⁴⁸ At the time that *Payless* declared bankruptcy, however, it failed to list any pending lawsuit on its bankruptcy schedules.¹⁴⁹ The facts of *Payless* thus suggest that it was unlikely that *Payless* inadvertently excluded the potential cause of action in its bankruptcy filings.¹⁵⁰ The court acted reasonably to bar *Payless* from pursuing its claim as part of its fresh start because it had many corporate lawyers working on its case, there was

¹⁴¹ *Id.* at 212.

¹⁴² *See id.* at 213; *Payless Wholesale*, 989 F.2d at 571.

¹⁴³ 81 F.3d 355, 357 (3d Cir. 1996).

¹⁴⁴ *Id.* at 356–57.

¹⁴⁵ *Id.* at 362 (quoting *Konstaninidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980)).

¹⁴⁶ *Id.* at 364 (finding that actions such as submitting a fee request to the bankruptcy court demonstrated the plaintiff-debtor did not "deliberately conceal[]" its pending litigation).

¹⁴⁷ *Id.* at 364–65 (citing *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 424 (3d Cir. 1988) (Stapleton, J., dissenting)).

¹⁴⁸ *Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc.*, 989 F.2d 570, 571 (1st Cir. 1993).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

substantial evidence that Payless knew it should have included the pending lawsuit on its schedules, and the lawsuit it had filed was against a firm that Payless claimed drove it into bankruptcy. Based on all of these factors combined, the court in Payless acted reasonably to bar it from pursuing the pending cause of action as part of its fresh start.

2. *An Individual Filing for Chapter 7 or Chapter 13 Protection with Counsel*

While courts may often assume that omissions on corporate debtors' schedules are deliberate, the same is probably not true for individual consumer debtors. Attorneys who represent individuals in bankruptcy proceedings should explain the bankruptcy process to their clients, as well as thoroughly describe the statement of financial affairs and the schedules. During this process, the bankruptcy attorney should inquire whether the plaintiff-debtor has any potential or pending causes of action that should be listed in the bankruptcy filing. However, an oversight by an attorney or a misunderstanding by a client could cause the plaintiff-debtor to inadvertently exclude a pending or potential lawsuit from the statement of financial affairs.

For example, a debtor who retains different representation in a bankruptcy case than in a pending lawsuit may not realize that the two proceedings are related.¹⁵¹ As discussed previously, even when a plaintiff-debtor informs her bankruptcy attorney of a potential or pending lawsuit but it is not listed on the bankruptcy schedules, some courts apply judicial estoppel to bar a plaintiff from pursuing a cause of action.¹⁵² Courts that take this strict approach find that an "attorney's omission is no panacea" because the "petitioner voluntarily chose this attorney as his representative in the action."¹⁵³ The plaintiff-debtor's remedy was not to be allowed to pursue the previously omitted claim.¹⁵⁴ Rather, it was a malpractice claim against his attorney.¹⁵⁵

Although it is important for an individual to be bound by the acts of his lawyer in a bankruptcy proceeding,¹⁵⁶ courts should limit the application of

¹⁵¹ See, e.g., *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 278 (9th Cir. 2013) (reviewing evidence that plaintiff-debtor did not know her bankruptcy case and her discrimination suit were related).

¹⁵² See *Barger v. City of Cartersville*, 348 F.3d 1289, 1297 (11th Cir. 2003).

¹⁵³ *Id.* at 1295.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962) ("[O]ur system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . .").

judicial estoppel where there is convincing evidence that the individual debtor omitted a cause of action because of an attorney's oversight.

3. *Pro Se Debtors*

Despite concerns about imputing the acts of an attorney to individual debtors in this context, possibly an even greater concern is the application of judicial estoppel against unrepresented debtors when there is convincing evidence that the omission was due to inadvertence or mistake. The majority of debtors who file for bankruptcy obtain an attorney during bankruptcy proceedings.¹⁵⁷ However, the number of pro se bankruptcy debtors has significantly increased over the past five years.¹⁵⁸

Although appearing pro se should not be a blanket excuse for mistakes, bankruptcy proceedings can be complex and confusing when they include schedules and statements of financial affairs. Courts should be more receptive to evidence of inadvertence or mistake when the plaintiff-debtor filed his bankruptcy pro se. Two factors should lead courts to this conclusion: (1) the special protections provided to pro se debtors in the Code and (2) the fact that bankruptcy forms provide little or no instruction for pro se filers.

a. *The Bankruptcy Code*

The Code provides certain protections for plaintiff-debtors and acknowledges that the process can be difficult when a plaintiff-debtor files for bankruptcy pro se.¹⁵⁹ For example, the Code requires that the court reviews any agreement in which a pro se debtor enters into a reaffirmation agreement during bankruptcy.¹⁶⁰ The fact that some protections are built into the Code for pro se debtors suggests that it would be reasonable for a court to give a pro se debtor leeway in determining when to invoke judicial estoppel. If a pro se plaintiff-debtor can provide evidence that she omitted a cause of action by an

¹⁵⁷ *See By the Numbers—Pro Se Filers in the Bankruptcy Courts*, THIRD BRANCH (Oct. 2011), http://www.uscourts.gov/News/TheThirdBranch/11-10-01/By_the_Numbers—Pro_Se_Filers_in_the_Bankruptcy_Courts.aspx. The central district of California had the highest percentage of pro-se filers at 27%. Most other bankruptcy courts have less than 10% of debtors who file for bankruptcy pro se.

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.*, 11 U.S.C. § 524(c)(6)(A) (2012) (directing the court to consider whether a reaffirmation agreement is in the best interest of the debtor when the debtor has filed for bankruptcy pro se).

¹⁶⁰ *Id.* (directing the court to approve agreements between unrepresented individuals and a creditor holding a debt that would be dischargeable in bankruptcy only if they do not impose “an undue hardship on the debtor” and that are “in the best interest of the debtor”).

inadvertent mistake, the court could limit the application of judicial estoppel and allow the plaintiff-debtor to pursue the claim.

b. A Lack of Clarity in the Instructions Accompanying Bankruptcy Forms

Furthermore, the statement of financial affairs and the Schedule B form lack clear instructions on how to properly complete each form, which could contribute to a pro se debtor's failure to list a pending or potential cause of action on either form. The instructions accompanying the statement of financial affairs, state "the debtor must list all lawsuits and administrative proceedings, to which the debtor was a party within one year before filing the bankruptcy case."¹⁶¹ The instructions explain that this section "includes, but is not limited to, divorce proceedings and state and federal administrative proceedings."¹⁶² An individual debtor who is unfamiliar with the bankruptcy process may not understand that a pending or yet-to-be-filed torts or breach of contract case should be disclosed on the statement of financial affairs.

While the instructions that accompany the statement of financial affairs are unclear, Schedule B, the personal property form, has no separate instructions at all.¹⁶³ The form itself states that the plaintiff-debtor should list "contingent and unliquidated claims of every nature."¹⁶⁴ There is no accompanying instruction explaining to unsophisticated debtors what a "claim of every nature" might entail. A plaintiff-debtor could inadvertently exclude a pending, or especially a potential, cause of action that has not yet been filed on the schedules or the statement of financial affairs because of the vagueness of the forms.¹⁶⁵ For example, the court in *In re Arana* noted that the couple filed for bankruptcy pro se and were unfamiliar with bankruptcy law.¹⁶⁶ Furthermore, the couple spoke English as a second language and only had access to an interpreter during some of their bankruptcy proceedings.¹⁶⁷ Although the court did not directly analyze

¹⁶¹ Form 7 Instructions, *supra* note 12; *see also* Form 7, *supra* note 12.

¹⁶² Form 7, *supra* note 12.

¹⁶³ *See Bankruptcy Forms*, U.S. COURTS, <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx> (last visited May 8, 2015). There is a section labeled "Instructions" next to Schedule B (Official Form 6B), but the link is not active.

¹⁶⁴ Schedule B, *supra* note 12.

¹⁶⁵ In fact, the court in *Ah Quin* gave weight to the plaintiff-debtor's affidavit where she stated that she did not understand the vague bankruptcy schedules. *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 277 (9th Cir. 2013). The plaintiff-debtor hired an attorney to represent her in her bankruptcy case, but the court still granted her some leniency in determining whether to apply judicial estoppel because she explained the forms were confusing. *Ah Quin*, 733 F.3d at 278.

¹⁶⁶ 456 B.R. 161, 174 (Bankr. E.D.N.Y. 2011).

¹⁶⁷ *Id.* at 167.

whether the plaintiff-debtors made a mistake, the court implied that the plaintiff-debtor acted inadvertently when she excluded a malpractice action from the statement of financial affairs, because “no one told her that the Malpractice Action was related to her bankruptcy, and . . . she did not know that it was.”¹⁶⁸

In summary, the court should first determine what type of plaintiff-debtor filed for bankruptcy. Courts may appropriately be skeptical of a corporation that tries to argue that it omitted a cause of action because of mistake or inadvertence. However, if a plaintiff-debtor is unfamiliar with the bankruptcy system, or files for bankruptcy pro se, a court should use caution when deciding to invoke the doctrine of judicial estoppel and bar that plaintiff-debtor from pursuing a cause of action. While a plaintiff-debtor’s ignorance of the law should not be an automatic excuse, confusion and misunderstanding suggest that the plaintiff-debtor acted because of inadvertence or an honest mistake.¹⁶⁹

B. The Plaintiff-Debtor’s Attempts to Disclose a Pending Claim

In determining whether a plaintiff-debtor inadvertently or mistakenly excluded a cause of action, courts should inquire whether the plaintiff-debtor made affirmative attempts to disclose the claim, particularly looking at attempts to amend the bankruptcy schedules and the timing of the disclosures. Where a plaintiff-debtor makes a conscious effort to disclose a potential or pending claim, judicial estoppel may be improper.¹⁷⁰ For example, in *Eubanks v. CBSK Financial Group*, the court held that judicial estoppel should not bar the plaintiff-debtor from recovering because of evidence that “Plaintiffs made the court, and the Trustee, aware of the potential civil claim against Defendant before the bankruptcy action closed.”¹⁷¹ In contrast, the court in *Barger* upheld the application of judicial estoppel, despite the plaintiff-debtor’s multiple

¹⁶⁸ *Id.* at 168; see also *Ah Quin*, 733 F.3d at 277 (applying an ordinary interpretation of mistake and inadvertence derived from a dictionary to find that the evidence was insufficient to determine whether the plaintiff-debtor’s omission was intentional).

¹⁶⁹ See, e.g., *Ah Quin*, 733 F.3d at 277. In *Ah Quin*, the court gave weight to Ah Quin’s affidavit that stated she was confused by the bankruptcy schedules and thought they were vague. The court considered the affidavit as evidence showing that Ah Quin’s omission of her pending lawsuit was inadvertent and mistaken.

¹⁷⁰ See *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 898 (6th Cir. 2004).

¹⁷¹ *Id.*; see also *Barger v. City of Cartersville*, 348 F.3d 1289, 1297 (11th Cir. 2003) (Barkett, J., dissenting) (dissenting partially on the grounds that judicial estoppel should not be applied to bar a claim when a plaintiff-debtor failed to list a pending lawsuit on her statement of financial affairs but orally informed the bankruptcy trustee and group of creditors about her pending lawsuit).

attempts to disclose her discrimination suit to her attorney, the bankruptcy trustee, and her creditors.¹⁷²

The difference in the outcomes of *Eubanks* and *Barger* exemplify how different circuits apply judicial estoppel in the face of evidence of the plaintiff-debtor's attempted disclosures. As the dissenting judge in *Barger* noted, the plaintiff-debtor's "voluntary disclosure undermines any suggestion that she intended to hide the suit from the trustee or the creditors."¹⁷³ By not giving appropriate weight to the debtor's attempt to disclose her claim, the court reached an inequitable result.

To avoid such an inequitable result, courts should consider evidence such as whether the plaintiff-debtor attempted to amend her bankruptcy schedule and the timing of the disclosure. A plaintiff-debtor can show the inadvertence of her omission through evidence that she attempted to amend the bankruptcy schedules to include a potential or pending cause of action. As stated by the court in *Ah Quin*, "Where . . . the plaintiff-debtor reopens bankruptcy proceedings, corrects her initial error, and allows the bankruptcy court to re-process the bankruptcy with the full and correct information, a *presumption* of deceit no longer comports with *New Hampshire*."¹⁷⁴ Furthermore, the timing of the plaintiff-debtor's disclosure to the court, her opposing party, or her attorney is important. Any evidence that shows that the debtor took steps to inform the defendant or the courts of the pending claim before they found out about it through other means should serve as evidence of honest mistake. For example, in *Ah Quin* "it was plaintiff's counsel who first raised the bankruptcy to Defendant's attention at a settlement conference."¹⁷⁵ If the plaintiff-debtor had not mentioned her bankruptcy filing during settlement conferences with the defendant, there is a possibility that the defendant would have settled instead of asserting a judicial estoppel defense. Judicial estoppel should not be applied in such a way that it punishes honesty. The fact that a plaintiff-debtor discloses her bankruptcy discharge to the defendant should be a key fact to determine whether her omission of her pending claim was inadvertent.¹⁷⁶

¹⁷² See *Barger*, 348 F.3d at 1296 ("[T]he fact that Barger informed the trustee about her discrimination suit during the creditor's meeting does not aid her cause."). For the facts of *Barger*, see *supra* text accompanying notes 19–25.

¹⁷³ 348 F.3d at 1298 (Barkett, J., dissenting).

¹⁷⁴ 733 F.3d at 273.

¹⁷⁵ *Id.*

¹⁷⁶ However, merely amending the schedules (and providing no additional evidence) after a defendant moves for summary judgment based on judicial estoppel will not be sufficient to show that the omission was inadvertent or mistaken. See *Dzakula v. McHugh*, 746 F.3d 399 (9th Cir. 2013) ("Plaintiff presented no

C. *Whether the Plaintiff-Debtor's Claim Arose Prepetition or Postpetition in the Context of a Chapter 13 Plaintiff*

If the debtor has filed for chapter 13 bankruptcy, in addition to looking for evidence of whether the plaintiff-debtor took steps to disclose the claim, courts should inquire when the pending cause of action arose: prepetition or postpetition.¹⁷⁷ Courts have not developed a clear rule whether a chapter 13 debtor should add a postpetition cause of action to the bankruptcy schedules as property of the estate.¹⁷⁸ Courts struggle with the uncertainty on whether chapter 13 debtor's should add a postpetition cause of action to the bankruptcy schedules because of an uncertainty created by two provisions in the Code. First, 11 U.S.C. § 1306(a)(1) creates a special definition of property in chapter 13 that includes "all property . . . that the debtor acquires after the commencement of the case but before the case is closed"¹⁷⁹ Thus any property that the debtor obtains after the commencement of the bankruptcy proceeding, such as wages or possibly claim for discrimination, would become property of the estate. However, 11 U.S.C. § 1327(b) states that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."¹⁸⁰ Section 1327(b) raises the inference that, if a debtor incurs a cause of action after the confirmation of his plan, the debtor should be able to pursue that cause of action without amending the bankruptcy schedules since all property of the estate has been invested in the plaintiff-debtor. Because of the uncertainty in the Code in terms of postpetition causes of action, courts should refrain from applying judicial estoppel when an individual plaintiff-debtor incurred a cause of action following the confirmation of his plan. Surely the integrity of the judicial process would not be compromised where there is a lack of clarity in the law, and the plaintiff-debtor was allowed to pursue a cause of action as part of the fresh start.¹⁸¹

evidence, by affidavit or otherwise, explaining her initial failure to include the action on her bankruptcy schedules.").

¹⁷⁷ There seem to be fewer cases where judicial estoppel is invoked as a defense in the case of a chapter 13 debtor. One explanation could be "because a Chapter 13 debtor, unlike a Chapter 7 debtor, holds property—including lawsuits—while in bankruptcy." Lega, *supra* note 45, at 253.

¹⁷⁸ See *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 129 (5th Cir. 2013) ("It may be uncertain whether a debtor must disclose assets post-confirmation.").

¹⁷⁹ Compare 11 U.S.C. § 1306(a)(1) (2012), with *id.* § 541(a) (including only property of the debtor as of the commencement of the case).

¹⁸⁰ 11 U.S.C. § 1327(b).

¹⁸¹ See *Flugence*, 738 F.3d at 129–30. In *Flugence*, the court acknowledged that the law regarding postpetition causes of action might be unclear, but it upheld the application of judicial estoppel because the

D. Whether the Plaintiff-Debtor Could Have Exempted Any of the Potential Claims During the Bankruptcy Case

If the plaintiff-debtor is filing for chapter 7 liquidation bankruptcy, courts could also consider whether a plaintiff-debtor could have exempted a potential or pending cause of action under state bankruptcy laws or under the Code.¹⁸² As discussed earlier, when the debtor files for bankruptcy, all of her interest in any claims become property of the estate.¹⁸³ Once the property comes into the estate, § 522 allows the debtor to claim certain property as exempt from liquidation under either the federal or state exemptions.¹⁸⁴ For example, the federal exemptions under the Code allow a debtor to exempt personal injury claims up to \$22,975.¹⁸⁵ Courts could refuse to invoke judicial estoppel when a plaintiff-debtor could have exempted the claim she excluded from her bankruptcy case.¹⁸⁶ The court in *McClain v. Coverdall & Co.* found that the omitted claims would not have exceeded the debtor's statutory exemption amount.¹⁸⁷ Therefore, the plaintiff-debtor had no motive to conceal the claims that she excluded from her statement of financial of affairs and schedules as she would not have received a windfall.¹⁸⁸ The court held that invoking the doctrine of judicial estoppel would have been inappropriate in the plaintiff debtor's case.¹⁸⁹

Under the strict approach to judicial estoppel in the bankruptcy context, courts hold that judicial estoppel should bar “a plaintiff from asserting claims previously undisclosed to the bankruptcy court where the plaintiff both knew about the undisclosed claims and had a motive to conceal them from the

plaintiff-debtor's chapter 13 confirmation plan stated that the estate's assets “would not revest in the debtor until discharge.” *Id.*; see also *Lewis v. Weyerhaeuser Co.*, 141 Fed. App'x 420, 427 (6th Cir. 2005).

¹⁸² Where states have implanted their own bankruptcy exemption statutes, an individual debtor is able to exempt property of the estate under either state law or under the federal bankruptcy laws. 11 U.S.C. § 521(b)(1). However, debtors must pick to use one set of exemptions and cannot mix and match exemptions from the state laws and federal bankruptcy laws. *Id.* For example, while not all states offer exemptions for pending or potential causes of action, the Code allows a plaintiff-debtor to exempt up to \$22,975 for a personal injury claim. *Id.* § 522(d)(11)(D) (authorizing the debtor to exempt up to \$22,975 “on account of personal bodily injury . . . of the debtor or an individual of whom the debtor is a dependent”).

¹⁸³ *Id.* § 541(a); see *supra* text accompanying notes 40–44.

¹⁸⁴ 11 U.S.C. § 522(b)(2)–(3). Most states have chosen to opt out of the federal exemptions, so debtors domiciled in those states can only use their state's exemptions.

¹⁸⁵ *Id.* § 522(d)(11)(D).

¹⁸⁶ *McClain v. Coverdall & Co.*, 272 F. Supp. 2d 631, 642 (E.D. Mich. 2003).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

bankruptcy court.”¹⁹⁰ However, as the court in *McClain* noted, the plaintiff-debtor’s motive for concealing a pending or potential cause of action is lacking where that plaintiff could have partially or fully exempted the claim when the bankruptcy petition was filed.¹⁹¹ In this circumstance, courts should consider the debtor’s ability to exempt the claim, and this should weigh against invoking judicial estoppel.

E. Whether the Plaintiff-Debtor Offset a Liability Claim with an Asset Claim

In certain circumstances, where a plaintiff-debtor fails to list a contingent or potential cause of action as an asset and also fails to list any harm resulting from that cause of action as a liability, the consistent omission may be one fact to consider when determining whether the omission was inadvertent or mistaken. On the other hand, if a plaintiff-debtor listed an injury incurred as a liability but fails to list a corresponding claim as an asset, the inconsistency could tend to show that the plaintiff-debtor knew she should have included the corresponding claim as an asset.

In *Ryan Operations v. Santiam-Midwest Lumber Co.*, the court noted that the plaintiff-debtor’s “failure to list the instant claims as contingent assets was offset by its failure to list the corresponding claims of [the defendants] against [the plaintiff-debtor] . . . as liabilities.”¹⁹² In light of other facts showing that the omission was an honest mistake, such as the fact that the plaintiff-debtor gave the bankruptcy court the name and contact information of his attorney in pending litigation, the court found that the plaintiff-debtor did not seek “to conceal the claims deliberately.”¹⁹³ Consequently, the court refused to apply judicial estoppel.¹⁹⁴ Conversely, in *Hamilton v. State Farm*, the plaintiff-debtor listed a \$160,000 vandalism loss as a liability in his bankruptcy filing, but failed to list any corresponding claims against State Farm as assets of the estate.¹⁹⁵ The court applied judicial estoppel in part based on that inconsistency when the plaintiff-debtor later filed a lawsuit against State Farm.¹⁹⁶

¹⁹⁰ De Leon v. Comcar Indus., Inc., 321 F.3d 1289, 1291 (11th Cir. 2003).

¹⁹¹ See *McClain*, 272 F. Supp. 2d at 642 (noting that, since the entire claim that the plaintiff-debtor failed to list on the statement of financial affairs could have been exempted, the mistake would not have materially affected the bankruptcy proceeding).

¹⁹² 81 F.3d 355, 363 (3d Cir. 1996).

¹⁹³ *Id.* at 364.

¹⁹⁴ *Id.* at 356.

¹⁹⁵ *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 781 (9th Cir. 2001).

¹⁹⁶ *Id.* at 784 (finding that the plaintiff-debtor clearly asserted inconsistent positions).

The final factor must be considered in light of the other factors discussed above, as well as the totality of the circumstances of the specific situation of the plaintiff-debtor. Because full and accurate disclosure is key in the bankruptcy context,¹⁹⁷ merely omitting the claim as both an asset and a liability would not be enough to show inadvertence or mistake. Instead, the inconsistency of listing a harm resulting in a liability without listing a corresponding asset could be one factor a court may use to decide that an omission may have been intentional and not due to inadvertence or mistake.

While certain courts have mentioned these individual factors in specific factual situations,¹⁹⁸ they have not articulated a totality of the circumstances test to analyze the debtor's intent. The five factors provide the main factors that courts should consider when determining if the debtor's omission was due to inadvertence or mistake. No factor is meant to be dispositive, and a court should analyze each factor that is relevant to the specific facts of a plaintiff-debtor's case. These factors are consistent with the purpose of judicial estoppel: courts should invoke the doctrine to prevent an inequitable result.¹⁹⁹ Courts will not achieve an equitable result when an honest but mistaken debtor is prevented from pursuing a cause of action against an alleged wrongdoer.²⁰⁰

IV. BENEFITS AND LIMITATIONS OF ANALYZING SUBJECTIVE INTENT

A. Judicial Discretion: The Strict Approach Versus the Subjective Test

Two of the primary arguments against the subjective approach are related to the increased judicial scrutiny that would be required for applying a new test. First, the strict approach used by the majority of courts to apply judicial estoppel in the bankruptcy context has the advantage of being easy to apply. The court determines whether the debtor knew about the claim at the time she

¹⁹⁷ See *Ryan Operations G.P.*, 81 F.3d at 362.

¹⁹⁸ See *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 898 (6th Cir. 2004) (holding that a plaintiff-debtor who makes affirmative attempts to disclose a pending claim should not be judicially estopped from pursuing a claim); *Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc.*, 989 F.2d 570, 571 (1st Cir. 1993) (holding corporations to a higher standard when determining if a plaintiff-debtor inadvertently omitted a potential or pending cause of action from the bankruptcy case); *McClain v. Coverdall & Co.*, 272 F. Supp. 2d 631, 642 (E.D. Mich. 2003) (holding that the court should not evoke judicial estoppel if the plaintiff-debtor could have exempted a cause of action from her bankruptcy case).

¹⁹⁹ In *New Hampshire*, the Court stated that observing various factors tipped the balance of equities in favor of the defendant. *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001).

²⁰⁰ See *Ah Quin v. County of Kauai Dep't of Trans.*, 733 F.3d 267, 272 (9th Cir.) (the court explained that a court is never bound to invoke the doctrine of judicial estoppel and should refrain from invoking the doctrine if it would lead to an inequitable result).

filed for bankruptcy and whether she included it on her bankruptcy schedules. If both factors are present, the judge applies judicial estoppel to prevent the debtor from prosecuting the undisclosed claim. On the other hand, applying a subjective test to determine if a plaintiff-debtor excluded a potential or pending cause of action due to inadvertence or mistake would require the courts to use more discretion and look into specific facts of each case. However, both bankruptcy courts and non-bankruptcy courts often decide cases on a specific and factual case-by-case basis.²⁰¹

In the bankruptcy context, courts have discretion in dismissing a petition where there is evidence that a debtor has filed in bad faith.²⁰² The Code does not provide a definition for “bad faith,” so courts must engage in fact-specific judgments that are subject to judicial discretion and decided on a case-by-case basis.²⁰³ In chapter 7 and chapter 13 proceedings, a court can dismiss a petition based on a discretionary totality of the circumstances test.²⁰⁴ Because courts have discretion in various areas of bankruptcy law, they should likewise have discretion to invoke the doctrine of judicial estoppel. A strict approach that functions as a bright-line rule for courts to invoke judicial estoppel is unnecessary and contrary to equitable policy concerns. Since a subjective analysis would be more nuanced than the strict approach, courts would better preserve judicial integrity where potential wrongdoers do not get a windfall at the expense of the plaintiff-debtor’s creditors.

Second, some have expressed concern that adopting a subjective analysis would “mandate[] an evidentiary hearing any time a plaintiff-debtor omits a claim on his or her bankruptcy schedules and later amends those schedules.”²⁰⁵ This concern is overblown. While some situations may require additional proceedings before a ruling on subjective intent, this will not always be required.²⁰⁶ In determining whether a plaintiff-debtor acted inadvertently or

²⁰¹ Courts outside of the bankruptcy context are given wide discretion in deciding certain cases. For example, in criminal cases judges are given sentencing guidelines, but have the discretion to determine which sentence should be given as long as the judge stays within those established guidelines. *See generally* Gall v. United States, 552 U.S. 38 (2007).

²⁰² *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 373–74 (2007).

²⁰³ *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1271–72 (11th Cir. 2013).

²⁰⁴ *Marrama*, 549 U.S. at 373–74; *Piazza*, 719 F.3d at 1271–72; *see* 11 U.S.C. §§ 707(b)(3), 1307(c) (2012).

²⁰⁵ *Dzakula v. McHugh*, 746 F.3d 399, 401 (2013).

²⁰⁶ As the court noted in *Dzakula*, the plaintiff-debtor offered no explanation as to why she omitted a pending discrimination suit from her bankruptcy case. *Id.* at 401–02. Conversely, the plaintiff-debtor in *Ah*

because of a mistake, a court should review the facts in light of the five subjective-intent factors discussed earlier. If a court is not convinced by the facts and circumstances of the plaintiff-debtor's case that an omission was due to inadvertence or mistake, the court could apply judicial estoppel to bar a plaintiff-debtor from pursuing a cause of action.²⁰⁷

B. Motive to Conceal

As discussed earlier, the majority approach applies judicial estoppel except when the plaintiff-debtor "lacks knowledge of the undisclosed claims or has no motive for their concealment."²⁰⁸ However, rather than probing the debtor's lack of motive, courts would better utilize limited judicial resources by reviewing evidence that an omission occurred because of inadvertence or mistake.²⁰⁹ Even though considering the facts of each case to determine if a plaintiff-debtor acted inadvertently or mistakenly would require more court time and consideration, this would not significantly add to the court's responsibilities. A court must already spend time analyzing the three factors of *New Hampshire* prior to invoking judicial estoppel.²¹⁰ Therefore, it does not seem unreasonable that courts should also make an inquiry into the subjective intent of the plaintiff-debtor to "inform the doctrine's application" where the plaintiff-debtor omitted a potential or pending cause of action from the bankruptcy case.²¹¹ The ultimate goal of judicial estoppel—to obtain equitable results and protect the integrity of the judicial process—should prevail when courts decide whether to invoke the doctrine of judicial estoppel in bankruptcy cases.

Quin submitted an affidavit describing her confusion with the vagueness of the bankruptcy schedules. *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 277–78 (9th Cir. 2013).

²⁰⁷ See *Dzakula*, 746 F.3d 399 (noting that the district court's decision to apply judicial estoppel will be reviewed on an abuse of discretion basis). While courts will have to decide on a case-by-case basis whether the plaintiff-debtor has provided enough evidence to show that an omission was mistaken or inadvertent, the factors discussed in Part III will help a court consider what evidence will be relevant in making that determination. See generally *id.*

²⁰⁸ *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 210 (5th Cir. 1999); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996); see *Whitten v. Fred's, Inc.*, 601 F.3d 231, 242 (4th Cir. 2010); *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006); see also *supra* note 65 and accompanying text.

²⁰⁹ See *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 899 & n.2 (6th Cir. 2004) (discussing the plaintiff's actions to inform the bankruptcy court of the civil suit as evidence "contrary to the conduct needed to establish a motive to conceal").

²¹⁰ See *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001).

²¹¹ *Id.* at 751.

CONCLUSION

In conclusion, courts should follow the trend recently advocated in *Ah Quin*²¹² by the Ninth Circuit and apply a subjective analysis to determine the intent of the plaintiff-debtor when she omitted a potential or pending cause of action from the bankruptcy case but later tries to pursue that claim. Determining the intent of the plaintiff-debtor not only comports with the Supreme Court's directives in *New Hampshire*,²¹³ but also helps meet the goals of bankruptcy law.

If a defendant makes a motion to dismiss the case based on judicial estoppel, a court must first determine whether a plaintiff-debtor's creditors may benefit from pursuing the claim. If it is clear that the plaintiff-debtor's creditors (or a trustee on their behalf) wish to pursue the claim, a court should not invoke judicial estoppel. While most courts have appropriately limited judicial estoppel when the plaintiff-debtor's creditors stand to benefit, some continue to apply judicial estoppel even at the expense of those creditors.²¹⁴ The objective of providing fair distribution of assets to all creditors is better satisfied if the trustee or creditors are allowed to pursue a potential or pending cause of action that the plaintiff-debtor excluded from the bankruptcy case.

Even if a court determines that the plaintiff-debtor's creditors likely will not benefit from pursuing the claim (or that a plaintiff-debtor might recover after distributions to creditors), the court should engage in a subjective analysis to determine whether to invoke judicial estoppel to bar the plaintiff-debtor from pursuing the claim. A court could use a combination of the relevant factors discussed above to determine whether the plaintiff-debtor excluded a cause of action because of an intent to deceive, or conversely, because of inadvertence or honest mistake. Because the Supreme Court cautioned against "establish[ing] inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel,"²¹⁵ the five factors mentioned above are not meant to be exclusive. However, the factors would help courts apply a more uniformed approach to invoking judicial estoppel in the bankruptcy context.

²¹² *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267 (9th Cir. 2013).

²¹³ *See New Hampshire*, 532 U.S. at 751.

²¹⁴ *See, e.g., Payless Wholesale Distribs., Inc. v. Alberto Culver, Inc.*, 989 F.2d 570 (1st Cir. 1993).

²¹⁵ *New Hampshire*, 532 U.S. at 751.

Using a subjective analysis to determine when to apply judicial estoppel, even in the context of bankruptcy cases, is a sensible solution because it provides sufficient protection of judicial integrity. In the context of bankruptcy cases, courts must be especially cautious because a plaintiff-debtor may have had a motive to conceal a claim.²¹⁶ However, “a *presumption* of deceit no longer comports with *New Hampshire*” when the plaintiff-debtor’s omission was due to inadvertence or mistake.²¹⁷ Furthermore, when a court determines that an omission was due to inadvertence or mistake, refusing to apply judicial estoppel to bar the plaintiff-debtor’s claim prevents a potential wrongdoer from benefitting at the expense of an honest but mistaken plaintiff-debtor.²¹⁸ Applying a subjective analysis to determine the plaintiff-debtor’s intent when she omitted a cause of action from her bankruptcy case will respect the integrity of the courts and further the objectives of bankruptcy law.

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²¹⁶ *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 210 (5th Cir. 1999).

²¹⁷ *Ah Quin*, 733 F.3d at 273.

²¹⁸ See *Fifth Circuit Applies Judicial Estoppel Doctrine*, *supra* note 60. It is a “disturbing trend” to apply judicial estoppel to bar a plaintiff-debtor from pursuing a cause of action in favor of “personal injury defendants over debtors who, without actual intent to deceive, fail to inform the bankruptcy court of a potential lawsuit.” *Id.*

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