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An ever growing body of judicial decisions, in particular three recent 6th Circuit Court of Appeals decisions, make it mandatory that plaintiff and defense attorneys clearly understand the relationship of a claim to a previously filed bankruptcy case by the claimant. A failure to grasp the significance of this relationship can mean a lost opportunity for summary judgment for the defense attorney and either a quick end to an otherwise promising plaintiff's case for the plaintiff's attorney or, even worse, a malpractice claim.

So, what is the connection? Judicial Estoppel. This doctrine "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." *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808 (2001). Stated another way, the doctrine of judicial estoppel is "where one states on oath in former litigation, either in a pleading or in a deposition or on oral testimony, a given fact as true, he will not be permitted to deny that fact in subsequent litigation, although the parties may not be the same." *Melton v. Anderson*, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948). The doctrine has, on occasion, been applied as an equitable estoppel concept. *CCI Construction Co. v. Manufacturers and Traders Trust Co.*, 128 Fed. Appx. 273 (3rd Cir. 2005) [not precedential and not selected for publication]. An issue that sometimes overlaps with judicial estoppel, but which is not discussed herein, is the issue of standing. *Headrick v. Bradley County Memorial Hospital*, 2006 WL 236931 (Tenn. Ct. App. 2006).

The doctrine of judicial estoppel is an equitable one and "preserve[s] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship." *Brown v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002). It should be applied with caution since the doctrine precludes a contradictory position without examining the truth of either statement. *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1218 (6th Cir. 1990). The doctrine of judicial estoppel comes into play in lawsuits when the plaintiff has previously filed a bankruptcy case, but failed to disclose the existence of the claim in the bankruptcy case. There are three factors for the courts to consider in the application of the doctrine. First, a party's later position must be clearly inconsistent with the earlier position; second, did the party successfully persuade the first court to accept the previous position so that a perception is created that one of the courts was misled; and third, would the party seeking to assert the inconsistent position obtain an unfair advantage or impose an unfair detriment on the opposing party if estoppel was not applied. *New Hampshire v. Maine*, *supra*. See also, *Excel Energy v. Smith (In re Commonwealth Institutional Securities, Inc.)*, 394 F.3d 401 (6th Cir. 2005).

The application of this doctrine was highlighted in the recent case of *Lewis v. Weyerhaeuser*, 141 Fed. App. 420 (6th Cir. 2005) [not recommended for full text publication]. Lewis filed a Chapter 13 case on December 26, 2001, but did not disclose (a) her 2001 wages from her employer, Weyerhaeuser, or (b) a contingent and unliquidated discrimination claim against Weyerhaeuser. In March 2002 (one month after Lewis' chapter 13 plan was confirmed), Lewis' attorney submitted a discrimination claim letter to the EEOC, which ultimately culminated in a lawsuit by Lewis against Weyerhaeuser in October 2002, while the chapter 13 case was still pending. Weyerhaeuser sought summary judgment on the basis of judicial estoppel, claiming that Lewis knew of the factual basis of her lawsuit, failed to disclose it as required in her bankruptcy, and had a motive to conceal it. Therefore, Weyerhaeuser argued, Lewis should be judicially estopped from pursuing the claim against Weyerhaeuser. Lewis defended the motion by blaming her attorney for failing to properly advise her to disclose her 2001 wages and her discrimination claim in the bankruptcy case.

In analyzing the summary judgment motion, the Sixth Circuit noted that a statement of financial affairs and an itemized list of assets and liabilities are required to be filed in a bankruptcy case pursuant to 11 U.S.C. § 521 (under an unsworn declaration under penalty of perjury by the debtor) and these disclosure obligations are at the very core of the bankruptcy process. Following a previous holding in *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002), the court held that (a) pursuit of the discrimination claim was contrary to Lewis' sworn bankruptcy petition and (b) the bankruptcy court adopted the state-

ment that Lewis had no claims when it confirmed the Chapter 13 plan.

The court also rejected Lewis' contention that she acted in good faith on the advice of her attorney. The court followed the holding of *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S. Ct. 1386 (1962), which held that a litigant is bound by the errors of his or her attorney. The court did not equate Lewis' conduct with mistake or inadvertence, even though the court was quick to observe that judicial estoppel does not apply where the prior inconsistent position occurred because of mistake or inadvertence.

It is also worthy of note that the court in *Weyerhaeuser* distinguished two other recent 6th Circuit rulings on judicial estoppel. First, in *Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894 (6th Cir. 2004) the court refused to apply judicial estoppel in a context similar to *Weyerhaeuser* because Mr. and Mrs. Eubanks did not actually conceal the claim in the prior bankruptcy case (lender liability action) and, instead, took affirmative steps to inform parties in the bankruptcy case of the claim. *Weyerhaeuser* has recently been distinguished in *Best v. Kroger Co.*, 339 B.R. 180 (W.D. Tenn. 2006).

Second, in *Pennycuff v. Fentress County Bd. of Educ.*, 404 F.3d 447 (6th Cir. 2005), the Court refused to apply judicial estoppel, at least in part, because the party asserting the inconsistent position relied on advice of counsel in the prior proceeding. The primary distinguishing factors between *Weyerhaeuser* and *Pennycuff* were: (1) the "admission" in the prior proceeding (that Plaintiff had tenure) was made at a time when tenure was not at issue, whereas the extent of Lewis' assets and earnings were highly relevant in her chapter 13 case and (2) Lewis acted intentionally and in bad faith because her original claim was filed one month after her chapter 13 plan was confirmed and she failed to disclose her 2001 earnings from Weyerhaeuser.

The application of state versus federal law may not make any difference (at least if the failure to disclose was in the context of a bankruptcy case) if the judicial estoppel issue arises in the context of a state court lawsuit, as at least one court has determined that when the issue arises in the context of a failure to disclose in a bankruptcy case, federal law should apply since the failure to disclose is an express duty under federal bankruptcy law. *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999).

Other courts have applied judicial estoppel to preclude pursuit of claims not previously disclosed. See, *In re Superior Crewboats*, 374 F.3d 330 (5th Cir. 2004), *DeLeon v. Comcar Indus.*, 321 F.3d 1289 (11th Cir. 2003), *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314 (3rd Cir. 2003), *Ortlieb v. Hudson Bank*, 312 F. Supp. 2d 705 (E.D. Pa. 2004), *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999), and *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3rd Cir. 1988). See also, "The Road from Plaintiff's Bankruptcy to Summary Judgment" in *For The Defense*, January 2006, Vol No. 48. *Contra, Carr v. Home Tech Services Co. Inc.*, 2005 WL 2600209 (W.D. Tenn. 2005), *Doughtie v. Ashland, Inc.*, 2005 WL 1140736 (W.D. Tenn. 2005), and *McClain v. Coverdell & Co.*, 272 F. Supp. 2d 631 (E.D. Mich. 2003).

Lessons to learn and apply from all of the above.

1. Plaintiff's attorneys need a good client interview process to ferret out the existence of the client's bankruptcy filings;
2. If it is determined that the client failed to disclose the claim in a prior bankruptcy case, look to *Eubanks* for guidance on how to repair the problem and avoid summary judgment or develop an inadvertent failure to disclose argument under the teachings of *Doughtie* or *McClain*;
3. From the defense perspective, consider implementing standard case opening procedures in your office to conduct a PACER search to discover prior bankruptcies and determine if the claim at issue was disclosed; and
4. If you discover a failure to disclose, don't foam at the mouth too quickly; pause and determine how to develop a judicial estoppel argument through the discovery process with an ultimate view toward summary judgment.