INADVERTENCE OR UNFAIR ADVANTAGE: THE FIFTH CIRCUIT'S AND TEXAS SUPREME COURT'S APPLICATIONS OF JUDICIAL ESTOPPEL FOLLOWING A BANKRUPTCY NON-DISCLOSURE AND HOW A PACER SEARCH CAN SPARE THE CLEANUP

Comment

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I. PLAYING FAST AND LOOSE

Tom Debtor was filling his 1998 Chevy pickup at the neighborhood gas station on a frigid morning in mid December.[1] When Debtor went to replace the nozzle in the pump, he stepped on black ice. Debtor's feet slipped from under him, and he fell to the ground. Debtor was rushed to the local hospital where it was discovered that Debtor sustained severe injuries, including a broken hip. Debtor was unable to operate his business as a result of his injuries, so he consulted a local attorney. Smith Attorney told Debtor he could bring a premises liability claim against the filling station. After consulting his wife, Debtor decided filing suit was the best option. Attorney prepared the pleadings. Attorney failed to ask Debtor one important question, however, and Debtor failed to disclose one important fact. Unfortunately for Debtor, the filling station's attorney did make this inquiry. Debtor and his wife had filed a joint petition for bankruptcy two years prior. Although Attorney established each element of the premises liability claim, Debtor would never make it past the filling station's motion for summary judgment on the ground of judicial estoppel.

Judicial estoppel is a doctrine most plaintiffs' attorneys rarely consider.[2] But once the court or opposing counsel raises it, judicial estoppel

1. These facts are adapted from Phillips v. Flying J Inc., 375 S.W.3d 367 (Tex. App.—Amarillo 2012, no pet.).

2. *See* Eric A. Schreiber, Comment, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions*, 30 LOY. L.A. L. REV. 323, 324 (1996)

is a doctrine those attorneys will never forget.[3] Given that litigants faced with judicial estoppel risk dismissal of their case, it is a threat of which all practitioners should be aware.[4] Judicial estoppel is a common law doctrine that prevents a party from asserting a position that is inconsistent with a successful position in a prior proceeding.[5] It is formulated to prevent litigants from "playing fast and loose with the courts to suit the exigencies of self interest."[6] In short, it is a principle crafted by courts to protect themselves from gamesmanship.[7] Attorneys may be unaware of this doctrine because it does not arise in day-to-day practice, but any attorney whose case has been dismissed because of this procedural weapon will realize that it is too costly to ignore.[8]

In light of the heavy consequences of judicial estoppel, this Comment explores its development in the bankruptcy setting while focusing on its application to Texas practitioners. Bankruptcy-related judicial estoppel arises when a plaintiff, who has filed bankruptcy, pursues a civil cause of action that was not disclosed to the bankruptcy court.[9] Debtors may fail to disclose because they wish to keep any potential award away from creditors, or they may fail to disclose because of oversight, confusion, or ignorance.[10] The court may then estop the plaintiff from pursuing the civil action that was not disclosed as required by the Bankruptcy Code.[11] Specifically, this Comment analyzes the intersection of civil litigation and bankruptcy law that results in a confusing doctrine crafted by non-bankruptcy courts in an attempt to protect the bankruptcy process.

To set the scene, Part II provides a background of judicial estoppel, beginning with its emergence in the United States in the non-bankruptcy setting by focusing on the Supreme Court decision of *New Hampshire v. Maine*. Part II then narrows to the doctrine's adoption in Texas and its development in the bankruptcy context. Part III lays a foundation of the relevant provisions of the Bankruptcy Code. Part IV explores the development of judicial estoppel in the Fifth Circuit Court of Appeals, namely discussing *Reed v. City of Arlington* and *Love v. Tyson Foods*. Part V discusses the application of the doctrine in the Texas Supreme Court. Consequently, Part VI analyzes the juncture of judicial estoppel as

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("Although it is an obscure legal doctrine, judicial estoppel, like other forms of estoppel, has important strategic value at trial and shame on the poor lawyer who has a case dismissed sua sponte by a court on a grounds that the lawyer has never even heard of.").

3. *See id.*

4. *See infra* Part II.C.

5. *See* New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

6. *In re* Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999) (quoting Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1998)).

7. *See supra* notes 5-6 and accompanying text.

8. *See* Schreiber, *supra* note 2, at 323-24.

9. *See infra* Part II.C.

10. *See infra* Part II.C.

11. *See infra* Part II.C.

developed by the Fifth Circuit and as developed by the Texas Supreme Court to provide the appropriate framework for Texas practitioners. This section points to two different formulations of judicial estoppel appearing in the United States Supreme Court, the Fifth Circuit, and the Texas Supreme Court.[12] Part VII surveys the approaches of the Seventh, Tenth, and Eleventh Circuit Courts of Appeals, which the Fifth Circuit cites in *Reed v. City of Arlington*. And lastly, Part VIII asks courts to reconsider their application of the *Reed v. City of Arlington* "inadvertence" framework outside of the Chapter 7 context and encourages practitioners to conduct a Public Access to Court Electronic Records (PACER) search before filing suit to prevent the doctrine's application altogether.

II. DEVELOPMENT OF JUDICIAL ESTOPPEL

A. Emergence in the United States

The origin of judicial estoppel can be traced to the Supreme Court of Tennessee in an 1857 opinion.[13] The purpose of this doctrine is to protect the integrity of the courts by preventing a party from manipulating the court system and prejudicing the administration of justice.[14] In *New Hampshire v. Maine*, the United States Supreme Court addressed judicial estoppel for the first time in the context of a boundary dispute between the two states concerning lobster fishing rights—notably, a non-bankruptcy setting.[15] The Court listed three factors for consideration: (1) the later position must be clearly inconsistent; (2) the party must have succeeded in persuading the court to accept the prior position; and (3) the party asserting the inconsistent position must "derive an unfair advantage or impose an unfair detriment on the opposing party."[16] The Court stated that judicial estoppel is an equitable doctrine that is invoked by courts at their discretion.[17] The Court also emphasized that it was not establishing a rigid or exhaustive standard, but rather that "[a]dditional considerations may inform the doctrine's application in specific factual contexts."[18] Therefore, while the Supreme

12. *See infra* Part VI.

13. *See* Hamilton v. Zimmerman, 37 Tenn. 39, 48 (1857) ("This doctrine is said to have its foundation in the obligation under which every man is placed to speak and act, according to the truth of the case; and in the policy of the law to suppress the mischiefs from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that, which by their solemn and deliberate acts, they have declared to be true."); Hon. William Houston Brown et al., *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197, 200 (2001).

14. *See* Roger M. Baron & Melissa M. Martin, *The Application of Judicial Estoppel in Texas*, 41 BAYLOR L. REV. 447, 447-50 (1989).

15. *See* New Hampshire v. Maine, 532 U.S. 742, 742-43 (2001).

16. *Id.* at 750-51.

17. *See id.* at 750.

18. *Id.* at 743; *see also* Robert F. Dugas, Note, *Honing A Blunt Instrument: Refining the Use of*

Court provided guidance for future judges faced with judicial estoppel, it did not provide an exhaustive test for the application of the doctrine.[19]

B. Emergence in Texas

The Texas Supreme Court first applied judicial estoppel in 1956 in *Long v. Knox*.[20] The court explained, "The doctrine of judicial estoppel is not strictly speaking estoppel at all but arises from positive rules of procedure based on justice and sound public policy."[21] Within Texas, state courts developed the following elements for judicial estoppel: (1) a sworn inconsistent position made in a prior proceeding; (2) the prior position was successful; (3) the prior position was not made inadvertently or by mistake, fraud, or duress; and (4) the prior position was clear and unequivocal.[22]

In *Long v. Knox*, the court distinguished the newly applied doctrine of judicial estoppel from equitable estoppel. Unlike equitable estoppel, judicial estoppel does not require injury or reliance.[23] Further, the party invoking the doctrine is not required to be a party to the former proceeding.[24] Moreover, because of its focus on the sanctity of adjudications, judicial estoppel is solely a product of the courts.[25]

Judicial Estoppel in Bankruptcy Nondisclosure Cases, 59 VAND. L. REV. 205, 213 (2006) ("Thus, *New Hampshire v. Maine* clarified the general motivation of the doctrine and provided guidance to the circuit courts in applying it but eschewed providing a strict definition.").

19. *See supra* note 18.

20. *See* Long v. Knox, 291 S.W.2d 292, 295 (Tex. 1956); Baron & Martin, *supra* note 14, at 447-48.

21. *Long*, 291 S.W.2d at 295.

22. *See e.g.*, Thompson v. Cont'l Airlines, 18 S.W.3d 701, 705 n.2 (Tex. App.—San Antonio 2000, no pet.).

23. *Long*, 291 S.W.2d at 295. The elements for equitable estoppel are as follows:

> (1) [A] false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations.

Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 515-16 (Tex. 1998) (citing Schroeder v. Tex. Iron Works, Inc., 813 S.W.2d 483, 489 (Tex. 1991)); *see also In re* Estate of Loveless, 64 S.W.3d 564, 577-78 (Tex. App.—Texarkana 2001, no pet.) ("The doctrine of judicial estoppel is sometimes confused with equitable estoppel arising from inconsistent positions taken in judicial proceedings.").

24. *See Long*, 291 S.W.2d at 295.

25. *See* Baron & Martin, *supra* note 14, at 447 (explaining that the doctrine has developed independent of the legislature).

C. Application in the Bankruptcy Context

The possibility for judicial estoppel is heightened in the bankruptcy context.[26] When the debtor petitions for bankruptcy, various provisions of the Bankruptcy Code require the debtor to disclose its assets.[27] The debtor may make such a disclosure but fail to list a pre-petition cause of action or fail to amend the disclosed assets to list a cause of action that accrues between the filing of the bankruptcy petition and the debtor's discharge from bankruptcy.[28] The debtor then brings the non-disclosed cause of action, and the defendant asserts that the debtor should be judicially estopped.[29] Herein lies the intersection between the Bankruptcy Code and a subsequent non-bankruptcy court; the court may judicially estop a party from bringing its cause of action if the subsequent suit was property of the bankruptcy estate and the party did not list its cause of action in a bankruptcy schedule, reorganization plan, or disclosure statement.[30]

Because the non-disclosure affects the bankruptcy court, the Fifth Circuit has instructed courts to apply federal law when addressing judicial estoppel in this context.[31] The Fifth Circuit sets out three elements for judicial estoppel to apply: (1) the position is clearly inconsistent with a prior position; (2) the court accepted the prior position; and (3) the non-disclosure was not inadvertent.[32] To show inadvertence, the party must lack knowledge of the claim or have no motive for concealment.[33] An assertion that the debtor did not know all the facts or was uncertain of the legal basis for the claim may not be sufficient to show a lack of knowledge.[34] Additionally, if the undisclosed cause of action would have increased the

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26. *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, 353 (2001).

27. *See* Dugas, *supra* note 18, at 219-20.

28. *See id.*

29. *See id.*

30. *See* Cricket Commc'ns, Inc. v. Trillium Indus., Inc., 235 S.W.3d 298, 304 (Tex. App.—Dallas 2007, no pet.) (citing Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 783 (9th Cir. 2001)).

31. *See In re* Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999). *But see* Nat'l Loan Investors, L.P. v. Taylor, 79 S.W.3d 633, 637 (Tex. App.—Waco 2002, pet. denied), *overruled by* Dall. Sales Co. v. Carlisle Silver Co., 134 S.W.3d 928 (Tex. App.—Waco 2004, pet. denied) (applying the four Texas elements of judicial estoppel to a case arising from a bankruptcy non-disclosure). Two years later, the same court overruled its prior decision by holding that federal law applies when the prior proceeding was in a bankruptcy court. *See Dall. Sales Co.*, 134 S.W.3d at 931 (reasoning that federal law should apply for two reasons: (1) "the primary purpose of judicial estoppel is to preserve the integrity of the prior judicial proceeding," which was in federal bankruptcy court; and (2) the Supreme Court has held that federal law applies when considering whether a state court cause of action is barred by a prior federal judgment). Additionally, the Texarkana Court of Appeals questioned whether federal law should apply because of inconsistencies among the federal circuits. *See In re* Estate of Loveless, 64 S.W.3d 564, 579 (Tex. App.—Texarkana 2001, no pet.).

32. *See* Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380, 385-86 (5th Cir. 2008).

33. *See id.* at 386.

34. *See Cricket Commc'ns, Inc.*, 235 S.W.3d at 306-07.

bankruptcy estate, a debtor will usually have motive to conceal the cause of action.[35] When analyzing judicial estoppel, the court and the attorneys must turn to the law that imposes the duty to disclose on the debtor—the Bankruptcy Code.[36]

III. ENTER THE BANKRUPTCY CODE: INTERSECTION OF CIVIL COURTS AND BANKRUPTCY PROVISIONS

Non-bankruptcy judges and plaintiffs' attorneys faced with a judicial estoppel defense must acquaint themselves with potentially unfamiliar and complex provisions within the Bankruptcy Code.[37] Accordingly, to decide whether the doctrine applies and to analyze how to defeat the defense, the court and attorney must understand its requirements.

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

The filing of a bankruptcy petition creates a bankruptcy estate.[38] In essence, property of the debtor becomes property of the bankruptcy estate. Section 541, which is the general rule applicable to Chapters 7, 11, 12, and 13, states that property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[39] Thus, under the general rule, a cause of action that accrues prior to the bankruptcy petition becomes property of the estate.[40] Conversely, if the cause of action is not property of the bankruptcy estate, a judicial estoppel defense may be misplaced.

The Bankruptcy Code imposes an affirmative duty on debtors to disclose all assets, including causes of action that may be unliquidated or contingent.[41] Further, debtors must disclose potential claims even if they are uncertain as to the facts or legal basis.[42] The duty to disclose is not a one-time obligation, but rather a continuing obligation.[43] Additionally,

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35. *See id.* at 307.

36. *Cf. supra* note 27 and accompanying text.

37. *See* Brown, *supra* note 13, at 197 (discussing the differing approaches of non-bankruptcy courts in applying judicial estoppel to a non-disclosure scenario).

38. *See* 11 U.S.C. § 541(a)(1) (2006).

39. 11 U.S.C. § 541.

40. *But see infra* note 67 and accompanying text.

41. *See In re* Coastal Plains, Inc., 179 F.3d 197, 207-08 (5th Cir. 1999); 11 U.S.C. § 521(a)(1) (2006). The Bankruptcy Code defines the term "claim" as: "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U.S.C. § 101(5) (2006).

42. *See Coastal Plains*, 179 F.3d at 207-08; Baron & Martin, *supra* note 14, at 447-50.

43. *See Coastal Plains*, 179 F.3d at 208.

Bankruptcy Schedule B requires individual debtors to list "[o]ther contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims" and to "[g]ive [an] estimated value of each."[44]

B. Role of the Trustee and Standing

The bankruptcy trustee is the representative of the estate and has the capacity to sue on behalf of the estate.[45] Accordingly, the issue of standing plays a significant role in the application of judicial estoppel in the bankruptcy context.[46] While this Comment does not delve into the details and mechanics of standing, it is impossible to address bankruptcy-based judicial estoppel without mentioning standing.[47] Additionally, some courts prefer to resolve the debtor's non-disclosure on standing alone, instead of applying judicial estoppel.[48] Therefore, this Comment points to standing as a potential resource for courts faced with this dilemma.[49] Ultimately, the role of the trustee—and its subsequent effect on standing—depends on whether the debtor files under Chapter 7, 11, 12, or 13 of the Bankruptcy Code.[50]

C. Chapter 7, 11, 12, and 13 Filings

Judicial estoppel may arise in the context of a Chapter 7, Chapter 11, Chapter 12, or Chapter 13 bankruptcy proceeding.[51] It is worth noting the differences among the chapters to highlight the complications of judicial estoppel in the bankruptcy context, especially in the areas of trustee standing and property of the estate.[52]

Chapter 7 is the "straight bankruptcy" setting that involves the liquidation and distribution of the debtor's assets.[53] The court appoints a trustee promptly after the filing of a Chapter 7 bankruptcy petition.[54] Additionally, the court tasks the trustee with determining what property should be considered property of the estate.[55] Generally, property acquired

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44. *See* Bankr. Official Form 6, Schedule B ¶ 21.
45. *See* 11 U.S.C. § 323(a), (b) (2006).
46. *See* Dugas, *supra* note 18, at 223; *infra* notes 198-201 and accompanying text.
47. *See* Dugas, *supra* note 18, at 223-25 (discussing standing in this context).
48. *See infra* Parts VII.A, C.
49. *See infra* Part VIII.B.1.
50. *See infra* Part III.B.
51. *See* Dugas, *supra* note 18, at 220-22.
52. *See id.* at 223-41 (discussing in detail judicial estoppel as applied to Chapters 7, 11, and 13 filings individually).
53. 28 STEPHEN G. COCHRAN, TEXAS PRACTICE SERIES: CONSUMER RIGHTS AND REMEDIES § 16.9 (3d ed. 2002).
54. *See* 11 U.S.C. § 701(a)(1) (2006).
55. *See* 11 U.S.C. § 704(a).

prior to the petition becomes property of the estate, while property acquired after belongs to the debtor.[56]

Chapter 11 primarily provides for business reorganizations, rather than liquidation.[57] In contrast to Chapter 7, an independent trustee is not appointed upon the filing of a Chapter 11 petition.[58] Under Chapter 11, "a trustee is the exception, rather than the rule."[59] The court appoints a trustee only upon showing of cause, such as dishonesty, fraud, or gross mismanagement of the debtor's affairs.[60] Therefore, in the typical Chapter 11 scenario, the debtor retains possession of the property and assumes the duties of a trustee.[61] After the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, property of the estate in a Chapter 11 filing is expanded to include the individual's post-petition earnings.[62]

Chapter 12 provides relief to family farmers and was largely modeled after Chapter 13.[63] Only the debtor may file a plan under Chapter 12.[64] Family fishermen are now also eligible to file under Chapter 12.[65] A trustee is appointed in every Chapter 12 case, but the debtor remains in possession of his property.[66] In both Chapter 12 and 13, property of the estate includes property described in § 541 that is acquired after the commencement of the case but before the case is closed, converted, or dismissed in addition to post-petition earnings.[67] Accordingly, in Chapters 12 and 13, a cause of action that accrues after the bankruptcy petition but before the bankruptcy case is closed, converted, or dismissed is property of the estate.

Chapter 13 is a mechanism for a debtor with regular income to make payments to creditors over an extended period of time.[68] Similar to Chapters 11 and 12, a Chapter 13 debtor remains in possession of his property.[69] Additionally, a Chapter 13 proceeding is voluntary, and only

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56. *See* 11 U.S.C. § 541 (2006).

57. *See* 15 J. MAXWELL TUCKER, TEXAS PRACTICE SERIES: TEX. FORECLOSURE L. & PRAC. § 15.01 (2011).

58. *See* Dugas, *supra* note 18, at 225; 5 WILLIAM L. NORTON JR., NORTON BANKR. L. & PRAC. § 91:1 (3d ed. 2012).

59. NORTON, *supra* note 58, § 91:1.

60. *See id.* (citing 11 U.S.C. § 1104(a)(1) (2006)).

61. *See id.* (citing 11 U.S.C. §§ 322, 1101, 1104, 1107, 1108 (2006)).

62. *See* 11 U.S.C. § 1115(a)(2).

63. *See* NORTON, *supra* note 58, 122:1. It does not appear that non-disclosure-based judicial estoppel has been asserted regarding a Chapter 12 filing but such a defense remains possible. *Cf.* 85 A.L.R.5th 353 (holding a "family farm corporation's representation in a reorganization plan that it would not contest the validity of the security interest a bank held in its property did not estop the farm from challenging the bank's subsequent foreclosure action").

64. 11 U.S.C. § 1221 (2006).

65. *See* NORTON, *supra* note 58, § 122:10 (citing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, § 1007 (Apr. 20, 2005)).

66. *See* NORTON, *supra* note 58, § 122:10 (citing 11 U.S.C. §§ 1202(a), 1203, 1204, 1226(c) (2006)).

67. *See* 11 U.S.C. §§ 1207, 1306 (2006).

68. *See* 3 BANKR. DESK GUIDE § 29:1.

69. *See* § 1306 (2006); TUCKER, *supra* note 57, § 15.01 ("A Chapter 13 case is likewise a

the debtor may file the repayment plan.[70] In contrast to Chapter 11, a trustee is appointed under Chapter 13.[71] However, unlike Chapter 7, the trustee serves primarily as a middleman to collect monies from the debtor in order to pay the creditors.[72]

D. Abandonment and Reopening

After a bankruptcy petition is filed, the trustee may "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."[73] Additionally, the Code provides that any property of the estate that is not abandoned or administered remains property of the estate.[74] Generally, an abandonment is irrevocable, but courts have carved limited exceptions, such as when the debtor gives the trustee false or incomplete information that prompts the abandonment.[75]

To further maintain property of the estate, a court may reopen a case even after the estate is fully administered and the trustee is discharged.[76] Section 350 provides, "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."[77] The decision to reopen a case is within the discretion of the bankruptcy court.[78] Notably, a concealed or non-disclosed asset may serve as cause to reopen.[79] Therefore, some courts turn to reopening as a potential solution when faced with a non-disclosure.[80] Procedurally, the debtor or a party in interest may move to reopen the case.[81] Additionally, the bankruptcy court may reopen a case sua sponte.[82] The court will consider the time and expense, as well as the likelihood of recovery, when deciding whether to reopen a case.[83]

Ultimately, an analysis of judicial estoppel arising out of a bankruptcy non-disclosure may seem daunting to civil judges or plaintiffs' attorneys unacquainted with the Bankruptcy Code. But with a proper foundation and

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reorganization proceeding conducted on a smaller scale and with fewer formal requirements than a Chapter 11 case.").

70. *See* 11 U.S.C. § 1321 (2006); COCHRAN, *supra* note 53, § 16.5.
71. *See* 11 U.S.C. § 1302 (2006); TUCKER, *supra* note 57, § 15.01.
72. *See* § 1302; TUCKER, *supra* note 57, § 15.01.
73. *See* 11 U.S.C. § 554(a) (2006).
74. *See id.* § 554(d).
75. *See* 4 WILLIAM J. NORTON, JR., NORTON BANKR. L. & PRAC. § 74:15 (3d. ed. 2012).
76. *See* 11 U.S.C. § 350 (2006).
77. *Id.*
78. *See* 2 WILLIAM J. NORTON, JR., NORTON BANKR. L. & PRAC. § 40:3 (3d. ed. 2012).
79. *See id.* § 40:4.
80. *See infra* Part VIII.B.1.
81. *See* NORTON, *supra* note 78, § 40:9.
82. *See id.*
83. *See id.* § 40:4.

a keen eye on its requirements, judges and attorneys can aptly address this defense.

IV. EVOLUTION IN THE FIFTH CIRCUIT

Regardless of whether the civil suit is filed in state or federal court within Texas, federal law will apply to the application of judicial estoppel following a bankruptcy non-disclosure.[84] Therefore, Texas practitioners must first turn to Fifth Circuit precedent.[85] The following five cases are the most recent bankruptcy-related judicial estoppel decisions out of the Fifth Circuit, with each case building upon the other's development of the doctrine.

A. In Re Coastal Plains

The Fifth Circuit's application of judicial estoppel in the bankruptcy context begins with *In re Coastal Plains*.[86] In the 1980s, Coastal Plains, Inc. (Coastal), an equipment distributor, faced financial problems.[87] Thus, Coastal impliedly told its creditors that it would file for bankruptcy if the creditors did not agree to a workout plan.[88] Under the plan, Coastal would return to its creditors inventory that the creditors sold to Coastal on credit.[89] The creditors would then "pay Coastal 50 percent of the inventory's cost and [would] write off Coastal's debt."[90] Coastal would then use this money to pay off its secured creditor.[91] One creditor, Browning, agreed to a workout plan, and Coastal began returning inventory.[92] Eventually, the workout plan did not occur as expected; Coastal returned its entire inventory to Browning, but Browning did not complete the transaction.[93] Thereafter, Coastal filed a Chapter 11 bankruptcy petition[94]

Coastal filed an adversary proceeding against Browning, requesting an injunction against the disposition of the returned inventory and an order directing its transfer to Coastal.[95] Coastal also asserted claims against Browning for conversion, interference with contracts and business relationships, violation of the automatic stay, and punitive damages.[96] The

84. *See supra* note 31 and accompanying text.
85. *See supra* note 31 and accompanying text.
86. See *In re* Coastal Plains, 179 F.3d 197, 201-16 (5th Cir. 1999).
87. *Id.* at 202.
88. *See id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

bankruptcy court found that Browning violated the automatic stay and ordered the return of the inventory to Coastal.[97] The court did not discuss the other claims.[98]

Subsequently, Coastal's CEO executed the sworn bankruptcy schedules and Statement of Financial Affairs for Coastal but omitted the claims against Browning.[99] Eventually, the automatic stay was lifted, and Coastal's secured creditor purchased the inventory at an auction.[100] The secured creditor then sold the assets to a corporation formed by Coastal's CEO, Industrial Clearinghouse, Inc. (IC).[101] The assets purchased by IC expressly included the undisclosed claims against Browning.[102] Ultimately, Coastal's bankruptcy case was converted to a Chapter 7, and "[a]fter the [t]rustee filed a no-asset report," the case was closed.[103]

Thereafter, the bankruptcy case was reopened for issues not related to Browning, and IC substituted for Coastal in the adversary proceeding against Browning.[104] The case was set for trial in district court when the trustee intervened asserting that Coastal's bankruptcy estate owned the claims.[105] The district court sent the case back to the bankruptcy court, which determined that the estate owned the tort claims and that IC owned those in contract.[106] Further, the bankruptcy court approved an agreement between IC and the trustee whereby IC and the trustee would share any recovery against Browning, with IC receiving 85%.[107] Ultimately, the jury found favorably for the plaintiffs on all claims except for fraud, and Browning appealed to the Fifth Circuit.[108]

The Fifth Circuit panel held that judicial estoppel applied.[109] The panel found the first prong—inconsistent statements—was met because the omission from the schedules and statement was tantamount to an assertion that the claim did not exist.[110] The next prong—acceptance—was not disputed because the stay was lifted because of Coastal's asserted value of assets.[111] As to the third prong, the panel explained that inadvertence in the bankruptcy context means the debtor had no knowledge of the claims or

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97. *Id.* at 203.
98. *See id.*
99. *Id.* (noting that Coastal's claims against Browning were worth up to $10 million).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* (explaining that in between the initiation of the adversary proceeding and the closing of the case, no mention was made of the claims against Browning).
104. *Id.*
105. *Id.* at 204.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 209.
110. *Id.* at 210 (explaining that even though the adversary proceeding stated the claims, the parties involved believed the adversary proceeding to be finished).
111. *Id.*

had no motive to conceal.[112] The panel found that Coastal had knowledge of the claim at the time the schedules and statement were prepared and had motive to conceal because had the claims been disclosed, the unsecured creditors might have opposed lifting the stay or creditors may have placed higher bids at the auction.[113] Thus, the three prongs were met, and judicial estoppel applied.[114]

B. In Re Superior Crewboats

The next Fifth Circuit case brought a new issue to the table—abandonment of the asset by the trustee.[115] In August 1999, Arthur Hudspeath was allegedly injured while disembarking a vessel owned by Superior Crewboats (Superior).[116] A year later, Mr. "Hudspeath and his wife . . . filed a Chapter 13 bankruptcy petition in the Eastern District of Louisiana."[117] In January 2001, while their bankruptcy case was pending, "the Hudspeaths filed a state court lawsuit against Superior" regarding Mr. Hudspeath's disembarking incident.[118] The original documents prepared by the Hudspeaths for the bankruptcy court did not reflect the cause of action.[119] Moreover, the Hudspeaths did not amend their bankruptcy schedules to reflect the filed suit.[120]

In July 2001, the Hudspeaths disclosed the lawsuit at the creditors' meeting; however, the Hudspeaths told the trustee that the statute of limitations had run on the case.[121] Later, the Hudspeaths alleged confusion as to whether maritime or Louisiana limitations applied.[122] Thereafter, the "trustee filed a Petition of Disclaimer and Abandonment" regarding the lawsuit against Superior.[123] The Hudspeaths received a "no asset" discharge from bankruptcy in October 2001.[124]

Shortly thereafter, in January 2002, "Superior filed an admiralty limitation proceeding in" the Eastern District of Louisiana, and the Hudspeaths responded with a complaint to recover damages arising out of the disembarking incident.[125] Six months later, Superior told the

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112. *Id.*
113. *Id.* at 212-13.
114. *Id.* at 216.
115. *See infra* notes 121-23 and accompanying text.
116. *See In re* Superior Crewboats, Inc., 374 F.3d 330, 333 (5th Cir. 2004).
117. *Id.* The Hudspeaths' bankruptcy was later converted to a Chapter 7. *See id.*
118. *Id.*
119. *See id.*
120. *See id.*
121. *See id.* at 333 n.1.
122. *See id.* at 333.
123. *See id*.
124. *Id.* The usual Chapter 7 case is one where the debtor has no assets for distribution to the creditors. *See* 8 WILLIAM J. NORTON, JR., NORTON BANKR. L. & PRAC. § 160:2 (3d. ed.2012).
125. *Superior Crewboats*, 374 F.3d at 333. For an explanation of an admiralty limitation

bankruptcy trustee that the Hudspeaths were continuing to pursue their claim.[126] Subsequently, the trustee moved to reopen the bankruptcy case, and the Hudspeaths amended their schedules to include the claim.[127] Additionally, Superior filed a motion to dismiss, and the trustee moved to substitute as the plaintiff in the limitation proceeding.[128]

Superior asserted two arguments in the motion to dismiss: (1) judicial estoppel barred the claim and (2) the suit was not brought by the real party in interest under Federal Rules of Civil Procedure Rule 17(a).[129] The district court rejected the judicial estoppel argument, reasoning that it was not a matter to be decided summarily, but rather at trial.[130] Additionally, the court rejected the 17(a) argument.[131] Consequently, Superior filed an appeal to the Fifth Circuit.[132]

The Fifth Circuit panel recognized three requirements for judicial estoppel to apply: (1) a clearly inconsistent position, (2) accepted by the previous court, and (3) the non-disclosure must not have been inadvertent.[133] First, the panel found that the positions were clearly inconsistent because an omission of a claim is tantamount to a representation that it does not exist.[134] Second, the panel reasoned that the bankruptcy court accepted the prior position because the trustee abandoned the claim.[135] Third, the non-disclosure was not inadvertent because it was made with knowledge of the claim and with motive to conceal.[136] The panel dismissed the Hudspeaths' alleged confusion as to the statute of limitations because the Hudspeaths knew of the facts giving rise to the claim and were aware of their continuing duty to disclose.[137] Further, the debtors had motive to conceal because they stood to reap a windfall if they received a judgment without disclosure to the creditors.[138] The Hudspeaths were not allowed to reopen their bankruptcy case to amend because the panel said judicial estoppel prevents parties from believing they only have

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proceeding, see 1 ROBERT FORCE, THE LAW OF MAR. PERS. INJURIES § 15:11 (5th ed. 2011).

126. *Superior Crewboats*, 374 F.3d at 333.

127. *Id.*

128. *Id.* at 334.

129. *Id.*

130. *Id.* at 333.

131. *Id.*

132. *Id.*

133. *Id.* at 335.

134. *Id.*

135. *Id.* Acceptance only requires "that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *In re* Coastal Plains, 179 F.3d 197, 206 (5th Cir. 1999) (quoting Reynolds v. Comm'r of Internal Revenue, 861 F.2d 469, 473 (6th Cir. 1988)).

136. *Superior Crewboats*, 374 F.3d at 335.

137. *Id.* ("The Hudspeaths certainly had knowledge of the undisclosed claim, initiating the suit only months after filing for bankruptcy and requesting service of process during the pendency of the bankruptcy petition.").

138. *Id.* at 336.

to disclose if they are caught.[139] The panel disposed of the 17(a) argument and motion to substitute in one sentence, stating that the judicial estoppel holding obviates the need to address both.[140]

C. Kane v. National Union Fire Insurance Co.

Four years later, the Fifth Circuit had the opportunity to explain its *Superior Crewboats* holding. The Kanes brought a personal injury lawsuit in a Louisiana state court arising out of a car accident.[141] Three years later, while the state court lawsuit was pending, the Kanes petitioned for a Chapter 7 bankruptcy.[142] The Kanes did not list their lawsuit on their bankruptcy schedules or inform the trustee of the claim; the Kanes received a discharge, and the trustee closed the case as a no-asset case.[143] The state court defendants filed a motion for summary judgment on judicial estoppel, and then the Kanes filed a motion in the bankruptcy court to reopen the proceedings so the trustee could administer the claim.[144] The bankruptcy court granted the motion to reopen.[145]

The defendant removed the case to federal court and again moved for summary judgment on judicial estoppel.[146] Additionally, the trustee moved to substitute himself as the real party in interest in order to pursue the claim on behalf of the bankruptcy estate.[147] Applying *Superior Crewboats*, the federal district court granted summary judgment on judicial estoppel and summarily dismissed the trustee's motion to substitute as moot.[148]

The Fifth Circuit panel disagreed, stating that *Superior Crewboats* did not control the case at bar.[149] The panel distinguished the prior decision by stating that the trustee in *Superior Crewboats* formally abandoned the claim.[150] Because the trustee in *Kane* did not abandon the claim, he was still the real party in interest.[151] The panel did not address the Hudspeaths' misstatement of the statute of limitations that prompted the *Superior Crewboats* trustee to abandon the claim.[152] Further, the Fifth Circuit panel noted that, unlike the Hudspeaths, the Kanes stood to gain only if there was

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139. *Id.*
140. *Id.*
141. Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380, 383 (5th Cir. 2008) (per curiam).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 383-84.
149. *Id.* at 386.
150. *Id.* at 386-87.
151. *See id.* at 387.
152. *See id.* at 386-87; *supra* notes 121-24 and accompanying text.

a surplus after debts and fees were paid to the bankruptcy creditors.[153] This left open the possibility that a judgment could be awarded in excess of the debts owed.

D. Reed v. City of Arlington

The Fifth Circuit again had the opportunity to explain its application of judicial estoppel in a 2011 en banc rehearing, *Reed v. City of Arlington*.[154]

1. District Court

Kim Lubke received a judgment in excess of one million dollars against the City of Arlington under the Family Medical Leave Act (FMLA).[155] During the city's appeal, Mr. Lubke and his wife filed a Chapter 7 bankruptcy petition, but the Lubkes did not disclose the FMLA judgment.[156] Subsequently, the Lubkes received a discharge, and the trustee closed the case as a no-asset case.[157]

A Fifth Circuit panel affirmed the FMLA judgment but remanded for a damages recalculation.[158] Thereafter, the plaintiff's attorney in the FMLA case learned of the Lubkes' bankruptcy petition and notified the bankruptcy trustee of the judgment.[159] The bankruptcy case was reopened, and the trustee substituted herself in the FMLA action as the real party in interest.[160] The city filed a petition for rehearing.[161] The panel denied the petition but ordered the district court to determine whether judicial estoppel applied.[162] The district court held judicial estoppel barred Lubke but crafted what it perceived to be an equitable remedy for the trustee.[163] The trustee could pursue the claim on behalf of the bankruptcy creditors, but any portion of the judgment in excess after distribution to the creditors would revert to the city.[164]

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153. *Kane*, 535 F.3d at 387.
154. *See* Reed v. City of Arlington, 650 F.3d 571 (5th Cir. 2011) (en banc).
155. *Id.* at 572-73.
156. *Id.* at 573 (noting that the Lubkes also did not inform their FMLA attorney of the bankruptcy petition).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

2. Panel Decision

A panel of the Fifth Circuit reversed.[165] The panel noted that the district court applied "this court's" requirements for judicial estoppel—(1) the position is clearly inconsistent with a prior position; (2) the court accepted the prior position; and (3) the non-disclosure was not inadvertent[166]—but later, in its own analysis, listed the Supreme Court's *New Hampshire v. Maine* non-exhaustive factors—(1) the later position must be clearly inconsistent, (2) the party must have succeeded in persuading the court to accept the prior position, and (3) the party asserting the inconsistent position must derive an unfair advantage or impose an unfair detriment on the opposing party.[167] The panel held that, considering the cost and consequences of Lubke's misrepresentations, equity weighed against further litigation by the trustee.[168] The panel concluded that the district court failed to engage in a fact-specific analysis regarding all parties involved.[169]

Specifically, the panel explained that the district court made two mistakes.[170] First, the debtor's misconduct could not be distinguished from the trustee because the trustee "succeeds to the debtor's claim with all its attributes."[171] Second, the balance of harm favored judicial estoppel.[172] The court found no material advantage to the creditors because only about one-sixth of the creditors timely filed claims when the case was reopened.[173] Therefore, the principal remaining claimants were the bankruptcy trustee's counsel and the FMLA attorney.[174] Further, Lubke's misrepresentations resulted in additional litigation and, thereby, increased attorney's fees that the city must statutorily bear—fees distinct from the underlying FMLA claim.[175] The panel reasoned that ultimately, the taxpayers of Arlington were forced to assume the cost of Lubke's misconduct.[176]

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165. *Id.* The panel opinion was authored by Chief Judge Edith Jones who was also the author of the *Superior Crewboats* opinion. *See* Reed v. City of Arlington, 620 F.3d 477, 480-81 (5th Cir. 2010), *rev'd en banc*, 650 F.3d 571 (5th Cir. 2011); *In re* Superior Crewboats, Inc., 374 F.3d 330, 332 (5th Cir. 2004).

166. *See Reed*, 620 F.3d at 480; *see also supra* note 32 and accompanying text (listing the factors the 5th Circuit previously applied).

167. *See Reed*, 620 F.3d at 479; *see also supra* note 16 and accompanying text (listing a different set of factors than it previously applied).

168. *Reed*, 620 F.3d at 483.

169. *Id.*

170. *Id.* at 482.

171. *Id.*

172. *Id.* at 482-83.

173. *Id.*

174. *Id.* at 483 ("[The trustee's] claim has been substantially increased because of this judicial estoppel litigation.").

175. *Id.*

176. *Id.*

3. En Banc Rehearing

The Fifth Circuit granted a rehearing en banc and held the trustee was not barred by judicial estoppel.[177] The court said that allowing the trustee to pursue the claim (1) follows from bankruptcy law, (2) follows from equity, (3) is consistent with Fifth Circuit precedent, and (4) is consistent with other circuits.[178] First, the court reasoned that the FMLA claim became an asset of the bankruptcy estate at the moment the petition was filed; moreover, the trustee was the real party in interest with the authority and duty to bring the claim on behalf of the estate.[179] Additionally, the general principle that a trustee received claims subject to defenses that could be raised against the debtor did not apply because it is limited to pre-petition defenses that would have been applicable had the debtor not filed bankruptcy.[180] Second, the court said estopping the trustee would frustrate a core goal of bankruptcy law—achieving a maximum and equitable distribution for creditors.[181] Third, the court cited *Kane* and *Superior Crewboats*, stating that the facts of *Kane* are nearly identical and, again, distinguishing *Superior Crewboats* on the issue of the trustee's abandonment.[182] As in *Kane*, the Fifth Circuit did not discuss the motivation for the trustee's abandonment—the debtor's misrepresentation regarding the statute of limitations.[183] The court also noted the fact that attorneys would be the principal parties to benefit from pursuing the cause of action was not a reason to apply judicial estoppel.[184] Lastly, the court pointed to the Seventh, Tenth, and Eleventh Circuit Courts of Appeals highlighting that its opinion is in accord.[185]

Chief Judge Edith Jones authored the dissenting opinion and was joined by Judge Edith Clement and Senior Judge Harold DeMoss Jr., who were the same three members of the court that served as the panel.[186] Chief Judge Jones opined that the court should take a broader perspective in analyzing the impact of Lubke's deception.[187] Specifically, the Chief Judge emphasized the impact on the federal district and circuit courts, in addition to the interests of the bankruptcy process.[188]

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177. Reed v. City of Arlington, 650 F.3d 571, 573-79 (5th Cir. 2011) (rehearing en banc).
178. *Id.*
179. *Id.* at 575.
180. *Id.*
181. *Id.* at 576.
182. *Id.* at 577-78.
183. *Cf.* Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380 (5th Cir. 2008) (per curiam).
184. *Reed*, 650 F.3d at 578.
185. *Id.* at 578-79.
186. *Reed*, 650 F.3d at 579-81 (Jones, C.J., dissenting).
187. *Id.* at 579.
188. *Id.* at 579-80

E. Love v. Tyson Foods

Less than one year later, the Fifth Circuit addressed judicial estoppel following a Chapter 13 case. In *Love v. Tyson Foods, Inc.,* Willie E. Love (Love) filed a lawsuit against his former employer, Tyson, alleging racial discrimination and retaliation.[189] Love was a debtor under a Chapter 13 proceeding when he filed the EEOC charge and lawsuit.[190] After the EEOC charge was filed, the bankruptcy court confirmed Love's plan, which did not include the cause of action.[191] Thereafter, Tyson moved for summary judgment on judicial estoppel, Love filed an amended schedule in his Chapter 13 case listing the claim, and the court granted the motion, dismissing Love's claim.[192] Love appealed to the Fifth Circuit.[193]

The Fifth Circuit panel said Love only argued the inadvertence element on appeal.[194] The panel opined that Love failed to create a fact issue as to inadvertence because the element was nowhere mentioned in his brief—noting that it only discussed "two of the three criteria that are central to this court's judicial estoppel analysis."[195] Instead, Love asserted, "Plaintiff will not derive any unfair advantage or impose any unfair detriment on any opposing party if not estopped."[196] Consequently, the panel held that Love did not raise a fact issue as to his inadvertence and thus, the application of judicial estoppel was proper.[197]

In contrast, the dissent opined that Tyson, the party asserting the judicial estoppel defense, did not carry its summary judgment burden and that even if Love was estopped, the court should have crafted a solution to allow the bankruptcy estate to benefit from the potential judgment.[198] Importantly, the dissent recognized that Love's response used the *New Hampshire v. Maine* three-factor test.[199] In short, the dissent explained that Love would not gain a legal advantage because a Chapter 13 debtor in possession essentially acts as a Chapter 7 trustee and any recovery received would be shared with Love's creditors.[200] Therefore, the dissent concluded that Love had no motive to conceal.[201]

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189. Love v. Tyson Foods, Inc., 677 F.3d 258, 260 (5th Cir. 2012).
190. *Id.* at 260-61.
191. *Id.* at 261.
192. *Id.*
193. *Id.*
194. *Id.* at 262.
195. *Id.* at 263. Love was not represented by an attorney in his lawsuit. *Id.* at 261 n.1.
196. *Id.* at 263.
197. *Id.*
198. *Id.* at 266-67 (Haynes, J., dissenting).
199. *See id.* at 269-70.
200. *See id.* at 270-75.
201. *Id.* at 264.

F. Synthesizing the Fifth Circuit Decisions

In *Reed v. City of Arlington*, the Fifth Circuit reconciled its prior decisions—*Superior Crewboats* and *Kane*—as being in accord with the proposition that the innocent trustee should not be estopped from pursuing the claim on behalf of the bankruptcy estate.[202] In both *Kane* and *Reed*, however, the court overlooked the distinguishing factor in *Superior Crewboats*—the trustee's formal abandonment of the claim under the Bankruptcy Code.[203] In her dissent, Chief Judge Jones—the author of the *Superior Crewboats* opinion—points out this inconsistency.[204] Addressing the trustee's abandonment in *Superior Crewboats*, the Chief Judge stated, "Just as a closed bankruptcy case may be 'reopened' when a trustee finds hidden assets, however, an abandonment may be revoked in the best interest of creditors."[205] Given this distinction, Chief Judge Jones stated there was not support in the circuit for the *Reed* trustee's position until *Kane*.[206]

The Chief Judge may be right because the cases can be construed as inconsistent. The *Reed* en banc decision stands in contrast with *Superior Crewboats* because the trustee in *Superior Crewboats* was not allowed to revoke its abandonment in order to substitute as the real party in interest.[207] In *Superior Crewboats*, the trustee filed a motion to substitute, but the court said the Rule 17(a) motion was moot after it granted summary judgment on judicial estoppel.[208] In *Kane*, the court explained away this distinction by stating that the trustee was not the real party in interest because it abandoned the claim.[209] Again, the trustee may revoke an abandonment.[210] Having done this, the trustee would be the real party in interest, and judicial estoppel would not apply.[211] Therefore, in *Superior Crewboats*, it appears that the circuit court did not allow the debtor to succeed in its subsequent suit because of its deception but, incongruously, denied the trustee's motion to substitute because the trustee fell victim to the very same deception by the debtor. Given that *Superior Crewboats* summarily dismissed the trustee's argument, it is not clear if and how these decisions may be reconciled. Nevertheless, in the en banc *Reed* opinion, the circuit court should have stated that the *Superior Crewboats* panel was in error or explained its apparent conflict.

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202. *See* Reed v. City of Arlington, 650 F.3d 571, 577-78 (5th Cir. 2011) (en banc).
203. *See supra* notes 121, 149-52, 183 and accompanying text.
204. *See Reed*, 650 F.3d at 580 n.1 (Jones, C.J., dissenting).
205. *Id.* at 580 n.1.
206. *Id.* at 580 n.2.
207. *See infra* notes 149-52 and accompanying text.
208. *In re* Superior Crewboats, Inc., 374 F.3d 330, 336 (5th Cir. 2004).
209. Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380, 384-88 (5th Cir. 2008) (per curiam).
210. *See supra* note 205 and accompanying text.
211. *See supra* note 205 and accompanying text.

Additionally, the circuit court apparently negated the potential for a judgment in excess of the debts owed if the trustee pursued the claim on behalf of the estate.[212] *Kane* left open the possibility of an excess judgment, but the district court in *Reed* said any excess amount would revert to the defendant.[213] Although the en banc circuit court did not engage in its own discussion of the possibility of an award in excess of debts, the court affirmed the district court's judgment.[214]

In *Reed*, the en banc Fifth Circuit hinted at the possibility for judicial estoppel to bar the trustee, but it was not clear when these "unusual circumstances" would arise.[215] Some practicing bankruptcy attorneys suggest that this may occur when the debtor stands to benefit from the judgment or when the judgment is in excess of debts owed.[216] But this does not comport with the circuit court's seeming support for allowing any excess to revert to the defendant.[217] Therefore, while the Fifth Circuit hinted at the potential use of judicial estoppel against the trustee, it remains to be seen if and when this would occur.

In addition to the en banc *Reed* opinion, attorneys within the Fifth Circuit must also keep *Love v. Tyson Foods* in mind.[218] Specifically, the chapter under which the plaintiff-debtor filed should receive heightened attention. Defendants are now incentivized to raise judicial estoppel when it arises in the context of a Chapter 13 filing because, as *Love* demonstrates, the defendant will receive a complete windfall if the debtor, who essentially stands in the shoes of a Chapter 7 trustee, is estopped.[219] Because *Love* provided no recovery for the bankruptcy creditors, this decision stands in contrast with the prior decisions of the Fifth Circuit, such as *Reed* and *Kane*, in which the court allowed the bankruptcy trustee to pursue the claim on behalf of the estate.[220]

Despite these areas of confusion, attorneys can likely count on the Fifth Circuit's inadvertence standard to earn the majority vote—(1) the position is clearly inconsistent with a prior position; (2) the court accepted the prior position; and (3) the non-disclosure was not inadvertent.[221] But

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212. *See supra* notes 153, 164 and accompanying text.

213. *See supra* notes 153, 164 and accompanying text.

214. *See* Reed v. City of Arlington, 650 F.3d 571, 579 (5th Cir. 2011) (en banc).

215. *See id.* at 573 ("We now . . . state a general rule that, absent unusual circumstances, an innocent trustee can pursue for the benefit of creditors a judgment or cause of action that the debtor fails to disclose in bankruptcy.").

216. *See* George Klidonas & Regina L. Griffin, *Estoppel Does Not Extend to Innocent Trustees*, AM. BANKR. INST. J., Nov. 2011, at 44, 45.

217. *See Reed*, 650 F.3d at 579; *supra* text accompanying notes 212-14.

218. *See supra* notes 189-201 and accompanying text.

219. *See supra* notes 189-97 and accompanying text.

220. *See supra* Parts IV.B, C.

221. *See supra* note 32-33 and accompanying text.

judicial estoppel does not only arise in federal courts.[222] Texas practitioners may also need to turn to state court applications as well.[223]

V. APPLICATION IN THE TEXAS SUPREME COURT

In 2009, the Texas Supreme Court addressed judicial estoppel in *Ferguson v. Building Materials Corp. of America*.[224] The debtors, who were under a Chapter 13 plan, listed their personal injury suit on their Statement of Financial Affairs and disclosed its existence to the bankruptcy trustee.[225] The debtors, however, omitted the suit from the bankruptcy schedules and the court-approved plan.[226] This omission was brought to the debtors' attention, and they amended their plan.[227] The Texas Supreme Court held that judicial estoppel did not apply because the debtors did not gain an advantage and the personal injury defendant and bankruptcy creditors did not suffer a disadvantage.[228]

The court was persuaded by the debtors' attempts to disclose the cause of action rather than the procedural error in omitting the cause of action from the Schedule of Personal Property.[229] While the court did not directly address what standard should apply, it did not cite to any Fifth Circuit precedent, instead relying primarily on its own decision in *Pleasant Glade Assembly of God v. Schubert*.[230] Both opinions emphasized the lack of an "unfair advantage"—language that tracks the standard set forth in the United States Supreme Court decision of *New Hampshire v. Maine*.[231] Thus, the Texas Supreme Court employs a different test than the Fifth Circuit, which may result in conflicting opinions between the two jurisdictions.

VI. BRINGING IT TOGETHER FOR TEXAS PRACTITIONERS: TWO STANDARDS EMERGE

A. The United States Supreme Court and the Fifth Circuit

Three potential standards for judicial estoppel have appeared in state and federal courts within Texas: (1) the Supreme Court's "unfair

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222. *See infra* Part V.
223. *See infra* Part V.
224. *See* Ferguson v. Bldg. Materials Corp. of Am., 295 S.W.3d 642, 643 (Tex. 2009) (per curiam).
225. *Id.*
226. *Id.*
227. *Id.* at 644.
228. *Id.*
229. *See id.* at 643.
230. *See id.* at 643-44 (citing Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 6 (Tex. 2008)).
231. *See id.*; New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001); *Pleasant Glade Assembly of God*, 264 S.W.3d at 6-8.

advantage" standard, (2) the Fifth Circuit's "inadvertence" standard, and (3) the Texas Supreme Court's original "bad faith" standard.[232] Because the Fifth Circuit instructed courts to apply federal law in the bankruptcy context, only the first two approaches are now applicable.[233] But the Fifth Circuit has not clarified how its three elements for bankruptcy-based judicial estoppel fit with the Supreme Court's non-exhaustive factors in *New Hampshire v. Maine*.[234] This distinction is evident in the discourse between the majority and dissent in *Love v. Tyson Foods*.[235]

The Supreme Court characterized its analysis as "several factors [that] typically inform the decision whether to apply the doctrine in a particular case."[236] In contrast, the Fifth Circuit enumerates three elements.[237] The Fifth Circuit's elements can clearly be traced to the Supreme Court's analysis.[238] But it is not apparent whether the circuit completely abandoned *New Hampshire v. Maine* given that the circuit employs the standard in non-bankruptcy cases.

1. Fifth Circuit Application in the Non-Bankruptcy Context

In *Hall v. GE Plastic Pacific PTE Ltd.*, the Fifth Circuit analyzed judicial estoppel in a non-bankruptcy setting.[239] Mr. Hall brought a personal injury lawsuit against GE in Texas state court alleging that GE manufactured an extension cord that caused a fire, resulting in severe burns to Mr. Hall.[240] The case was removed to federal court and referred to a magistrate judge, at which point GE moved for summary judgment on the ground of judicial estoppel.[241] GE argued judicial estoppel applied because Mr. Hall asserted that GE was the manufacturer of the cord after asserting in an earlier lawsuit that only Woods Industries could be the

232. *See supra* notes 16, 22, 133 and accompanying text. One element of the Texas formulation of judicial estoppel is that the prior position was not made inadvertently or by mistake, fraud, or duress. *See supra* note 21 and accompanying text.

233. *See supra* notes 32-33 and accompanying text.

234. *See supra* note 18.

235. *See* Love v. Tyson Foods, Inc., 677 F.3d 258, 270 n.7 (5th Cir. 2012) (Jones, C.J., dissenting) ("The majority opinion condemns Love for framing his argument based on the Supreme Court's three-prong test, which differs slightly from that set out by our precedent. The majority opinion states that *New Hampshire*'s third prong—'whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped'—is an entirely different issue than Love's motive at the time of nondisclosure. . . . I cannot agree, however, that these issues are entirely distinct." (citation omitted)).

236. *New Hampshire*, 532 U.S. at 750.

237. *See supra* note 32 and accompanying text.

238. *Cf.* Eastman v. Union Pac. R. Co., 493 F.3d 1151, 1157 (10th Cir. 2007) (explaining that, although the Supreme Court instructed courts to resist the application of judicial estoppel when the prior position was by inadvertence or mistake, the circuit courts have evolved a much higher bar in the bankruptcy context).

239. *See* Hall v. GE Plastic Pac. PTE Ltd., 327 F.3d 391, 395-400 (5th Cir. 2003).

240. *Id.* at 393.

241. *Id.* at 394.

manufacturer.[242] The magistrate judge—applying federal law—recommended that the motion be granted.[243] After de novo review, the district court granted the motion.[244] Mr. Hall appealed claiming that judicial estoppel was inappropriate.[245]

On appeal, the Fifth Circuit panel listed the first and second *New Hampshire v. Maine* elements—(1) the later position must be clearly inconsistent and (2) the court must have accepted the prior position—as the "two bases for judicial estoppel."[246] The panel noted that the circuit primarily relies on the first two factors but went on to discuss other factors, including the third non-exclusive factor from *New Hampshire v. Maine*—(3) whether the party asserting the inconsistent position will derive an unfair advantage or impose an unfair detriment on the opposing party.[247] Notably, the court stated that detrimental reliance, privity, and intent are not required within the Fifth Circuit.[248] Further, the panel rejected a defense of mistake, pointing out that Mr. Hall did not allege that he now has new information or that he had less incentive to discover the manufacturer in the first suit.[249] The panel cited the inadvertence element for the bankruptcy context—no knowledge of the claim and no motive to conceal.[250] Concluding, the panel said the lower court was correct in judicially estopping Mr. Hall because the first two bases were met, and Mr. Hall lacked *any* defense.[251] The panel went on to note that, "it was within the court's discretion to utilize judicial estoppel and prevent Hall from playing 'fast and loose' with the court by 'changing positions based upon the exigencies of the moment.'"[252]

Five years later, the Fifth Circuit was able to reflect on its non-bankruptcy approach in *Hopkins v. Cornerstone America*.[253] The panel stated, "Generally, we have recognized at least two requirements to invoke the doctrine," referring to the "two bases" or the first two *New Hampshire v. Maine* factors.[254] Further, the panel highlighted that *New Hampshire v.*

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242. *Id*.

243. *Id*.

244. *Id.*

245. *Id.* On appeal, Mr. Hall also claimed that state law should apply. *Id.* The Fifth Circuit concluded that federal law should apply because "the application of federal law concerning judicial estoppel is appropriate in this case because both suits filed by Hall ended up in federal court and it is the federal court that is subject to manipulation and in need of protection." *Id.* at 395-96.

246. *Id.* at 396 (quoting Ahrens v. Perot Sys. Corp., 205 F.3d 831, 833 (5th Cir. 2000)); *see supra* note 16 and accompanying text.

247. *Hall*, 327 F.3d at 399-400.

248. *See id.* at 399. *Contra* Love Terminal Partners v. United States, 97 Fed. Cl. 355, 403 (Fed. Cl. 2011) (explaining that the Federal Circuit retained the privity requirement for judicial estoppel).

249. *Hall*, 327 F.3d at 399.

250. *Id.* at 399-400; *supra* note 33 and accompanying text.

251. *Hall*, 327 F.3d at 400.

252. *Id.* (quoting Ergo Sci., Inc. v. Martin, 73 F.3d 595, 598 (5th Cir. 1996)).

253. *See* Hopkins v. Cornerstone Am., 545 F.3d 338, 347 (5th Cir. 2008).

254. *See id.*

Maine did not create "inflexible prerequisites."[255] It explained that, in some instances, it has allowed a broader interpretation of the "acceptance" or "success" element of judicial estoppel.[256] Therefore, the panel indicated its flexibility in regard to judicial estoppel in the non-bankruptcy context.

2. Fifth Circuit—Supreme Court Distinction Within the Circuit

As illustrated by the preceding cases, outside of the bankruptcy context, the Fifth Circuit favors the United States Supreme Court's unfair advantage standard. But within the bankruptcy context, the Fifth Circuit employs its inadvertence test.[257] The original panel opinion and Chief Judge Jones' dissent in *Reed v. City of Arlington* should be viewed in light of these conflicting approaches.[258] In a footnote, the panel enumerated the Fifth Circuit's "three particular requirements" but outlined the *New Hampshire v. Maine* factors in its own analysis.[259] In fact, the panel described judicial estoppel as follows: "Because it is an equitable doctrine, judicial estoppel is not rigidly defined . . . ."[260] This description demonstrates that the panel was motivated by the Supreme Court's standard, rather than its own circuit's test. The panel stated, "[t]he lowest common denominator appears to lie in a holistic, fact-specific consideration of each claim of judicial estoppel that arises from litigation claims undisclosed to a bankruptcy court."[261]

This exact distinction came to a head in *Love v. Tyson Foods*.[262] Judge Haynes dissented because she found support for the district court's decision to not apply judicial estoppel based on the pro se plaintiff's brief, while the majority found the brief lacked a required element—inadvertence.[263] Judge Haynes's dissent logically discussed the inadvertence-unfair-advantage distinction and reconciled the two tests.[264] She opined that Love's assertion that he would not gain an unfair advantage could support the inadvertence element the majority sought.[265]

In short, the Fifth Circuit formulated its own test for judicial estoppel following a bankruptcy non-disclosure based on the United States Supreme

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255. *Id.* at 348 n.2 (quoting New Hampshire v. Maine, 532 U.S. 742, 751 (2001)).

256. *Id.*

257. *See supra* notes 32-33 and accompanying text.

258. *See supra* Part IV.C.

259. *See* Reed v. City of Arlington, 620 F.3d 477, 483 n.3 (5th Cir. 2010) (quoting *In re* Superior Crewboats, Inc., 374 F.3d 330, 335 (5th Cir. 2004)), *rev'd en banc*, 650 F.3d 571 (5th Cir. 2011). The panel analyzed Fifth Circuit precedent and concluded, "What are the bankruptcy courts, which confront these problems regularly in our circuit, to make of these decisions?" *Id.* at 481.

260. *Id.* at 481 (citing New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001)).

261. *Id.* at 482.

262. *See supra*, Part IV.E.

263. *See supra* notes 198-201 and accompanying text.

264. *See* Love v. Tyson Foods, Inc., 677 F.3d 258, 268-75 (5th Cir. 2012) (Haynes, J., dissenting).

265. *Id.*; *see supra* note 200 and accompanying text.

Court's non-bankruptcy application.[266] Yet, judges within the Fifth Circuit are still split as to which standard the court should employ.[267] This divide led to the dissenting opinions in *Reed* and *Love*, but the Fifth Circuit is not alone in the unfair advantage-inadvertence rift.

B. The Fifth Circuit and the Texas Supreme Court

In addition to the distinction within the Fifth Circuit, the disparity is also evident between the Fifth Circuit and the Texas Supreme Court.[268] In fact, after *Love v. Tyson Foods*, the Texas Supreme Court's application of judicial estoppel in a Chapter 13 case may be in conflict with that of the Fifth Circuit.[269] In *Ferguson*, the Texas Supreme Court held judicial estoppel did not apply to the Chapter 13 debtors because the debtors attempted to disclose their cause of action and to amend their schedules to include the lawsuit once their procedural error was brought to their attention.[270] In contrast, the Fifth Circuit held judicial estoppel applied to the Chapter 13 debtor in *Love* despite his willingness to amend to include the cause of action.[271]

Because the Texas Supreme Court and the Fifth Circuit are concurrent appellate courts, Texas practitioners have no guidance as to whether *Ferguson* is still good law. Given that the Fifth Circuit instructed practitioners to apply federal law to bankruptcy-based judicial estoppel, however, the *Love* approach is the more persuasive of the two.[272] Although it is now evident that *Ferguson* may conflict with *Love*, the *Ferguson* intermediate court decision foreshadowed this issue.[273] Specifically, the El Paso Court of Appeals' decision demonstrates the significant disparity that may arise between the inadvertence and unfair advantage approaches to Chapter 13 cases.[274]

The El Paso Court of Appeals, which was reversed by the Texas Supreme Court, applied the three particular requirements of the Fifth Circuit or the inadvertence test.[275] As to the first requirement—a clearly inconsistent statement—the court of appeals noted that the debtors told the trustee only after judicial estoppel was raised and, further, that disclosure to

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266. *See supra* note 32 and accompanying text.
267. *See supra* text accompanying notes 257-66.
268. *See infra* notes 269-85 and accompanying text.
269. *See supra* notes 224-31 and accompanying text.
270. *See* Ferguson v. Bldg. Materials Corp. of Am., 276 S.W.3d 45, 50-52 (Tex. App.—El Paso 2008), *rev'd*, 295 S.W.3d 642 (Tex. 2009).
271. Love v. Tyson Foods, Inc., 677 F.3d 258, 266 (5th Cir. 2012).
272. *See supra* note 31 and accompanying text.
273. *See Ferguson*, 276 S.W.3d at 50-52.
274. *See id.*
275. *Id.*

the trustee in a creditors' meeting was insufficient.[276] The court was also not persuaded by the amended schedule stating that considering an amendment—filed only after the other party raises judicial estoppel—encourages debtors to not disclose claims unless they are caught.[277] Therefore, the subsequent disclosure and amendment were not sufficient in light of the failure to list the claim in the Schedule of Personal Property as required by the Bankruptcy Code.[278] As to the second element—acceptance of the inconsistent statement by the prior court—the appellate court quickly disposed of the issue stating that the Fifth Circuit finds acceptance when the bankruptcy court confirms a plan under a Chapter 13 proceeding.[279]

Lastly, as to the third element of inadvertence, the court analyzed the two prongs of the test: (1) knowledge of the claim and (2) motive to conceal.[280] The debtors conceded knowledge of the claim, so the court addressed motive to conceal.[281] The court found motive because, under the original confirmed plan, the creditors would have been entitled to seven cents on the dollar, while under the amended plan, the creditors would be repaid dollar for dollar.[282] Therefore, the appellate court held judicial estoppel applied.[283] Thus, under the inadvertence test, as applied by the El Paso Court of Appeals, judicial estoppel applied. Under the unfair advantage standard, however, as applied by the Texas Supreme Court, judicial estoppel did not apply.

Consequently, practitioners in Texas may be faced with the unfair advantage standard of the Texas Supreme Court or the inadvertence test of the Fifth Circuit majority.[284] As *Ferguson* indicates, this distinction can be crucial, especially in the Chapter 13 context.[285]

VII. A LOOK OUTSIDE TEXAS

In the en banc *Reed v. City of Arlington* opinion, the Fifth Circuit cited its consistency with the Seventh, Tenth, and Eleventh Circuit Courts of

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276. *Id.* at 51-52.
277. *Id.*
278. *Id.* at 50-51.
279. *Id.* at 52 (citing Jethroe v. Omnova Solutions, Inc., 412 F.3d 598, 600 (5th Cir. 2005)).
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.* at 54.
284. *See* New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (noting the flexible nature of the judicial estoppel inquiry); Ferguson v. Bldg. Materials Corp. of Am., 295 S.W.3d 642, 643-44 (Tex. 2009) (applying the *New Hampshire v. Maine* inadvertence standard); *see generally* Reed v. City of Arlington, 620 F.3d 477, 483 (5th Cir. 2010), *rev'd en banc*, 650 F.3d 571 (5th Cir. 2011) (explaining that the doctrine is not rigidly defined); Reed v. City of Arlington, 650 F.3d 571, 574 (5th Cir. 2011) (en banc) (enumerating three elements).
285. *See supra* notes 274-83 and accompanying text.

Appeals.[286] Accordingly, these circuit courts have allowed bankruptcy trustees to pursue non-disclosed claims on behalf of the bankruptcy estate.[287]

A. Seventh Circuit

Although the *Reed* holding tracks that of prior cases in the Seventh Circuit, the Fifth Circuit overlooked differences along the way. In *Cannon-Stokes v. Potter*, the Seventh Circuit reasoned that the possibility of judicial estoppel applying to the debtor arises once the trustee abandons the claim because "as a technical matter the estate in bankruptcy, not the debtor, owns all pre-bankruptcy claims, and unless the estate itself engages in contradictory litigation tactics the elements of judicial estoppel are not satisfied."[288] Therefore, the Seventh Circuit analyzed the application of judicial estoppel to the debtor because the trustee had abandoned the claim, and the creditors were out of the picture.[289] This suggests that the Seventh Circuit would resolve the issue on standing alone, rather than judicial estoppel, if both the trustee and debtor were involved.

A subsequent decision by the Bankruptcy Court for the Eastern District of Wisconsin distinguished the Seventh Circuit's application of the doctrine.[290] In *In re FV Steel & Wire Co.*, the debtor filed an employment discrimination charge with the EEOC before filing a Chapter 7 bankruptcy

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286. *See, e.g.*, Biesek v. Soo Line R.R. Co., 440 F.3d 410 (7th Cir. 2006); Cannon–Stokes v. Potter, 453 F.3d 446, 448 (7th Cir. 2006); Eastman v. Union Pac. R.R. Co., 493 F.3d 1151 (10th Cir. 2007); Parker v. Wendy's Int'l, Inc., 365 F.3d 1268 (11th Cir. 2004). Although the *Reed* opinion primarily discussed the approaches of the Seventh, Tenth, and Eleventh Circuit Courts of Appeals, other circuit courts have addressed judicial estoppel as well. *See, e.g.*, Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 570-72 (1st Cir. 1993) (holding that former debtor was judicially estopped from bringing a pre-petition claim, which was not disclosed in Chapter 11 case); *In re* I. Appel Corp., 104 Fed. App'x 199, 201-02 (2d Cir. 2004) (noting the absence of case law to support the application of judicial estoppel to a reopening and holding that judicial estoppel would not apply anyway because the debtor's claim was adequately disclosed); Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 319-25 (3rd Cir. 2003) (applying judicial estoppel to claims known to the debtor at the time of the bankruptcy even though the debtor attempted to amend the disclosure statement); Whitten v. Fred's, Inc., 601 F.3d 231, 241-42 (4th Cir. 2010) (concluding judicial estoppel would not bar sexual harassment suit because debtor disclosed the possibility of a lawsuit in the bankruptcy petition); Stephenson v. Malloy, 700 F.3d 265, 266-75 (6th Cir. 2012) (holding judicial estoppel did not bar trustee from pursuing claim and debtor's omission was inadvertent); Stallings v. Hussmann Corp., 447 F.3d 1041, 1047-49 (8th Cir. 2006) (concluding judicial estoppel did not apply because the bankruptcy court did not accept the inconsistent position given that the bankruptcy case was dismissed and the debtor's debts were not discharged); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-86 (9th Cir. 2001) (holding debtor was judicially estopped from bringing claim that was not disclosed in prior bankruptcy); Moses v. Howard Univ. Hosp., 606 F.3d 789, 791-800 (D.C. Cir. 2010) (reasoning employee was judicially estopped from bringing Title VII claims against former employee because the claims were not disclosed in bankruptcy initiated after Title VII suit was filed).

287. *See Eastman*, 493 F.3d at 1155 n.3.

288. *Cannon-Stokes*, 453 F.3d at 448.

289. *Id.*

290. *See In re* FV Steel & Wire Co., 349 B.R. 181, 185-89 (Bankr. E.D. Wis. 2006).

petition.[291] The debtor did not list her claim in the bankruptcy schedules or Statement of Financial Affairs.[292] The debtor received a no-asset discharge, and thereafter, the former employer filed its own Chapter 11 petition.[293] Subsequently, the debtor filed a proof of claim with the bankruptcy court concerning her discrimination claim against the former employer.[294]

During settlement discussions, the former employer's attorney notified the debtor's attorney that the debtor failed to disclose the claim in the debtor's own closed bankruptcy case.[295] Thereafter, the debtor's Chapter 7 case was reopened, the debtor amended the schedule to include the claim, and the trustee employed an attorney to represent the bankruptcy estate in pursuing the claim.[296] The trustee became the real party in interest, with the result that any recovery in excess of the debts owed would be paid to the debtor.[297] The former employer then sought to disallow the debtor's claim on the basis of judicial estoppel, but the bankruptcy court held that the doctrine did not apply because the circumstances shifted the equities in favor of the debtor.[298]

The court reasoned that the employer failed to show how it was harmed or how the debtor was benefited from the nondisclosure and further, that the employer failed to show the "requisite intent to deceive the court."[299] Additionally, the court noted that judicial estoppel could not apply to the trustee because the trustee made no inconsistent statements.[300] Although this case does not have subsequent history, its analysis, if accepted by the Seventh Circuit, would cast doubt on its harmony with the Fifth Circuit.[301] In *Superior Crewboats*, the Fifth Circuit did not allow the debtors to reopen their bankruptcy case to amend, reasoning that such behavior would encourage non-disclosure until the debtors are caught.[302]

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291. *Id.* at 183.

292. *Id.* The debtor claimed she informed the bankruptcy attorney of the charge and also that she was unaware that the potential claim was an asset of the bankruptcy estate or that she was required to disclose it. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 184.

296. *Compare id.* (holding that judicial estoppel is not applicable when the equities have been shifted in the debtor's favor), *with In re* Miller (Berti), 767 N.Y.S.2d 729, 729 (N.Y. App. Div. 2003) (reasoning that judicial estoppel is not applicable absent a final determination in the bankruptcy case endorsing the inconsistent position, and therefore, reopening the case nullifies a final determination).

297. *See In re FV Steel*, 349 B.R. at 189.

298. *See id.* at 184-85, 189.

299. *See id.* at 189.

300. *See id.*

301. *See infra* text accompanying note 302.

302. *See supra* note 139 and accompanying text.

B. Tenth Circuit

The Tenth Circuit first applied judicial estoppel in the non-bankruptcy context in *Johnson v. Lindon City Corp.*, noting that it resisted its application until the Supreme Court's directive in *New Hampshire v. Maine*.[303] The Tenth Circuit then had the chance to address judicial estoppel following a bankruptcy non-disclosure in *Eastman v. Union Pacific*.[304] Circuit Judge Bobby Ray Baldock provided a meaningful analysis of the circuit courts' treatment of *New Hampshire v. Maine* in the bankruptcy setting.[305] He set forth the Supreme Court's flexible approach but cautioned litigants that although the Supreme Court said judicial estoppel may not be proper when the omission is by mistake or inadvertence, the circuit courts have crafted a near insurmountable bar in the bankruptcy context.[306]

This stands in contrast to the Fifth Circuit, which has not articulated its journey from *New Hampshire v. Maine* to its current application of judicial estoppel in the bankruptcy setting.[307] In *Eastman*, the debtor claimed that his attorney was to blame because he told the attorney of the cause of action and, further, that he—as a layperson—was ignorant of the law.[308] Applying the no-knowledge or no-motive-to-conceal standard, the court rejected this argument.[309] This is consistent with the inadvertence approach of the Fifth Circuit.[310]

C. Eleventh Circuit

The Eleventh Circuit led the way for the Seventh and Tenth Circuits with *Parker v. Wendy's International, Inc*.[311] In *Parker*, the Chapter 7 trustee intervened in the debtor's pre-bankruptcy employment discrimination claim, which was not disclosed to the bankruptcy court.[312] The Eleventh Circuit explained that although the Supreme Court stated judicial estoppel is probably not reducible to any general formula, the Eleventh Circuit generally considers two factors: (1) whether the allegedly inconsistent statements were made under oath in a prior proceeding and

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303. *See* Johnson v. Lindon City Corp., 405 F.3d 1065, 1068-69 (10th Cir. 2005).

304. *See Eastman*, 493 F.3d at 1151.

305. *See id.* at 1157-58.

306. *See Eastman*, 493 F.3d at 1157 ("Where a debtor has both knowledge of the claims and a motive to conceal them, courts routinely, albeit at times *sub silentio*, infer deliberate manipulation."); *see also supra* note 16 and accompanying text (listing three factors for consideration).

307. *See supra* notes 236-38 and accompanying text.

308. *Eastman*, 493 F.3d at 1157.

309. *Id.* at 1158 (emphasizing the debtor's direct denial of any claim when questioned by the trustee).

310. *See supra* Part VI.A.

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

312. *Id.* at 1269.

(2) whether the inconsistencies were "calculated to make a mockery of the judicial system."[313] In *Burnes v. Pemco Aeroplex, Inc.*, the Eleventh Circuit reasoned that these two factors are consistent with *New Hampshire v. Maine* and leave courts with sufficient flexibility: "We recognize that these two enumerated factors are not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine."[314]

Faced with the argument that even if judicial estoppel applies to the debtor, it should not apply to the trustee, the Eleventh Circuit concluded, "judicial estoppel should not be applied at all."[315] The court called into question its prior application of judicial estoppel in *Burnes*, stating that the more appropriate defense would have been that the debtor lacked standing.[316] The Eleventh Circuit explained that a pre-bankruptcy petition cause of action is the property of the bankruptcy estate, and only the bankruptcy trustee has standing to prosecute causes of action belonging to the estate.[317]

Therefore, the trustee is the proper party in interest, and the debtor ceases to have an interest in the cause of action unless and until the trustee abandons it.[318] The court noted that judicial estoppel might arise in the "unlikely scenario" that the trustee recovers more money than the amount necessary to satisfy the creditors, and then, "perhaps judicial estoppel could be invoked by the defendant to limit any recovery to only that amount and prevent an undeserved windfall from devolving on the non-disclosing debtor."[319] This approach is similar to that of the Seventh Circuit, with both being distinguishable from the Fifth Circuit's approach because of the preference to resolve the defense on standing alone, rather than judicial estoppel.[320]

VIII. PROVIDING A SOLUTION FOR TEXAS

A. The Mess as the Law Stands

Judicial estoppel has greatly evolved from its initial application, but it is still plagued with inconsistencies in the bankruptcy context.[321] Some courts question the application of judicial estoppel altogether when the

313. *Id.* at 1271 (quoting Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002)).
314. *Burnes,* 291 F.3d at 1285-86.
315. *Parker*, 365 F.3d at 1272.
316. *See id.*
317. *Id.* ("Section 541 of the Bankruptcy Code provides that virtually all of a debtor's assets, both tangible and intangible, vest in the bankruptcy estate upon the filing of a bankruptcy petition.").
318. *See id.* at 1272 n.2.
319. *Id.* at 1273 n.4.
320. *See supra* notes 288-89 and accompanying text.
321. *See supra* Part II.

issue can be resolved on standing alone.[322] These courts rely on the Bankruptcy Code's allocation of standing to the trustee.[323] Additionally, because judicial estoppel no longer serves as a complete bar to recovery, but rather typically resolves on substitution of the bankruptcy trustee, the defendant will not necessarily reap the same windfall by raising the defense.[324] Accordingly, the defendant may lack motivation to assert judicial estoppel.[325] Given that the Fifth Circuit appears to limit recovery to the debts owed, however, this may serve as an incentive to the defendant hoping to minimize any potential liability.[326]

And most significantly, Texas practitioners face uncertainty as to which standard the court will favor: the unfair advantage approach from *New Hampshire v. Maine* or the inadvertence test of the Fifth Circuit majority.[327] While the latter evolved from the former, the distinction may prove crucial because it turns on the willingness of the court to take a holistic approach and weigh the equities of the case.[328] The plaintiff will typically prefer the *New Hampshire v. Maine* approach by arguing that the non-disclosure was an accident or a mistake or that equity favors reopening the bankruptcy case to amend.[329] The defendant, on the other hand, will argue for the Fifth Circuit standard, which is better described as a checklist with an impossible defense of inadvertence.[330] Although these standards fit within one another, they reflect a judicial attitude or mood in regard to a bankruptcy debtor who claims he did not know any better.[331] Depending on whether the case goes up to the Texas Supreme Court or the Fifth Circuit, the debtor may have a better idea of which attitude will guide the court's decision, but in between those courts, the plaintiff-debtor can only hope for the more forgiving of the two.[332]

Despite this conflict, the Fifth Circuit reached the correct result in the en banc rehearing of *Reed v. City of Arlington*.[333] The claim belonged to the bankruptcy estate; therefore, the trustee was entitled to pursue the claim on its behalf.[334] Still, the Fifth Circuit did not explain the significance of

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322. *See supra* notes 315-20 and accompanying text.
323. *See supra* note 45 and accompanying text.
324. *See supra* notes 315-20 and accompanying text.
325. *See supra* notes 315-20 and accompanying text.
326. *See supra* notes 212-14 and accompanying text.
327. *See supra* Part VI.
328. *See supra* Part VI.B.
329. *See supra* Part VI.
330. *See supra* notes 32-35 and accompanying text.
331. *See supra* Part VI; *see also* Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 73 (2005) ("One is left wondering whether the willingness to apply judicial estoppel, wrong as a matter of bankruptcy law and wrong as a matter of procedure, reflects judicial hostility toward discrimination plaintiffs.").
332. *See supra* Part VI.
333. *See infra* note 334 and accompanying text.
334. *See* 11 U.S.C. § 541 (2006); Reed v. City of Arlington*,* 650 F.3d 571, 574 (5th Cir. 2011) (en

the *New Hampshire v. Maine* factors in its decision.[335] This was evident in *Love v. Tyson Foods*.[336]

In contrast to *Reed*, the Fifth Circuit did not reach the correct result in *Love*.[337] The Fifth Circuit's inadvertence test should give way to the Supreme Court's unfair advantage standard outside the Chapter 7 context. The inadvertence approach is ill-suited for most scenarios outside of Chapter 7 because a Chapter 11 or 13 debtor is essentially acting as a Chapter 7 trustee.[338] In contrast to liquidation under Chapter 7, Chapters 11 and 13 primarily provide for reorganization or payment plans.[339] Given the time frame for these plans and the statutes of limitations for most causes of actions, it is likely that the Chapter 11 or 13 debtor would still be under such plan when judicial estoppel is asserted.[340] In that scenario, the court should allow the debtor to amend the plan to include this cause of action. This approach serves the primary goal the Fifth Circuit cited in *Reed*—providing maximum recovery to creditors.[341] In the unlikely event that the debtor's plan is complete, the court should proceed with its inadvertence approach. By recognizing the distinctions among the bankruptcy filings, the Fifth Circuit can fix the inconsistency that arose when it allowed the creditors to receive a portion of any recovery in *Reed* but prevented any such relief in *Love*.

B. Cleaning up the Doctrine: How Courts and Practitioners Can Pitch In

1. Consider the Debtor's Circumstances When Determining Which Standard Applies

In his *Northern Pipeline* dissent, Justice White explained that Congress's perception of a lack of judicial interest in bankruptcy matters was a factor behind the establishment of bankruptcy courts.[342] Simply put, Article III judges were not that interested in bankruptcy.[343] But explaining

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banc); Klidonas & Griffin, *supra* note 216, at 44, 45.

335. *Reed,* 650 F.3d at 574.

336. *See* Love v. Tyson Foods, Inc., 677 F.3d 258, 265 (5th Cir. 2012)*; supra* Part IV.E.

337. *See* Steve Sather, *Fifth Circuit Tackles Judicial Estoppel Yet Again Resulting in a Split Decision*, A TEXAS BANKRUPTCY LAWYER'S BLOG, (Apr. 5, 2012) http://stevesathersbankruptcynews.blogspot.com/2012/04/fifth-circuit-tackles-judicial-estoppel.html (providing a critical analysis of *Love v. Tyson Foods*).

338. *See supra* Part III.C (explaining the differences between Chapters 7, 11, and 13 filings).

339. *See supra* Part III.C.

340. *See supra* Part III.C.

341. *See* Reed v. City of Arlington, 650 F.3d 571, 576 (5th Cir. 2011) (rehearing en banc).

342. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 116-17 (1982) (White, J., dissenting) (citing H.R. REP. NO. 95-595, at 14 (1977)) (explaining that the Bankruptcy Act of 1978 was not an attempt by the political branches to usurp power, but rather "Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner").

343. *See id.*

away bankruptcy-based judicial estoppel as a lack of interest underestimates non-bankruptcy judges.[344] A better explanation is that non-bankruptcy courts are misperceiving the nature of bankruptcy courts in applying this equitable doctrine.

Technically, a bankruptcy judge does not sit as a court of equity, but rather as a statutory court of bankruptcy.[345] But cases, articles, and commentary assert otherwise.[346] In fact, § 105(a) of the Bankruptcy Code grants wide-ranging authority to bankruptcy judges:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.[347]

The United States Supreme Court recognized this "broad authority granted to bankruptcy judges" in *Marrama v. Citizens Bank of Massachusetts*.[348] While a further discussion of the statutory-equity distinction is outside the scope of this Comment, this distinction is useful in addressing the problems that arise when non-bankruptcy courts apply judicial estoppel following a non-disclosure. Non-bankruptcy courts' application of the doctrine likely stems from a misperception of bankruptcy courts.[349] But as § 105(a) demonstrates, an equitable doctrine can square with the Bankruptcy Code.[350]

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344. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 791-92 (2010) (noting that circuit courts' procedure to refer appeals from bankruptcy matters to a magistrate judge before resolution by a district judge "suggests that the Article III courts do not view bankruptcy matters as central to the duties of the life-tenured judiciary").

345. *See generally* Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 2 (2005) (explaining that a bankruptcy judge has no general equitable power).

346. *See, e.g.*, BANKR. L. MANUAL § 2:21 (5th ed. 2012); Lynne F. Riley & Maria C. Furlong, *The Supreme Court Restores Discretion and Enhances Jurisdiction of the Bankruptcy Courts*, ANN. SURV. OF BANKR. LAW 4 (2008) ("Bankruptcy courts are traditionally viewed as rooted in equity—possessing the discretion needed to implement a statute that incorporates social policy and to resolve the myriad situations that arise in bankruptcy cases but are not specifically addressed in the Bankruptcy Code."). *See generally* Hon. Marcia S. Krieger, "*The Bankruptcy Court Is a Court of Equity": What Does That Mean?*, 50 S.C. L. REV. 275 (1999) (discussing why bankruptcy courts are commonly referred to as courts of equity).

347. 11 U.S.C. § 105(a) (2006).

348. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 374-75 (2007). *But see* Ahart, *supra* note 345, at 3 (reasoning that "these inherent powers are not truly inherent if [11 U.S.C.] § 105(a) [2006] confers these powers").

349. *Cf.* Cheng v. K&R Diversified Invs., Inc. (*In re* Cheng), 308 B.R. 448, 453 (B.A.P. 9th Cir. 2004) ("Thus, regardless of whether technical equitable rules and distinctions are controlling, the rich lore of equitable principles cannot be ignored.").

350. *See supra* notes 347-48 and accompanying text. Bankruptcy courts' equitable powers are not limited to § 105(a). *See* 11 U.S.C. § 510(c) (outlining equitable subordination); J. Stephen Gilbert, Note,

A better non-disclosure framework allows for flexibility and greater interaction with bankruptcy courts. Two professors assert that judicial estoppel in the bankruptcy context is wrong as a matter of bankruptcy policy and procedure.[351] As a solution, they argue that existing bankruptcy procedures can protect creditors and that the trustee can be joined under the Federal Rules of Civil Procedure.[352] The professors state that the bankruptcy system is designed to ensure that one of two things will occur: (1) the non-disclosure will be detected and thwarted or (2) the non-disclosure will temporarily succeed, but will be void or voidable.[353] The potential to rely solely on the Bankruptcy Code is heightened in Chapters 11 and 13 because of the extended plan periods. Chapter 7, however, also provides apt remedies for a non-disclosure, such as the loss of discharge or the revocation of discharge and reopening of the case.[354] Additionally, the court may impose criminal sanctions on a debtor who fails to disclose.[355]

Another article, authored by a bankruptcy judge and two law clerks, urges courts to consider whether the bankruptcy court may provide more appropriate remedies, other than dismissal, and to allow bankruptcy courts to consider reopening the case.[356] The authors explain that the bankruptcy courts' reluctance to reopen cases coincides with the strict application of judicial estoppel.[357] Therefore, bankruptcy judges may be hesitant to reopen cases until non-bankruptcy courts demonstrate that they will consider amendment as a potential solution.[358] While these articles do not provide a quick fix to the current state of confusion, their analysis bolsters the need for the Fifth Circuit to reconsider its approach.

A portion of the surveyed jurisdictions suggests resolution on standing alone; however, this approach does not account for the differences among Chapters 7, 11, and 13 filings.[359] A better method would provide for flexibility based on the debtor's circumstances. The need for this reformulation is illustrated in *Love* in which the Fifth Circuit's rote

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Substantive Consolidation in Bankruptcy: A Primer, 43 VAND. L. REV. 207, 208 (1990) (describing substantive consolidation, which is not mentioned in the Bankruptcy Code).

351. *See generally* Beiner & Chapman, *supra* note 331, at 2 (arguing that employers are getting away with discrimination, creditors are losing the chance to be repaid, and victims are not receiving their day in court because of judicial estoppel).

352. *See id.* at 37-69 ("Bankruptcy law, considered as procedure, *already* provides methods to handle a debtor's dishonesty and to prevent creditors from being deprived of the value of that civil action.").

353. *See id.* at 45-46.

354. *See* 11 U.S.C. § 727(a)(2), (4) (denial of discharge); § 727(d), (e) (revocation of discharge); § 350(b) (reopening of the case).

355. *See* 18 U.S.C. § 152 (providing for fine and imprisonment in relation to concealment of assets and false oaths); § 3284 (stating that the concealment of assets is deemed a continuing offense and the statute of limitations does not begin to run until final discharge or denial of discharge).

356. *See* Brown, *supra* note 13, at 227.

357. *See id.* at 214.

358. *See id.*

359. *See supra* Part III.C.

application of judicial estoppel faltered.[360] In *Reed*, the Fifth Circuit aimed to serve a core bankruptcy goal—maximizing recovery for creditors.[361] This same goal could have been achieved in *Love*, but it was discarded in favor of form. Based on the five prominent Fifth Circuit decisions, two apt approaches to judicial estoppel emerge: (1) the inadvertence test and (2) the unfair advantage standard.[362]

The inadvertence test is suitable for a Chapter 7 scenario, such as *Reed*. Under this approach, the court should analyze whether the debtor should be judicially estopped and, if so, allow the bankruptcy trustee to pursue the claim on behalf of the creditors. In contrast, the unfair advantage standard should be employed outside the Chapter 7 context. The inadvertence test fails to account for the distinction among the chapter filings and ultimately shortchanges the bankruptcy creditors. By viewing judicial estoppel through the broader unfair-advantage lens, the court may account for the potential to amend a bankruptcy plan that remains open. In contrast to the current state of the doctrine within the Fifth Circuit, these approaches are congruous because they both serve the interests of the bankruptcy system and provide recovery to creditors.

The Fifth Circuit reached the correct result in *Reed*. *Love*, however, demonstrated the need to limit the inadvertence test to its facts. In *Love*, the circuit court should have taken the opportunity to highlight the differences among the bankruptcy chapters and the role judicial estoppel should play therein. Unfortunately, the Fifth Circuit majority missed this opportunity. By broadening its approach to non-disclosure, the Fifth Circuit can account for these differences and respect the goals of the bankruptcy process.[363] Ultimately, bankruptcy law is not black and white, and neither should be the civil courts' approach to a non-disclosure. At the next opportunity, the Fifth Circuit should reconsider its use of judicial estoppel, but in the meantime, a protective measure exists for attorneys to spare the confusion.

2. Conduct a PACER Search Prior to Filing Suit

Defense attorneys have long been encouraged to discover whether a judicial estoppel defense is available.[364] Plaintiffs' attorneys and defense

360. *See* Love v. Tyson Foods, Inc., 677 F.3d 258, 263-67 (5th Cir. 2012).

361. *See* Reed v. City of Arlington, 650 F.3d 571, 576 (5th Cir. 2011) (en banc).

362. *See supra* Part IV (evaluating and synthesizing the major Fifth Circuit decisions that shaped the application of judicial estoppel).

363. *See supra* notes 351-62 and accompanying text.

364. *See* Thomas H. Dickenson et. al, *The Bankruptcy Tainted Plaintiff's Worst Nightmare—Judicial Estoppel*, PRACTICE TIPS (June 2006) http://hdclaw.com/Publications-Seminars/Bankruptcy_Nightmare.pdf; Roman T. Galas & John P. Mueller, *Using Bankruptcy Filings to (E)stop a Plaintiff in His Tracks*, DRITODAY (Oct. 13, 2011), http://dritoday.org/feature.aspx?id=178; *see also* Anita Hotchkiss & Elizabeth M. McKeever, *Plaintiff's Bankruptcy to Summary Judgment* (Jan. 2006), *available at* http://www.pbnlaw.com/data/articles/Boon_for_Defendants_The_Road_from_Plaintiffs_

counsel alike should conduct this inquiry.[365] One attorney writes, "'[h]ave you ever filed for bankruptcy?' may be the single most important question a lawyer asks a client."[366] This seems obvious enough, but clearly, it is not being asked. It is a simple question, but it is one with a powerful, preventive effect. Most importantly, the timing of this question is key. Every plaintiff's attorney should ask this question before filing suit to short-circuit a judicial estoppel defense.[367]

At first glance, plaintiffs' attorneys may not view this approach as a solution at all, but rather as a roadblock to their potential suit; however, plaintiffs' attorneys need not fret because catching a judicial estoppel defense before filing is much better than the alternative.[368] Attorneys cannot ignore the potential for the defense out of fear of losing a claim.[369] If a judicial estoppel defense exists, the court or the defendant will likely discover it, thereby cutting short the lawsuit and wasting the attorney's time and money.[370] On the other hand, plaintiffs' attorneys that are proactive can discover the defense themselves and possibly still bring the subsequent suit.[371]

Attorneys who discover that a client has filed bankruptcy should advise the client to consult with the bankruptcy attorney or with the bankruptcy trustee if the bankruptcy case is still open.[372] The bankruptcy court may allow the client to rectify the situation, which would likely thwart any judicial estoppel defense if the client successively brings suit.[373]

Ban.pdf ("[T]his frequently overlooked concept might prove to be just what you need to get summary judgment for your client.").

365. *See infra* notes 366-71 and accompanying text. Two online sources suggested that plaintiffs' attorneys should conduct this inquiry as well, but this approach has not been widely accepted. *See also* Tanya N. Lewis, *Bankruptcy as a Silver Bullet: Bankruptcy Actions Can Have Major Impacts on Plaintiff Personal Injury Claims* (Aug. 2006), *available at* http://www.hutchlegal.com/resources/article/Communique%20Tanya%20Lewis.pdf ("Attorneys who are knowledgeable and informed about the doctrine, whether they practice on the plaintiff or defense side, stand a better chance of being prepared for its effects on cases involving their clients."); Dickenson, *supra* note 364, at 4 ("Plaintiff's attorneys need a good client interview process to ferret out the existence of the client's bankruptcy filings.").

366. *See* Betty Ruth Fox, *Bankruptcy: Behold or Beware?*, http://www.watkinseager.com/pdfs/BRF%20Article.pdf (last visited Oct. 11, 2012).

367. If attorneys discover a bankruptcy filing before filing suit, they can wait to file until their client resolves matters with the bankruptcy court, thereby preventing any inconsistent statement made in a subsequent proceeding. *See supra* note 5 and accompanying text; *see also* Lewis, *supra* note 365, at 34, 36 (explaining how a PACER search allowed the defendant to raise a judicial estoppel defense).

368. *See supra* notes 27-30 and accompanying text (discussing the typical judicial estoppel scenario).

369. *See supra* notes 27-30 and accompanying text (discussing the typical judicial estoppel scenario).

370. *Cf. supra* note 364 and accompanying text (stating that defense attorneys frequently search for a judicial estoppel defense); *supra* note 175 and accompanying text (discussing the fees accrued in defending a judicial estoppel defense).

371. *See* infra text accompanying notes 372-73.

372. *See supra* note 367 and accompanying text.

373. *See* Dugas, *supra* note 18, at 240-41 (addressing the willingness of bankruptcy courts to reopen cases at the request of the debtor).

Therefore, it is crucial that attorneys ask their clients, "have you ever filed for bankruptcy?" Clients have no reason to answer dishonestly unless they are aware of judicial estoppel.[374] Even then, this situation is unlikely because a client who is aware of judicial estoppel should be aware of its devastating effect to the subsequent action.[375] Even if an attorney is faced with a dishonest client, however, there is one sure-fire way to answer this important question.[376]

Public Access to Court Electronic Records (PACER) allows attorneys to obtain case information from bankruptcy courts for a nominal fee.[377] Defense attorneys have used PACER to launch their judicial estoppel defense,[378] but it should be routine for plaintiffs' attorneys to conduct a search as well.[379] This should be done before the attorney files suit.[380] Similar to conflict checks, these searches should become a routine firm activity.[381] It is by no means good news to discover that a client filed bankruptcy and failed to disclose the potential claim. But it is far superior to learn this prior to filing suit than to be blindsided by a motion for summary judgment or a motion to dismiss. By adopting this procedure, attorneys can avoid a court's interpretation and adoption of judicial estoppel and, thereby, save the time and money incurred along the way.

IX. CONCLUSION

The Fifth Circuit should reconsider its approach to judicial estoppel following a bankruptcy non-disclosure. The inadvertence test employed in *Reed v. City of Arlington* is apt for the Chapter 7 scenario.[382] As demonstrated in *Love v. Tyson Foods*, however, this approach should not be universal.[383] Under Chapters 11 and 13, when the debtor is more akin to the Chapter 7 trustee, the court should look to the unfair advantage approach for guidance.[384] This standard counsels the use of amendments to current plans rather than a complete dismissal of the suit.[385] By taking a broader view, the court may consider the creditors' interests and allow for maximum recovery—a goal the Fifth Circuit aimed to serve less than one year prior in *Reed*.

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374. *See supra* Part II.C.

375. *See supra* Part II.C. This Comment does not suggest presuming client dishonesty, but rather promotes an open discussion with a client with a PACER search as a secondary source.

376. *See infra* note 377 and accompanying text.

377. *See* PACER, http://www.pacer.gov (last visited Oct. 11, 2012).

378. *See supra* note 364 and accompanying text.

379. *See supra* notes 365-75 and accompanying text.

380. *See supra* notes 366-67 and accompanying text.

381. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 3 (2011).

382. *See supra* Part IV.E.

383. *See supra* Part IV.E.

384. *See supra* Part VIII.B.1.

385. *See supra* Part VIII.B.1.

In the meantime, attorneys can take matters into their own hands. Rather than hoping for the most favorable approach, attorneys on both sides of the litigation can be proactive.[386] All practitioners can take the first step by cutting out any judicial estoppel defense with a pre-suit PACER search.[387] Attorneys should no longer risk dismissal on the ground of judicial estoppel now that a simple solution is at their fingertips.[388]

386. *See supra* Part VIII.B.2.
387. *See supra* Part VIII.B.2.
388. *See supra* Part VIII.B.2.