No. 12-15548-GG

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SANDRA SLATER,
Plaintiff/Appellant,

– v. –

U.S. STEEL CORP.,
Defendant/Appellee.

On Appeal from the United States District Court
For the Northern District of Alabama
Docket No. 2:09-cv-01732-KOB

EN BANC BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

NATIONAL ASSOC. OF CONSUMER
BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
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October 24, 2016

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Eleventh Circuit Local Rule 26.1-2, Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

1) The following parties have an interest in the outcome of this case:

- Bowdre, Hon. Karen O. (U.S. District Judge, N.D. Ala.)
- Cooper, Ivan B. (Appellee's counsel)
- Graham, Roderick (Appellant's counsel)
- Heath, J. Erik (Amicus counsel)
- Jeselnik, Anthony F. (Appellee's counsel)
- Lightfoot, Franklin & White, LLC (Appellee's counsel)
- Morrow, William H. (Appellee's counsel)
- National Association of Consumer Bankruptcy Attorneys (Amicus curiae)
- Slater, Sandra (Plaintiff/Appellant)
- Tatum, Jr., Charles C. (Appellant's counsel)
- U.S. Steel Corp. (Defendant/Appellee)

2) Is party/amicus a publicly held corporation or other publicly held entity?

NO

3) Does party/amicus have any parent corporations? **NO**

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4) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

5) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

6) Does this case arise out of a bankruptcy proceeding? **NO**.

This 24th day of October, 2016.

/s/ Jon Erik Heath
J. Erik Heath
Ga. Bar No. 940564
Attorney for Amicus Curiae

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STATEMENT OF INTEREST OF AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non–profit organization consisting of approximately 3,000 consumer bankruptcy attorneys nationwide.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various cases seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Harris v. Viegelahn*, 135 S. Ct. 1829 (2015); *Schwab v. Reilly*, 560 U.S. 770 (2010); *Whaley v. Tennyson*, 611 F.3d 873 (11th Cir. 2010).

NACBA and its membership have a vital interest in the outcome of this case. NACBA member attorneys represent individuals in a large portion of all consumer bankruptcy cases filed. The current form of judicial estoppel in the Eleventh Circuit has muddied bankruptcy procedure, making it difficult for NACBA attorneys to advise their clients about the disclosure of legal claims, and it has also unfairly limited the ability of the honest debtor and trustee to pursue those claims on behalf of the estate. The result is a manifest injustice. Honest debtors and

creditors alike are barred from any recovery on valid causes of action, while defendant tortfeasors obtain a free pass – for no justifiable reason at all. This Court's ruling will help clarify when, if ever, the strong medicine judicial estoppel should prevent honest debtors, including those represented by NACBA members, from seeking recovery on behalf of their bankruptcy estates for tortious acts committed against them.

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

STATEMENT OF THE ISSUES

Whether the doctrine of judicial estoppel as applied to *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003), and *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002), should be overruled.

SUMMARY OF ARGUMENT

The equitable doctrine of judicial estoppel is no longer about equity, but has become a "get out of jail free" card for savvy defendants. This windfall comes at the expense of the parties in bankruptcy court – the creditors, the trustees, as well as many honest debtors – all without any countervailing benefit of protecting the judicial system.

In the end, judicial estoppel should be abandoned as a tool to fight bankruptcy fraud, as there are other tools specifically crafted for that purpose. Those tools also properly give the bankruptcy court more discretion to determine when its rules have been violated. To the extent judicial estoppel continues to be applied in this context, a number of changes to the *Burnes*/*Barger* doctrine can help ensure it is more equitably applied.

ARGUMENT

The strong medicine of judicial estoppel "has long been detached from its moorings in equity." *Slater v. U.S. Steel Corp.*, 820 F.3d 1193, 1235 (11th Cir. 2016) (Tjoflat, J., concurring). Recent jurisprudence has indeed demonstrated that "its application produces at-least-inequitable results, if not manifestly unjust ones." *Id*. at 1247. These unjust results are marked by the complete "striking [of] a meritorious claim," in favor of giving a defendant tortfeasor a "pure windfall" – all without any countervailing protections to judicial integrity. *See id*. at 1238.

These manifestly unjust results are most apparent when a cause of action accrues after a Chapter 13 petition has been filed. Because bankruptcy law does not require schedules to be amended in such circumstances, many honest debtors are not on notice that supplemental filings would later be expected by a district court. By the time the issue is raised, it is too late for an unsuspecting debtor to stop the swift hammer of judicial estoppel from disposing of the claim.

The Court should take this opportunity to end the injustice by overruling the *Burnes* line of cases. In doing so, it should abandon judicial estoppel as a tool to fight bankruptcy fraud because there are more appropriate tools to deter such conduct. To the extent judicial estoppel survives in this context, some changes to the doctrine would help blunt its most inequitable effects.

I. Judicial Estoppel Has Become A "Get Out Of Jail Free" Card For Savvy Defendants.

Historically, judicial estoppel has served a noble purpose. It sought "to protect the integrity of the judicial process" by barring a litigant from affirmatively seeking two conflicting decisions from the court. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Since 2002, however, the strong medicine of judicial estoppel has evolved from a rarely applied doctrine to a "get out of jail free" card for many savvy defendants.

A. Under This Circuit's *Burnes* Precedent, Judicial Estoppel Has Abandoned Its Purpose.

Judicial estoppel has traditionally been applied to protect the integrity of the court by preventing inconsistent court determinations deriving from a party's clearly inconsistent positions. *See New Hampshire*, 532 U.S. at 749-50. In order to fulfill this purpose, the Supreme Court has cautioned against inflexible formulas in applying the doctrine. *Id.* at 751. The doctrine's current incarnation in this Circuit looks considerably different than what the *New Hampshire* Court envisioned.

The *New Hampshire* case itself illustrated the "unusual circumstances" that judicial estoppel was crafted to prevent. A border dispute between New Hampshire and Maine traced back to a 1740 decree by King George II of England, which defined used the term "Middle of the River" to define the boundary. In the

1970s, the two states engaged in heavy litigation to determine what the phrase meant, ultimately entering a consent order defining the term as "the middle of the main channel of navigation of the Piscataqua River." *Id*. at 746-47.

By 2000, the two states were involved in yet another border dispute at a different location, but still involving the same 1740 phrase "Middle of the River." However, in that latest round of litigation, New Hampshire had adopted an entirely different interpretation of the phrase, insisting that it meant something much closer to the Maine shore. Examining these "unusual circumstances," the Supreme Court concluded "that a discrete doctrine, judicial estoppel, best fits the controversy." *Id*. at 749.

After the high-profile *New Hampshire* decision, cases invoking the "discrete doctrine" of judicial estoppel proliferated. In 2002, this Court was presented with its first case involving the doctrine where a legal claim was omitted from a bankruptcy debtor's asset schedules. *See Burnes*, 291 F.3d at 1285-88. The *Burnes* Court, deciding that the Circuit's previous two-prong test for judicial estoppel survived *New Hampshire*, found the first prong automatic: by omitting the legal claim from his bankruptcy schedules, the plaintiff made an inconsistent position "under oath in a prior proceeding." *Id*. at 1286. Further, because a plaintiff could not go back and correct even inadvertent disclosures after being

"challenged by an adversary," there was no way to overcome the automatic application of this prong. *Id*. at 1288.

The following year, the second prong became as automatic as the first. As long as the debtor knew of the claim, or had a motive to conceal it, the debtor's "intentional manipulation" of the bankruptcy process would be inferred as a matter of law. *See Barger*, 348 F.3d at 1296. Notably, the *Barger* debtor also automatically met the first prong because she failed to include the legal claim on her bankruptcy schedule, even though she did inform the bankruptcy trustee about the claim, presumably under oath, at her meeting of creditors. *Id*. at 1297 (Barkett, J., dissenting).

Thus, despite the Supreme Court's admonishment against inflexible formulas for applying judicial estoppel, *Burnes* and *Barger* together created a precise formula. If a legal claim does not appear specifically on the debtor's schedules, and there could conceivably be a motive for that omission, judicial estoppel will automatically apply.

B. The *Burnes* Doctrine Was Expanded To Defeat Postpetition Claims Of Chapter 13 Debtors Who Violated No Duties.

The bankruptcy bar was blind-sided by the next development from the *Burnes* line of cases, which is by far the greatest injustice inflicted by judicial estoppel in this Circuit. Despite the fact that Chapter 13 debtors are not required to amend bankruptcy schedules to disclose postpetition causes of action, these claims

unexpectedly became exposed to the *Burnes* doctrine as well. In order to understand the harshness of the doctrine in this setting, some background about the nuances of Chapter 13 practice is necessary.[1]

1) Bankruptcy Rules Require Amended Schedules Only In Limited Circumstances, But Generally Not When Chapter 13 Debtors Acquire Property Post-Petition.

It had been established bankruptcy practice that a Chapter 13 debtor does not have "a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty." *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1246 (11th Cir. 2008); *see also Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001).

Rather than creating such a broad duty, the Bankruptcy Rules expressly define the limited circumstances when amendment is required. Specifically, amended schedules are only required when "the debtor acquires or becomes entitled to acquire any interest in property" pursuant to Section 541(a)(5) of the Code. Fed. R. Bankr. P. 1007(h). The property covered under Section 541(a)(5) is a discrete category, covering fairly unusual, one-time events -- inheritances, divorce settlements, and insurance proceeds, to which the debtor becomes entitled

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[1] The plaintiff in this case originally commenced her bankruptcy case under Chapter 7, but later converted it to Chapter 13.

within 180 days of the petition's filing date. 11 U.S.C. § 541(a)(5); *In re Woodson*, 839 F.2d 610, 617 (9th Cir. 1988). Notably, Rule 1007(h) does not require amendment to reflect property entering the estate pursuant to Section 1306, such as post-petition wages and assets.[2] *See Vasquez v. Adair*, 253 B.R. 85, 90 (B.A.P. 9th Cir. 2000); *Batten v. Cardwell (In re Batten)*, 351 B.R. 256, 259 (Bankr. S.D. Ga. 2006). In fact, other provisions of the Code would be superfluous if such amendments were required. *See, e.g.*, 11 U.S.C. § 521(f) (procedure for obtaining supplemental disclosures).

2) In The Unique Context Of Chapter 13 Proceedings, Heightened Disclosures Would Be Impractical.

There is good reason for the Bankruptcy Rules to limit the occasions when amendment is required. Not only do such amendments provide little utility, but it would be overly burdensome to furnish them during a protracted Chapter 13 proceeding.

Bankruptcy schedules serve an important role at commencement of a bankruptcy petition, but they are not meant to provide real-time financial

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[2] Two complementary provisions in the Bankruptcy Code define estate property in Chapter 13 cases. Section 541, which is generally applicable to chapters 7, 11, 12, and 13, 11 U.S.C. § 103(a), covers pre-petition property and the limited post-petition property enumerated in subparagraph (a), *see* 11 U.S.C. § 541. Section 1306, which is only applicable to Chapter 13 proceedings, 11 U.S.C. § 103(i), covers post-petition earnings and assets, *see* 11 U.S.C. § 1306.

information as the case progresses. Their purpose is simply to give "inquiry notice to affected parties to seek further detail" about a particular item if desired. *Cusano*, 264 F.3d at 946-7; *see also Vasquez*, 253 B.R. at 90-91. In Chapter 13 cases, the scheduled information guides whether a proposed repayment plan can overcome two initial hurdles: the "disposable income" test and the "best interests of the creditors" test. Once those tests have been passed, and a plan confirmed, then the asset and income schedules have served their purpose.

First, because of the specific role played by a debtor's assets in Chapter 13 proceedings, amendments to disclose post-petition legal claims serve little function. Unlike bankruptcies in Chapters 7 or 11, where creditors may be paid from the liquidation of a debtor's assets, *see* 11 U.S.C. § 704(a)(1) (requiring Chapter 7 trustee to "reduce to money the property of the estate"), Chapter 13 repayment plans are typically funded solely by the "future earnings or other future income of the debtor." *See* 11 U.S.C. § 1322(a)(1), (d); *see Brown v. Gore*, 742 F.3d 1309, 1315-1316 (11th Cir. 2014). The plan payments are typically calculated based on the debtor's "projected disposable income" during the applicable commitment period of three- to five years. *See* 11 U.S.C. §§ 1322(d); 1325(d).[3] Thus, for a new legal claim to have any effect on the debtor's repayment plan, then

[3] The term "projected disposable income" can be a complicated term of art. *See* 11 U.S.C. §§ 1325(b)(2); 101(10A); *Hamilton v. Lanning*, 560 U.S. 505, 509-24 (2010).

at a minimum, it must first be liquidated before the expiration of the five-year cap on the commitment period. *See e.g.*, *In re Hall*, 442 B.R. 754, 762 (Bankr. D. Idaho 2010).

Second, an asset's primary function in a Chapter 13 case is not to pay creditors. *See Brown*, 742 F.3d at 1316. Instead, the asset helps guide the "best interests of the creditors" test, which simply juxtaposes the case with a hypothetical liquidation under Chapter 7. This test allows confirmation of a plan only if the present value of the debtor's proposed repayment plan is "not less than the amount that would be paid" to creditors under the hypothetical liquidation of assets in a Chapter 7. *See* 11 U.S.C. § 1325(a)(4); *In re Valone*, 784 F.3d 1398, 1404 (11th Cir. 2015). Because the test is only applied at the beginning of the case, it is not applicable to subsequent plan modifications when assets may have fluctuated. *See Hollytex Carpet Mills v. Tedford*, 691 F.2d 392, 393 (8th Cir. 1982); *In re McAllister*, 510 B.R. 409, 416 (Bankr. N.D. Ga. 2014) (reapplying the test, but noting that the petition date is the operative date for the calculation). A post-petition acquisition (except for property specified in Section 541(a)(5)) is therefore wholly irrelevant for purposes of the "best interests of the creditors" test.

Argument in other judicial estoppel cases sometimes focuses on the irrelevant question of whether a legal claim is property of the estate. But whether such property is part of the estate is beside the point. Post-petition property may

enter the estate. But, as shown above, the fact that the property belongs to the estate does not mean that it must be scheduled or that its liquidated value is automatically available for plan payments.

Keeping in mind the specific role that assets play in Chapter 13 proceedings, the rules reflect the impracticality of requiring a Chapter 13 debtor to amend schedules when the estate receives new assets. "[O]bviously, such a requirement would be unworkable, since the debtor's schedules would have to be amended to reflect each paycheck or acquisition of property, as well as every expenditure." 8 Collier on Bankruptcy ¶ 1306.01 at 1306-3 (16th ed.). This infeasibility is especially striking when considering the protracted length of a chapter 13 proceeding.[4]

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[4] The impracticality of heightened disclosures cannot be resolved simply by limiting them to the acquisition of major assets. Such a rule would create confusion over whether post-petition assets are substantial enough to warrant amended schedules. Neither the Code nor the rules would provide any guidance on that point because they do not even contemplate such disclosure, except as required by Section 521(f).

3) Beginning With *Robinson*, Judicial Estoppel Was Applied To Chapter 13 Debtors Who Did Nothing Wrong.

Despite the lack of any requirement in the Bankruptcy Code or rules for a Chapter 13 debtor to amend schedules to reflect postpetition legal claims, this Court in 2010 remarkably found that there was a "statutory duty" to do so. *See Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274 (11th Cir. 2010).[5] The *Robinson* decision quietly represented another landmark shift in judicial estoppel in this Circuit. Rather than requiring an inconsistent position "under oath in a prior proceeding," *Robinson* expanded the doctrine to include non-statements about matters that were not required to be disclosed by amended schedules. *Id*.

The *Robinson* case created an utter windfall for defendants. Chapter 13 debtors, who were unaware of any misstep they took in their bankruptcy proceedings, and who very likely could have relied on the advice of counsel in not amending their schedules, began seeing their claims dismissed in large numbers. *See, e.g.*, *D'Antignac v. Deere & Co*., 604 F. App'x 875 (11th Cir. 2015) (per curiam); *Copeland v. Birmingham Nursing & Rehab. Ctr., LLC*, 2015 WL 4068647 (N.D. Ala. July 1, 2015); *Brown v. Winn-Dixie Stores, Inc.*, 2015 WL 3448614 (S.D. Ga. May 20, 2015); *In re Tyson Foods*, 732 F. Supp. 2d. 1363

[5] The Court did not cite any text within the Bankruptcy Code to support this "statutory duty," but only cited to "the established law of this circuit," including *Burnes*, *De Leon*, and *Waldron*. *Robinson*, 595 F.3d at 1274.

(M.D. Ga. 2010). Because these Chapter 13 debtors are generally not on notice that amended schedules will be expected, a savvy defendant need only conduct a PACER search to see if it can avail itself of the judicial estoppel "free pass." The end result of this application of *Burnes* is a gross miscarriage of justice.

II. Rather Than Protect The Bankruptcy Court, The Current State Of Judicial Estoppel Interferes With The Bankruptcy Process.

Instead of protecting the bankruptcy court, the *Burnes* doctrine has interfered with the bankruptcy process. It does this by depriving the bankruptcy court of discretion to evaluate alleged misconduct before it, and by generally rewriting established bankruptcy practice and procedure.

A. The Doctrine Undermines The Discretion Of The Bankruptcy Court.

The bankruptcy court is in the best position to evaluate purported misconduct taking place in a bankruptcy proceeding. It is more familiar with both the specific conduct in a case before it, and how that conduct fits into established bankruptcy practice more generally. Nevertheless, the nature of judicial estoppel means that it is usually asserted as a defense in summary judgment proceedings in district court. As a result, it is most often the district court, not the bankruptcy court, that decides whether the debtor was making a "mockery" of the bankruptcy process.

This procedure reveals a peculiar aspect of judicial estoppel. Under *Burnes*, the district court is bound, almost automatically, to conclude that a debtor has made a mockery of the judicial process by omitting an asset from a bankruptcy schedule. Yet, the bankruptcy court, which has presumably borne the brunt of the offense, is sometimes less concerned. The bankruptcy court's concern (or lack thereof) is usually informed by the context of the bankruptcy case as a whole. For instance, a particular claim may involve an insignificant recovery or be entirely exempt from distribution. Or, as is often the case in Chapter 13 proceedings, the bankruptcy court may not be concerned with the existence of the legal claim, but only concerned with the final liquidation of the claim. However, judicial estoppel has become too inflexible to allow the bankruptcy court, or any court, make a determination based on such circumstances – all that matters under the doctrine as applied in this Circuit is that the claim was omitted on a particular schedule form.

The instant case exemplifies how the bankruptcy court may view these issues differently. Judge Tjoflat summarized the bankruptcy proceedings in this particular case below:

> The bankruptcy judge noted that he "normally . . . g[ot] [motions based on nondisclosed lawsuits] after they've settled them." The Bankruptcy Judge's statement suggests that he hears about contingent assets, like lawsuits, somewhat regularly and usually only after their values become fixed. Having Slater's employment-discrimination claims go undisclosed, then, did not appear particularly troubling from the judge's

> perspective. He was willing to let Slater pursue her claims.

Slater, 820 F.3d at 1210-11 (Tjoflast, J., concurring); *see also In re Barger*, 2002 Bankr. LEXIS 924, at *7 (Bankr. N.D. Ga. Jun. 18, 2002) (not finding bad intent on behalf of debtor, even though district later did so). Thus, the bankruptcy court here was apparently not offended by the debtor's conduct, but the claims were not allowed to move forward anyway. The bankruptcy court, whose integrity is supposedly at stake, has no say in this outcome.

B. Judicial Estoppel Cases Have Rewritten Bankruptcy Procedure.

Given that these issues arise outside of bankruptcy court, it is hardly surprising that the non-bankruptcy litigants misapply nuances of bankruptcy law. As a result, judicial estoppel has thrown otherwise established bankruptcy procedures into question.

For instance, the bankruptcy rules allow a debtor to amend schedules "as a matter of course at any time before the case is closed," Fed. R. Bankr. P. 1009(a), and even after closing, the Code allows the bankruptcy case to be reopened "to administer assets, to accord relief to the debtor, or for other cause," 11 U.S.C. § 350(b); *see also* Fed. R. Bankr. P. 5010. The bankruptcy court has broad discretion "to base its decision to reopen on the particular circumstances and equities of each particular case." *Apex Oil Co. v. Sparks (In re Apex Oil Co.)*, 406

F.3d 538, 542 (8th Cir. 2005) (citing *In re Shondel*, 950 F.2d 1301, 1304 (7th Cir. 1991)).

The Bankruptcy Code and rules therefore take an open approach to amendment, freely allowing it as the bankruptcy court deems fit. Despite this clear mandate from the Code, *Burnes* imposed an important limit on this right: the debtor must exercise the right before "his omission has been challenged by an adversary." *Burnes*, 291 F.3d at 1288. To be clear, there is no such limitation in the Code. In fact, this limitation from *Burnes* is contradictory to the language of the Code, which gives the debtor the right to amend any time before the case is closed. The limitation also divests the bankruptcy court of its generally broad discretion to decide when a case warrants reopening for an amendment.

Even more concerning, as described *supra* at 13, judicial estoppel has rewritten entirely the rules and practice concerning a Chapter 13 debtor's duty to amend schedules for postpetition causes of action. As illustrated by the bankruptcy court's decision in this case, the common practice is to bring the cases to the court's decision if they affect the Chapter 13 debtor's disposable income. *Slater*, 820 F.3d at 1211 (Tjoflast, J., concurring) ("The Bankruptcy Judge's statement suggests that he hears about contingent assets… only after their values become fixed."). But decisions such as *Robinson* have created confusion about this

practice by creating amendment requirements that are nowhere in the Bankruptcy Code.

III. Remedies Exist To Fight Bankruptcy Fraud Outside Of Judicial Estoppel.

As a tool for fighting bankruptcy fraud, judicial estoppel is a square peg in a round hole. *Ah Quin v. Cty. of Kauai DOT*, 733 F.3d 267, 275 (9th Cir. 2013) ("the deterrence justification… is a very awkward fit for the doctrine of judicial estoppel"). There are other remedies that are much better suited for that task, which should render judicial estoppel unnecessary in this context.

A. Judicial Estoppel Is Intended To Prevent Inconsistent Court Decisions, Not Dishonesty.

The purpose of judicial estoppel "is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749-50. (internal quotations and citations omitted). However, an omitted asset from a bankruptcy schedule is hardly the kind of inconsistent position that judicial estoppel was intended to prevent, and its use to that effect does nothing to protect the bankruptcy process.

First, in order for judicial estoppel to be appropriate, "a party's later position must be 'clearly inconsistent' with its earlier position." *Id*. at 750. The *New Hampshire* scenario is far removed from cases such as this one. Most obviously,

New Hampshire had affirmatively pressed for court decisions on the merits of its two specific, and conflicting, positions as to what "Middle of the River" meant. By contrast here, the inconsistency is inferred by omission, and the court decision sought (the discharge order) is general in nature – it does not specifically address the merits of the purportedly inconsistent statement.

This distinction with *New Hampshire* is far from technical, as it shows there are many instances where an asset omitted from a schedule can exist side by side with a bankruptcy discharge. *See Cleveland v. Policy Mgmt. Systems*, 526 U.S. 795, 802-3 (1999) (no inconsistency where, despite their ostensible inconsistencies, "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side"). For example, as described above, in Chapter 13 cases, an omitted postpetition asset should not be considered an inconsistency at all because the debtor has no duty under the Code or rules to amend schedules. Even in the context of required disclosure, the bankruptcy court may decide to reopen the case and administer the asset, but keep the discharge order in place. Especially in the context of "modern procedure [which] welcomes inconsistent positions in the course of a single litigation," 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4477 (2d ed. 2002), it is difficult to justify affixing the label of "clearly inconsistent" on these omissions for purposes of judicial estoppel.

To be clear, there is no justification for intentionally concealing assets in a required bankruptcy disclosure. However, the *Burnes* application of judicial estoppel is not about inconsistent positions, but about dishonesty. And, unlike *New Hampshire* and as described below, *infra* at 22, there are plenty of more appropriate tools to remedy such dishonesty. Judicial estoppel does not add anything to this toolbox.[6]

B. The More Appropriate Analysis In These Cases Is Standing.

"[I]t is questionable as to whether judicial estoppel was correctly applied in *Burnes*. The more appropriate defense in the *Burnes* case was, instead, that the debtor lacked standing." *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004). Indeed, treating such cases as implicating standing, rather than judicial estoppel, would reach the desired result without the collateral damage inflicted by judicial estoppel.

Standing to bring a claim is determined by two factors: whether the claim is property of the estate, and the chapter under which the bankruptcy case is proceeding. Under any chapter, the commencement of a bankruptcy action creates an estate, which largely includes "all legal or equitable interests of the debtor in property," such as unliquidated causes of action. 11 U.S.C. § 541(a)(1); *see*

[6] "Standing alone, relieving a thief of stolen property is unlikely to deter theft. If anything, it would encourage more theft." *Slater*, 820 F.3d at 1239 (Tjoflast, J., concurring).

Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (In re Alvarez), 224 F.3d 1273, 1276 (11th Cir. 2000).

In Chapter 7 cases, "[o]nce an asset becomes part of the bankruptcy estate, all rights held by the debtor in the asset are extinguished unless the asset is abandoned back to the debtor pursuant to § 554 of the Bankruptcy Code." *Parker*, 365 at 1272. Abandonment can occur formally, or by operation of law once the case has closed, but unscheduled property is not abandoned. *See* 11 U.S.C. § 554(a)-(d). Unless a legal claim is abandoned, only the Chapter 7 trustee has standing to prosecute it. *Cable v. Ivy Tech State College*, 200 F.3d 467, 472 (7th Cir. 1999); *Olick v. Parker & Parsley Petroleum Co*., 145 F.3d 513, 515 (2d Cir. 1998); *see also* 11 U.S.C. § 707(a)(1).

Chapter 13 cases are structured differently. As in all other bankruptcy chapters, the Chapter 13 estate includes prepetition legal claims. 11 U.S.C. § 541(a)(1). Unlike other chapters, Chapter 13 debtors remain in possession of estate property, 11 U.S.C. § 1306(b), which means that they have standing to prosecute legal claims on behalf of the estate, *Crosby v. Monroe County*, 394 F.3d 1328, 1331 n. 2 (11th Cir. 2004); *Smith v. Rockett*, 522 F.3d 1080, 1081-1082 (10th Cir. 2008).

Examining these cases through the lens of standing, rather than judicial estoppel, results in fair outcomes. First, Chapter 7 debtors may not have standing

to recover damages for themselves, but the innocent trustees would be able to seek recovery. *See e.g.*, *Reed v. City of Arlington*, 650 F.3d 571, 573 (5th Cir. 2011) (en banc). Further, this approach gives the bankruptcy court more deference in abandoning the claim to the debtor in appropriate cases, such as those cases dealing with truly inadvertent or nonmaterial omissions. At the same time, the approach allows Chapter 13 debtors to continue pursuing claims on behalf of the estate without technical difficulty.

C. There Are Already Remedies Outside Of Judicial Estoppel That Punish Dishonest Debtors.

This Circuit's current application of judicial estoppel serves only to punish debtors who conceal assets from the bankruptcy court. There is a myriad of other punishments that better fit that purpose.

The mere existence of other punishments in Title 11 and elsewhere raises questions about the validity of an equitable remedy such as judicial estoppel to fight bankruptcy fraud. The Supreme Court consistently disapproves of equitable remedies when there are other remedies provided by statute. *See, e.g*., *Law v. Siegel*, 124 S. Ct. 1188, 1194-95 (2014) (cases cited).

Indeed, the punishments for bankruptcy fraud are wide-ranging. First, it is a criminal offense, carrying a maximum penalty of five years' imprisonment, to conceal knowingly and fraudulently "any property belonging to the estate of a debtor." 18 U.S.C. § 152(1). "There is [also] ample authority to deny the

dishonest debtor a discharge." *Law*, 134 S. Ct. at 1198 (citing 11 U.S.C. § 727(a)(2)-(6)). Further, the bankruptcy court can impose a variety of sanctions on the dishonest debtor, including Fed. R. Bankr. P. 9011(c) and its "sanctioning authority under either § 105(a) or its inherent powers." *Law*, 134 S. Ct. at 1198 (citing 11 U.S.C. § 105(a)).

Because of the availability of these remedies, "no judicial estoppel is necessary in the limited circumstances when a debtor seeks to assert a cause of action he omitted from his bankruptcy schedules." Hon. James D. Walker, Jr., and Amber Nickell, *Judicial Estoppel and the Eleventh Circuit Consumer Bankruptcy Debtor*, 56 Mercer L. Rev. 1115, 1128 (2005); *see also Quin*, 733 F.3d at 273.

IV. If Judicial Estoppel Survives In This Context, It Should Be Tempered To Avoid Its Harshest Effects.

As described above, judicial estoppel is not the best weapon for fighting bankruptcy fraud. However, should it survive in some form, it should at least be tempered to avoid its harshest effects. At a minimum, (1) inconsistency should not be inferred from silence unless the debtor had a clear affirmative obligation to disclose the legal claim; (2) discretion should be restored to the bankruptcy court by requiring "acceptance" of the inconsistent statement, and allowing debtors to try to reopen their cases and amend schedules; (3) a debtor's malicious intent should

not be inferred as a matter of law; and (4) a trustee with standing to pursue the claim should not be subject to judicial estoppel.

A. An Inconsistent Statement Should Not Be Inferred From Silence Absent A Clear And Certain Disclosure Requirement.

As a matter of both common sense and basic fairness, a legal claim omitted from a debtor's bankruptcy schedules should not form the basis of judicial estoppel unless there was a clear and affirmative obligation to disclose the claim. While such a limit on judicial estoppel should be axiomatic, the harsh effects of the *Burnes* doctrine, as illustrated by cases such as *Robinson*, demand such clarification.

Judicial estoppel is only appropriate in those cases when "a party's later position [is] 'clearly inconsistent' with its earlier position." *New Hampshire*, 532 U.S. at 751. The "clearly inconsistent" standard traditionally bars two affirmative, irreconcilable positions. As this doctrine was first applied in the bankruptcy context, courts inferred an inconsistency when a debtor failed to disclose a legal claim, *in violation of an affirmative duty* to do so. *See, e.g.*, *Barger*, 348 F.3d at 1294-95 (finding an inconsistent statement where debtor concealed a pre-petition claim from her schedules, in direct violation of statutory disclosure duties). If judicial estoppel is appropriate in any circumstance in this context, then the case of a debtor who is aware of, and fails to disclose, a significant prepetition asset surely fits the bill.

However, it does not follow that silence always creates an inconsistency. As described above, there is no duty for Chapter 13 debtors to file amended schedules reflecting the acquisition of postpetition assets such as legal claims. It is unfathomable that judicial estoppel, a doctrine rooted in concerns with "divergent sworn positions," *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257, 1261 (11th Cir. 1988), would be used against these unsworn, unstated positions that were never required to be made. However, *Burnes* and *Barger*, as shown in *Robinson*, have accomplished precisely that result. Dismissing these claims, and giving the debtor no opportunity to bring the settlement or judgment proceeds to the Chapter 13 estate, is a travesty.

Any overhaul of the judicial estoppel doctrine in this Circuit must address this troubling aspect of the current doctrine.

B. Ultimate Acceptance By The Bankruptcy Court Of The Inconsistency Should Be A Requirement For Judicial Estoppel.

"Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." *New Hampshire*, 532 U.S. at 750-51. Nevertheless, the *Burnes* case did not formally adopt this "acceptance" prong from *New Hampshire* as part of this Circuit's judicial estoppel doctrine. The Court should take this opportunity to do so.

Requiring "acceptance" of the litigant's bankruptcy position would fashion judicial estoppel into the more flexible doctrine imagined by the Supreme Court. First, the doctrine would be more forgiving of those instances where a bankruptcy case was not resolved based on the inaccurate information. For example, a dismissed bankruptcy case creates no threat of inconsistent court determinations. *See, e.g.*, *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006).

Further, the "acceptance" prong should not prevent debtors from amending their schedules, even if the bankruptcy case has been closed. Where "the plaintiff-debtor reopens bankruptcy proceedings, corrects her initial error, and allows the bankruptcy court to re-process the bankruptcy with the full and correct information, a presumption of deceit no longer comports with New Hampshire." *Quin*, 733 F.3d at 273; *Clark v. Perino*, 235 Ga. App. 444, 446 (1998) (under Georgia law, judicial estoppel not appropriate where debtor reopened bankruptcy to amend schedules). To be sure, allowing a debtor to prevent judicial estoppel by reopening the bankruptcy case does not create an automatic escape for debtors who were truly attempting to game the system; it simply shifts the discretion back to the bankruptcy court to determine whether the debtor's conduct truly merits sanctions.

C. A Debtor's Intent To Make A Mockery Of The Judicial System Should Not Be Inferred As A Matter Of Law.

"[B]y inferring bad intent by any debtor who had knowledge of his claim and who stood to benefit financially by omitting it, the Eleventh Circuit discourages an inquiry into the debtor's actual motives. It is unclear under the Eleventh Circuit standard when, if ever, the omission can be deemed inadvertent." Walker, *supra* at 1128. Because judicial estoppel is not appropriate "when a party's prior position was based on inadvertence or mistake," *see New Hampshire*, 532 U.S. at 753, any changes to the doctrine should eliminate the presumption of malicious intent from *Burnes* and *Barger*.

This Circuit's insurmountable presumption of intent creates precisely the kind of "inflexible" doctrine against which the Supreme Court has cautioned. *See New Hampshire*, 532 U.S. at 751; *compare In re Barger*, 2002 Bankr. LEXIS 924, at *4 (bankruptcy court found that "Debtor did not conceal the claim or attempt to obtain a financial advantage for herself"), *with Barger*, 348 F.3d at 1294-97 (district court's application of judicial estoppel upheld anyway).

This approach also ignores the practicality that there are various reasons why such motive may not exist. Importantly, Chapter 13 such motive is lacking by Chapter 13 debtors facing postpetition claims. See *Copeland v. Hussmann Corp.*, 462 F. Supp. 2d 1012, 1020 (E.D. Mo. 2006) ("an allegation that a Chapter 13 debtor has secret motives to secret[e] assets is a dubious claim at best, given that

Chapter 13 creditors are repaid out of the debtor's income."). It is also possible that a debtor is unaware that an asset such as a viable legal claim exists, *see Stallings*, 447 F.3d at 1049, or a debtor may stand to gain nothing from the omission, *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002) (no motive to conceal for Chapter 11 debtor whose creditors would have been paid from the proceeds of the claim); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 363 (3d Cir. 1996) (no motive where debtor "derived and intended no appreciable benefit from [] nondisclosure."). Indeed, this Circuit has even recognized, despite the *Burnes* and *Barger* presumption of intent, that there are occasions where intent becomes a question of fact. *See Ajaka v. BrooksAmerica Mortg. Corp.*, 453 F.3d 1339, 1345 (11th Cir. 2006).

The restrictive approach on this prong from *Burnes* and *Barger* has recently been rejected by other courts as well. Expressly refusing to follow *Burnes*, the Ninth Circuit explained that "rather than applying a presumption of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood." *Quin*, 733 F.3d at 276; *see also Seymour v. Collins*, 2015 IL 118432, ¶ 63 (Ill. 2015) (Illinois Supreme Court is "not so ready, as the federal courts appear to be, to penalize, via presumption, the truly inadvertent omissions of good-faith debtors").

This Court should follow the lead of *Quin* and *Seymour* and end the presumption of deceit.

D. At A Minimum, Judicial Estoppel Should Not Prevent A Chapter 7 Trustee With Standing To Pursue The Debtor's Legal Claims From Doing So.

Finally, and at a minimum, in the event that a trustee has standing to pursue a debtor's claim, the trustee should not face a judicial estoppel defense from a defendant because of an omission by the debtor. Otherwise, the defendant tortfeasor would receive a pure windfall, but at the expense of the creditors instead of the debtor. Indeed, this straightforward principle has already been recognized by several circuits, *see e.g.*, *Reed*, 650 F.3d at 578, including this one, *see Parker*, 365 F.3d at 1272. However, because *Parker* may have run afoul of the prior panel precedent rule, *see Slater*, 820 F.3d at 1230 n. 113, this Court should reinforce this aspect of the case.

CONCLUSION

For the reasons stated above, *amicus curiae* asks that this court overrule the current form of judicial estoppel in this Circuit, and reverse the decision of the district court below.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,509 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on October 24, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Pursuant to 11th Cir. R. 35-8, twenty copies of the foregoing brief will be filed with the clerk upon the court's granting of leave for this filing.

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