**Ninth and Tenth Circuits Differ on Judicial Estoppel Considerations**

When determining whether judicial estoppel should be applied in cases where a debtor has failed to disclose a pending lawsuit in her bankruptcy schedules, the ninth circuit expanded the inquiry into what constitutes “inadvertence” or “mistake” to include a subjective component.

In *Ah Quin v. County of Kauai Dept. of Trans.,* No. 10-16000 (9th Cir. July 24, 2013), the district court granted the defendant's motion for summary judgment on the basis that the debtor/plaintiff had failed to disclose the lawsuit in her subsequent chapter 7 bankruptcy schedules.

In reversing and remanding, the ninth circuit broke with its sister circuits and found that the district court applied the wrong legal standard to the question of whether the failure to list the lawsuit was due to “inadvertence or mistake.” The court found that, at least where, as here, a debtor had reopened her bankruptcy case to include the omitted information, the inquiry should include an element of subjective intent.

Beginning with a look at general principles of judicial estoppel as set forth in *New Hampshire v. Maine,*532 U.S. 742, 750 (2001), the court found that it was appropriate to consider: 1) whether a party’s later position is clearly inconsistent with a prior one, 2) whether it appeared that either the first or second court was actually misled, and 3) whether the party asserting the inconsistent position would gain an unfair advantage by reason of the inconsistency. *See Payless Wholesale Distribs., Inc. v. Alberto Culver*(*P.R.*)*Inc.*, 989 F.2d 570, 571 (1st Cir. 1993); *Hay v. First Interstate Bank of Kalispell, N.A.,*978 F.2d 555, 557 (9th Cir. 1992) (applying these factors in the bankruptcy context). But in *New Hampshire*, the Court opened the door to consideration of extenuating circumstances where the the inconsistent position was a result of “inadvertence or mistake.”

Courts, like the district court here, generally interpret the “inadvertence or mistake” language narrowly, reducing it to the dual questions of whether the debtor knew of the pending claim and had a motive to conceal it, thereby creating a “presumption of deceit.” *See, e.g., Eastman v. Union Pac. R.R. Co.,*493 F.3d 1151, 1157 (10th Cir. 2007); *Burnes v. Pemco Aeroplex, Inc.,*291 F.3d 1282, 1286-87 (11th Cir. 2002); *Browning v. Levy,*283 F.3d 761, 776 (6th Cir. 2002); *Browning Mfg. v. Mims*(*In re Coastal Plains, Inc.*),179 F.3d 197, 206 (5th Cir. 1999). But the ninth circuit found that, under *New Hampshire*, the rules of judicial estoppel should not be applied inflexibly. Rather, an additional element of the debtor/plaintiff’s subjective intent should be considered.

The court began its analysis with the statement that, “Along with most of our sister circuits, we have held that—at least where the plaintiff-debtor does not claim inadvertence or mistake—the reopening of a bankruptcy case is generally irrelevant to the analysis of judicial estoppel. *Eastman,*493 F.3d at 1160; *Barger v. City of Cartersville,*348 F.3d 1289, 1297 (11th Cir. 2003); *Burnes,*291 F.3d at 1288; *Hamilton,*270 F.3d at 784;[5](file:///C:\\Users\\Lisa\\Documents\\NACBA\\NCBRC\\Blogs\\Estoppel\\Ah%20Quin%209th%20Sept%202013%20jud'l%20estoppel.docx" \l "fr5) *Oneida,*848 F.2d at 418. That is, even if a plaintiff-debtor corrects the initial mistake and no longer receives a benefit in bankruptcy court, judicial estoppel still applies—wiping out a potentially meritorious action against an unrelated third party.”

The court went on to devote a substantial portion of its opinion to undermining this basic premise. It began by essentially finding that because the debtor/plaintiff reopened her bankruptcy to correct the scheduling error, the first two factors of *New Hampshire* were obviated; the inconsistency was corrected and no court was misled. Moreover, the reopening of the bankruptcy case prevented the debtor/plaintiff from gaining any advantage from the inconsistency. In addition, once the debtor corrects the schedules, the creditors in the bankruptcy case stand to gain from the conclusion of the lawsuit. On the other hand, application of judicial estoppel serves no one’s best interest except, perhaps, the bad actor in the lawsuit who has the case against him dismissed under the doctrine. *See* *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410 (7th Cir. 2006), (finding that application of judicial estoppel merely puts a period at the end of the debtor’s omission by removing any hope creditors have of recouping money through resolution of the lawsuit).

Nonetheless, the court ultimately settled on interpretation of “inadvertence or mistake,” as the avenue by which a debtor/plaintiff could escape the harsh result of judicial estoppel. The court found that, at least where the debtor reopens her bankruptcy case to correct the omission, the phrase “inadvertence or mistake” should be given its ordinary meaning to include an element of subjective intent to deceive. Because there was evidence in this case to support a lack of such intent, the court remanded for further inquiry into the plaintiff’s state of mind.

Judge Bybee filed a dissenting opinion arguing that state of mind inquiry into the otherwise objective “inadvertence or mistake” factors of knowledge of the lawsuit and motive to conceal, contradicted other circuit court decisions as well as previous ninth circuit law. The dissent also disagreed with the majority opinion that there could be any question as to the debtor/plaintiff’s intent to deceive.

The Tenth Circuit more recently dealt with the same issue and similar facts in *Queen v. TA Operating,*Nos. 11-8090, 11-8098 (Aug. 20, 2013). There, the debtor/plaintiffs filed a chapter 7 bankruptcy after initiating a slip and fall lawsuit in district court. Although they did not disclose the lawsuit in their schedules (after apparently disclosing it to their bankruptcy counsel and receiving poor advice) they did mention that their insurer was suing on their behalf in a questionnaire distributed to the trustee and creditors at the creditor’s meeting. The trustee responded with a notice to debtors to amend their schedules, which they did, albeit citing a lower value than they were actually seeking in the lawsuit. The bankruptcy case was treated as a no-asset case and the debtors obtained a discharge.

The district court granted the defendant’s motion for summary judgment on the basis of judicial estoppel. The tenth circuit applied an “arbitrary, capricious, or manifestly unreasonable” standard of review and affirmed. After finding that the three *New Hampshire*factors were present to trigger estoppel, the court went on to determine whether the debtor/plaintiffs’ inconsistent position was a result of inadvertence or mistake. In finding that it was not, the court applied the dual-factor approach under which the court may consider only knowledge of the lawsuit and motive to conceal without regard to subjective intent. The court rejected the debtor/plaintiffs’ assertion that their inconsistent position was a result of their bankruptcy attorney’s error stating that, while that may be the case, it is no excuse. The remedy for attorney error is a malpractice lawsuit.