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### Debtor's Failure to Disclose No Longer Deadly in Eleventh Circuit

Employers and other defendants suffered a setback recently. Most large companies have been sued by an employee who failed to disclose the lawsuit or cause of action in their individual bankruptcy case. For many years, the failure to disclose summarily prevented the lawsuit from going forward.

A recent *en banc* decision by the U.S. Court of Appeals for the Eleventh Circuit, following a trend in other jurisdictions, eliminates the inference of "manipulation on the court" when a debtor fails to disclose a civil lawsuit on its bankruptcy schedules and makes it easier for a debtor, or bankruptcy trustee, to maintain lawsuits against civil defendants for the benefit of the creditors of the debtor's estate. Before the holding in [Slater v. U.S. Steel Corp.](#), No. 12-15548 (11th Cir. Sept. 18, 2017), a debtor who failed to disclose ongoing or potential litigation in the Eleventh Circuit would be subject to a finding of "judicial estoppel" and, absent extraordinary circumstances, would be unable to maintain their civil lawsuit.

However, following the decision in *Slater*, courts in the Eleventh Circuit (similar to courts in the Sixth, Seventh and Ninth Circuits) will employ a "totality of the circumstances" analysis to include, but not be limited to, an examination of the debtor's level of sophistication, whether and under what circumstances the nondisclosure was corrected, whether the debtor's attorney and/or creditors were aware of the lawsuit, and what action, if any, the bankruptcy court deemed appropriate to deal with the late disclosure (e.g., subordinating the debtor's claims to any recovery until creditors are paid in full). This more thorough analysis allows the courts to account for the possibility that the failure to disclose could be inadvertent or a mistake.

#### Case Details

In *Slater*, the debtor failed to disclose a pending civil lawsuit against her employer, U.S. Steel, alleging both retaliation and discrimination. After the administration of Slater's bankruptcy case was complete, U.S. Steel moved for summary judgment in the civil action on the basis that judicial estoppel should bar Slater from pursuing claims that she failed to disclose to the bankruptcy court.

Following existing Eleventh Circuit precedent, the district court granted summary judgment in favor of U.S. Steel, holding that Slater's claims were barred by the doctrine of judicial estoppel because her nondisclosure was sufficient to establish the presumption that such nondisclosure was an attempt to mislead the court and conceal assets from her creditors. Based on its adopted "totality of the circumstances" test, the Eleventh Circuit remanded the matter to the original three-judge appellate panel to determine whether the district court abused its discretion in applying judicial estoppel.

#### Differing Court Opinions

Unlike the view set forth by the Eleventh Circuit in *Slater*, the Tenth Circuit continues to endorse the view that nondisclosure requires an inference that the debtor had the requisite intent to manipulate the judicial system. The Fifth Circuit favors "flexibility" in its judicial estoppel analysis in order to achieve "substantial justice," but permits recoveries from undisclosed claims that benefit innocent creditors. This matter could head to the U.S. Supreme Court to determine a unified rule of law regarding the effect of a debtor's failure to disclose at some point in the future. Until that occurs, civil defendants in many jurisdictions will continue to litigate matters involving debtors when those claims were not disclosed in the plaintiff's bankruptcy case.

## Authors

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