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THE DOCTRINE OF JUDICIAL ESTOPPEL: SHOULD A LITIGANT BE BARRED FROM PURSUING A CLAIM NOT DISCLOSED AS AN ASSET IN A PREVIOUSLY FILED BANKRUPTCY PETITION?

By Glenn R. Reiser, Esq. ©

Assume the following scenario. An individual files for bankruptcy to obtain relief from creditors, and in so doing certifies under oath as to the accuracy of his or her assets and liabilities. The bankruptcy case is considered to be a “no asset” case, meaning that after applying the debtor’s maximum federal or state property exemptions there are no assets to be liquidated and distributed to creditors. The bankruptcy trustee appointed to administer the debtor’s case examines the debtor under oath at an initial creditors’ meeting, the debtor confirms that the accuracy of the bankruptcy petition, the trustee files a no asset report, the court grants the debtor a bankruptcy discharge, and the bankruptcy case is closed.

Unbeknownst to the bankruptcy trustee or the debtor’s lawyer, the debtor omitted listing an asset required to be disclosed in the bankruptcy petition; examples include a breach of contract claim on a promissory note, a personal injury claim, or ownership in real estate. Assume the potential asset or claim is substantial. Now that the debtor has obtained a bankruptcy discharge and with the bankruptcy trustee and discharged creditors in the rear view mirror, the debtor files a lawsuit in the Superior Court of New Jersey to pursue the claim but uses a different lawyer and never discloses the prior bankruptcy filing to the new lawyer.

The defendant retains your firm to defend the state court case. As part of your due diligence, you decide to search the plaintiff’s name in the federal court Pacer database. Lo and behold, you uncover the plaintiff’s prior bankruptcy filing. After downloading the entire bankruptcy petition from Pacer, you notice that the debtor failed to list the claim against the potential client on Schedule B (personal property) of his or her bankruptcy petition. Upon further investigation, you obtain a copy of the recorded transcript of the debtor’s testimony given at the initial creditors’ meeting in the bankruptcy case. On the recording you hear the debtor answer under oath “yes” in response to the bankruptcy trustee’s question of whether the bankruptcy petition accurately reflects all of the debtor’s assets and liabilities. Whether the debtor purposely omitted disclosing the asset is, of course, a critical factual issue.

Does the doctrine of judicial estoppel bar the debtor from suing the defendant under these circumstances? After all, the debtor previously certified in federal court that no such claim exists but now sings a different tune in state court.

Several published decisions from the Third Circuit Court of Appeals address application of judicial estoppel to post-bankruptcy litigation. However, there does not appear to be any published decisions by trial or appellate courts in New Jersey that speak to the post-bankruptcy litigation niche of judicial estoppel. Instead, New Jersey state court practitioners are limited by several unpublished Appellate Division decisions that meet with different results, and reflect a lack of uniformity in how New Jersey state courts apply judicial estoppel in this particular circumstance. In several of these unpublished decisions, the Appellate Division has demonstrated a reluctance to dismiss a case under judicial estoppel grounds without first affording the bankruptcy trustee an opportunity to determine whether or not to pursue the claim or cause of action as part of the bankruptcy estate. No such consideration for the bankruptcy trustee is reflected in opinions issued at the federal trial court level in New Jersey and the Third Circuit Court of Appeals. New Jersey courts have also considered whether the adverse party was prejudiced in some way.

One thing is clear though: Both New Jersey federal and state courts do not employ a *per se* rule that applies judicial estoppel to bar a post-bankruptcy litigation claim. While the Third Circuit test requires a showing of bad faith, New Jersey does not. Further, New Jersey has adopted a “totality of circumstances” approach to evaluate judicial estoppel, and requires a finding of miscarriage of justice as does the Third Circuit test.

A. Judicial Estoppel

Judicial estoppel is grounded in the principle of protecting the integrity of the court system by barring litigants from adopting inconsistent positions in more than one legal proceeding. The doctrine is illustrated as follows: “The principle is that if you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events.” Kimball Int’l v. Northern Metal Prods., 334 N.J. Super. 596, 607 (App. Div. 2000), certif. denied, 167 N.J. 88 (2001). Thus, “[W]hen a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events.” Kress v. La Villa, 335 N.J. Super. 400, 412 (App. Div. 2000), certif. denied, 168 N.J. 289 (2001). Accord New Hampshire v. Maine, 532 U.S. 742, 749 (2001). As the United States Supreme Court explained, the doctrine is used to “prevent the perversion of the judicial process” by “prohibiting parties from deliberately changing positions according to the exigencies of the moment.” Id. at 750.

It is generally accepted that judicial estoppel is an “extraordinary remedy,” which should be invoked only “when a party’s inconsistent behavior will otherwise result in a miscarriage of justice.” Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996). Accord Ali, 166 N.J. at 288.

[Judicial estoppel] is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to “secure substantial equity.”

Ibid.

B. Test for Applying Judicial Estoppel Under the Third Circuit

The Third Circuit has identified the following criteria for determining when seemingly inconsistent litigation stances justify application of judicial estoppel:

- (1) The party to be stopped must have taken two positions that are irreconcilably inconsistent;
- (2) The party changed his or her position in bad faith –i.e., with intent to play fast and loose with the court.
- (3) The doctrine is tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant’s misconduct.

In re Kane, 628 F.3d 631, 638 (3d Cir. 2010) (citing Montrose Medical Group Participating Savings Plan v. Bulger, 243 F.3d 773 (3d Cir. 2001)).

In addition, citing equitable principles the Third Circuit requires the party to be estopped be given a meaningful opportunity to provide an explanation for the changed position. Kane, 328 F.3d at 638-369 (citing Krystal Cadillac-Olds GMC Truck, 337 F.3d 314, 319-320 (3d Cir. 2001)). The Third Circuit’s application of judicial estoppel does not require that a party must have benefitted from their prior position in order to be judicially estopped from subsequently asserting an inconsistent one. Ryan Operations, 81 F.3d at 361. The presence of a benefit received is merely a factor in determining whether the evidence would support a conclusion of bad faith. Krystal, 337 F.3d at 324.

In the bankruptcy context, the Third Circuit recognizes that “a rebuttable inference of bad faith arises when averments in the pleadings demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative

duty to disclose.” Krystal, 337 F.3d at 321. As one New Jersey District Court judge commented, “[A] person seeking to discharge his debts in bankruptcy [has] a motive to conceal potential assets.” Clark v. Strober-Haddonfield Group, Inc., 2008 U.S. Dist. Lexis 58865, *7 (D.N.J. July 29, 2008). Because non-disclosure of an asset or claim raises only a rebuttable presumption of bad faith, the Third Circuit has expressly left open the question of “whether such nondisclosure [in bankruptcy schedules], standing alone, can support a finding that a plaintiff has asserted inconsistent positions within the meaning of the judicial-estoppel doctrine.” Ryan Operations, 81 F.3d at 362 (citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988), cert. denied, 488 U.S. 967 (1988)).

C. New Jersey’s Test for Applying Judicial Estoppel

New Jersey courts need not adopt or follow the jurisprudence of federal courts regarding the doctrine of judicial estoppel. “Since the purpose of the doctrine of judicial estoppel is to protect the integrity of the tribunal before which a party seeks to contest facts which he has previously [and successfully] admitted, it is that tribunal which should determine whether or not to invoke this doctrine.” New Jersey v. Gonzalez, 273 N.J. Super. 239, 260 (App. Div. 1994), aff’d, 142 N.J. 618 (1995). However, the New Jersey Appellate Division referred to the Third Circuit’s judicial estoppel test in Montrose, in Marquez v. Drew, 2009 N.J. Super. Unpub. LEXIS 2606 (App. Div. January 26, 2010), certif. denied, 201 N.J. 157 (2010).

The New Jersey Supreme Court has instructed, a “totality of circumstances” approach must be used to determine whether to invoke judicial estoppel. Ali v. Rutgers, 166 N.J. 280 (1991). For judicial estoppel purposes, successful maintenance of a position requires only “that the party was allowed by the court to maintain its position,” and not that the “party prevailed in the underlying action.” Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996). Accord Chatten v. Cape May Greene, Inc., 243 N.J. Super. 590, 620 (App. Div. 1990), aff’d, 124 N.J. 520 (1991). In other words, the party must have convinced the court to accept its position. Ali, 166 N.J. at 288 (2000)(internal citation omitted).

Similar to the Third Circuit’s test, New Jersey treats judicial estoppel as an extraordinary remedy to be applied only when a party’s inconsistent behavior will otherwise result in a miscarriage of justice. See State v. Jenkins, 178 N.J. 347 (2004)(quoting Kimball Int’l, 334 N.J. Super. at 608). Unlike its federal counterpart, New Jersey’s judicial estoppel test does not require a finding of bad faith. See Ruffin v. Kinder Morgan Liquids Terminal, LLC, 2009 N.J. Super. Unpub. LEXIS 251, *6 (App. Div. 2009), certif. denied, 198 N.J. 473 (2009) (quoting City of Atlantic City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68 (App. Div. 2006)(“[A] finding of ‘bad faith’ is not a requirement under New Jersey law.”).

D. Accurate Disclosure of Financial Information on Bankruptcy Petitions

“The Bankruptcy Code requires that a debtor file necessary declarations adequately, honestly, and in good faith. *See, e.g.*, 11 U.S.C. 521(a)(1)(defining a debtor’s filing duties); Fed. R. Bankr. P. 9011(b)(outlining requirements of proper purpose and evidentiary support in representations to bankruptcy court).” Kane, 628 F.3d at 635. In Ryan Operations, *supra*, the Third Circuit explained the importance of disclosing accurate financial information on a bankruptcy petition:

The Code imposes on debtors an affirmative duty of full disclosures. Section 521 requires the debtor to file with the court “a schedule of as assets and liabilities ... and a statement of the debtor’s financial affairs.” The schedule must disclose, *inter alia*, “contingent and unliquidated claims of every nature” and provides an estimated value for each one.

...

These disclosure requirements are crucial to the effective functioning of the federal bankruptcy system. Because creditors and the bankruptcy court rely heavily on the debtor’s disclosure statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated.

81 F.3d at 361. Thus, as indicated by the above passage, a bankruptcy “debtor’s disclosure obligation extends to ‘contingent assets’ such as causes of action pursued against another party, . . . because such disclosure ‘allows the trustee and the creditors to determine whether’ to pursue these assets ‘on the creditors’ behalf.” Kane, 628 F.3d. at 637.

Section 541 of the Bankruptcy Code, 11 U.S.C. § 541(a)(1), defines property of the bankruptcy estate as including, *inter alia*, “all legal or equitable interests of the debtor in property as of the commencement of the case. *Id.* As the Third Circuit has recognized, Section 541(a) “was intended to sweep broadly to include ‘all kinds of property, including tangible or intangible property, [and] causes of action.’” Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 241 (3d Cir. 2001)(internal citation omitted).

Indeed, in Chapter 7 bankruptcy cases which are considered a liquidation proceeding, “[C]ourts have held that where a debtor conceals an asset or fails to schedule it, the asset remains the property of the bankruptcy estate and, accordingly, the debtor can be found to lack standing to pursue its further disposition.” Kane, 628

F.3d at 640 (internal citations omitted); Hutchins v. I.R.S., 67 F.3d 40, 43 (3d Cir. 1995)(“[T]he failure to schedule the refund is fatal to [plaintiff’s] claim.”).

E. Judicial Estoppel Applied to Remedy Inconsistent Disclosures in Prior Bankruptcy Filings

It is undisputed that judicial estoppel may be invoked when a prior inconsistent position was taken in bankruptcy proceedings. Davidowski v. Davidowski, 2012 N.J. Super. Unpub. LEXIS 192, *5 (citing Oneida Motor Freight, 848 F.2d at 419). “The party invoking the doctrine need not have been a creditor or otherwise involved in the bankruptcy proceedings.” Davidowski, 2012 N.J. Super. Unpub. LEXIS 192, * 5 (citing Ryan Operations, 81 F.3d at 359-361). “In Oneida, the Third Circuit affirmed the dismissal of various contract claims by the Oneida Freight trucking company, against United Jersey Bank, due largely to the company’s failure to include the claims as assets in its prior Chapter 11 bankruptcy case.” Eric Hilmo, Bankruptcy Estoppel: The Case for a Uniform Doctrine of Judicial Estoppel as Applied Against Former Bankruptcy Debtors, 81 Fordham L. Rev. 1353, 1374 (2013)(citing Oneida, 848 F.3d at 418). “Though the decision actually rested on the doctrine of equitable estoppel, the court noted judicial estoppel as an alternative available theory.” Id.

More recently, in an unpublished decision issued by the United States District Court for the District of New Jersey, Lewis v. Eberle & Bci Servs., LLC, 2013 U.S. Dist. LEXIS 116807 (D.N.J. Aug. 19, 2013), judicial estoppel was applied to bar a plaintiff’s employment based discrimination lawsuit due to omitting the claim on her bankruptcy petition. In that case, the plaintiff’s employer terminated her employment well before the her bankruptcy case concluded; the case originally was filed as a Chapter 13 reorganization, but later was converted to Chapter 7 liquidation. Plaintiff filed her employment lawsuit while her bankruptcy case was still pending. She received a bankruptcy discharge in Chapter 7, and her bankruptcy trustee filed a no asset report.

The District Court observed that: (i) Lewis did not disclose the claim after converting her case to Chapter 7 and amending her bankruptcy petition to add additional creditors; (ii) Lewis failed to introduce any evidence to challenge the inference of bad faith; and (iii) she did not take any affirmative steps to amend her disclosure. The District Court rejected Lewis’ contention that omitting the employment lawsuit was inadvertent, pointing out that she previously listed a workers’ compensation claim on her bankruptcy petition which the District Court interpreted as suggesting her omission of discrimination claim was overt. Further, in her opposition to her former employer’s motion to dismiss her complaint Lewis represented her intention to rectify the omission by reopening her bankruptcy case. During oral argument at the motion hearing, Lewis said she would take affirmative steps to remedy the problem if and when the court renders a decision. “Such a posture cannot be tolerated as it sends a message that “a debtor should consider disclosing potential assets only if he is caught

concealing them." Lewis, 2013 U.S. Dist. LEXIS 116807, * 10 (citing Krystal, 337 F.3d at 325)(other internal citation omitted).

In a recent non-precedential opinion, the Third Circuit applied judicial estoppel in affirming the dismissal of complaint due to inaccurate disclosures made by individuals (husband and wife) in their bankruptcy petition, in J.H. Group, LLC v. Royal Rolling Chairs, LLC, 2013 U.S. App. LEXIS 9898 (3d Cir. N.J. May 17, 2013). See also Coles v. Carlini, 2013 U.S. Dist. LEXIS 101873 (D.N.J. July 22, 2013)(District Court applied judicial estoppel to dismiss the civil rights claims of 2 plaintiffs who failed to disclose the claims in their separately filed bankruptcy petitions, rejecting their explanation of omitting the claims because they believed them to be of little or no value).

In J.H. Group, John and Stephanie Taimanglo were the sole stockholders and principals in an entity known as Ocean Rolling Chairs d/b/a J.H. Group, L.L.C. ("Ocean Rolling Chairs"), which leased rolling chair equipment to independent contractors for use on the Atlantic City boardwalk. The Taimanglos and J.H. Group filed suit in the District Court claiming that the City of Atlantic City, a competitor and others had conspired to destroy their business through unnecessary inspections and other unfair tactics.

Five months after commencing the District Court action, the Taimanglos filed a joint bankruptcy petition that contained the following representations: (i) they had no income from the operation of business; (ii) their income was wage income; (iii) they did not own more than five percent of the voting or equity securities of a business; (iv) they were not self-employed full or part-time; (v) they did not own any stock and interest in incorporated and unincorporated businesses or interest in partnerships or joint ventures; (vi) they had no contingent and unliquidated claims; and (vii) they owned no office equipment, furnishings, or supplies used in business.

The defendants moved to dismiss the District Court complaint on grounds of judicial estoppels, pointing to the inconsistent statements made by the Taimanglos in their bankruptcy petition after the filing of the District Court action. The trial court granted the motion, finding that "the Taimanglos had taken inconsistent positions by failing to disclose their business and the present lawsuit in their bankruptcy petition while at the same time bringing the suit based on their ownership in Ocean Rolling Chairs." Id., *3. The District Court opined that "the nature and frequency of the inconsistencies established bad faith, noting that the financial problems in the rolling chair business were the impetus to [the Taimanglos] filing for bankruptcy. Id., *3-4. Even though the Taimanglos bankruptcy case was ultimately dismissed, the District Court said dismissal of the federal action "was appropriate because a lesser sanction would send a message that a debtor should disclose assets only if he is caught hiding them." Id., *4.

The Taimanglos, but not Ocean Rolling Chairs, appealed the dismissal to the Third Circuit. Their sole argument on appeal was to blame their bankruptcy lawyer for their inadequate disclosures, claiming they had provided the lawyer with all relevant financial information and pending lawsuits but that the lawyer neglected to include this information in their bankruptcy petition. The District Court rejected this argument, declaring that giving documents to their attorney did not relieve the Taimanglos of their obligation for candor to the bankruptcy court. The Third Circuit agreed. Citing decisions from other courts of appeals where counsel error was rejected as a defense to applying judicial estoppel, the Third Circuit noted that the Taimanglos had knowledge of their claim when they filed for bankruptcy and had a motive to shield their assets. *Id.*, * 5-6.

F. Unpublished Decisions of New Jersey Appellate Division Applying Judicial Estoppel in Post-Bankruptcy Litigation

In 2008, the New Jersey Appellate Division was confronted with applying judicial estoppel in post-bankruptcy litigation, in Buttermark v. A.J.D. Construction Co., Inc., 2008 N.J. Super. Unpub. LEXIS 2246 (App. Div. July 21, 2008), certif. denied, 196 N.J. 600 (2008). There, the plaintiff Buttermark had failed to list a pending workers' compensation claim in his Chapter 13 bankruptcy petition filed approximately 9 months after the accident. At the initial hearing conducted by the Chapter 13 bankruptcy trustee Buttermark testified that he was seeking legal advice for work injuries resulting from falling down a set of stairs. Despite this disclosure, Buttermark did not amend his bankruptcy petition to include the workers' compensation claim and proceeded forward with a Chapter 13 plan providing for payments to his creditors. The Chapter 13 bankruptcy remained "open" due to the ongoing payment plan.

Slightly more than 1 year into his bankruptcy case, and about 2 years after the accident, Buttermark filed a complaint in the Superior Court of New Jersey seeking compensation for his injuries. During the course of his deposition Buttermark disclosed his pending bankruptcy status. Several months after Buttermark rejected a non-binding arbitration award of \$225,000 the defendants filed summary judgment motions premised on judicial estoppel. The motion record reflects that within 2 weeks of the summary judgment motions being filed Buttermark's bankruptcy lawyer amended the bankruptcy petition to include the claim as an asset.

In opposing summary judgment, Buttermark argued that he did not hide the possibility of pursuing a lawsuit from his bankruptcy attorney or the Chapter 13 bankruptcy trustee and disclaimed accountability for not amending his bankruptcy petition at an earlier stage. The trial judge rejected Buttermark's explanation, and granted summary judgment dismissing Buttermark's complaint on the grounds of judicial estoppel. The trial judge concluded that "a rebuttable inference of bad faith arises when the pleadings demonstrate both knowledge of a claim and a motive to

conceal the claim in the face of an affirmative duty to disclose.” Buttermark, 2008 N.J. Super. Unpub. LEXIS 2246, * 3.

On appeal, the Appellate Division in Buttermark reversed the summary judgment award finding that a material factual issue existed as to whether Buttermark’s non-disclosure of his injury claim in the earlier filed bankruptcy case was inadvertent. Specifically, the appeals panel took issue with the trial judge’s failure to explain why he did not consider Buttermark’s testimony at the initial hearing held before the bankruptcy trustee to be a fulfillment of his affirmative duty to disclose the injury claim. “The doctrine should not bar him from pursuing his personal injury claims as the failure of bankruptcy counsel and the trustee to amend the petition, was not due to any omission on his part.” Id.

Application of judicial estoppel in the post-bankruptcy litigation arena was also before the Appellate Division in Ruffin, supra, 2009 N.J. Super. Unpub. LEXIS 251 (App. Div. 2009). Ruffin was a truck driver whose employment required him to transport loads of liquid chemicals from a terminal facility in Carteret. On December 12, 2012 Ruffin sustained serious personal injuries resulting from an accident that occurred at the defendant’s facility during his employment, which necessitated an 11-day hospital stay.

About 18 months after the accident, on July 16, 2004, Ruffin filed a Chapter 7 bankruptcy petition in New Jersey but did not disclose the negligence claim against defendant. The appellate record reflects that at the time Ruffin sought bankruptcy protection he had spoken to a personal injury lawyer about filing suit against defendant. The bankruptcy court set November 29, 2004 as the deadline for creditors to object to Ruffin’s bankruptcy discharge. Apparently, no one objected to Ruffin’s bankruptcy discharge and the case was closed on January 13, 2005.

After Ruffin received his bankruptcy discharge but approximately 1 month before his bankruptcy case was closed, on December 9, 2004, which was a day before expiration of the 2-year statute of limitations period, Ruffin filed his personal injury/negligence lawsuit against the defendant. A trial in the personal injury action commenced on December 13, 2007. During cross-examination, the defendants’ counsel grilled Ruffin about his failure to disclose the injury lawsuit on Schedule B of his bankruptcy petition. Following cross-examination and a brief recess, defendant filed a motion to dismiss Ruffin’s action citing judicial estoppel – that the failure to disclose the negligence claim as an asset on his bankruptcy petition was irreconcilably inconsistent with his pursuit of the Law Division action, and thus the personal injury case required dismissal.

The trial judge granted the defense’s motion to dismiss with prejudice. Remarking about the in excess of \$100,000 in creditor claims that Ruffin “washed away by his false perjurious and misleading filing of the voluntary [petition],” the trial judge

rejected Ruffin's contention that he didn't understand what he was signing or that his bankruptcy counsel didn't explain it to him. "[Plaintiff is] essentially trying to . . . get two bites at the apple. One is . . . the creditors, and the second one is . . . the case now against [defendant]." Ruffin, 2009 N.J. Super. Unpub. LEXIS 251, *6.

The appeals court rejected Ruffin's assertion that he did not act in bad faith, holding that "bad faith" is not a requirement under New Jersey law. Id. (citing Atlantic City, supra, 23 N.J. Tax at 67-69. Instead of affirming the dismissal on judicial estoppel grounds, the Appellate Division vacated the order of dismissal and remanded the matter to the trial court so that Ruffin's Chapter 7 bankruptcy trustee would have the opportunity to determine whether to pursue the litigation. The Appellate Division agreed with Ruffin's argument that the trial judge should have narrowly tailored application of judicial estoppel to address the specific harm. Pointing to the possibility of reopening Ruffin's bankruptcy case to allow the trustee a chance to examine Ruffin and determine whether a recovery could be obtained for the benefit of Ruffin's creditors, the Appellate Division was unwilling to affirm the outright dismissal of Ruffin's claim. Though the Appellate Division cautioned that its "determination should not be construed to reward plaintiff for his omission." Ruffin, 2009 N.J. Super. Unpub. LEXIS 251, * 17.

The next Appellate Division decision to address judicial estoppel in post-bankruptcy litigation was Marquez v. Drew, 2009 N.J. Super. Unpub. LEXIS 2606 (App. Div. January 26, 2010), certif. denied, 201 N.J. 157 (2010). In this case plaintiffs filed a civil rights suit against police officers after filing for bankruptcy, but failed to disclose the contingent civil rights claim in their bankruptcy petition. Under the specific facts presented, the appellate panel in Marquez declined to bar the civil rights suit under judicial estoppel. The court emphasized that plaintiffs did not conceal the bankruptcy from the defendants, but rather disclosed their bankruptcy filing when responding to form interrogatories inquiring about their economic losses. In addition, the plaintiffs filed an application with the bankruptcy court to employ their state court counsel as their special counsel in the bankruptcy case. The plaintiffs argued that their filing a special counsel application in the bankruptcy court protected the creditors' rights to obtain an eventual share of the lawsuit proceeds. Likewise, the bankruptcy trustee appointed in the plaintiffs' bankruptcy case submitted a letter confirming that he was on notice of the potential asset and would prevent the debtors from obtaining a discharge without first satisfying him about the outcome of the civil rights lawsuit.

In addition, there was no evidence that the plaintiffs in Marquez benefitted or sought to benefit from the fact that their creditors did not initially know about the civil rights suit. Also, the police defendants had no significant connection to the bankruptcy case. Concluding that dismissal on judicial estoppel grounds constituted a miscarriage of justice and a mistaken exercise of the trial court's discretion, the Appellate Division vacated the dismissal.

In another unpublished New Jersey Appellate Division decision issued just a few months after Marquez, an appeals panel in Barzda v. Clemente, 2010 N.J. Super. Unpub. LEXIS 426 (App. Div. March 3, 2010) affirmed the dismissal of a plaintiff's post-bankruptcy complaint on judicial estoppel grounds. In this case, plaintiff transferred a his real estate to a third party during the midst of a divorce proceeding with his estranged spouse, fearing she would assert a claim against the property. The deed transferring the property to defendant reflected payment of a dollar as the purchase price. During oral argument, Barzda conceded having been romantically involved with defendant, claimed they had an agreement allowing him to remain as an undisclosed partner and joint owner of the property, and that he made substantial improvements and purchased numerous items of personalty for the property.

Less than a year after transferring his real estate Barzda filed a Chapter 7 bankruptcy petition, but failed to disclose his alleged real estate interest in the petition despite signing a declaration under penalty of perjury, that the schedules of assets listed therein were true and correct. Barzda obtained a bankruptcy discharge on May 21, 2011, without the bankruptcy court being aware of this potential asset. Nevertheless, Barzda claimed that he disclosed his real estate interest to both his bankruptcy lawyer and the trustee.

In 2002 Barzda and defendant ended their romantic relationship, prompting defendant to demand he vacate the property. Four years later, in 2006, Barzda filed a complaint against defendant alleging breach of fiduciary duty, fraud, and conversion for her failure to transfer his share of the proceeds from their real estate joint venture. Defendant filed a motion to dismiss the complaint in lieu of filing an answer.

On the return date of the motion to dismiss, and immediately before oral argument was to begin, Barzda attempted to amend his complaint and introduce a document purporting to be the unauthenticated minutes of the creditors' meeting conducted by the bankruptcy trustee. Barzda represented that he had just received the minutes the day before and proffered that these minutes proved he had disclosed his real estate interest in the real estate to the bankruptcy trustee. The motion judge refused to admit the unauthenticated document as evidence in opposition to the summary judgment motion. Treating the motion as one for summary judgment, the trial judge dismissed the complaint by concluding that the doctrine of judicial estoppel barred Barzda's claim based on his affirmative statements given under oath in his bankruptcy petition. The trial judge believed that the Barzda entered into an unenforceable contract with the defendant, and purposely withheld the transfer from the family court and the bankruptcy court.

In affirming the trial court's decision, the Appellate Division equated Barzda's conduct as "almost a textbook example of facts calling for the applicability of judicial

estoppel.” Barzda, 2010 N.J. Super. Unpub. LEXIS 426, *6. “By his own words, plaintiff attempted to conceal his alleged interest in this real property to mislead his former spouse and frustrate any attempt on her part to seek legal recognition of a potential equitable interest in the property.” Id. “In furtherance of this scheme, plaintiff deliberately failed to disclose his alleged interest in the petition he filed under oath before the federal bankruptcy court in order to induce that tribunal to give him relief from the legitimate claims of his creditors.” Id. The appeals panel found that Barzda’s assertions in the Law Division were materially irreconcilable with the position he successfully adopted in the bankruptcy court, and that it would constitute a gross miscarriage of justice if Barzda was permitted to prosecute the state law claims any further. Id.

In Romano v. Romano, 2012 N.J. Super. Unpub. LEXIS 73 (App. Div. January 12, 2012), the Appellate Division upheld the application of judicial estoppel in a post-bankruptcy matrimonial proceeding. In that case, John Romano (“John”) filed a Chapter 13 bankruptcy petition in which he certified that the estimated value of his assets was no more than \$50,000, and that he did not own any interest in real property by answering “none” on Schedule A of the bankruptcy petition requiring disclosure of such interest. The bankruptcy court approved John’s Chapter 13 payment plan.

Prior to filing his Chapter 13 bankruptcy case, John filed a complaint for divorce against his spouse Dana Romano (“Dana”) in the Superior Court of New Jersey. Following confirmation of his Chapter 13 plan with the bankruptcy court, John filed a Case Information Statement (“CIS”) in the divorce proceeding claiming an interest in the parties’ marital residence – listing the property as a joint asset with a value of \$494,000 subject to an approximate \$110,250 mortgage. In his CIS, John listed substantially less income than what he previously reported and certified in his bankruptcy petition.

The parties proceeded to a contested divorce trial. John sought to recover one-half of the \$383,000 equity in the marital residence, including the down payment, thus bringing the total value of his claim to approximately \$190,000. John alleged that his bankruptcy lawyer advised him to deny any ownership interest in the marital home. In electing to apply judicial estoppel to bar John’s claims against the property, the matrimonial judge “took issue with John’s inconsistent sworn statements and the conflict between the sworn financial representations on his bankruptcy petition and his divorce filings.” Id., * 2.

Striking similar to the Appellate Division’s previous “textbook” declaration issued in Barzda, supra, the appellate panel in Romano likewise viewed John’s conduct as “almost a textbook example of facts calling for the application of judicial estoppel.” Id. *3. “By his own admission, John advanced inconsistent positions regarding his interest in the marital home. John failed to disclose his alleged interest in the home in the

petition he filed under oath before the federal bankruptcy court.” Id. “In addition, John filed an amendment to his bankruptcy petition ..., but did not alter this critical detail. A bankruptcy plan was subsequently approved based on John’s financial representations.” Id.

The appeals panel rejected John’s attempt to throw his bankruptcy lawyer under the bus, declaring that the advice did not absolve him of responsibility for his certification. Critically, John did not call his bankruptcy lawyer to testify as a witness in the divorce trial. The appeals panel thus viewed John’s position as an unsubstantiated excuse. Id.

Just a few weeks after deciding Romano, the Appellate Division issued another unpublished decision involving application of judicial estoppel in the circumstance of post-bankruptcy litigation, in Davidowski, supra, 2012 N.J. Super. Unpub. LEXIS 192. In this case, the Burlington County Chancery Court applied the doctrine to bar the claims brought by a mother against her son and his friend for allegedly defrauding her out of approximately \$125,000 by means of a sham private mortgage and note that she executed shortly before her husband died.

The plaintiff Louise Davidowski (“Louise”) filed a bankruptcy petition shortly after selling her home in 2005. In her bankruptcy petition she did not disclose any interest in real estate, or any claims against third parties who owed her any money. She signed her bankruptcy petition under penalty of perjury attesting to the accuracy of the schedules included with the petition. At her initial creditors’ meeting, she stated that she had no interest in real estate and made no reference to the potential claim (which she would ultimately file several years later). Based on her affirmative representations Louise received a bankruptcy discharge.

According to the appellate record, prior to the bankruptcy filing the defendants, including Alan Davidowski (“Alan”) who was Louise’s son, and a realtor allegedly perpetrated a fraud by either forging Louise’s signatures on a \$125,000 note and mortgage or deceptively induced her to sign these documents. When Louise sold her property in 2005 following her husband’s death, the realtor, identified as the mortgagee, received payment of \$125,000 thereby depriving Louise of the equity in her home. In addition, Louise claimed that the realtor had subsequently transferred \$80,000 of these proceeds to Alan to fund his purchase of another property. Louise also moved into Alan’s new home, claimed she paid for substantial improvements, and that Alan had promised to make her a beneficial co-owner of the home he purchased using proceeds from the sale of Louise’s home following her husband’s death.

In 2009, approximately 4 years after the filing of her bankruptcy petition, Louise filed an action in Chancery Court predicated on the alleged fraud perpetrated by Alan

and his realtor friend. In her Chancery Division complaint, Louise claimed an equitable co-ownership interest in Alan's property based on alleged oral promises made by Alan that the home would belong to both of them because Alan had used a substantial portion of the sale proceeds from Louise's former home to fund the purchase of his new home. Not only were these allegations clearly inconsistent with her declarations in the bankruptcy proceedings, but they also contradicted the representations made in her federal income tax returns where she claimed to be "renting" the residence titled in Alan's name, not that she owned it. Id.,*5.

In reversing the trial court's application of judicial estoppel to dismiss Louise's Chancery Division complaint, the Appellate Division noted the existence of a key factual dispute; namely, Louise's knowledge of the relevant facts at the time her bankruptcy petition was filed. Louise asserted that the bankruptcy petition was prepared upon Alan's advice and with his assistance, and claimed she was unaware that her beneficial interest in Alan's property should be listed on her bankruptcy petition, or that she had a viable claim at that time against the realtor. The Appellate Division also concluded that there was no prejudice to the defendants from Louise's factual assertions before the bankruptcy court. In addition, the appeals court remarked, "[W]here the doctrine of judicial estoppel may benefit those who engaged in a fraud related to the same inconsistent assertions, 'no compelling circumstance or injustice' warrant the court's 'invoking the doctrine.'" Id., *6 (quoting Ali, supra, 166 N.J. at 288-289).

Underlying the Appellate Division's decision to reject the application of judicial estoppel in Davidowski was the panel's concern about the legitimacy of Louise's bankruptcy filing and the role that Alan may have played in protecting her assets for his own benefit, thus possibly contributing to the material omissions of Louise's claims against him on her bankruptcy petition and schedules.

If the mortgage was fraudulent, so may have been the bankruptcy filing. The bankruptcy may have been part of an overall scheme, devised or assisted by Alan, to avoid the claims of his mother's creditors and to preserve his own prospective interest in her assets. The evidence presented in Louise's case in chief showed Alan's active participation in disposing of Louise's interest in the Florence township property and in her filing for bankruptcy. The trial court never considered what Alan's role may have been in presenting allegedly false information for Louise's bankruptcy filing.

Id. *7. On remand, the Appellate Division instructed the trial court to determine whether Louise's bankruptcy trustee could claim any interest in the outcome of the litigation. Id.

G. Conclusion

At the federal court level, there is more uniformity and precedential Third Circuit decisions to guide the federal court practitioner in New Jersey on the application of judicial estoppel in the context of post-bankruptcy litigation.

However, absent the New Jersey Supreme Court issuing a definitive ruling in the application of judicial estoppel in the context of post-bankruptcy litigation, there is less certainty for New Jersey state court practitioners and their clients looking to dismiss claims under this doctrine. Instead, New Jersey practitioners and litigants fighting their battles in state court are left to grapple with the lack of uniformity in how New Jersey courts have applied the doctrine in this particular instance, as evidenced by the varying results of the unpublished Appellate Division decisions mentioned in this article. While some appellate panels dismissed the case outright, other panels demonstrated a more cautious approach by declining dismissal in favor of affording the bankruptcy trustee an opportunity to pursue the claim on behalf of the entire creditor body; no such consideration is shown at the District Court and Third Circuit levels.

There is no *per se* rule under either federal common law or New Jersey common law that strictly applies judicial estoppel to every situation where a debtor omits disclosing an asset, claim or cause of action on his or her bankruptcy petition. Both the Third Circuit and New Jersey apply the doctrine with discretion based on the specific facts of each case, including whether the omission was intentional or inadvertent, and factor whether the party's inconsistent behavior will result in a miscarriage of justice. Whereas the Third Circuit recognizes a presumption of bad faith arising from such an omission, New Jersey does not require a finding a bad faith to apply judicial estoppel. While New Jersey considers whether the adverse party has been prejudiced by the inconsistent behavior, the Third Circuit does not.

It is generally accepted that judicial estoppel is an “extraordinary remedy,” which should be invoked only “when a party’s inconsistent behavior will otherwise result in a miscarriage of justice.” Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996). Accord Ali, 166 N.J. at 288.

[Judicial estoppel] is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to “secure substantial equity.”

Ibid.

B. Test for Applying Judicial Estoppel Under the Third Circuit

The Third Circuit has identified the following criteria for determining when seemingly inconsistent litigation stances justify application of judicial estoppel:

- (1) The party to be stopped must have taken two positions that are irreconcilably inconsistent;
- (2) The party changed his or her position in bad faith –i.e., with intent to play fast and loose with the court.
- (3) The doctrine is tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant’s misconduct.

In re Kane, 628 F.3d 631, 638 (3d Cir. 2010) (citing Montrose Medical Group Participating Savings Plan v. Bulger, 243 F.3d 773 (3d Cir. 2001)).

In addition, citing equitable principles the Third Circuit requires the party to be estopped be given a meaningful opportunity to provide an explanation for the changed position. Kane, 328 F.3d at 638-369 (citing Krystal Cadillac-Olds GMC Truck, 337 F.3d 314, 319-320 (3d Cir. 2001)). The Third Circuit’s application of judicial estoppel does not require that a party must have benefitted from their prior position in order to be judicially estopped from subsequently asserting an inconsistent one. Ryan Operations, 81 F.3d at 361. The presence of a benefit received is merely a factor in determining whether the evidence would support a conclusion of bad faith. Krystal, 337 F.3d at 324.

In the bankruptcy context, the Third Circuit recognizes that “a rebuttable inference of bad faith arises when averments in the pleadings demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative

duty to disclose.” Krystal, 337 F.3d at 321. As one New Jersey District Court judge commented, “[A] person seeking to discharge his debts in bankruptcy [has] a motive to conceal potential assets.” Clark v. Strober-Haddonfield Group, Inc., 2008 U.S. Dist. Lexis 58865, *7 (D.N.J. July 29, 2008). Because non-disclosure of an asset or claim raises only a rebuttable presumption of bad faith, the Third Circuit has expressly left open the question of “whether such nondisclosure [in bankruptcy schedules], standing alone, can support a finding that a plaintiff has asserted inconsistent positions within the meaning of the judicial-estoppel doctrine.” Ryan Operations, 81 F.3d at 362 (citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988), cert. denied, 488 U.S. 967 (1988)).

C. New Jersey’s Test for Applying Judicial Estoppel

New Jersey courts need not adopt or follow the jurisprudence of federal courts regarding the doctrine of judicial estoppel. “Since the purpose of the doctrine of judicial estoppel is to protect the integrity of the tribunal before which a party seeks to contest facts which he has previously [and successfully] admitted, it is that tribunal which should determine whether or not to invoke this doctrine.” New Jersey v. Gonzalez, 273 N.J. Super. 239, 260 (App. Div. 1994), aff’d, 142 N.J. 618 (1995). However, the New Jersey Appellate Division referred to the Third Circuit’s judicial estoppel test in Montrose, in Marquez v. Drew, 2009 N.J. Super. Unpub. LEXIS 2606 (App. Div. January 26, 2010), certif. denied, 201 N.J. 157 (2010).

The New Jersey Supreme Court has instructed, a “totality of circumstances” approach must be used to determine whether to invoke judicial estoppel. Ali v. Rutgers, 166 N.J. 280 (1991). For judicial estoppel purposes, successful maintenance of a position requires only “that the party was allowed by the court to maintain its position,” and not that the “party prevailed in the underlying action.” Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996). Accord Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 620 (App. Div. 1990), aff’d, 124 N.J. 520 (1991). In other words, the party must have convinced the court to accept its position. Ali, 166 N.J. at 288 (2000)(internal citation omitted).

Similar to the Third Circuit’s test, New Jersey treats judicial estoppel as an extraordinary remedy to be applied only when a party’s inconsistent behavior will otherwise result in a miscarriage of justice. See State v. Jenkins, 178 N.J. 347 (2004)(quoting Kimball Int’l, 334 N.J. Super. at 608). Unlike its federal counterpart, New Jersey’s judicial estoppel test does not require a finding of bad faith. See Ruffin v. Kinder Morgan Liquids Terminal, LLC, 2009 N.J. Super. Unpub. LEXIS 251, *6 (App. Div. 2009), certif. denied, 198 N.J. 473 (2009) (quoting City of Atlantic City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68 (App. Div. 2006)(“[A] finding of ‘bad faith’ is not a requirement under New Jersey law.”).

D. Accurate Disclosure of Financial Information on Bankruptcy Petitions

“The Bankruptcy Code requires that a debtor file necessary declarations adequately, honestly, and in good faith. *See, e.g.*, 11 U.S.C. 521(a)(1)(defining a debtor’s filing duties); Fed. R. Bankr. P. 9011(b)(outlining requirements of proper purpose and evidentiary support in representations to bankruptcy court).” Kane, 628 F.3d at 635. In Ryan Operations, *supra*, the Third Circuit explained the importance of disclosing accurate financial information on a bankruptcy petition:

The Code imposes on debtors an affirmative duty of full disclosures. Section 521 requires the debtor to file with the court “a schedule of as assets and liabilities ... and a statement of the debtor’s financial affairs.” The schedule must disclose, *inter alia*, “contingent and unliquidated claims of every nature” and provides an estimated value for each one.

...

These disclosure requirements are crucial to the effective functioning of the federal bankruptcy system. Because creditors and the bankruptcy court rely heavily on the debtor’s disclosure statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated.

81 F.3d at 361. Thus, as indicated by the above passage, a bankruptcy “debtor’s disclosure obligation extends to ‘contingent assets’ such as causes of action pursued against another party, . . . because such disclosure ‘allows the trustee and the creditors to determine whether’ to pursue these assets ‘on the creditors’ behalf.” Kane, 628 F.3d. at 637.

Section 541 of the Bankruptcy Code, 11 U.S.C. § 541(a)(1), defines property of the bankruptcy estate as including, *inter alia*, “all legal or equitable interests of the debtor in property as of the commencement of the case. *Id.* As the Third Circuit has recognized, Section 541(a) “was intended to sweep broadly to include ‘all kinds of property, including tangible or intangible property, [and] causes of action.’” Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 241 (3d Cir. 2001)(internal citation omitted).

Indeed, in Chapter 7 bankruptcy cases which are considered a liquidation proceeding, “[C]ourts have held that where a debtor conceals an asset or fails to schedule it, the asset remains the property of the bankruptcy estate and, accordingly, the debtor can be found to lack standing to pursue its further disposition.” Kane, 628

F.3d at 640 (internal citations omitted); Hutchins v. I.R.S., 67 F.3d 40, 43 (3d Cir. 1995)(“[T]he failure to schedule the refund is fatal to [plaintiff’s] claim.”).

E. Judicial Estoppel Applied to Remedy Inconsistent Disclosures in Prior Bankruptcy Filings

It is undisputed that judicial estoppel may be invoked when a prior inconsistent position was taken in bankruptcy proceedings. Davidowski v. Davidowski, 2012 N.J. Super. Unpub. LEXIS 192, *5 (citing Oneida Motor Freight, 848 F.2d at 419). “The party invoking the doctrine need not have been a creditor or otherwise involved in the bankruptcy proceedings.” Davidowski, 2012 N.J. Super. Unpub. LEXIS 192, * 5 (citing Ryan Operations, 81 F.3d at 359-361). “In Oneida, the Third Circuit affirmed the dismissal of various contract claims by the Oneida Freight trucking company, against United Jersey Bank, due largely to the company’s failure to include the claims as assets in its prior Chapter 11 bankruptcy case.” Eric Hilmo, Bankruptcy Estoppel: The Case for a Uniform Doctrine of Judicial Estoppel as Applied Against Former Bankruptcy Debtors, 81 Fordham L. Rev. 1353, 1374 (2013)(citing Oneida, 848 F.3d at 418). “Though the decision actually rested on the doctrine of equitable estoppel, the court noted judicial estoppel as an alternative available theory.” Id.

More recently, in an unpublished decision issued by the United States District Court for the District of New Jersey, Lewis v. Eberle & Bci Servs., LLC, 2013 U.S. Dist. LEXIS 116807 (D.N.J. Aug. 19, 2013), judicial estoppel was applied to bar a plaintiff’s employment based discrimination lawsuit due to omitting the claim on her bankruptcy petition. In that case, the plaintiff’s employer terminated her employment well before the her bankruptcy case concluded; the case originally was filed as a Chapter 13 reorganization, but later was converted to Chapter 7 liquidation. Plaintiff filed her employment lawsuit while her bankruptcy case was still pending. She received a bankruptcy discharge in Chapter 7, and her bankruptcy trustee filed a no asset report.

The District Court observed that: (i) Lewis did not disclose the claim after converting her case to Chapter 7 and amending her bankruptcy petition to add additional creditors; (ii) Lewis failed to introduce any evidence to challenge the inference of bad faith; and (iii) she did not take any affirmative steps to amend her disclosure. The District Court rejected Lewis’ contention that omitting the employment lawsuit was inadvertent, pointing out that she previously listed a workers’ compensation claim on her bankruptcy petition which the District Court interpreted as suggesting her omission of discrimination claim was overt. Further, in her opposition to her former employer’s motion to dismiss her complaint Lewis represented her intention to rectify the omission by reopening her bankruptcy case. During oral argument at the motion hearing, Lewis said she would take affirmative steps to remedy the problem if and when the court renders a decision. “Such a posture cannot be tolerated as it sends a message that “a debtor should consider disclosing potential assets only if he is caught

concealing them." Lewis, 2013 U.S. Dist. LEXIS 116807, * 10 (citing Krystal, 337 F.3d at 325)(other internal citation omitted).

In a recent non-precedential opinion, the Third Circuit applied judicial estoppel in affirming the dismissal of complaint due to inaccurate disclosures made by individuals (husband and wife) in their bankruptcy petition, in J.H. Group, LLC v. Royal Rolling Chairs, LLC, 2013 U.S. App. LEXIS 9898 (3d Cir. N.J. May 17, 2013). See also Coles v. Carlini, 2013 U.S. Dist. LEXIS 101873 (D.N.J. July 22, 2013)(District Court applied judicial estoppel to dismiss the civil rights claims of 2 plaintiffs who failed to disclose the claims in their separately filed bankruptcy petitions, rejecting their explanation of omitting the claims because they believed them to be of little or no value).

In J.H. Group, John and Stephanie Taimanglo were the sole stockholders and principals in an entity known as Ocean Rolling Chairs d/b/a J.H. Group, L.L.C. ("Ocean Rolling Chairs"), which leased rolling chair equipment to independent contractors for use on the Atlantic City boardwalk. The Taimanglos and J.H. Group filed suit in the District Court claiming that the City of Atlantic City, a competitor and others had conspired to destroy their business through unnecessary inspections and other unfair tactics.

Five months after commencing the District Court action, the Taimanglos filed a joint bankruptcy petition that contained the following representations: (i) they had no income from the operation of business; (ii) their income was wage income; (iii) they did not own more than five percent of the voting or equity securities of a business; (iv) they were not self-employed full or part-time; (v) they did not own any stock and interest in incorporated and unincorporated businesses or interest in partnerships or joint ventures; (vi) they had no contingent and unliquidated claims; and (vii) they owned no office equipment, furnishings, or supplies used in business.

The defendants moved to dismiss the District Court complaint on grounds of judicial estoppels, pointing to the inconsistent statements made by the Taimanglos in their bankruptcy petition after the filing of the District Court action. The trial court granted the motion, finding that "the Taimanglos had taken inconsistent positions by failing to disclose their business and the present lawsuit in their bankruptcy petition while at the same time bringing the suit based on their ownership in Ocean Rolling Chairs." Id., *3. The District Court opined that "the nature and frequency of the inconsistencies established bad faith, noting that the financial problems in the rolling chair business were the impetus to [the Taimanglos] filing for bankruptcy. Id., *3-4. Even though the Taimanglos bankruptcy case was ultimately dismissed, the District Court said dismissal of the federal action "was appropriate because a lesser sanction would send a message that a debtor should disclose assets only if he is caught hiding them." Id., *4.

The Taimanglos, but not Ocean Rolling Chairs, appealed the dismissal to the Third Circuit. Their sole argument on appeal was to blame their bankruptcy lawyer for their inadequate disclosures, claiming they had provided the lawyer with all relevant financial information and pending lawsuits but that the lawyer neglected to include this information in their bankruptcy petition. The District Court rejected this argument, declaring that giving documents to their attorney did not relieve the Taimanglos of their obligation for candor to the bankruptcy court. The Third Circuit agreed. Citing decisions from other courts of appeals where counsel error was rejected as a defense to applying judicial estoppel, the Third Circuit noted that the Taimanglos had knowledge of their claim when they filed for bankruptcy and had a motive to shield their assets. *Id.*, * 5-6.

F. Unpublished Decisions of New Jersey Appellate Division Applying Judicial Estoppel in Post-Bankruptcy Litigation

In 2008, the New Jersey Appellate Division was confronted with applying judicial estoppel in post-bankruptcy litigation, in Buttermark v. A.J.D. Construction Co., Inc., 2008 N.J. Super. Unpub. LEXIS 2246 (App. Div. July 21, 2008), certif. denied, 196 N.J. 600 (2008). There, the plaintiff Buttermark had failed to list a pending workers' compensation claim in his Chapter 13 bankruptcy petition filed approximately 9 months after the accident. At the initial hearing conducted by the Chapter 13 bankruptcy trustee Buttermark testified that he was seeking legal advice for work injuries resulting from falling down a set of stairs. Despite this disclosure, Buttermark did not amend his bankruptcy petition to include the workers' compensation claim and proceeded forward with a Chapter 13 plan providing for payments to his creditors. The Chapter 13 bankruptcy remained "open" due to the ongoing payment plan.

Slightly more than 1 year into his bankruptcy case, and about 2 years after the accident, Buttermark filed a complaint in the Superior Court of New Jersey seeking compensation for his injuries. During the course of his deposition Buttermark disclosed his pending bankruptcy status. Several months after Buttermark rejected a non-binding arbitration award of \$225,000 the defendants filed summary judgment motions premised on judicial estoppel. The motion record reflects that within 2 weeks of the summary judgment motions being filed Buttermark's bankruptcy lawyer amended the bankruptcy petition to include the claim as an asset.

In opposing summary judgment, Buttermark argued that he did not hide the possibility of pursuing a lawsuit from his bankruptcy attorney or the Chapter 13 bankruptcy trustee and disclaimed accountability for not amending his bankruptcy petition at an earlier stage. The trial judge rejected Buttermark's explanation, and granted summary judgment dismissing Buttermark's complaint on the grounds of judicial estoppel. The trial judge concluded that "a rebuttable inference of bad faith arises when the pleadings demonstrate both knowledge of a claim and a motive to

conceal the claim in the face of an affirmative duty to disclose.” Buttermark, 2008 N.J. Super. Unpub. LEXIS 2246, * 3.

On appeal, the Appellate Division in Buttermark reversed the summary judgment award finding that a material factual issue existed as to whether Buttermark’s non-disclosure of his injury claim in the earlier filed bankruptcy case was inadvertent. Specifically, the appeals panel took issue with the trial judge’s failure to explain why he did not consider Buttermark’s testimony at the initial hearing held before the bankruptcy trustee to be a fulfillment of his affirmative duty to disclose the injury claim. “The doctrine should not bar him from pursuing his personal injury claims as the failure of bankruptcy counsel and the trustee to amend the petition, was not due to any omission on his part.” Id.

Application of judicial estoppel in the post-bankruptcy litigation arena was also before the Appellate Division in Ruffin, supra, 2009 N.J. Super. Unpub. LEXIS 251 (App. Div. 2009). Ruffin was a truck driver whose employment required him to transport loads of liquid chemicals from a terminal facility in Carteret. On December 12, 2012 Ruffin sustained serious personal injuries resulting from an accident that occurred at the defendant’s facility during his employment, which necessitated an 11-day hospital stay.

About 18 months after the accident, on July 16, 2004, Ruffin filed a Chapter 7 bankruptcy petition in New Jersey but did not disclose the negligence claim against defendant. The appellate record reflects that at the time Ruffin sought bankruptcy protection he had spoken to a personal injury lawyer about filing suit against defendant. The bankruptcy court set November 29, 2004 as the deadline for creditors to object to Ruffin’s bankruptcy discharge. Apparently, no one objected to Ruffin’s bankruptcy discharge and the case was closed on January 13, 2005.

After Ruffin received his bankruptcy discharge but approximately 1 month before his bankruptcy case was closed, on December 9, 2004, which was a day before expiration of the 2-year statute of limitations period, Ruffin filed his personal injury/negligence lawsuit against the defendant. A trial in the personal injury action commenced on December 13, 2007. During cross-examination, the defendants’ counsel grilled Ruffin about his failure to disclose the injury lawsuit on Schedule B of his bankruptcy petition. Following cross-examination and a brief recess, defendant filed a motion to dismiss Ruffin’s action citing judicial estoppel – that the failure to disclose the negligence claim as an asset on his bankruptcy petition was irreconcilably inconsistent with his pursuit of the Law Division action, and thus the personal injury case required dismissal.

The trial judge granted the defense’s motion to dismiss with prejudice. Remarking about the in excess of \$100,000 in creditor claims that Ruffin “washed away by his false perjurous and misleading filing of the voluntary [petition],” the trial judge

rejected Ruffin's contention that he didn't understand what he was signing or that his bankruptcy counsel didn't explain it to him. "[Plaintiff is] essentially trying to . . . get two bites at the apple. One is . . . the creditors, and the second one is . . . the case now against [defendant]." Ruffin, 2009 N.J. Super. Unpub. LEXIS 251, *6.

The appeals court rejected Ruffin's assertion that he did not act in bad faith, holding that "bad faith" is not a requirement under New Jersey law. Id. (citing Atlantic City, supra, 23 N.J. Tax at 67-69. Instead of affirming the dismissal on judicial estoppel grounds, the Appellate Division vacated the order of dismissal and remanded the matter to the trial court so that Ruffin's Chapter 7 bankruptcy trustee would have the opportunity to determine whether to pursue the litigation. The Appellate Division agreed with Ruffin's argument that the trial judge should have narrowly tailored application of judicial estoppel to address the specific harm. Pointing to the possibility of reopening Ruffin's bankruptcy case to allow the trustee a chance to examine Ruffin and determine whether a recovery could be obtained for the benefit of Ruffin's creditors, the Appellate Division was unwilling to affirm the outright dismissal of Ruffin's claim. Though the Appellate Division cautioned that its "determination should not be construed to reward plaintiff for his omission." Ruffin, 2009 N.J. Super. Unpub. LEXIS 251, * 17.

The next Appellate Division decision to address judicial estoppel in post-bankruptcy litigation was Marquez v. Drew, 2009 N.J. Super. Unpub. LEXIS 2606 (App. Div. January 26, 2010), certif. denied, 201 N.J. 157 (2010). In this case plaintiffs filed a civil rights suit against police officers after filing for bankruptcy, but failed to disclose the contingent civil rights claim in their bankruptcy petition. Under the specific facts presented, the appellate panel in Marquez declined to bar the civil rights suit under judicial estoppel. The court emphasized that plaintiffs did not conceal the bankruptcy from the defendants, but rather disclosed their bankruptcy filing when responding to form interrogatories inquiring about their economic losses. In addition, the plaintiffs filed an application with the bankruptcy court to employ their state court counsel as their special counsel in the bankruptcy case. The plaintiffs argued that their filing a special counsel application in the bankruptcy court protected the creditors' rights to obtain an eventual share of the lawsuit proceeds. Likewise, the bankruptcy trustee appointed in the plaintiffs' bankruptcy case submitted a letter confirming that he was on notice of the potential asset and would prevent the debtors from obtaining a discharge without first satisfying him about the outcome of the civil rights lawsuit.

In addition, there was no evidence that the plaintiffs in Marquez benefitted or sought to benefit from the fact that their creditors did not initially know about the civil rights suit. Also, the police defendants had no significant connection to the bankruptcy case. Concluding that dismissal on judicial estoppel grounds constituted a miscarriage of justice and a mistaken exercise of the trial court's discretion, the Appellate Division vacated the dismissal.

In another unpublished New Jersey Appellate Division decision issued just a few months after Marquez, an appeals panel in Barzda v. Clemente, 2010 N.J. Super. Unpub. LEXIS 426 (App. Div. March 3, 2010) affirmed the dismissal of a plaintiff's post-bankruptcy complaint on judicial estoppel grounds. In this case, plaintiff transferred a his real estate to a third party during the midst of a divorce proceeding with his estranged spouse, fearing she would assert a claim against the property. The deed transferring the property to defendant reflected payment of a dollar as the purchase price. During oral argument, Barzda conceded having been romantically involved with defendant, claimed they had an agreement allowing him to remain as an undisclosed partner and joint owner of the property, and that he made substantial improvements and purchased numerous items of personalty for the property.

Less than a year after transferring his real estate Barzda filed a Chapter 7 bankruptcy petition, but failed to disclose his alleged real estate interest in the petition despite signing a declaration under penalty of perjury, that the schedules of assets listed therein were true and correct. Barzda obtained a bankruptcy discharge on May 21, 2011, without the bankruptcy court being aware of this potential asset. Nevertheless, Barzda claimed that he disclosed his real estate interest to both his bankruptcy lawyer and the trustee.

In 2002 Barzda and defendant ended their romantic relationship, prompting defendant to demand he vacate the property. Four years later, in 2006, Barzda filed a complaint against defendant alleging breach of fiduciary duty, fraud, and conversion for her failure to transfer his share of the proceeds from their real estate joint venture. Defendant filed a motion to dismiss the complaint in lieu of filing an answer.

On the return date of the motion to dismiss, and immediately before oral argument was to begin, Barzda attempted to amend his complaint and introduce a document purporting to be the unauthenticated minutes of the creditors' meeting conducted by the bankruptcy trustee. Barzda represented that he had just received the minutes the day before and proffered that these minutes proved he had disclosed his real estate interest in the real estate to the bankruptcy trustee. The motion judge refused to admit the unauthenticated document as evidence in opposition to the summary judgment motion. Treating the motion as one for summary judgment, the trial judge dismissed the complaint by concluding that the doctrine of judicial estoppel barred Barzda's claim based on his affirmative statements given under oath in his bankruptcy petition. The trial judge believed that the Barzda entered into an unenforceable contract with the defendant, and purposely withheld the transfer from the family court and the bankruptcy court.

In affirming the trial court's decision, the Appellate Division equated Barzda's conduct as "almost a textbook example of facts calling for the applicability of judicial

estoppel.” Barzda, 2010 N.J. Super. Unpub. LEXIS 426, *6. “By his own words, plaintiff attempted to conceal his alleged interest in this real property to mislead his former spouse and frustrate any attempt on her part to seek legal recognition of a potential equitable interest in the property.” Id. “In furtherance of this scheme, plaintiff deliberately failed to disclose his alleged interest in the petition he filed under oath before the federal bankruptcy court in order to induce that tribunal to give him relief from the legitimate claims of his creditors.” Id. The appeals panel found that Barzda’s assertions in the Law Division were materially irreconcilable with the position he successfully adopted in the bankruptcy court, and that it would constitute a gross miscarriage of justice if Barzda was permitted to prosecute the state law claims any further. Id.

In Romano v. Romano, 2012 N.J. Super. Unpub. LEXIS 73 (App. Div. January 12, 2012), the Appellate Division upheld the application of judicial estoppel in a post-bankruptcy matrimonial proceeding. In that case, John Romano (“John”) filed a Chapter 13 bankruptcy petition in which he certified that the estimated value of his assets was no more than \$50,000, and that he did not own any interest in real property by answering “none” on Schedule A of the bankruptcy petition requiring disclosure of such interest. The bankruptcy court approved John’s Chapter 13 payment plan.

Prior to filing his Chapter 13 bankruptcy case, John filed a complaint for divorce against his spouse Dana Romano (“Dana”) in the Superior Court of New Jersey. Following confirmation of his Chapter 13 plan with the bankruptcy court, John filed a Case Information Statement (“CIS”) in the divorce proceeding claiming an interest in the parties’ marital residence – listing the property as a joint asset with a value of \$494,000 subject to an approximate \$110,250 mortgage. In his CIS, John listed substantially less income than what he previously reported and certified in his bankruptcy petition.

The parties proceeded to a contested divorce trial. John sought to recover one-half of the \$383,000 equity in the marital residence, including the down payment, thus bringing the total value of his claim to approximately \$190,000. John alleged that his bankruptcy lawyer advised him to deny any ownership interest in the marital home. In electing to apply judicial estoppel to bar John’s claims against the property, the matrimonial judge “took issue with John’s inconsistent sworn statements and the conflict between the sworn financial representations on his bankruptcy petition and his divorce filings.” Id., * 2.

Striking similar to the Appellate Division’s previous “textbook” declaration issued in Barzda, supra, the appellate panel in Romano likewise viewed John’s conduct as “almost a textbook example of facts calling for the application of judicial estoppel.” Id. *3. “By his own admission, John advanced inconsistent positions regarding his interest in the marital home. John failed to disclose his alleged interest in the home in the

petition he filed under oath before the federal bankruptcy court.” Id. “In addition, John filed an amendment to his bankruptcy petition ..., but did not alter this critical detail. A bankruptcy plan was subsequently approved based on John’s financial representations.” Id.

The appeals panel rejected John’s attempt to throw his bankruptcy lawyer under the bus, declaring that the advice did not absolve him of responsibility for his certification. Critically, John did not call his bankruptcy lawyer to testify as a witness in the divorce trial. The appeals panel thus viewed John’s position as an unsubstantiated excuse. Id.

Just a few weeks after deciding Romano, the Appellate Division issued another unpublished decision involving application of judicial estoppel in the circumstance of post-bankruptcy litigation, in Davidowski, supra, 2012 N.J. Super. Unpub. LEXIS 192. In this case, the Burlington County Chancery Court applied the doctrine to bar the claims brought by a mother against her son and his friend for allegedly defrauding her out of approximately \$125,000 by means of a sham private mortgage and note that she executed shortly before her husband died.

The plaintiff Louise Davidowski (“Louise”) filed a bankruptcy petition shortly after selling her home in 2005. In her bankruptcy petition she did not disclose any interest in real estate, or any claims against third parties who owed her any money. She signed her bankruptcy petition under penalty of perjury attesting to the accuracy of the schedules included with the petition. At her initial creditors’ meeting, she stated that she had no interest in real estate and made no reference to the potential claim (which she would ultimately file several years later). Based on her affirmative representations Louise received a bankruptcy discharge.

According to the appellate record, prior to the bankruptcy filing the defendants, including Alan Davidowski (“Alan”) who was Louise’s son, and a realtor allegedly perpetrated a fraud by either forging Louise’s signatures on a \$125,000 note and mortgage or deceptively induced her to sign these documents. When Louise sold her property in 2005 following her husband’s death, the realtor, identified as the mortgagee, received payment of \$125,000 thereby depriving Louise of the equity in her home. In addition, Louise claimed that the realtor had subsequently transferred \$80,000 of these proceeds to Alan to fund his purchase of another property. Louise also moved into Alan’s new home, claimed she paid for substantial improvements, and that Alan had promised to make her a beneficial co-owner of the home he purchased using proceeds from the sale of Louise’s home following her husband’s death.

In 2009, approximately 4 years after the filing of her bankruptcy petition, Louise filed an action in Chancery Court predicated on the alleged fraud perpetrated by Alan

and his realtor friend. In her Chancery Division complaint, Louise claimed an equitable co-ownership interest in Alan's property based on alleged oral promises made by Alan that the home would belong to both of them because Alan had used a substantial portion of the sale proceeds from Louise's former home to fund the purchase of his new home. Not only were these allegations clearly inconsistent with her declarations in the bankruptcy proceedings, but they also contradicted the representations made in her federal income tax returns where she claimed to be "renting" the residence titled in Alan's name, not that she owned it. Id.,*5.

In reversing the trial court's application of judicial estoppel to dismiss Louise's Chancery Division complaint, the Appellate Division noted the existence of a key factual dispute; namely, Louise's knowledge of the relevant facts at the time her bankruptcy petition was filed. Louise asserted that the bankruptcy petition was prepared upon Alan's advice and with his assistance, and claimed she was unaware that her beneficial interest in Alan's property should be listed on her bankruptcy petition, or that she had a viable claim at that time against the realtor. The Appellate Division also concluded that there was no prejudice to the defendants from Louise's factual assertions before the bankruptcy court. In addition, the appeals court remarked, "[W]here the doctrine of judicial estoppel may benefit those who engaged in a fraud related to the same inconsistent assertions, 'no compelling circumstance or injustice' warrant the court's 'invoking the doctrine.'" Id., *6 (quoting Ali, supra, 166 N.J. at 288-289).

Underlying the Appellate Division's decision to reject the application of judicial estoppel in Davidowski was the panel's concern about the legitimacy of Louise's bankruptcy filing and the role that Alan may have played in protecting her assets for his own benefit, thus possibly contributing to the material omissions of Louise's claims against him on her bankruptcy petition and schedules.

If the mortgage was fraudulent, so may have been the bankruptcy filing. The bankruptcy may have been part of an overall scheme, devised or assisted by Alan, to avoid the claims of his mother's creditors and to preserve his own prospective interest in her assets. The evidence presented in Louise's case in chief showed Alan's active participation in disposing of Louise's interest in the Florence township property and in her filing for bankruptcy. The trial court never considered what Alan's role may have been in presenting allegedly false information for Louise's bankruptcy filing.

Id. *7. On remand, the Appellate Division instructed the trial court to determine whether Louise's bankruptcy trustee could claim any interest in the outcome of the litigation. Id.

G. Conclusion

At the federal court level, there is more uniformity and precedential Third Circuit decisions to guide the federal court practitioner in New Jersey on the application of judicial estoppel in the context of post-bankruptcy litigation.

However, absent the New Jersey Supreme Court issuing a definitive ruling in the application of judicial estoppel in the context of post-bankruptcy litigation, there is less certainty for New Jersey state court practitioners and their clients looking to dismiss claims under this doctrine. Instead, New Jersey practitioners and litigants fighting their battles in state court are left to grapple with the lack of uniformity in how New Jersey courts have applied the doctrine in this particular instance, as evidenced by the varying results of the unpublished Appellate Division decisions mentioned in this article. While some appellate panels dismissed the case outright, other panels demonstrated a more cautious approach by declining dismissal in favor of affording the bankruptcy trustee an opportunity to pursue the claim on behalf of the entire creditor body; no such consideration is shown at the District Court and Third Circuit levels.

There is no *per se* rule under either federal common law or New Jersey common law that strictly applies judicial estoppel to every situation where a debtor omits disclosing an asset, claim or cause of action on his or her bankruptcy petition. Both the Third Circuit and New Jersey apply the doctrine with discretion based on the specific facts of each case, including whether the omission was intentional or inadvertent, and factor whether the party's inconsistent behavior will result in a miscarriage of justice. Whereas the Third Circuit recognizes a presumption of bad faith arising from such an omission, New Jersey does not require a finding a bad faith to apply judicial estoppel. While New Jersey considers whether the adverse party has been prejudiced by the inconsistent behavior, the Third Circuit does not.