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No Fault Judicial Estoppel

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The Eleventh Circuit in *Robinson v. Tyson Foods, Inc.*,[1] has added new dimensions to the old aphorism, "No good deed goes unpunished."

Any bankruptcy practitioner of more than recent vintage has known the particular mix of mortification and dread brought on by clients who fail to disclose an interest in property until the most inopportune moment. Whether these sins are mortal or venial, usually the well-meaning and inadvertent nondisclosures are separated from their more deceptive kindred, and treated appropriately. However, in *Robinson* the Eleventh Circuit has run so far down its narrow path of judicial estoppel that it cannot see the hole in the middle of its doctrine, nor did it appreciate facts in the case that could have allowed injustice to be avoided. This is the inevitable result of a limited and problematic judicial estoppel test, and this case displays a lack of appreciation for the realities of bankruptcy practice. In effect, the Eleventh Circuit has invented no-fault estoppel.

Facts

The facts of *Robinson* are pedestrian. After voluntarily dismissing a prior Chapter 13 case,

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Brenda Robinson filed a new Chapter 13 case in April of 2002. Her plan was confirmed in May 2002, and provided for 100% payment of all creditors over 60 months. During administration of the plan, in September 2005, Robinson resigned from Tyson Foods, Inc. amid allegations of racial harassment. In October 2006, she brought suit against Tyson alleging constructive termination due to racial mistreatment and seeking compensatory and punitive damages. The Eleventh Circuit does not reveal whether the racial discrimination that lead to her resignation occurred before or after the bankruptcy filing, or whether she was aware of her claim upon filing the bankruptcy petition. Tyson never contended that Robinson was aware of the potential discrimination case when she filed her bankruptcy or when she obtained confirmation of her plan.

Robinson completed her plan payments in July 2007, repaying all debts in full as required under the confirmed plan, and she obtained a discharge. The only hiccup had been a brief delinquency in payments that she resolved by bringing the plan current without abating or otherwise amending the confirmed plan. Robinson did not schedule an unrelated worker's compensation claim she had filed on behalf of her deceased husband that was pending at the filling of her bankruptcy in 2002. Tyson moved to dismiss Robinson's discrimination suit based upon judicial estoppel, due to the fact that she did not disclose the claim as an asset in her Chapter 13 case.

Judicial Estoppel

The doctrine of judicial estoppel provides that a party cannot assume a position in one legal proceeding, and after success before the court, change that position in a different proceeding just because that party's interests have changed. In a bankruptcy context this issue most often arises when a debtor fails to schedule a lawsuit or cause of action yet obtains a discharge or plan confirmation—retaining the financial rewards of the suit for themselves.

The standards for judicial estoppel are well established as the three-factor test stated by the Supreme Court in *New Hampshire v. Maine*.[2] First, a party's later position must be "clearly inconsistent" with its earlier position.[3] Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled."[4] 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.[5] The third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[6] The Supreme Court has emphasized, and most courts addressing the issue take great pains to recognize, that these standards are not to be considered inflexible prerequisites or an exhaustive formula for determining judicial estoppel.[7] The court must carefully consider all the facts in the matter, as additional considerations may aid in the application of judicial estoppel.

The Eleventh Circuit has formulated a different standard for judicial estoppel, adopting a two-factor test. First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding.[8] Second, such inconsistencies

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must be shown to have been calculated to make a mockery of the judicial system.[9] In *Burnes,* the Eleventh Circuit acknowledged the three factors stated in *New Hampshire* and concluded that its two-part test was still valid because the Supreme Court emphasized the flexibility of its three-part approach and the panel in *Burnes* found that the factors outlined in *New Hampshire* were fully addressed by the Eleventh Circuit test.

Applying the *Burnes* two-part test rather than the three factors outlined in *New Hampshire*, the *Robinson* court determined that inconsistent positions were maintained by Robinson under oath when she did not, under her continuing duty to disclose assets, note the existence of her discrimination claim in the bankruptcy.

The "mockery" prong was reduced to a question of Robinson's intent. The Eleventh Circuit characterized the intent inquiry in this context as whether the failure to disclose was inadvertent, which can only be found if the debtor either lacks knowledge of the undisclosed claims or has no motive to conceal her lawsuit. The court concluded that since Robinson clearly knew of the existence of her claim, the question turned on her motive. Unfortunately, this determination was not based upon any testimony or evidence of intent by Ms. Robinson. Instead, her intent was simply implied from her failure to amend her schedules to add the discrimination claim.

The court rejected the argument that Robinson's full-payment plan obviated any implied intent to conceal. Instead the court hypothesized that, at the time she brought suit, the debtor could have defaulted in payments or could have dismissed her case and obtained the benefit without paying her creditors. Oddly stated, the court held that "the motive to conceal stems from the possibility of defrauding the courts and not from any actual fraudulent result."[10]

The lack of any evidence directly from the debtor, or consideration of other relevant factors—such as her payment history—left the *Robinson* court to speculate about a possible motive, without addressing what the debtor actually thought at the time. Instead, the court focused on her prior failed Chapter 13 filing and her recent default in payments. Bankruptcy practitioners know that failed cases and defaults are elements that can be found, in various forms, in almost all Chapter 13 cases. The Eleventh Circuit does not reveal in *Robinson* why these are markers of intent to conceal. Ms. Robinson was found to have punishable motive merely because she poorly managed her money, then cured the default. Sadly, it seems that the Eleventh Circuit believes that almost all Chapter 13 debtors are potentially making a mockery of the bankruptcy court.

The full payment plan would likely cause a regular bankruptcy practitioner immediate pause, as it would be considered a factor of central significance. In many jurisdictions a plan which pays all creditors in full is relatively rare, but the implications are well understood.

It is elementary that the Chapter 13 trustee is not a liquidating trustee. The "best interests of creditors" test makes the nature of a Chapter 13 debtor's assets less important than the liquidation value of those assets. The liquidation value of a significant asset may be quite high, but irrelevant to confirmation if the plan proposes full payment of all creditors or payments to unsecured creditors in excess of the nonexempt value of all assets. Since creditors under a full-payment plan will receive their statutory entitlements in cash from future income of the debtor, an actual sale and realization of value from assets is unnecessary and irrelevant. In essence, the value of prepetition and postpetition assets has no impact on confirmation in a full-payment plan.

In addition, measured at the time of confirmation, a debtor proposing a full-payment plan would lack even speculative bad faith motive to conceal assets because the bankruptcy court would have no cause to consider the value of assets in confirming the plan. Thus, when the issue of motive or intent to conceal is considered under the *Burnes* test, the full-payment plan on its face is disconnected from intent to conceal as it avails the debtor nothing.

The *Robinson* court does not delve into these practicalities; instead, motive to conceal is found based upon the possibility of defrauding the court.[11] While it certainly may be possible to find evidence of actual intent to conceal even in a full payment case, the *Robinson* case is not an exer-

cise in determining actual intent. The Eleventh Circuit distills intent to mislead the court from the debtor's actions in the case. Ironically, the full-payment plan should have been dispositive evidence of a lack of intent, due to the lack of any advantage in the concealment.

Robinson reveals a substantial failing of the *Burnes* test. While the Eleventh Circuit gives assurances that the standards of *New Hampshire* are included within the boundaries of *Burnes*, the *Robinson* case highlights that it fails to account for a substantial factor—the adoption by the court of a prior, inconsistent position. The second prong of the *New Hampshire* test requires that the offending party have success in pushing the inconsistent position, or that the court actually adopted the inconsistent position in a ruling. Since the doctrine of judicial estoppel exists to protect the courts, and not individual litigants, this is a key question in its application. Inconsistent positions that have no bearing upon a court ruling are not subject to the doctrine. If a court has not been actually misled by adopting the inconsistent position in its ruling, the harm to be avoided by the doctrine does not exist.

If the value of the asset, and its very existence, are rendered moot by the confirmation of a full payment plan, how can it be argued that the bankruptcy court has been mislead, or has adopted the fact that the asset did not exist? Consider for a moment if Ms. Robinson had somehow been able to go back in time and alter her schedules to disclose the then-unknown claim. Would the bankruptcy court have refused to confirm her full payment plan due to the existence of the claim? The obvious answer is that the plan would have been confirmed and creditors could demand no more than full payment. Since the *Robinson* court never discussed the implications of the *New Hampshire* test, the import of the full-payment plan was never explored. *Robinson* reveals that the *New Hampshire* factors are not contained within the *Burnes* analysis.

The importance of the provision requiring court adoption of the inconsistent position is demonstrated in *Cargo v. Kansas City Southern Railway Co.*,[12] where the court dealt with a number of discrimination claimants in various stages of Chapter 13 bankruptcy. In each case, the court noted that confirmation of the plan was where the bankruptcy court had accepted the inconsistent position of the debtors, and that if the debtors knew of the claim and did not disclose it prior to confirmation, judicial estoppel was appropriate.[13] For debtor/plaintiffs that failed to disclose a known lawsuit just prior to confirmation, the court had adopted their inconsistent position and judicial estoppel was properly invoked. If the debtor had no knowledge of the claim prior to confirmation, it could not be said that the court had adopted their position and the doctrine was not applicable.

In *Robinson,* there is no analysis of confirmation or any detail about when the bankruptcy court actually adopted Ms. Robinson's inconsistent position. It cannot be argued that the position was adopted upon discharge because the finding of bad motive by the Eleventh Circuit depended entirely upon speculation of Robinson's intent at the time of the nondisclosure, when the court had not taken any action apart from plan confirmation.

Another case that puts the proper emphasis on the adoption factor is the Eighth Circuit decision in *Stallings v. Hussmann Corp.*[14] In *Stallings*, the debtor had just been dismissed from a confirmed Chapter 13 case when he filed a Family Medical Leave Act claim against his employer for actions that occurred during the pendency of the bankruptcy. The Eighth Circuit correctly noted that judicial estoppel may bar a cause of action not raised in a reorganization plan or the schedules, and the failure to list such a claim is tantamount to a representation that no such claim existed.[15] The court then noted that the *New Hampshire* factors require that the bankruptcy court must have adopted the debtor's position.[16] The court illustrated by giving the example of a failure to disclose in a Chapter 7 case that results in a no-asset discharge as an acceptance of the representation that no claim existed.[17] In that example, the debtor obtained judicial relief on the representation that no claims existed, and the debtor is prohibited from resurrecting such claims and obtaining relief on the opposite basis.[18]

The *Stallings* court found that the debtor's positions were clearly inconsistent, but held that

there was no judicial acceptance of Stallings' inconsistent position, because it never discharged Stallings' debts based upon the schedules—the case was dismissed without a discharge.[19] Thus, while there may be a duty to disclose an asset postconfirmation, this does not answer the question whether there was an adoption of the position that the undisclosed asset does not exist. Absent a grant of a discharge, plan confirmation or other judicial action, no adoption exists.

An example of judicial adoption in a full payment plan is found in *Young v. Time Warner Cable Capital, L.P.*[20] The only factual difference between *Young* and *Robinson* was that Young's employment discrimination claim arose before the filing of his Chapter 13 bankruptcy. While the debtor in *Robinson* could claim ignorance of her rights at the time of filing and confirmation, the debtor in *Young* could not. This difference did not alter the result due to the full payment plan. The debtor's confirmed plan provided for all his claims to be paid in full, as the debtor asserted the sole reason for the bankruptcy was to avoid a home foreclosure.[21] The court noted the *New Hampshire* factors and determined that the case centered on the court adoption standard.[22] Time Warner argued that adoption did not require a formal judgment, only that the court adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.[23] The court agreed that plan confirmation would be an adoption of a position, but recognized the clear difference in other cases in which the plans paid unsecured creditors only a percentage of their claims.[24] The court stated:

> By contrast, in the present case, the Bankruptcy Court likely did not rely to any measurable extent on plaintiff's omission of this lawsuit as an asset, given that the Chapter 13 plan it confirmed required plaintiff to repay 100 percent of all specified debts.... Because this court is not convinced that the Bankruptcy Court relied on plaintiff's omission when it confirmed his Chapter 13 plan, the adoption factor is not satisfied.[25]

The court determined that since no creditor can obtain more than 100% of their claims, the bankruptcy court could not have relied upon the nondisclosure in confirming the plan. This powerful logic should have rejected the outcome in *Robinson*.

Among the troubling aspects of *Robinson*, its rejection of the full payment plan as dispositive is the most difficult to understand and explain. Application of judicial estoppel fundamentally requires a motive to conceal or an unfair advantage. In *Robinson*, any concealment availed her nothing as far as the bankruptcy court was concerned, as she paid her creditors in full. Nor did it give her some unfair advantage in her discrimination lawsuit. In actuality, the unfair advantage was enjoyed entirely by Tyson Foods, as it gained the dismissal of a possibly meritorious suit, without being able to point to harm to itself, or harm to any creditor of Robinson. *Robinson* allows estoppel without fault on the part of the party estopped or harm to the party asserting estoppel—a form of no-fault estoppel inconsistent with the entire concept.

Curiously, the *Robinson* court does not discuss the power of some creditors to seek postconfirmation modification of the plan in a Chapter 13 case. Under 11 U.S.C.A. § 1329(a)(1) allowed unsecured creditors and the trustee can amend the Chapter 13 plan postconfirmation. This raises the only possible detriment to creditors in *Robinson*—loss of the opportunity to seek to amend the plan to demand postpetition interest on their claims.

While this theoretical possibility existed and was prevented by the nondisclosure, it was not cited by the Eleventh Circuit and the argument runs squarely into several legal and practical hurdles. First, it does not aid in the application of judicial estoppel as it still fails to satisfy the adoption prong of the *New Hampshire* test. Since the asset did not exist at the time of confirmation, it cannot be said that the court ever adopted the position of the debtor. Second, since there is no actual intent to mislead or defraud the court, the central harm of the judicial estoppel doctrine still does not exist. It would be a profound stretch to find that Ms. Robinson knowingly hid her lawsuit to avoid paying postpetition interest to her creditors. While it is tempting to get lost in speculative possibilities, this is the error of *Robinson*, as the court loses sight of the questions of adoption and harm to the court.

In *Robinson*, Circuit Judge Anderson expresses concerns about the "mockery" prong in a concurrence.[26] After noting that judicial estoppel cases require intentional contradictions, not simple error or inadvertence, Judge Anderson repeated the Supreme Court's warning to give due consideration to all the circumstances of a particular case. Judge Anderson worried that *Burnes* created an inflexible formula that prevents examination of all the circumstances of the case. Judge Anderson considered that the full payment plan raised a reasonable inference that there would be a material fact to consider in favor of Robinson upon summary judgment. However, since Judge Anderson believed that *Burnes* dictated a different result, a ruling against Ms. Robinson was necessary.

While Judge Anderson's diplomatic concurrence is understandable, laying the blame on *Burnes* dodges the issue that the *Robinson* court did not fully examine the circumstances of the case. *Burnes* dealt with a debtor who knew of a discrimination claim prior to filing a Chapter 7 case and obtaining a discharge. In that circumstance there was little need for a detailed factual examination of the debtor's intent. However, even the *Burnes* court had one eye on the factual circumstances, as it refused to dismiss the debtor's claims for injunctive relief that did not involve monetary claims.

The *Robinson* court uses *Burnes* as an excuse for its failure to fully examine the circumstances of the case, when *Burnes* itself easily identified important facts that lead to a claim surviving, in part. In a case like *Robinson* where motive is at issue, a determination of actual intent is required. The test does not ask for possible motives. The objective facts were that Ms. Robinson had faithfully paid on her confirmed plan for several years prior to filing her discrimination case. After she did file the discrimination case, she had a default in payments—a circumstance that could have allowed her to fulfill the Circuit's speculation by allowing her bankruptcy case to be dismissed. Yet, inexplicably—in light of her imputed desire to make a mockery of the court—she brought the plan current and completed her promised 100% payments. Why the *Robinson* court preferred its imputations to an exploration of actual intent is baffling.

Judge Anderson's concerns about precedent are well-founded, as apart from loss of the adoption prong, the Eleventh Circuit approach fails to take into account elements of bad faith and unfair advantage established in *New Hampshire* and other cases. A recent case in the Northern District of Georgia dealing with judicial estoppel notes these additional concerns with the *Robinson* ruling.

In *Evans v. Potter*,[27] a debtor filed a Chapter 13 case that was confirmed prior to the filing of her sexual harassment lawsuit. Six days after the filing of the suit, the Chapter 13 case was dismissed for failure to make plan payments and the debtor obtained no discharge. After noting the two part *Burnes* test, and the standard warning not to read judicial estoppel as an inflexible doctrine, the court stated that the caselaw provides that a finding of bad faith is required before a court may use its equitable sanctioning power by invoking judicial estoppel, and other courts have explicitly adopted a bad faith standard. Discussing *Burnes,* the court noted that while bad faith is not an explicit factor in the Eleventh Circuit, bad faith is implied in a finding of intention to mislead the court.[28] The court noted that the Third Circuit holds that judicial estoppel should only be invoked when a miscarriage of justice or damage to the integrity of the judicial system would otherwise result.[29] Observing that dismissal of a lawsuit is a particularly severe sanction, the court states:

> [J]udicial estoppel is an "extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." It 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."[30]

In the end, the *Evans* court found no bad faith because the bankruptcy court dismissed the case without discharging debts.

This plainly puts judicial estoppel back into its appropriate context as an issue of bad faith. *Evans* is consistent with the *New Hampshire* re-

quirement that the party asserting the inconsistent position must derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. If these considerations are encapsulated in the Eleventh Circuit's test for motive, it is plain in *Robinson* that these factors were not considered. The full payment plan is both inconsistent with any measure of bad faith and ends any discussion of an unfair advantage.

While full disclosure is a duty and enforcement of that duty is important, no caselaw suggests that failure to disclose automatically invokes the severe sanction of judicial estoppel. The unfair advantage most at issue in bankruptcy would be discharge of debts when an asset should have been available to pay some or all claims. Since all claims were paid in full in the *Robinson* case, no unfair advantage was obtained at confirmation or after and no other fact revealed in the decision suggests that a miscarriage of justice occurred. Tyson has few equities on its side in the matter, and the Eleventh Circuit allowed Tyson to use an equitable doctrine as a sword to eviscerate a potentially valid claim. The *Robinson* court focused on speculation about how the debtor was defrauding the court and missed entirely the complete absence of evidence of actual intent to harm creditors or mock the bankruptcy court.

The *Robinson* court pinned its outcome on another shaky predicate: that the debtor had a statutory duty to amend her schedules to include the postconfirmation asset. In its examination of this duty, the *Robinson* court cites several cases and notes 11 U.S.C.A. § 541(a)(7) as the statutory basis for a continuing duty of disclosure.

Section 541(a)(7) addresses property that the estate acquires after filing. It is not clearly established as a matter of law that postconfirmation property is property of the Chapter 13 estate subject to the continuing disclosure rules. Omitted entirely from the discussion of duty and motive by the *Robinson* court is the tangled issue of vesting of property of the estate in the debtor at confirmation in a Chapter 13.

The Eleventh Circuit in *Telfair v. First Union Mortgage Corp.*,[31] determined that, among the options available to reconcile the provisions of 11 U.S.C.A. §§ 1306 and 1327(b), the "estate transformation approach" was the appropriate methodology.[32] This construct provides that only property necessary for the execution of the plan remains property of the Chapter 13 estate after confirmation.[33]

In a different judicial estoppel case, the Eleventh Circuit held that an undisclosed wage claim was not property of the bankruptcy estate and there was no duty to disclose that asset for judicial estoppel purposes.[34] The application of *Telfair* and the estate transformation approach in judicial estoppel cases is controversial. There is a serious disagreement about the duty to disclose postconfirmation assets under these rules.[35]

This controversy was avoided in *Robinson* because, as allowed by § 1327(b), the confirmation order provided that property of the estate did not vest in the debtor until discharge or dismissal.

It cannot be categorically stated, as did the *Robinson* court, that there is an absolute duty to disclose assets acquired postconfirmation. That vesting in this case did not control the duty to disclose begs an important question about intent to mislead and bad faith.

As much as practitioners wish their clients had flawless recall of all advice provided and complete understanding of every nuance of bankruptcy law, rarely do either of these wishes come true. If the *Robinson* confirmation order did not delay the statutory time of vesting, arguably under *Telfair* and *Muse*, she would not have been required to disclose the postconfirmation cause of action and could not be faulted for her alleged deception. Perversely, the addition of the vesting language in the order that confirmed her 100% plan now makes her subject to the loss of her discrimination lawsuit due to nondisclosure.[36] If bad faith and intent to mislead are important concepts, they should not turn on unresolved questions of vesting, or obscure plan provisions the debtor likely neither read nor understood. In any rational scheme of judicial estoppel, deception should depend upon actual knowledge and intent of the actor, not an unknowing failure to amend schedules.

Focus upon wrongful concealment done to the disadvantage of a party and in a manner that deceives the court would do much to bring judicial estoppel back into its proper context. The Seventh

Circuit in *Biesek v. Soo Line Railroad Co.*,[37] considered a debtor who concealed a prepetition injury claim against his employer. The Seventh Circuit rejected the use of judicial estoppel based upon the harm its application would cause creditors:

> Biesek's nondisclosure in bankruptcy harmed his creditors by hiding assets from them. Using this same nondisclosure to wipe out his FELA claim would complete the job by denying creditors even the right to seek some share of the recovery. Yet the creditors have not contradicted themselves in court. They were not aware of what Biesek has [sic] been doing behind their backs. Creditors gypped by Biesek's maneuver are hurt a second time by the district judge's decision. Judicial estoppel is an equitable doctrine, and using it to land another blow on the victims of bankruptcy fraud is not an equitable application. Instead of vaporizing assets that could be used for the creditors' benefit, district judges should discourage bankruptcy fraud by revoking the debtors' discharges and referring them to the United States Attorney for potential criminal prosecution.[38]

The Seventh Circuit is correct that nondisclosure is a wrong corrected by appropriate action against a debtor's discharge or by prosecution, not by denying creditors a right to an asset. As a matter of equity, if judicial estoppel is available it should allow for valuable causes of actions to survive for the benefit of creditors. This is what the *New Hampshire* Court was talking about when it looked to the prejudice caused to the party who acquiesced to the former position and to whom the activity caused an unfair detriment. Putting aside for the moment that creditors were not harmed in *Robinson*, if the rule of possible intent prevails to bar the debtor from proceeding in a discrimination case, the end result is that the bankruptcy court stiffs the creditors and frees a defendant from its misconduct, all to punish a debtor. This lacks the hallmarks of equity.

Since judicial estoppel concerns the integrity of the court system rather than representations between litigants, all courts have a significant interest in carefully guarding the doctrine from becoming just another litigation tactic. The harm to be avoided in all judicial estoppel cases is that of a party, in bad faith and with intent to mislead the court, established a position that the court adopted as truth in determining a result. This should require actual intent to mislead on the part of the debtor, not a benefit constructed out of speculative results. It requires a court that was actually mislead by the concealment in determining some result that benefitted the wrongful actor, or harmed the other party. The *Robinson* court presents itself as trapped by precedent. However, full examination of the circumstances of the case, along with a well-grounded knowledge of bankruptcy practice, would have led the court to a different result.

Research References: Norton Bankr. L. & Prac. 3d § 110:5

West's Key Number Digest, Bankruptcy ⚷3539.1

Notes

1. Robinson v. Tyson Foods, Inc., 595 F.3d 1269 (11th Cir. 2010).
2. New Hampshire v. Maine, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).
3. New Hampshire, 532 U.S. at 750.
4. New Hampshire, 532 U.S. at 750.
5. New Hampshire, 532 U.S. at 750-51.
6. New Hampshire, 532 U.S. at 751.
7. New Hampshire, 532 U.S. at 751.
8. Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002).
9. Burnes, 291 F.3d at 1285.
10. Robinson, 595 F.3d at 1275 (emphasis added).
11. The reader may recognize in this instance the one possible disadvantage to creditors being the lack of postpetition interest on the claims that may have been available due to a solvent estate. However, as discussed later, the asset was not in existence at the time of confirmation, thus it could not have been the basis for the court's confirmation of the plan, and could not provide a motive to conceal.
12. Cargo v. Kansas City S. Ry. Co., 408 B.R. 631 (W.D. La. 2009).
13. Cargo, 408 B.R. at 646.
14. Stallings v. Hussmann Corp., 447 F.3d 1041 (8th Cir. 2006).
15. Stallings, 447 F.3d at 1047.
16. Stallings, 447 F.3d at 1047.
17. Stallings, 447 F.3d at 1047.
18. Stallings, 447 F.3d at 1047.

19. Stallings, 447 F.3d at 1049.
20. Young v. Time Warner Cable Capital, L.P., No. 04-0651-CV-W-HFS, 2006 WL 2927569 (W.D. Mo. Oct. 12, 2006) (unpublished).
21. Young, 2006 WL 2927569 at *2.
22. Young, 2006 WL 2927569 at *3.
23. Young, 2006 WL 2927569 at *4.
24. Young, 2006 WL 2927569 at *4.
25. Young, 2006 WL 2927569 at *4 (citing Donato v. Metropolitan Life Ins. Co., 230 B.R. 418, 423 (N.D. Cal. 1999)).
26. Robinson, 595 F.3d at 1277-78.
27. Evans v. Potter, No. 1:08-CV-1687-TWT, 2009 WL 529599 (N.D. Ga. Feb. 27, 2009).
28. Evans, 2009 WL 529599 at *3.
29. Evans, 2009 WL 529599 at *3.
30. Evans, 2009 WL 529599 at *4 (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996)).
31. Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000).
32. Telfair, 216 F.3d at 1340.
33. Telfair, 216 F.3d at 1340.
34. Muse v. Accord Human Res., Inc, No. 04-16491, 2005 WL 891015 (11th Cir. Apr. 15, 2005).
35. See In re Foreman, 378 B.R. 717 (Bankr. S.D. Ga. 2007); In re Harvey, 356 B.R. 557 (Bankr. S.D. Ga. 2006).
36. This raises an interesting question about Robinson's control over the suit. If the suit is actually property of the estate, it was not something that she had the right to imperil by her conduct, and there would be an argument that she is not the true party in interest in the suit.
37. Biesek v. Soo Line R.R. Co., 440 F.3d 410 (7th Cir. 2006).
38. Biesek, 440 F.3d at 413.

THE EFFECT OF § 503(b)(9) ON THE § 547(c)(4) SUBSEQUENT NEW VALUE DEFENSE: DOES *COMMISSARY OPERATIONS* MAKE A GOOD FIRST IMPRESSION?

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In the never-ending war of preference litigation, there is a new battlefield, and the United States Bankruptcy Court for the Middle District of Tennessee has fired the first shot. In *Commissary Operations, Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.)*[1] (hereinafter, *COI*), Judge Harrison decided an issue of first impression: If a creditor is the holder of an administrative expense claim pursuant to 11 U.S.C.A. § 503(b)(9)[2] (20-Day Claim)[3] in an amount equal to the value of goods delivered to the debtor in the ordinary course of business within 20 days before the petition (20-Day Goods), can that creditor also assert as part of the subsequent new value defense to a preference claim pursuant to § 547(c)(4) (SNV Defense)[4] that the value of those 20-Day Goods furnished after receipt of allegedly avoidable preference payments (each, an APP) constitutes subsequent new value (SNV) that reduces preference liability? Judge Harrison answered yes, holding that any postpetition payment of the 20-Day Claim does not preclude the preference defendant from asserting the SNV Defense using the value of the 20-Day Goods that also forms the basis of the 20-Day Claim.

In response, debtor advocates scream that this is unfair and inequitable because it allows the creditor to receive a windfall in the form of "double recovery" in that, if the debtor is administratively solvent, a creditor with an allowed 20-Day Claim will receive full payment as a priority administrative expense and that creditor will also receive the value of the 20-Day Goods as a credit to reduce its preference liability (SNV Credit). Nevertheless, the plain meaning of § 547(c)(4) and the consistent underlying purpose of that defense mandate the creditors' victory in this battle.

The *COI* facts are straightforward: COI filed preference adversaries against numerous defendants that received APPs from the debtor during the 90-day preference period. Subsequent to receipt of the APPs, many of these defendants had furnished goods (SNV) to the debtor; as a result, to defend the preference claim, these defendants also asserted the SNV Defense seeking a SNV Credit against the prior APPs to the extent of the SNV. In many instances, a portion of this SNV consisted of 20-Day Goods. For this reason, postpetition, certain of the creditors also filed § 503(b)(9) applications to recover the value of the 20-Day Goods as a priority administrative expense. These

creditors, in their summary judgment motions, argued that any postpetition payment of their 20-Day Claims did not preclude using the value of the 20-Day Goods as part of the SNV Credit. COI vehemently disagreed.

Considering the plain meaning of §§ 547(a)(2), (c)(4) and 503(b)(9) and underlying policy, Judge Harrison decided the issue in favor of the creditors.

The statutory analysis

With respect to statutory analysis, Judge Harrison first concluded that, under the circumstances of the case before her, the 20-Day Goods fall within the § 547(a)(2) definition of "new value"—"money or money's worth in goods."[5] Specifically, Judge Harrison noted that goods will be treated as new value for § 547(c)(4) purposes when furnishing that value enhances the debtor in that the goods replenish the debtor after the debtor depleted its assets when it previously made APPs to the creditor. Judge Harrison then concluded that the value of the 20-Day Goods subject to the 20-Day Claim did constitute new value that enhanced the debtor and, therefore, could be used as part of the SNV Credit to reduce preference liability.[6]

In deciding this sub-issue, Judge Harrison considered a prior holding in the district in one of the Phoenix Restaurant Group (PRG) cases, *Phoenix Restaurant Group, Inc. v. Proficient Food Co. (In re Phoenix Restaurant Group, Inc)*[7] (hereinafter, *Proficient*). In *Proficient*, the bankruptcy court held, and the district court agreed that, when, postpetition, the debtor's estate pays the creditor its reclamation claim (Reclamation Claim), those goods (Reclaimed Goods) cannot be part of the SNV Credit because those Reclaimed Goods did not enhance the debtor.[8] In particular, the *Proficient* court reasoned that, when a creditor furnishes goods subject to a Reclamation Claim, those goods are furnished with "strings"[9]—i.e., the right to reclaim (take back) the goods; therefore, once the Reclamation Claim was fully paid, there is no new value remaining that can be part of the SNV Credit. As a result, the SNV did not qualify as § 547(a)(2) new value.

Judge Harrison distinguished the *Proficient* holding, reasoning that a 20-Day Claim is not the same as a Reclamation Claim. Judge Harrison reasoned as follows:

First, unlike a Reclamation Claim, a 20-Day Claim "does not allow a creditor to claim a lien or otherwise repossess those delivered goods" or require a debtor to "hold in trust the value of the goods" for the benefit of the creditor.[10] In addition, a debtor must segregate and hold in trust goods subject to a Reclamation Claim; therefore, the debtor is deprived of "the ability to re-sell the goods at a profit or to incorporate the goods into a manufactured product for sale."[11] However, a "debtor can freely use goods subject to a § 503(b)(9) claim [the 20-Day Claim], whether before or after the petition date," and, therefore, such 20-Day Goods are "exactly the same as 'money or money's worth as goods shipped free of the seller's strings.'"[12] Moreover, unlike the restrictions a Reclamation Claim imposes on the goods themselves, the right to assert a 20-Day Claim merely permits a creditor to "request priority payment for goods that are in the debtor's possession pre-petition and then used by the debtor-in-possession post-petition to continue operations" and such "payment is dependent upon whether the claimant's § 503(b)(9) claim is approved by the Court and whether the debtor-in-possession has the ability to pay the § 503(b)(9) claim."[13]

Second, a Reclamation Claim is a right available prepetition under state law, which the Bankruptcy Code merely protects, but a 20-Day Claim only arises *after* a bankruptcy filing and is a creature of the Bankruptcy Code itself.[14]

Having distinguished the *Proficient* holding and concluding that, unlike Reclaimed Goods, 20-Day Goods are eligible to be new value, Judge Harrison next discussed whether the possible postpetition payment of the 20-Day Claim by the estate falls within the § 547(c)(4)(B) limitation and, therefore, whether that new value can be included in the SNV Credit to reduce preference liability. [Please recall: Pursuant to § 547(c)(4)(B), stated without the double negatives, on the one hand, if a debtor makes a payment on account of new value (POANV) to or for the benefit of a creditor and if that POANV is itself avoidable, the paid new value is included as part of the SNV Credit; in that

