JUDICIAL ESTOPPEL, RES JUDICATA, AND COLLATERAL ESTOPPEL IN BANKRUPTCY CASES

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I.

OVERVIEW

This paper addresses three doctrines that can preclude a party from prevailing in bankruptcy or postbankruptcy litigation because of what transpired in earlier litigation. These doctrines are judicial estoppel, res judicata, and collateral estoppel.

Judicial estoppel prevents a party from taking a position in current litigation that contradicts a position taken by the party and accepted by a court in prior litigation where the change of position is to meet the exigencies of the moment. A crucial question is whether the second court's acceptance of the change of position would create the perception that either the first court or the second court was misled. This paper addresses cases in which business and consumer debtors are judicially estopped by virtue of positions taken in their bankruptcy case.

Res judicata, now often referred to as "claim preclusion," precludes a party from raising claims that were, or should have been, raised in earlier litigation. ***Collateral estoppel***, now often referred to as "issue preclusion," precludes a party from relitigating issues that were actually litigated and adjudicated in earlier litigation. Res judicata differs from collateral estoppel in that res judicata precludes not only claims that were actually litigated in earlier litigation but also those that should have been raised and adjudicated in that litigation. *See* Christopher Klein, Lawrence Ponoroff & Sarah Borrey, *Principles of Preclusion and Estoppel in Bankruptcy*, 79 Am Bankr. L. J. 839, 8 (2005).

With respect to res judicata, this paper addresses cases in which that doctrine precludes a creditor from asserting claims that confirmation of a Chapter 11 or Chapter 13 plan resolved adversely to the creditor, even if the bankruptcy court exceeded its subject matter jurisdiction or otherwise committed clear legal error in confirming the plan. A crucial question is whether the confirmation procedures afforded the creditor sufficient notice and opportunity to object or, alternatively, were so irregular as to be a denial of procedural due process.

With respect to collateral estoppel this paper addresses cases in which that doctrine precludes a debtor in a dischargeability action from a denying a creditor's allegations of fraud, breach of fiduciary duty, or willful injury to property, where such allegations were established as facts in prebankruptcy litigation. A crucial question is whether the allegations were actually litigated and determined in the earlier litigation.

This paper also addresses cases in which an estate representative established by a confirmed Chapter plan 11 is precluded from bringing avoidance or other preconfirmation claims because the plan does not provide expressly for the retention and enforcement of such claims. Some cases hold that the estate representative is precluded by reason of res judicata from enforcing such claims after confirmation. Other cases reason that, without regard to res judicata, the estate representative is not empowered, and therefore lacks standing, to bring claims that were not expressly retained. With respect to either theory, a crucial question is whether the plan adequately describes the claims to be retained when they are described by category.

II.

JUDICIAL ESTOPPEL

A. Judicial Estoppel in Business Cases.

In both business and consumer cases, the federal courts look to the Supreme Court's exposition of the doctrine of judicial estoppel in the seminal case of *New Hampshire v. Maine*, 532 U.S. 742,750 (2001). In that case, Supreme Court described judicial estoppel as an equitable doctrine intended to prevent the perversion of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. As the Court explained, the doctrine typically applies when (1) a party asserts a position inconsistent with a position that the party took in earlier litigation; (2) the party succeeded in the earlier litigation in persuading the court to accept the earlier position so that judicial acceptance of the earlier position would create the perception that either the first court or the second court was misled; and (3) 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. The Court noted that the doctrine of judicial estoppel is an equitable doctrine and thus the circumstances under which judicial estoppel may be appropriate are not reducible to any general formulation.

In *New Hampshire v. Maine*, the Court applied the doctrine where the two states were the parties to each of the two cases. In bankruptcy cases, the doctrine is applied where the debtor is seeking to adopt a position inconsistent with the debtor's earlier position even if the party adverse to the debtor in the second litigation was not a party to the earlier litigation.

In Chapter 11 cases, a position that a business debtor successfully asserts in gaining approval of debtor-in possession financing, a bankruptcy sale, or a plan of reorganization may judicially estop the debtor from asserting a contrary position in later litigation. Thus, the Second Circuit ruled that by virtue of a position taken by consolidated debtors in obtaining confirmation of their plan, the plan trustee of the parent debtor was judicially estopped from changing that position in a fraudulent transfer case that was litigated post-confirmation by the plan trustee against a lender. *See Adelphia Recovery Trust v. Goldman Sachs & Co*., 748 F.3d 110 (2d Cir. 2014). In that fraudulent transfer action, the plan trustee sought to avoid an adverse judgment by amending its pleading to assert that the bank concentration account from which the transfer was made was owned by the parent debtor, rather than a subsidiary debtor. This position was inconsistent with the debtors' position in litigation to obtain confirmation of their plan, where their position was that the bank account was that of the subsidiary. The ownership of the account was quite significant in the confirmation litigation, and the bankruptcy court accepted the debtors' position in confirming the plan. The Second Circuit concluded that the change of position was a deliberate attempt to meet the exigencies of the moment.

Also, the misleading silence of an attorney of the debtor-in-possession at a hearing to approve a sale free and clear of liens can result in judicial estoppel where the silence induced the court to approve the sale under the erroneous belief that no party other than those present and consenting had an interest in liens. *Adelphia Recovery Trust v. HSBC Bank USA, N.A.*, 634 F.3d 678 (2d Cir. 2011). In that case, the attorney did not know that another set of attorneys for the debtor in possession were actively investigating fraudulent transfer actions that, if successful, would have given the defendants in those actions an interest in the liens.

The Second Circuit found that even though the debtor's attorney appearing at the hearing was not intentionally untruthful or misleading, the debtor clearly was aware of the possible actions. The court concluded that the debtor could not escape judicial estoppel by keeping its attorney in the dark about its plans.

B. Judicial Estoppel in Consumer Cases.

Judicial estoppel applies in consumer cases to preclude debtors from pursuing unscheduled causes of action. In a typical consumer case, judicial estoppel arises when the debtor fails to schedule a potential claim, often an employment discrimination or personal injury claim, and receives a discharge. Shortly thereafter, the trustee files a report of no assets, which operates to abandon all scheduled assets, but not unscheduled assets. The debtor is granted a discharge.

The debtor then pursues the unscheduled cause of action by commencing a civil action or by continuing prosecution of a civil action filed prepetition. The debtor is typically represented by a lawyer undertaking the representation on a contingency basis. Unscheduled actions that arise under federal law, such as employment discrimination actions, are filed in federal district court, while unscheduled actions that arise under state law, such as personal injury actions, are generally filed in state courts. When the defendant learns that the action was not scheduled in the debtor's bankruptcy case, the defendant moves for summary judgment on the basis of judicial estoppel. The debtor then moves to reopen the bankruptcy case to amend the schedules by listing the claim.

Although the motion to reopen the bankruptcy case will be filed in the bankruptcy court, the issue whether the debtor should be judicially estopped from pursuing the unscheduled action will not be before the bankruptcy court. Rather, the issue will be before the district court or the state court, where the defendant has moved for summary judgment.

Whether the debtor should be judicially estopped raises several issues. One is whether the debtor's initial failure to schedule the action was the result of inadvertence or mistake. Another is whether the debtor, rather than the trustee, is the real party in interest, since a report of no assets is effective to abandon only scheduled assets – and not unscheduled assets such as the employment discrimination claim. *See* 11 U.S.C. § 554(c).

Other issues arise if the trustee seeks to be substituted, as the real party in interest, in the employment discrimination or personal injury action and to continue the contingency arrangement with the debtor-plaintiff's lawyer. One such issue is whether, if the debtor would otherwise be judicially estopped from pursuing the action, the trustee's recovery should be limited to the amount due to creditors, so that the debtor will not get the recovery that might exceed that amount. If so, a subsidiary issue is whether the contingency fee should be calculated on the whole amount of the judgment so as to incentivize the attorney litigating the undisclosed claim to continue the representation on a contingency basis.

The federal courts generally hold that that the doctrine applies if the debtor (1) knew of the cause of action when the bankruptcy case was filed and (2) intended to pervert justice by concealing the cause of action from the bankruptcy court. The Georgia courts have historically striven to apply the "federal" doctrine of judicial estoppel with respect to a debtor's failure to schedule a cause of action in a bankruptcy case. *See Ibf Participating Income Fund v. Dillard-Winecoff*, 275 Ga. 765, 766 (2002) (admitting that its success in applying the federal doctrine has been mixed).

Initially many federal courts of appeal ruled that the intent to pervert the judicial process can be inferred if the debtor had a motive to conceal the claim from the creditors. These courts reasoned that the motive for the debtor's non-disclosure is crystal clear: it is to benefit from the recovery on the claim without sharing the recovery with creditors. Since this motive is crystal clear in every case, the only factual question is whether the debtor knew of the claim. Often, the debtor knows of the claim when the bankruptcy case was filed. If so, the debtor will be judicially estopped from prosecuting the undisclosed claim, because there was always an inference of intent to make a mockery of the judicial system.

In these early cases, after the issue of judicial estoppel was raised by the employer, the debtor would move to reopen the bankruptcy case and amend the schedules. The debtor would seek to explain that the non-disclosure was inadvertent – caused by confusion or by a bankruptcy attorney who did not include the claim on the schedules – or that the trustee was told something of the claim at the meeting of creditors. The courts would not allow these explanations, even if true, to defeat the application of judicial estoppel. *E.g.*, *Cannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006); *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002).

Some courts were more willing to allow the debtor to show that the failure to schedule the claim was not to pervert the judicial process. Thus, the Seventh Circuit declined to apply judicial estoppel in favor of the debtor's employer and explained that the debtor should be allowed her request to prove, by the transcript of the meeting of creditors, that she informed the Chapter 7 trustee of her unscheduled claim for employment discrimination. *Matthew v. Potter*, 316 Fed. Appx. 518 (7th Cir. 2009).

Similarly, the Eleventh Circuit reversed a judgment based on judicial estoppel and allowed a Chapter 13 debtor to excuse a late amendment to her schedules because of his bankruptcy attorney's three-month delay in amending the schedules to disclose a newly discovered claim. *Ajakla v. BrooksAmerica Mortgage Corp.*, 453 F.3d 1339 (11th Cir. 2006). In so ruling, the Eleventh Circuit was inconsistent with its earlier precedents, *Barger* and *Burnes*, which did not allow such excuses.

Recently, the Eleventh Circuit undertook en banc to reconsider and reconcile its inconsistent precedents with respect to judicial estoppel of debtors pursuing undisclosed claims. *Slater v. U.S. Steel Corp.*, 871 F3d. (11th Cir. 2017) (en banc). The result is a major revamp of the Eleventh Circuit's approach. First, the Eleventh Circuit overruled *Barger* and *Burnes* to the extent that they held that the mere fact of non-disclosure is sufficient to apply judicial estoppel, even if the debtor corrected his bankruptcy schedules after the omission was called to his attention and the bankruptcy court allowed the correction without penalty. With respect to the debtor's motive in failing to schedule a claim, the Eleventh Circuit ruled that the district court in which the debtor is prosecuting the unscheduled claim must consider all the facts and circumstances in deciding whether the debtor intended to make a mockery of the judicial system. Those circumstances include the debtor's level of sophistication, the debtor's explanation for the omission, whether the debtor corrected the disclosures and what action the bankruptcy court took concerning the non-disclosures.

The Eleventh Circuit's direction to the district court to consider the action taken by the bankruptcy court makes relevant the view of the bankruptcy court as to whether judicial estoppel should apply. When the debtor moves to reopen the bankruptcy case to amend the schedules, the Eleventh Circuit is expecting the bankruptcy court to express its view as to whether the initial failure to schedule the claim was excusable. Nevertheless, the district court before which the undisclosed claim is pending will still make the ultimate decision as to whether judicial estoppel should apply.

The courts of appeals generally hold that judicial estoppel would not apply to estop the Chapter 7 trustee from prosecuting the undisclosed claim even if the debtor would be judicially estopped from doing so. These courts note that the Chapter 7 trustee has taken no inconsistent position and it would serve no purpose to punish the creditors of the bankruptcy. *E.g.*, *Metrou v. M. A. Mortensen Co*., 781 F.3d 357 (7th Cir. 2015); *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011) (en banc); *Parker v. Wendy's Int'l, Inc*., 365 F.3d 1268 (11th Cir. 2004) (cited with approval in *Slater*). Typically in such cases, after the employer moves for judicial estoppel and the debtor reopens the bankruptcy case and files amended schedules, the Chapter 7 trustee moves to be substituted as the real party in interest in the debtor's civil action to recover on the undisclosed claim. In such cases, the trustee correctly asserts that the earlier filing of a no asset report and closing of the estate did not abandon unscheduled claims.

Courts have suggested that the debtor who is judicially estopped should not benefit from the trustee's recovery of funds in excess of the amount necessary to pay all creditors and litigation expenses. *E.g. Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1273 n.4 (11th Cir. 2004) (stating that perhaps the defendant could invoke judicial estoppel to prevent an undeserved windfall from devolving on the debtor). The Seventh Circuit expressed concern that the bankruptcy trustee may not be able to find counsel to represent the estate on a contingency basis if the recovery is limited to the amount due the creditors. Thus, the Seventh Circuit held that the bankruptcy trustee should be allowed to pursue the personal injury action without a cap on the recovery so as to enable the trustee to hire counsel on a contingency fee basis and thus accord the creditors the chance to receive their due. The Seventh Circuit noted that if the recovery was greater than needed to satisfy the creditors and pay counsel, the bankruptcy court could determine whether the debtor was judicially estopped from receiving the surplus and, if so, whether any surplus should be returned to the defendants. *Metrou v. M. A. Mortensen Co.*, 781 F.3d 357 (7th Cir. 2015).

III.

RES JUDICATA

A. Res Judicata in Business Cases.

The doctrine of res judicata, now often referred to as claim preclusion, precludes a party from asserting in litigation a claim that was adjudicated in an earlier action between the parties. Res judicata applies where (1) the parties in the two actions are the same, (2) the judgment was entered in the earlier action by a court of competent jurisdiction, (3) the judgment was a final judgment on the merits, and (4) the same cause of action was involved in both actions. Res judicata precludes a plaintiff from presenting in a second civil action claims that could or should have been brought in the first civil action but were not. *See, e.g., Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)* 898 F.2d 1544 (11th Cir. 1990); Restatement (Second) of Judgments § 24 (stating that res judicata precludes remedies with respect to all or any part of the transaction, or series of transactions, out of which the first civil action arose).

Res judicata applies to the terms of Chapter 11 plans confirmed by final order. When confirmed by orders that are not appealed, plans will bind parties in interest who had sufficient notice of the confirmation process, even if the bankruptcy court lacked subject matter jurisdiction to approve certain terms or committed clear legal error in approving the terms. *Corbett v. McDonald*, 124 F.3d 82 (2d Cir. 1997); *Republic Bank v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987); *see Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940).

Res judicata has been applied to bar challenges to confirmed plans that provide for the release of third parties from claims brought by other third parties. Thus, in *Republic Bank*, a bank argued that the bankruptcy court lacked subject matter jurisdiction to enjoin it from suing a guarantor of the debtor's obligation. The Fifth Circuit held that the guarantor of the bank's loan to a company was entitled to summary judgment in an action brought by the bank in district court to enforce the guarantee.

The order confirming the company's plan of reorganization provided for the release of the liability to the bank of that guarantor as well as the other guarantor. In that regard, the other guarantor contributed assets to the estate in exchange for a plan provision that the plan provide for the release of both guarantors from their liability to the bank. There was no appeal from the confirmation order.

The bank brought an action on the guarantee against the guarantor after the other guarantor, who had contributed assets, had died. The district court granted summary judgment based on the confirmed plan in favor of the guarantor who was sued. The Fifth Circuit affirmed.

As to the requirement that the parties to the two actions be the same, the Fifth Circuit concluded that both the guarantor and the bank were parties in interest in the Chapter 11 proceeding, as well as in the guaranty action. As to the finality of the earlier judgment, it was undisputed that the bank did not appeal the confirmation order. As to the requirement that the cause of action be the same in the two actions, the Fifth Circuit concluded that the guaranty was at issue in the plan as well as in the guaranty action.

The substantial dispute was as to the competency of the bankruptcy court to confirm a plan providing for a third-party release. The bank argued that it was beyond the competence of the bankruptcy court to release a debt owed by a third party, the guarantor, to another third party, the bank. The bank cited 11 U.S.C. § 524 to argue that the bankruptcy discharge can discharge only the debtor, not third parties.

For purposes of argument, the Fifth Circuit assumed that the release of the guarantor was beyond the subject matter jurisdiction of the bankruptcy court. Moreover, the Fifth Circuit took it as axiomatic that the bankruptcy court does not have the power to extend its subject matter jurisdiction. But the Fifth Circuit held that this axiom must be limited to allow the bankruptcy court to determine whether it has subject matter jurisdiction, if there is an arguable basis for it. Finding an arguable basis for it, the Fifth Circuit held that the bankruptcy court's implied determination that it had jurisdiction could not be collaterally attacked even if was erroneous. Rather, consistent with general principles of res judicata, the bank could have attacked the order only by an appeal of the confirmation order. The Fifth Circuit opined that giving res judicata effect to a plan confirmation that arguably was beyond the subject matter jurisdiction of the bankruptcy court was warranted because the interest in ending the plan litigation was superior to the interest in correcting whatever errors may have been made.

The Fifth Circuit noted that the bank had more than adequate notice that the plan provided for a release by guarantors. In that regard, a bank representative was chairman of the creditor's committee and had raised an objection to the releases at a hearing to approve the disclosure statement, even though the objection was not renewed at the hearing on confirmation.

B. Res Judicata in Consumer Cases.

As with orders confirming Chapter 11 plans, orders confirming Chapter 13 cases can be res judicata even if confirmation of certain of the terms was clear error. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). In that case, the Supreme Court unanimously affirmed the Ninth Circuit's judgment that a student loan lender should be enjoined from seeking to collect unpaid interest where the bankruptcy court had confirmed the borrower's Chapter 13 plan providing for discharge of the unpaid interest. The lender filed a proof of claim and received notice of the plan and of its confirmation but did not object to confirmation nor appeal the confirmation order.

The Court held that confirmation order was res judicata even though the discharge of the interest clearly was procedurally erroneous. The Court concluded that the discharge was procedurally defective for two reasons. First, determination of dischargeability of a student loan obligation requires an adversary proceeding under Bankruptcy Rule 7001(6). Second, dischargeability of a student loan requires a determination under 11 U.S.C. § 523(a)(8) that payment of the student loan would be an undue hardship.

With respect to the failure to file an adversary proceeding, the Court held that this did not amount to a lack of due process, since the lender had considerable notice of the plan provisions and of confirmation and did not object to confirmation. In that regard, the bankruptcy clerk served the lender before confirmation with a copy of the plan, with a notice setting the date of the confirmation hearing, and with a warning that the lender's rights may be impaired by the plan. After confirmation, the Chapter 13 trustee sent the lender a notice, to which the lender did not respond, that the amount of the lender's claim listed in the plan differed from the amount shown on the lender's proof of claim and that the lender needed to notify the trustee if the lender wished to dispute the plan's treatment of the claim.

The Supreme Court disagreed with the Ninth Circuit's guidance that bankruptcy judges should confirm a plan discharging debt even if the proper procedure is not followed, where the lender files no objection to the plan. The Ninth Circuit reasoned that the bankruptcy court should view the lender's failure to object as acquiescence to the proposed treatment under the plan. *Espinosa v. United Student Aid Funds*, 553 F.3d 1193 (9th Cir. 2008).

The Supreme Court took the opposite view and said that bankruptcy courts have not only the authority but also the obligation to direct the debtor to conform the Chapter 13 plan to the Code requirements for discharging student debt. Thus, the Supreme Court effectively imposed on bankruptcy judges the duty to raise objections, particularly procedural objections, on behalf of creditors.

Until recently, procedural difficulties were particularly rampant with respect Chapter 13 plans dealing adversely with secured claims. This is because the procedure for objecting to the amount or validity of secured claims did not mesh well with the procedures for confirming Chapter 13 plans. *See Hope v. Acorn Financial, Inc.*, 731 F.3d. 1189, 1195 (11th Cir. 2013)

("We have tried, given our existing precedent, to make the best of bankruptcy provisions which do not mesh very well together").

Since *Espinosa*, courts have generally held that secured creditors were bound by plans that modified the amount or validity of their secured claims even if the debtor did not follow the claims allowance procedures or provide perfect notice, so long as the secured claimants had sufficient notice of the proposed confirmation to meet due process standards. *See* W. Homer Drake, Paul W. Bonapfel & Adam M. Goodman, 1 Chapter 13 Practice and Procedure § 10.6 (2017).

The procedural difficulties may be substantially resolved by the adoption, effective December 1, 2017, of amendments to the Bankruptcy Rules and of an official form for Chapter 13 plans. These amendments are designed to mesh the claims allowance process with the Chapter 13 confirmation process. To achieve this, filing deadlines for claims have been shortened and procedures for objecting to them been modified. The official form of Chapter 13 plan sets forth how the plan should set forth the treatment of secured claims. Within limits, federal districts are permitted to modify the official form of plan. Even with such modifications, Chapter 13 plans should have more uniformity nationwide with respect to how the plans set forth the proposed treatment of secured claims.

IV.

LACK OF STANDING AS A BAR TO POSTCONFIRMATION ACTIONS.

The Bankruptcy Code provides that a Chapter 11 Plan may provide for the postconfirmation estate representative (such as a reorganized debtor or a plan trustee) to retain and enforce the debtor's preconfirmation claims, such as avoidance actions. 11 U.S.C. § 1123 (b)(3)(B). The implication of the statute is that if the plan does not so provide, the estate representative does not retain the claims. *E.g., Dynasty Oil & Gas, L.L.C. v. Citizens Bank (In re United Operating, L.L.C.)*, 540 F.3d 351 (5th Cir. 2008).

Some courts have reasoned that doctrine of res judicata precludes the estate representative from bringing claims not retained by the Chapter 11 plan. *E.g,. Browning v. Levy*, 283 F3d 761 (6th Cir. 2002); see *Spicer v. Laguna Madre Oil & Gas II (In re Texas Wyoming Drilling, Inc.)*, 647 F.3d 547, 553 (5th Cir. 2011) (finding no res judicata because the claims were expressly reserved). But res judicata may not be the apt doctrine. This is because it can be argued that the putative defendant was not a party to the confirmation process. Also it can be argued that the confirmation process was not an appropriate vehicle in which to adjudicate the merits of preconfirmation actions. Rather, the more apt analysis might be simply that the estate representative is precluded by statute, rather than by res judicata. *See Kaye v. A.R.E. Distribution and Alpine Records, LLC (In re Value Music Concepts, Inc.)*, 329 B.R. 111 (Bankr. N.D. Ga. 2005) (Bonapfel, J.). The Fifth Circuit avoided concluding that res judicata was the basis for holding that a plan was ineffective to retain claims. *Dynasty Oil & Gas, L.L.C. v. Citizens Bank (In re United Operating, L.L.C.)*, 540 F.3d 351 (5th Cir. 2008). Instead, the Fifth Circuit reasoned that the estate representative lacked standing because he was not vested with the right to bring the action. Finding a lack of standing, the court declined to analyze whether res judicata would apply.

The theory for precluding the estate representative from enforcing claims makes no practical difference. The issue is whether the plan adequately describes the claims to be retained.

The courts generally agree that the plan must provide clearly identify the claims that the plan is retaining. The reason for this requirement is to inform creditors as to what claims are going to be pursued post-confirmation so that the creditors can decide whether the proposed plan resolves matters to their satisfaction. It is generally agreed that a vague description of the claims, such as any and all claims, is not sufficiently specific. *See, e.g. Dynasty Oil & Gas, L.L.C. v. Citizens Bank (In re United Operating, L.L.C.)*, 540 F.3d 351 (5th Cir. 2008); *Fleet National Bank v. Gray (In re Bankvest Capital Corp.)*, 375 F3d 51, 59 (1st Cir. 2004); *Browning v. Levy*, 283 F3d 761 (6th Cir. 2002); *P.A. Bergner, & Co. v. Bank One Milwaukee, N.A. (In re P.A. Bergner & Co.)* 140 F.3d 1111, 1117 (7th Cir. 1998); *Harstad v. First American Bank*, 39 F.3d 898 (8th Cir. 1994); *Retail Marketing Co. v. King (In re Mako, Inc.)* 985 F.2d 1052 (10th Cir. 1993).

The issue of the adequacy of the description is most acute when the retained causes of action are numerous and are described by category, rather than by individual claim. Generally the courts agree that a description by category can be sufficient, even if the prospective defendants are not identified. *See, e.g., Harstad v. First American Bank*, 39 F.3d 898 (8th Cir. 1994); *P.A. Bergner, & Co. v. Bank One Milwaukee, N.A. (In Re P.A. Bergner & Co.)*, 140 F.3d 1111, 1117 (7th Cir. 1998); *Kaye v. A.R.E. Distribution and Alpine Records, LLC (In re Value Music Concepts, Inc.)*, 329 B.R. 111 (Bankr. N.D. Ga. 2005). The courts also generally agree that the disclosure statement is appropriate for providing specificity, since its purpose is to provide “adequate information” to enable creditors to make an informed judgment about the plan. *See Spicer v. Laguna Madre Oil & Gas II (In re Texas Wyoming Drilling, Inc.)*, 647 F.3d 547 (5th Cir. 2011).

In recent years, the Fifth Circuit has adopted the standard that the identification of claims must be “specific and unequivocal.” That is a standard that other courts have developed and discussed. *See Retail Marketing Co. v. King (In re Mako, Inc.)* 985 F.2d 1052, 1055 n.3 (10th Cir. 1993).

The Fifth Circuit has been rather demanding about specificity but has not been wholly definitive as to the degree of specificity is required as to categorization. Rather, the Fifth Circuit states that the required level of specificity will vary with the case. *Wooley v. Haynes & Boone, L.L.P. (In re SI Restructuring, Inc.)*, 714 F.3d 860, 864 (5th Cir. 2013); *see* John W. Bush, *Should I Stay or Should I go? A Practitioner's Guide to the Fifth Circuit's Specific and Unequivocal Retention Standard under Bankruptcy Code 11 U.S.C. § 1123*, 66 Baylor L. Rev. 447 (2014).

The Eleventh Circuit and some other circuits have not addressed the issue of how specific the categorization must be. Therefore, practitioners in those circuits often look to the standards of the Fifth Circuit, since those are the most demanding standards.

The Fifth Circuit has held that a description of a *category* of claims coupled with references to a *category* of potential defendants is sufficient to permit the estate representative to pursue the claims post-confirmation. *Spicer v. Laguna Madre Oil & Gas II, L.L.C. (In re Texas Wyoming Drilling, Inc)*, 647 F3d 547 (5th Cir. 2011) (holding adequate the description of retained claims as claims "for fraudulent transfer and recovery of dividends" and the description of the potential defendants as "various prepetition shareholders"); *Compton v. Anderson (In re MPF Holdings, U.S., L.L.C.)*, 701 F3d 449, 453 (5th Cir. 2012) (describing the retained claims as avoidance claims and describing the potential defendants as those listed on an exhibit to the statement of financial affairs). But the Fifth Circuit declined to opine on whether a plan would be specific enough if the plan discloses the category of retained claims but does not identify the prospective defendants in some way. *Wooley v. Haynes & Boone, L.L.P. (In re SI Restructuring, Inc.)*, 714 F.3d 860, 865 n.1 (5th Cir. 2013) (observing that the issue had not yet been presented).

The Fifth Circuit held that the retention provision meets the "specific and unequivocal" standard even if the provision does not to state that the estate representative will definitely pursue the specified claims. Rather, a retention provision can be regarded as "unequivocal" even if the provision states that the estate representative might, rather than will, pursue the claims and has discretion in that that regard. *Compton v. Anderson (In re MPF Holdings, U.S., L.L.C.)*, 701 F.3d 449, 453 (5th Cir. 2012).

V.

COLLATERAL ESTOPPEL IN DISCHARGEABILITY ACTIONS

While res judicata results in claim preclusion, collateral estoppel results in issue preclusion. As with res judicata, collateral estoppel applies when the parties to a civil action were also parties to a prior civil action that was fully and finally adjudicated. The elements of collateral estoppel are generally in the same in all states, although the application of those elements varies somewhat. S*ee* Restatement (Second) of Judgments §27 (1982). The Eleventh Circuit has described those elements rather conventionally. They are (1) that the issue at stake in the second civil action must be identical to the one in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been a critical and necessary part of the judgment in that action. *Halpern v. First Georgia Bank*, 810 F.2d 1061 (11th Cir. 1987).

Collateral estoppel applies in dischargeability actions. Where the judgment in the prior action was rendered by a state court, the bankruptcy court will apply the law of the state to determine whether that judgment is preclusive of an issue litigated therein. *See Heckert v. Dotson (In re Heckert)*, 272 F.3d 253, 255 (4th Cir. 2001). Where the prior judgment was rendered by a federal court, the principles of issue preclusion set forth in the *Restatement*

(Second) of Judgments will be applied. *See Bush v. Balfour Beatty Bahamas, Ltd*., 62 F.3d 1319, 1322 (11th Cir. 1995).

Collateral estoppel applies even with respect to those grounds of non-dischargeability that are committed to the exclusive jurisdiction of the bankruptcy court. *Grogan v. Garner*, 498 U.S. 279 (1991). Those grounds are fraud, defalcation while acting in a fiduciary capacity, and willful and malicious infliction of injury. 11 U.S.C. §§ 523(a)(2), (4), and (6). With respect to those grounds, claimants must file an adversary proceeding in the bankruptcy court to have the debtor's liabilities determined to be nondischargeable. 11 U.S.C. § 523(c)(1); Fed. R. Bankr. P. 7001(6).

Although most often the issue is whether collateral estoppel precludes the debtor from contesting an issue, collateral estoppel may also be asserted offensively by a debtor. Thus, the Fifth Circuit held that a creditor was collaterally estopped from alleging that the liability was nondischargeable where the jury in the prebankruptcy action found the debtor liable but specifically found that he was not liable on the ground that would establish non-dischargeability. *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284 (5th Cir. 1995).

The general rule is that collateral estoppel does not apply where the judgment in the prior action was an ordinary default judgment or a consent judgment that merely recites the contentions of the parties and sets the monetary amount. This is because the issues are deemed not to have been actually litigated in such cases. Restatement (Second) of Judgments § 27 comment e; *M & M Transmissions Inc. v. Raynor*, 922 F.2d 1146 (4th Cir. 1991).

But there are exceptions to this general rule. In some states, a default judgment may have collateral estoppel effect where the debtor files an answer and then fails to participate in the trial to adjudicate the issues thus joined, or where the default judgment is a discovery sanction, or where the default judgment is issued with findings of fact after a trial held to liquidate the amount of the damages. *See Bush v. Balfour Beatty Bahamas, Ltd.*, 62 F.3d 1319 (11th Cir. 1995)

A consent judgment results in collateral estoppel if the parties to it manifest the intention that the issues established by the judgment are conclusively established. *See* Restatement (Second) Judgments §27 comment e; *Klingman v. Levinson*, 831 F2d. 1292 (7th Cir. 1987); (*Halpern v. First Georgia Bank*, 810 F.2d 1061 (11th Cir. 1987). In *Klingman*, the court of appeals precluded the debtor from denying that his liability was based on defalcation where the consent judgment recited that it was based on defalcation and further provided that his liability would be non-dischargeable in bankruptcy. Similarly in *Halpern*, the Eleventh Circuit precluded the debtor from denying that his liability was non-dischargeable where the consent judgment recited specific facts establishing fraud and willful injury to property and also provided the judgment debtor's agreement that the liability would be non-dischargeable in bankruptcy.

There is often doubt as to whether fraud or any other non-dischargeable ground was actually and necessarily litigated and found in the prior action. This is because in the prior action a dischargeable ground is often joined with a non-dischargeable ground. For instance, in a prebankruptcy civil action, the claimant may sue on the dischargeable ground of breach of contract or non-payment of a note, as well as on the non-dischargeable ground of fraud.

Where there is doubt as to whether the non-dischargeable ground was the basis for the prebankruptcy judgment, the debtor should not be estopped from denying fraud in a later non-dischargeability action. Thus if the judgment of a trial court is based on alternative grounds, the judgment is not conclusive with respect to either ground. Restatement (Second) of Judgments § 27 (comment i); *Rutamen v. Baylis (In re Baylis)*, 217 F.3d 66 (1st Cir. 2000) (refusing to give preclusive effect to a state court judgment rendered on alternate grounds where the state supreme court affirmed only on the ground that would be non-dischargeable).

In cases where a creditor sues and obtains a judgment before bankruptcy solely on a ground that would be dischargeable, the creditor should not thereby be precluded from asserting that the debtor's liability is non-dischargeable. That issue often arises in cases in which the prebankruptcy action was based on a dischargeable ground, such as breach of contract or non-payment of a note, as well as fraud. In such a case, the analytical framework is not collateral estoppel but res judicata – whether the judgment in favor of the creditor on a dischargeable ground precludes a later action asserting that the liability is non-dischargeable. *Brown v. Felsen*, 442 U.S. 127 (1979)

In *Brown*, the Supreme Court held that res judicata did not preclude the creditor from asserting that the debtor's liability was non-dischargeable even though the prebankruptcy litigation resulted in a consent judgment that did not state whether the basis of the judgment was contract or fraud. The Court reasoned that a contrary rule would force premature federal issues on the state courts and would be contrary to the bankruptcy policy that only honest debts be discharged. Such a rule would not serve the interest of res judicata because it would force state courts to decide questions at a stage when they are not directly in issue and when the parties have no incentive to litigate them. The Court observed that the mere fact that a conscientious creditor has reduced its claim to judgment should not bar the bankruptcy court's inquiry into the true nature of the liability.

After *Brown*, the Supreme Court applied the reasoning in that case to allow a creditor to prove that the debtor's liability on a note given prepetition in resolution of a fraud claim is non-dischargeable. *Archer. v. Warner*, 538 U.S. 314 (2003). In *Archer*, the creditors brought a fraud action against the debtor. The parties entered a settlement agreement pursuant to which the debtor paid a sum partly in cash, with the balance evidenced by a note. Also, pursuant to the settlement agreement, the creditors released the debtors from all liability except that set forth in the settlement agreement and dismissed with prejudice the fraud action. The debtor made no payment on the note and commenced a bankruptcy case. The creditors filed an action to establish that the debtor's liability on the note was non-dischargeable as arising out of fraud.

The Court concluded that the settlement agreement and releases would not bar the creditors from showing that the settlement debt arose out of fraud unless the debtor could show that the settlement agreement was clearly meant to preclude the creditors from making a claim of non-dischargeability. The burden would be on the debtor to establish the parties' intent to preclude non-dischargeability, and such an intent must be clearly shown.