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Cover Page Footnote

The author would like to thank his friends and family for their continued support and encouragement. The author would also like to thank his Executive Editor for Notes & Comments, Matt Branic, as well as Professors Morris and Hallinan for their input and assistance given in the production of this case note.

KILLING TWO BIRDS WITH ONE STONE[1]- THE PROPER (NON)APPLICATION OF JUDICIAL ESTOPPEL: *PARKER V. WENDY'S INTERNATIONAL, INC.*, 365 F.3d 1268 (11th Cir. 2004)

Jonathan M. Hiltz[*]

I. INTRODUCTION

In *Parker v. Wendy's Int'l, Inc.*, the Eleventh Circuit exercised an appropriate degree of restraint in its decision not to invoke the doctrine of judicial estoppel.[2] The court correctly decided that judicial estoppel, which is "an equitable doctrine invoked at a court's discretion,"[3] was not applicable. The court upheld not only the equitable principles upon which judicial estoppel is founded, but also properly observed one of the primary purposes behind bankruptcy. The court also precluded an allegedly discriminating employer from eluding legal scrutiny for its nefarious actions.

Judicial estoppel is an equitable doctrine that seeks "to prevent the perversion of the judicial process."[4] While not compromising this objective, the court advanced important objectives such as the accountability of employers and repayment of creditors in bankruptcy. These objectives were advanced through the court's well reasoned opinion that not only shows the proper place for judicial estoppel, but also allows for further doctrinal changes that will preclude the evils that judicial estoppel seeks to prevent.

This Note will discuss the virtues that the Eleventh Circuit opinion serves, and will provide a measured response to the likely counterarguments. This Note will also make recommendations as to

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[1] 1656 Hobbes, "Liberty,etc" (1841) 117 "t.h. thinks to kill two birds with one stone and satisfy two arguments with one answer." (available at www.phrases.org.uk/bulletin_board/24/messages/871.html).

[2] *Parker v. Wendy's Intl. Inc.*, 365 F.3d 1268 (11th Cir. 2004).

[3] *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002).

[4] *Id.*

prudent steps that the courts could take to (1) advance the objectives that the *Parker* court seeks to attain; and (2) to prevent unjust enrichment. Section II will provide an overview of the procedural history of the case and the Eleventh Circuit's opinion. This section will also discuss the substance of the judicial estoppel doctrine along with an explanation of objectives that the doctrine seeks to achieve. Section III will discuss how the *Parker* decision is supported by the text of the Bankruptcy Code. This section will also explain how the court's holding upholds the equitable considerations that are at the foundation of the Bankruptcy Code and our legal system in general. This section concludes with a suggested extension of the doctrine of judicial estoppel. This extension is based on the foundation laid down by the Eleventh Circuit in *Parker*. Section IV will conclude that the *Parker* court appropriately clarified the doctrine of judicial estoppel in a way consistent with the text of the Bankruptcy Code. This section also concludes that the principles laid down in *Parker* would allow for an extension of the doctrine that would further the equitable considerations discussed in Section III.

II. BACKGROUND

In analyzing the proper place for judicial estoppel in the bankruptcy context, it is necessary to understand the doctrine of judicial estoppel, the purpose it serves, and the evils it seeks to prevent. It is also necessary to understand the equitable considerations inherent in bankruptcy and employment discrimination law. This section will discuss the facts and procedural history of the case, followed by a brief description of the case that *Parker* is distinguished from. Finally, it will describe in detail the holding of the Eleventh Circuit Court of Appeals and the rationale behind the decision.

A. *The Doctrine of Judicial Estoppel in the Bankruptcy Context*

Judicial estoppel prevents a party from prevailing with a certain legal argument at one legal phase, only to advocate a contradictory position at a later legal phase.[5] In the bankruptcy context, this doctrine prevents a debtor from concealing potential causes of action when scheduling their assets and potential assets, only to pursue that cause of action at a later time.[6] Judicial estoppel seeks to prevent litigants from "playing fast and loose with the courts" by asserting inconsistent positions before the courts.[7] This arises in the bankruptcy context when a litigant fails to schedule causes of action that arose before they filed for bankruptcy. In failing to schedule this potential asset, the debtor effectively asserts a position before

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[5] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).
[6] *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996).
[7] *In re Cassidy*, 892 F.3d 637, 641 (7th Cir. 1990).

the court that the particular cause of action does not exist.[8] The Bankruptcy Code requires that the debtor schedule all assets and liabilities.[9] The moment the debtor files its petition for relief and schedules all actual and potential assets, the debtor is asserting a position before the court that the scheduled assets and liabilities are the only ones that exist.[10] The Bankruptcy Code also requires that the debtor update his asset schedule with any interest in property that the debtor acquires after the commencement of the case.[11]

The bankruptcy courts will apply judicial estoppel when a debtor omits potential causes of action against third parties from its schedule of assets (Chapter 7)[12] or its reorganization plan (Chapter 11[13] or Chapter 13[14]), and then asserts those causes of action in subsequent litigation.[15] Courts have held that any likely litigation outside the bankruptcy context must be scheduled with the existing assets.[16] "The rule of full disclosure of assets is without qualification or exception, and is perhaps the single most fundamental tenet of bankruptcy law."[17]

Given that creditors and the bankruptcy courts rely heavily on the debtor's schedule of assets,[18] the discouragement of nondisclosure is a vital objective of the courts. A debtor's attempt to "[c]onceal [his] claims, get rid of [his] creditors on the cheap, and start over with a new bundle of rights . . . is a palpable fraud that the court will not tolerate."[19] In the case that a debtor in bankruptcy: (i) is aware of a potential claim against a party prior to the filing of its bankruptcy petition; (ii) omits the potential claim from its schedule of assets; (iii) asserts such a claim against that third party for the

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[8] Honorable William Houston Brown, Lundy Carpenter, & Donna T. Snow, *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 Am. Bankr. L.J. 197, 228 (2001) (*citing e.g., Jinright v. Paulk*, 758 So.2d 553 (Ala. 2000)).

[9] 11 U.S.C. § 521(1) (2000).

[10] *Westland Oil Dev. Corp. v. MCorp Mgt. Solutions, Inc.*, 157 B.R. 100, 102 (S.D. Tex. 1993).

[11] 11 U.S.C. § 541(a)(7) (2000). *See also Tennyson v. Challenge Reality*, 313 B.R. 402, 405 (Bankr. W.D. Ky. 2004) ("The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court.").

[12] *See Chapter 7 Liquidation*, 11 U.S.C. § 701-784 (2000).

[13] *See Chapter 11 Reorganization*, 11 U.S.C. § 1101-1174 (2000).

[14] *See Chapter 13 Adjustment of Debts of an Individual with Regular Income*, 11 U.S.C. § 1301-1330 (2005).

[15] *See Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570 (1st Cir. 1993); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3rd Cir. 1988).

[16] *Oneida Motor Freight*, 848 F.2d at 417 (citing *Monroe County Oil Co. v. Amoco Oil Co*., 75 B.R. 158 (S.D. Ind. 1987)).

[17] J. Gottlieb & B. Greer, *The Doctrines of Standing and Judicial Estoppel: How Actions or Omissions in Bankruptcy Proceedings May Preclude the Assertion of Claims by a Debtor in a Subsequent Action*, 9 J. Bankr. L. & Prac. 487, 492 (2000).

[18] Creditors and bankruptcy courts rely on the debtor's disclosure statements and the accuracy thereof when considering whether to approve a no-asset discharge. *Burnes*, 291 F.3d at 1282. *See also Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3rd Cir. 1996) (noting that full and honest disclosure in a bankruptcy case is "crucial to the effective functioning of the federal bankruptcy system" and its importance "cannot be overstated").

[19] *Payless Wholesale Distributors, Inc.*, 989 F.2d at 571.

debtors benefit; and in certain jurisdictions (iv) has demonstrated a motive to conceal such claims from its asset schedules, that debtor will be judicially estopped from pursuing that cause of action against a third party.[20] To trigger judicial estoppel, two factors must be shown: "[f]irst, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system."[21]

B. *Facts of* Parker v. Wendy's International, Inc.

In January 1999, Parker filed a complaint against Wendy's alleging racial discrimination in the workplace and retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. §2000e, *et seq*.[22] Wendy's denied the allegations contained in the complaint, and the case was then set for trial.[23] On February 9, 2001, Parker and her former husband filed a petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the North Division of Alabama.[24] Parker's schedule of assets did not include the claim against Wendy's as a potential asset.[25] On May 31, 2001, the bankruptcy court entered an order granting a "no asset" discharge[26] for Parker and her former husband.[27] When Parker learned that the existence of the cause of action against Wendy's should have been disclosed to the bankruptcy trustee, she authorized her attorneys representing her in the District Court case to contact the Trustee.[28] The Trustee, Reynolds, moved to have the bankruptcy case reopened so that he could distribute the asset in the event of an award to Parker.[29] Reynolds also moved to intervene in the discrimination case or, alternatively, for substitution as the real party in interest.[30] The bankruptcy court granted Reynolds' motion to reopen, and the district court granted his motion to intervene.[31] Wendy's then moved to dismiss Parker's discrimination claims, arguing that under the Eleventh Circuit's reasoning in *Burnes v.*

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[20] J. Gottlieb & B. Greer, *supra* n. 17, at 494-95. Although some jurisdictions do not require that the debtor intentionally fail to disclose the existence of a potential cause of action. *See Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420 (7th Cir. 1993); *Tenneco Chems. v. William T. Burnett & Co.*, 691 F.2d 658, 665 (4th Cir. 1982); *Brassfield v. Jack McLendon Furniture, Inc.*, 953 F. Supp. 1424 (M.D. Ala. 1996).

[21] *Burnes*, 291 F.3d at 1285 (quoting *Salomon Smith Barney, Inc. v. Harvey, M.D.*, 269 F.3d 1302, 1308 (11th Cir. 2001)).

[22] *Parker*, 365 F.3d at 1269.

[23] *Id.* at 1270.

[24] *Id.*

[25] *Id.*

[26] The release of a debtor from monetary obligations upon adjudication of bankruptcy. *Black's Law Dictionary* 495 (Bryan A. Garner ed., 8th ed., West 2004); 11 U.S.C. § 727(a)(6).

[27] *Parker*, 365 F.3d at 1269.

[28] Appellant's Br., *Parker v. Wendy's Intl. Inc.*, 365 F.3d 1268 (11th Cir. 2004).

[29] *Id.*

[30] *Parker*, 365 F.3d at 1270.

[31] *Id.*

Pemco Aeroplex, Inc.,[32] Parker was barred by the doctrine of judicial estoppel because the cause of action was not asserted in the bankruptcy court.[33] Wendy's claimed that Parker would not have been entitled to a "no asset" complete discharge of all her debts if the creditors, the bankruptcy court, and her trustee had known of the lawsuit claiming substantial damages.[34]

The district court granted Wendy's motion to dismiss, which it construed as a motion for judgment on the pleadings.[35] The district court found the case "factually and procedurally indistinguishable from *Burnes* because Parker had failed to disclose the existence of her discrimination claim when she filed for Chapter 7 bankruptcy, . . . [resulting] in the discharge of her debts."[36] As a result, the district court held that Parker was judicially estopped from bringing her discrimination claim and dismissed her claim with prejudice.[37]

Reynolds then moved for reconsideration, arguing that the Parker case was distinguishable from *Burnes*.[38] Reynolds argued that the real party in interest in *Burnes* was the debtor acting on his own behalf, whereas in this case it was the Trustee acting on behalf of Parker's creditors.[39] Reynolds further argued that Parker and her attorneys informed Reynolds of the claim and he reopened the bankruptcy case before Wendy's moved to dismiss based on judicial estoppel.[40] In *Burnes*, the debtor moved to reopen the bankruptcy case only after the defendant filed a motion to dismiss based on judicial estoppel.[41] Finally, Reynolds argued that imposing judicial estoppel would result in an injustice to the innocent creditors who would be denied the possibility of recovering money owed to them by the debtor.[42] Further, it would also grant a windfall to Wendy's, who would escape its liability at the expense of the creditors in the bankruptcy case.[43]

The district court was not persuaded by Reynolds' intervention as the real party in interest, nor that Reynolds reopened the case prior to

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[32] *Burnes*, 291 F.3d at 1282. In *Burnes*, a debtor in bankruptcy had a pending cause of action against and employer and failed to schedule it. The debtor initially failed to disclose the potential asset on his Chapter 13 petition, then again failed to disclose it when the Chapter 13 case was converted to Chapter 7. In focusing on the apparent intent of the debtor to hide the cause of action, the court held that the debtor was judicially estopped from asserting the discrimination claim against his employer.
[33] *Parker*, 365 F.3d at 1270.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Infra* n. 53.
[42] *Parker*, 365 F.3d at 1271.
[43] *Id.*

Wendy's asserting judicial estoppel.[44] The district court held that Parker, who remained a party to the discrimination action, had asserted a claim that was inconsistent with the position she took in the bankruptcy case.[45] She was, therefore, judicially estopped.[46] Reynolds filed a timely appeal.[47]

C. *The Eleventh Circuit Court of Appeals Opinion*

On appeal from the United States District Court, the Eleventh Circuit reviewed the issue of judicial estoppel for an abuse of discretion.[48] The court of appeals considered two factors under which judicial estoppel would be invoked. "First it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system."[49] The court of appeals seemed persuaded by Reynolds' argument that the inconsistent statements of Parker should not be attributed to him because he himself did not make inconsistent statements before the court.[50] The court of appeals also acknowledged that applying judicial estoppel to the Trustee would not serve the policy of encouraging disclosure and that it would also preclude money from getting to the creditors.[51]

While acknowledging the arguments of the Trustee, the court did not follow that rationale in formulating its holding. The court ruled that the correct analysis compels "the conclusion that judicial estoppel should not be applied at all."[52] The court of appeals then called into question whether the *Burnes*[53] case, which was the basis for the district court's decision, was a correct application of judicial estoppel.[54] The court stated that the more appropriate defense in *Burnes* was that the debtor lacked standing.[55] Citing *Barger v. City of Cartersville*, the court held that "[g]enerally . . . a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate,

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[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* The court reviewed the judgment on the pleadings *de novo*, however the district court's application of judicial estoppel was reviewed for under an abuse of discretion standard.
[49] *Infra* n. 53.
[50] *Parker*, 365 F.3d at 1271.
[51] *Id.*
[52] *Id.* at 1272.
[53] 291 F.3d at 1282 (focusing on the intentional nondisclosure of a cause of action by a debtor). This court held that the initial nondisclosure, along with a further nondisclosure when the debtor converted his bankruptcy case from Chapter 13 to Chapter 7. This apparent intentional nondisclosure seemed to compel the court to apply judicial estoppel. *Burnes* can also be distinguished from *Parker* due to the fact that the trustee never attempted to intervene in *Burnes*, therefore judicial estoppel was applied solely to the nondisclosing debtor.
[54] *Parker*, 365 F.3d at 1272.
[55] *Id.*

and only the trustee in bankruptcy has standing to pursue it."[56] The Bankruptcy Code provides that both tangible and intangible assets vest in the bankruptcy estate as of the commencement of the case.[57] Considering that such property includes causes of action belonging to the debtor, the trustee, as representative of the bankruptcy estate, is the proper party in interest and the only party with standing to prosecute causes of action belonging to the estate.[58] The court explained that once an asset becomes part of the bankruptcy estate, all rights held by the debtor in an asset are extinguished[59] unless the asset is abandoned back[60] to the debtor by the trustee.[61] Property of the estate that is not abandoned under § 554 and is not administered to the creditors in the bankruptcy proceeding remains property of the estate.[62] Therefore, Parker's discrimination claim became an asset of the bankruptcy estate when she filed her petition.[63] Because Reynolds as the trustee became the real party in interest in Parker's discrimination claim, and he never took an inconsistent position before the court, he cannot be judicially estopped from pursuing it.[64]

III. ANALYSIS

The new direction that the Eleventh Circuit takes in the *Parker* case is appropriate for three primary reasons. First, the decision is supported by the text of the Bankruptcy Code. Second, the decision furthers the equitable considerations that are the foundations of the Bankruptcy Code, the doctrine of judicial estoppel, and our legal system as a whole. These equitable considerations include the repayment of creditors in bankruptcy[65] and the legal accountability[66] of discriminating parties and other tortfeasors.[67] Third, while the *Parker* decision furthers these objectives and sets a clear path for other courts deciding cases dealing with judicial estoppel and nondisclosure in bankruptcy, the court could have included

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[56] *Id.* (citing *Barger v. City of Cartersville*, 348 F.3d 1289, 1292 (11th Cir. 2003)). *See also Dunmore v. U.S.*, 358 F.3d 1107, 1112 (9th Cir. 2004) (reasoning that trustee, not the debtor, is the real party in interest and only the trustee has standing to pursue such claim).
[57] 11 U.S.C. § 541(a)(1) (2000).
[58] 11 U.S.C. § 323 (2000); *Barger*, 348 F.3d at 1292.
[59] *Barger*, 348 F.3d at 1292. The court used the term "extinguished." The property rights of the debtor are actually held in trust, where they may be administered to creditors and/or re-vested with the debtor after the bankruptcy proceeding. *See* 11 U.S.C. 726.
[60] 11 U.S.C. § 554(a) (2000). The trustee may disclaim an asset of the debtor that is burdensome to the estate or that is of inconsequential value to the estate.
[61] *See* 11 U.S.C. § 554 (a)-(c).
[62] *Id.* at § 554 (d).
[63] *Parker*, 365 F.3d at 1272.
[64] *Id.*
[65] *Infra* n. 83.
[66] *See generally* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 Fordham L. Rev. 423 (2002).
[67] "A constitutional tort committed under the color of state law (such as a civil-rights violation) is actionable under 42 USCA § 1983." *Black's Law Dictionary* at 1526.

within its holding a "middle of the road" provision which would preserve some of the objectives of judicial estoppel.

The "middle of the road" provision would involve allowing the trustee to intervene and carry out a lawsuit on behalf of the plaintiff, but it would only allow a damages award to the extent necessary to repay the creditors. The nondisclosing debtor would only be precluded from receiving the residual amount of the award that is over and above the debt if he is found to have *intentionally* failed to disclose a cause of action. Thus, the residual discrimination award that is left over after the repayment of creditors will remain with the defendant in the discrimination suit. This resolution would provide some degree of solace to a defendant seeking to invoke judicial estoppel. It would also create a disincentive for a debtor in bankruptcy from failing to schedule causes of action. In the contrary situation where the lawsuit award amounts to less than what is required to pay the creditors in bankruptcy, the court can hold the debtor judicially estopped from receiving a discharge of the debts still remaining. This condition could be applied at the discretion of the court. In their analysis of judicial estoppel, many courts have held that the second of two elements that must be met is that the debtor must have shown a bad faith intent to hide the existence of a cause of action from the bankruptcy court, the creditors, and the trustee.[68]

A. *The Court's Holding is Supported by the Text of the Bankruptcy Code*

The court held that the correct analysis compels the conclusion that the debtor did not have standing and that judicial estoppel should not be applied at all.[69] The court cited *Barger* for the proposition that a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate; therefore, it is the trustee and not the individual debtor that has standing to pursue it.[70] The property of the bankruptcy estate includes "all legal and equitable interests of the debtor in property as of the commencement of the case."[71] Pursuant to § 323, the trustee is the representative of the estate and the trustee manages the assets of the estate.[72] In *Barger*, the court found that the property described in § 541 included causes of action belonging to

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[68] The Seventh Circuit and the Eight Circuit have expressly required intentional nondisclosure. *See In re Cassidy* 892 F.2d at 641; *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 738 n. 6 (8th Cir. 1987). The First Circuit and the Third Circuit have expressed that a finding of intentional nondisclosure is not necessary. *See Jeffrey v. Desmond*, 70 F.3d 183 (1st Cir. 1995); *Ryan Operations G.P. v. Santiam-Midwesy Lumber Co.*, 81 F.3d 355, 365 (3rd Cir. 1996).

[69] *Parker*, 365 F.3d at 1272 (calling into question the application of judicial estoppel in *Burnes* as well).

[70] *Id.*

[71] 11 U.S.C. § 541(a)(1). This requires that all of the debtor's assets, both tangible and intangible, vest in the bankruptcy estate at the moment the debtor files its bankruptcy petition.

[72] 11 U.S.C. § 323(a) (2000) "The trustee in a case under this title . . . is the representative of the estate." *Id. See also* 11 U.S.C. § 704.

the debtor at the commencement of the case.[73] The approach of the *Barger* court was procedural, analyzing the estate's interests in an undisclosed cause of action within the context of Federal Rules of Civil Procedure 17(a)[74] and 25(c)[75] as a simple transferee of an interest in a cause of action.[76] In *Parker*, Rule 17 may not have been applicable because the action was filed by the proper party.[77] "Thus, the trustee, as the representative of the bankruptcy estate, is the proper party in interest, and is the only party with standing to prosecute causes of action belonging to the estate."[78] The trustee was the real party in interest; therefore, the trustee has exclusive standing to assert any discrimination claims.[79]

In *Parker*, the trustee's exclusive standing was caused by the filing of the bankruptcy case. The difference in the analysis between *Parker* and *Barger* is that the court in *Parker* did not use Rule 25(a) to bind the trustee who intervened in the lawsuit to the effect of judicial estoppel.[80] The holding in *Parker* seemed to be an alternative application of the principles set forth in *Barger*. *Barger* effectively held that the statutory protections afforded by §§ 541, 323, and 362 of the Bankruptcy Code were subordinate to procedural rules designed to govern the mechanics of civil proceedings in the federal legal system.[81] The analysis in *Parker* relied exclusively on the provisions of the Bankruptcy Code in resolving the standing issue.[82] Based on these considerations, the court's holding on the trustee's exclusive

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[73] *Barger*, 348 F.3d at 1292.
[74] Fed. R. Civ. P. 17(a). "Every action shall be prosecuted in the name of the real party in interest." *Id.*
[75] Fed. R. Civ. P. 25(c) (stating "[i]n case of any transfer of interest, the action may be continued by or against the original party"). However, this rule is overridden by Section 362 of the Bankruptcy Code. 11 U.S.C. § 362 (2000). Section 362(a)(3) provides a stay against any action to control or possess property of the estate. *Id.* In this situation, the continuation of the action by the debtor, without intervention by the trustee or authorization of the court, is an exertion of control over the estate's cause of action. Louis M. Phillips & Brandon A. Brown, *Continuing Ruminations on Judicial Estoppel: Barging into the Consumer Field*, 2004 No. 2 Norton Bank. L. Advisor 4, 5. (stating "[r]ule 25(a) is a procedural rule and cannot override the substantive component of § 362").
[76] Phillips & Brown, *supra* n. 75, at 3.
[77] *Id.* The article here called into question the use of Rule 17(a) in *Barger* because it is a rule that mandates no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until reasonable time has been allowed for joinder or substitution of the real party in interest. *See Hilbrands v. FarEast Trading Co.*, 509 F.2d 1321, 1323 (9th Cir. 1975) (reasoning "[r]ule 17(a) would control if an interest was transferred prior to commencement of the suit").
[78] *Parker*, 365 F.3d at 1272; 11 U.S.C. § 323(b) (2000) (reading "[t]he trustee in a case under this title has capacity to sue and be sued").
[79] *Barger*, 348 F.3d at 1291 (stating that the plaintiff/debtor filed her bankruptcy petition after she filed her discrimination claims, thus the discrimination claims were property of the bankruptcy estate and the trustee has exclusive standing to asset such claims). *See Wienberg v. GTE Southwest Incorporated*, 272 F.3d 302, 306 (5th Cir. 2001) (holding that when the trustee is the real party in interest, only that trustee has standing to assert a claim belonging to the bankruptcy estate); *Frank v. Utica Mutual Insurance Co.*, 109 B.R. 668 (E.D. Penn. 1990) (holding that where a debtor fails to list a cause of action as an asset, the trustee cannot abandon that claim and thus the debtor is precluded from enforcing the claim after discharge); *In re Alvarez*, 224 F.3d 1273 (11th Cir. 2000) (debtor may not assert claims belonging to the bankruptcy estate without participation of the trustee).
[80] *Parker*, 365 F.3d at 1272.
[81] Phillips & Brown, supra n. 75, at 8.
[82] *Parker*, 365 F.3d at 1272 (citing 11 U.S.C. § 541(a)(1)).

standing is supported by the Bankruptcy Code and the prior precedent.

B. *The Court's Decision Upholds the Equitable Considerations that are at the Foundation of the Bankruptcy Code and our Legal System*

The Bankruptcy Code and our traditional jurisprudence contain equitable considerations that pertain to the treatment of various parties under the law and also to the application of existing law as it applies to those various parties.[83] Bankruptcy law has been a crucial component to both our legal system and our economy.[84] It is bankruptcy law that determines the financial fate of both debtors and creditors. It applies not only after a debtor has defaulted on a debt owed, but also dictates what the character of the financial relationship will be prior to engaging in lending and borrowing.

Given the dramatic effect that bankruptcy law has on the lives of individuals and businesses, it is of the utmost importance that the framers of the Bankruptcy Code write the law in such a way as to observe principles of equity, fairness, and accountability. "Bankruptcy law has two primary goals: It seeks the orderly and equitable repayment of claims for the benefit of the creditors, and it offers an economic fresh start to the proverbial 'honest but unfortunate debtor.'"[85] Debtor relief as a primary objective of bankruptcy law in particular is a peculiarity of American law.[86] Professor Charles Hallinan notes that the developing recognition of the legitimacy of debtor protection and relief in the nineteenth century can be attributed to the corresponding importance of credit in the nation's economic structure.[87] One of the two reasons that Professor Hallinan states for the development of debtor relief laws is that the moral ideals manifested in forgiving the debtor's misfortune are favorable to any harsh punishment that might be inflicted for the debtor's wrongdoing.[88] This important consideration of debtor relief, or the "fresh start" policy,[89] is balanced by the first of two

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[83] Hon. Marcia S. Krieger, *"The Bankruptcy Court is a Court of Equity": What Does That Mean?*, 50 S.C. L. Rev. 275, 276 (1999) (reasoning "[b]ankruptcy law is implemented by using both legal and equitable procedures").

[84] *See* Lewis D. Soloman & Kathleen J. Collins, *Humanistic Economics: A New Model for the Corporate Social Responsibility Debate*, 12 J. Corp. L. 331, 352 (1987) (explaining a new model of humanistic economics which was designed to improve corporate social responsibility).

[85] Whaley & Morris, *Problems and Materials on Debtor and Creditor Law*, 2 (2d. ed., Aspen L. & Bus. 2001); *See Local Loan Co. v. Hunt*, 292 U.S. 234 (1934). This is one of the most cited bankruptcy decisions of the U.S. Supreme Court.

[86] Charles G. Hallinan, *The 'Fresh Start' Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. Rich. L. Rev. 49, 53 n. 12 (1986) (stating that of the various legal systems in which bankruptcy is an available remedial device for adjusting the debtor-creditor relationship, only United States bankruptcy appears to afford a freely available discharge to debtors without regard to the level of payments or consent of the creditors).

[87] *Id.* at 56.

[88] *Id.* at 57.

[89] *Local Loan Co.*, 292 U.S. at 244.

goals of bankruptcy law, the orderly and equitable repayment of creditors.

The goals of bankruptcy are heavily influenced by our traditional system of jurisprudence. Our legal system has developed over two hundred years under the premise that justice is sought and wrongdoers are to be accountable, not only for the betterment of their victims, but also in the sense that wrongdoers deserve punishment and must be deterred from further wrongful acts.[90] The objectives of bankruptcy law are not unique to American law. In fact, the concepts of debtor relief within bankruptcy can be found in both the Old Testament[91] and Roman Law.[92] As it concerns American law, the founding fathers recognized the sociopolitical and commercial importance of bankruptcy.[93] The court in *Parker* properly observed these aforementioned considerations by reaching a result that allowed for the bankruptcy estate to have more money for the repayment of worthy creditors. The *Parker* decision upholds these principles by punishing the discriminating party for its unlawful discrimination and not punishing the creditors in bankruptcy for the wrongful acts of the debtor. Thus, the Eleventh Circuit acted appropriately in reaching a result that properly observes the fundamental precepts of bankruptcy.

1. The Repayment of Creditors

As noted above, the repayment of creditors is one of the primary goals of the bankruptcy courts and should be observed by other courts dealing with debtors and creditors in bankruptcy. Courts have recently given more recognition to this objective. One such opinion states that, "court[s] cannot countenance depriving Debtor's creditors of the opportunity to share in damages to which [debtors are] entitled in order to preserve [the defendant's] judicial estoppel argument."[94]

In *Rochester*, the court analyzed the importance of the repayment

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[90] *See* W. Nelson, *Americanization of the Common Law* (1975) for a general analysis of the historical development of the common law, and in particular, pages 41- 43, for an analysis of the common law and natural law roots of American bankruptcy law.

[91] Deuteronomy 15:1-4. ("At the end of every seven years thou shalt make a release. And this is the manner of the release: Every creditor that lendeth aught unto his neighbor shall release it; he shall not exact it of his neighbor or his brother; because it is called the Lord's release. Of a foreigner thou mayest exact it again; but that which is tine with they brother thine hand shall release; save when there shall be no poor among you.").

[92] David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. Bankr. L. & Prac. 165, 167 (2000) (explaining that until Julius Caesar had enacted the law known as Cessio Bonorum, Roman Law gave creditors the right to carve up the body of the insolvent debtor and authorized each creditor to take a proportionate or pro rata share).

[93] *Id.* at 170 (noting that Congress' power to establish uniform bankruptcy laws was inserted in the Constitution immediately after the power to regulate commerce in Article I, Section 8, Clause 4).

[94] *In the Matter of Rochester*, 308 B.R. 596, 605-606 (N.D. Georgia 2004) (balancing the importance of the repayment of creditors against the preservation of the defendant's judicial estoppel argument in the context of whether or not to reopen the bankruptcy case). In *Parker*, the bankruptcy case was in fact reopened upon the motion of the trustee. *Parker*, 365 F.3d at 1268.

of creditors. That court noted that "[a] debtor's attempt to keep assets from creditors should not preclude those same creditors from sharing in the proceeds of the concealed asset."[95] There have been three cases in which the Eleventh Circuit has affirmed orders in which a district court has granted summary judgment to a defendant on the basis that the plaintiff's failure to disclose a cause of action during a bankruptcy case judicially estopped that plaintiff from pursuing the claim.[96] These cases suggest that the debtor may be judicially estopped if the court has found that the debtor intentionally failed to disclose or purposefully tries to hide the assets from the bankruptcy estate.[97] While there was no finding of intentional nondisclosure in *Parker*, the policy considerations behind changing the effect of *intentional* nondisclosure are substantial. In the prior section, the analysis behind the standing argument suggests that the application of judicial estoppel based on the intent of the nondisclosing debtor would either be irrelevant or disjointed and inconsistent with the law. The bad faith that a nondisclosing debtor displays should be used to punish the debtor, not the innocent creditors. This important objective can be achieved and will be addressed in section C of this article.

The *Parker* court's resistance to apply judicial estoppel is understandable. This modest approach works to benefit the innocent creditors and allows for a clearer doctrine that does not involve the court trying to quasi-subjectively determine the debtor's intent. The carelessness of a hapless debtor who fails to schedule a potential lawsuit with the bankruptcy estate should not work against innocent creditors who already have had their rights usurped by the filing of bankruptcy.[98] As this article will further discuss, the objective of the doctrine of judicial estoppel, which punishes inconsistencies in one's positions being shown "to make a mockery of the judicial system,"[99] can be achieved in another way, not at the expense of the innocent creditors.

2. A Discriminating Party Should Not Be Absolved of Wrongdoing Based on a Mistake of a Debtor in Bankruptcy

When the district court held the plaintiff judicially estopped, it jettisoned Wendy's liability on a basis that had nothing to do with the merits of the employment discrimination case. The district court not only

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[95] *In the Matter of Rochester*, 308 B.R. at 602.
[96] *See Barger*, 348 F.3d 1289; *DeLeon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11th Cir. 2003); *Burnes*, 291 F.3d 1282.
[97] *In the Matter of Rochester*, 308 B.R. at 604.
[98] Under Section 362 of the Bankruptcy Code, the filing of the petition for bankruptcy creates an automatic stay which precludes any creditor collection activity (with the exceptions listed in subsection (b)). 11 U.S.C. § 362. This effectively makes for an injunction against the creditors from collecting or even accepting money and property of the debtor that is rightfully owed to them. However, the creditors may apply for relief from the stay under § 362(d), (e), and (f). *Id.*
[99] *Solomon Smith Barney, Inc.*, 260 F.3d at 1308.

dismissed the case, but dismissed it with prejudice, meaning that Parker could not bring the lawsuit in the future. This dismissal effectively creates a windfall for Wendy's and does nothing to discourage the potentially illegal behavior of a major employer. The position taken by the court of appeals in *Parker* allows for the merits of the discrimination suit to be tried and for the liable party to be punished for its indiscretions.

The tradition behind American jurisprudence compels the judicial system to punish wrongdoers and to hold those who commit wrongs to be accountable not only for the sake of justice, but also for the deterrent effect that discrimination litigation can have on businesses. In recent years, the doctrine of judicial estoppel has been raised as a defense to various claims with increasing frequency.[100] The application of judicial estoppel in conventional fashion leaves victims uncompensated, while wrongdoers avoid legal scrutiny for their actions. If the court of appeals had affirmed the district court's implementation of judicial estoppel, innocent creditors would have gone unpaid for something over which they had no control and also a potentially liable employment discriminator would have gone unpunished. These two outcomes would have been in the name of "[protecting] the judiciary, as an institution, from the perversion of judicial machinery."[101] While preserving integrity of the judiciary is an important motive, it should not come at the expense of innocent creditors, and consequence-free discrimination, when there is a better way to apply the principles of judicial estoppel that preserve the integrity of the judicial system.

C. *The Proper Extension of the Doctrine of Judicial Estoppel Based on* Parker

Critics of the Eleventh Circuit's decision in *Parker* might argue that the whole purpose behind judicial estoppel is moot if the courts allow the trustee in bankruptcy to intervene in the plaintiff/debtors cause of action that they did not disclose. These critics will claim that the purpose of judicial estoppel that discourages debtors from hiding assets from the bankruptcy estate will be phased out and made irrelevant by allowing trustees to intervene on behalf of the plaintiff/debtor. The argument would purport that *Parker* encourages a debtor to hide pending or potential causes of action knowing that if they are discovered, the trustee can simply intervene and carry out the suit on the debtor's behalf. Thus, the deterrent effect of judicial estoppel is negated. This could be true based on the doctrine that seems to have been laid down by *Parker*. However, a change in the application of the doctrine, together with the court's holding on

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[100] *In the Matter of Rochester*, 308 B.R. at 602. *See* Brown, Carpenter, & Snow, *supra* n. 8, at 197.
[101] *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) (describing the design of the doctrine of judicial estoppel in theoretical terms).

standing, would quash the counterarguments to the doctrine laid down in *Parker*. This change involves a relatively small doctrinal change in the application of judicial estoppel and an extension of the principles of *Parker.*

1. Allow the Bankruptcy Estate to Have the Monetary Award from a Discrimination Suit and Judicially Estop the Intentional Non-disclosing Debtor from Collecting the Residual Amount

As was explained earlier, and held in *Parker*, the trustee must be permitted to intervene as the real party in interest because it is afforded standing by the Bankruptcy Code.[102] The doctrine of judicial estoppel, however, can still be applied to the plaintiff. Many courts have held that bad faith or intentional nondisclosure of a cause of action when scheduling the assets in bankruptcy is a necessary element for application of judicial estoppel.[103] The difficulty may arise in how a court might determine whether a nondisclosing debtor was intentionally hiding assets. The Fifth Circuit has adopted a test which has been also adopted by the Sixth Circuit[104] to determine whether an omission was inadvertent.[105] Under the Fifth Circuit test, as outlined in *In re Coastal Plains, Inc.*, there are two circumstances under which a debtor's failure to disclose a cause of action in a bankruptcy proceeding might be deemed inadvertent.[106] The first is where the debtor lacks knowledge of the factual basis of the undisclosed claims.[107] The second is where the debtor has no motive for concealment.[108] The Eleventh Circuit has employed this standard as well.[109]

The proper application of judicial estoppel should take place in the context of what amount of money, if any, should go to the plaintiff/non-disclosing debtor after the bankruptcy estate has paid off all of the creditors.[110] The same factors and analysis used in deciding whether a plaintiff is judicially estopped can still be applied, but only to determine whether the plaintiff/debtor can retain the residual award that remains after the creditors have been fully paid. For example, if a debtor has $100,000 of debt, and the likely award from a discrimination suit is $150,000, then assuming that the discrimination award is used to pay the entire debt, there

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[102] *Parker*, 365 F.3d at 1272; 11 U.S.C. § 541(a)(1).
[103] *Tennyson*, 313 B.R. at 407 (stating that judicial estoppel should not be used in situations of inadvertence or mistake). *See also U.S. v. Hussein*, 178 F.3d 125, 130 (2nd Cir. 1999); *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196-197 (4th Cir. 1998); *Helfand v. Gerson*, 105 F.3d 530, 536 (9th Cir. 1997).
[104] *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002).
[105] *Tennyson*, 313 B.R. at 407.
[106] *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999).
[107] *Id.*
[108] *Id.*
[109] *De Leon, Inc.*, 321 F.3d at 1289 (reasoning debtors knew of claims and stood to benefit from their omission from the bankruptcy schedules).
[110] 11 U.S.C. § 726(a)(6) (2000). The property of the estate will be returned to the debtor after all creditors and administrators have been paid pursuant to § 726. *Id.*

is $50,000 left over for the debtor. Under this alternative application of judicial estoppel, the positive objectives of the creditor repayment and the accountability of the discriminating party are realized. The judicial estoppel analysis should still be applied to the debtor, including the provisions that exist in some jurisdictions that require intentional nondisclosure on the part of the plaintiff. If the debtor is found to have intentionally hid the existence of a cause of action from the bankruptcy estate, then that plaintiff should be judicially estopped from receiving the award money that is left over after the creditors are paid.

This policy would serve the goal of discouraging nondisclosure and punishing those who attempt to hide assets from the bankruptcy estate. This policy also places the punishment on the wrongdoing party instead of holding innocent creditors accountable for the chicanery of the debtor. This method is consistent with the concept that only the trustee has standing because it is the real party in interest.[111] If one was to analyze the interest that the debtor and the trustee have in the award money, one could conceive that the trustee's interest in the award would only exist to the extent that the award could go to pay the creditors. Thus, the interest of the debtor may then extend to the amount that exists after the creditors have been paid. It would make sense to judicially estop the intentional, nondisclosing debtor to the extent that he has an interest in the award, which would only be the amount, if any, that is over and above what is needed to pay the creditors. Under this application, the objectives that judicial estoppel seeks to attain would be preserved, while further considerations of creditor repayment and accountability of discriminating parties would be addressed appropriately as well.

2. If the Monetary Award is Less Than the Amount Owed to Creditors in Bankruptcy, the Court Should Judicially Estop the Intentional, Non-disclosing Debtor from Getting a Discharge of the Residual Debt

The equitable considerations addressed in Subsection (1) can be applied in the same sense when the award from a lawsuit is not sufficient to cover the debt owed to the creditors in bankruptcy. The standard that must be met for judicial estoppel to be triggered is basically the same as the standard explained in Subsection (1). If a debtor is found to have intentionally hidden a pending cause of action from the bankruptcy estate, the trustee should still be permitted to intervene on behalf of the plaintiff. However, judicial estoppel will still be applied to punish the debtor and benefit the creditors. If the amount of the award does not cover the debts owed to the creditors in bankruptcy, the remaining debt will not be discharged if the debtor has been found to have intentionally hid that cause

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[111] *Supra* n. 79.

of action from the bankruptcy estate. For example, if a debtor has $100,000 of debt, and the likely award from a discrimination suit is only $60,000, then assume that the penniless debtor must use that entire award to pay his creditors. If this debtor has been found to have intentionally hid the existence of this discrimination suit from the bankruptcy estate, that debtor should be judicially estopped from having the remaining $40,000 of his debt discharged.

This application of judicial estoppel would further the same equitable principles discussed in the previous sections. Under this application, a bad faith, non-disclosing debtor would be punished for double-dealing with the bankruptcy court. Also, the discriminating party would not be granted a windfall by having its liability extinguished through no positive action of its own. Likewise, this application allows for the creditors to be paid off in full, or at least to a greater extent than they would have been paid had judicial estoppel precluded the lawsuit from being carried out. The court's authority to implement this application is also supported by § 105(a) of the Bankruptcy Code.[112]

IV. CONCLUSION

The decision of the Eleventh Circuit in *Parker* is an appropriate one because it clarifies the doctrine of judicial estoppel, and it also is consistent with the text of the Bankruptcy Code. The decision also furthers the equitable considerations of repayment of creditors and accountability of tortfeasors. The *Parker* decision represents a change in the application of judicial estoppel. For the abovementioned reasons, this change is appropriate; but what it fails to do is remedy an evil of which judicial estoppel is supposed to quash. Part C of Section III of this article proposes a policy that allows for nondisclosing debtors in bad faith to be judicially estopped from receiving a monetary award from a discrimination suit or from having debts discharged that cannot be paid from the proceeds of a third party lawsuit. Under the holding in *Parker*, along with the alternative application advocated in this article, the doctrine of judicial estoppel can be used to preserve the integrity of the judicial system, as well as advance equitable principles inherent in the Bankruptcy Code and traditional American jurisprudence.

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[112] 11 U.S.C. § 105(a) (2000) (reading "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title").