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ABOUT THE AUTHOR

Caren Enloe leads Smith Debnam' s consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: Consumer Financial Services Litigation and Compliance dedicated to consumer

District Court Takes on the Intersection of Bankruptcy and the FDCPA

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A New York District Court recently tackled the intersection between bankruptcy and pre-petition FDCPA claims and the application of judicial estoppel to undisclosed claims. In December 2013, Jeziorowski filed a complaint alleging violations of the Fair Debt Collection Practices Act (FDCPA) and the Telephone Consumer Protection Act of 1991 (TCPA). *Jeziorowski v. Credit Prot. Assn., L.P.*, 2017 U.S. Dist. LEXIS 66084 (W.D.N.Y. 2017). Shortly after filing suit, Jeziorowski filed bankruptcy pursuant to Chapter 7. At his 341 meeting, Jeziorowski orally informed the trustee about his pending FDCPA and TCPA claims. The trustee instructed him to have his attorney report to the court if the pending claims had more value than $1,000. Shortly thereafter, Jeziorowski was granted his discharge. At the time of his discharge, the FDCPA/TCPA lawsuit remained pending and Jeziorowski had not amended his schedules to reflect the claims.

Two years later, Jeziorowski requested the bankruptcy be reopened to allow him to amend his schedules to include the FDCPA and TCPA claims. Shortly after, Jeziorowski filed a motion in the pending FDCPA/TCPA litigation to substitute the trustee as plaintiff. In response, the defendant opposed the motion, arguing that both Jeziorowski and the trustee should be judicially estopped from pursuing the FDCPA and TCPA claims and requesting the complaint be dismissed with prejudice.

The intersection of bankruptcy and pre-petition consumer protection claims is a tricky one. The proper functioning of the bankruptcy system requires a full disclosure of all claims. The failure to do so may prevent the unwary consumer from pursuing them. In Chapter 7, disclosed claims may be abandoned by the trustee post discharge and returned to the debtor to pursue. However, undisclosed claims remain the property of the estate and the debtor may be estopped from pursuing them. In short, the doctrine of judicial estoppel prevents consumers from gaming the system.

In addressing the defendant's judicial estoppel argument, the court first noted that for judicial estoppel to apply, "1) a party's later position must be 'clearly inconsistent' with its earlier position; 2) the party's former position has been adopted in some way by the court in the earlier proceeding, and 3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." *Jeziorowski* at *6. The court

financial services and has been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

noted, however, that the failure to disclose an asset does not necessarily preclude his claims when the non-disclosure is inadvertent. The court went on to state that even if the debtor is judicially estopped from pursuing an undisclosed claim, a trustee is not necessarily estopped from pursuing the same claim on behalf of the creditors.

Rejecting the defendant's judicial estoppel argument, the court reasoned that neither the debtor nor the trustee was judicially estopped from pursuing the FDCPA and TCPA claims. In doing so, the court relied heavily on the fact that Jeziorowski had orally disclosed the pending litigation to the trustee at his 341 meeting. The court concluded, therefore, that "there is no basis for concluding that Jeziorowski deliberately asserted inconsistent positions to gain an advantage; on the contrary, there is every reason to conclude that his nondisclosure was inadvertent and that he acted in good faith." *Id.* at *10. Moreover, the court concluded that there was no reason to judicially estop the trustee from pursuing the claims. "Estopping the trustee … would work the sort of unfair windfall – this time, to the defendant – that equity is designed to prevent." *Id.* at *9.

The opinion serves as a reminder that, at the outset of every litigation, defense counsel should determine whether the plaintiff has filed bankruptcy and closely examine any bankruptcy petition for a disclosure of the claims. Generally, a court will invoke the judicial estoppel doctrine if the plaintiff was deliberately asserting inconsistent positions in order to play "fast and loose with the courts." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996).

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