Office of the Chapter 13 Trustee—Akron Ohio
Keith L. Rucinski—Trustee

Chapter 13 Quarterly Newsletter
December 2013

1. Best Wishes for the Holidays and Upcoming New Year!

The Chapter 13 office wishes to extend best wishes for the holidays and the upcoming New Year to the bankruptcy community! The past year has been a difficult one for bankruptcy professionals as a decline in case filings has caused many firms to reduce staffing while still maintaining professional responsibilities to clients.

All parties in the bankruptcy system play an important part in both maximizing the return to creditors and allowing debtors to earn a fresh financial start.

The Chapter 13 office hopes that everyone in the bankruptcy community will take some time to spend with their family and friends this holiday season and recharge their batteries for 2014.

To allow the Chapter 13 staff to spend time with their families please note that the Chapter 13 office will be closed on December 24, 25, 26, 27 and January 1, 2014.

2. Personal Financial Management Class, Monday, April 28, 2014

Please note that the Chapter 13 office in Akron will hold its next Personal Financial Management Class for debtors who have not yet taken this required class on Monday, April 28, 2014 from 6 PM to 8 PM at the main library in downtown Akron. The Chapter 13 office offers this class free of charge.

As all counsel know, if a debtor fails to take the class, the debtor will not be eligible for discharge and creditors would be permitted to keep all funds paid into the plan and seek further recovery from the debtors. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made the Personal Financial Management Class a requirement for discharge.

A few cases did not receive a discharge this year but were closed for the debtor's failure to take the required class. The cases were closed even after the debtor was given a warning that the case would close without a discharge but the debtors, for whatever reasons, failed to take the class.

The Trustee thanks all counsel for working with their clients to take the class early in the bankruptcy process as possible as taking the class within the first few months of the petition filing date does seem to help the debtors complete the plan successfully and gives the debtors a better understanding of the Chapter 13 program.

A flyer for the April 28, 2014 class is attached to this newsletter for counsel to share with their clients.

3. Case Statistics for Fiscal Year 2013

For fiscal year 2013 (ending September 30, 2013), the following statistics for Chapter 13 cases in Akron are available:

Number of New Cases	845
Number of Case Closed	1,146
Total Number of Cases Earning Discharge	616
Number of Cases Closed with Hardship Discharge	22
Percent of Closed Cases Earning Discharge	56%
Average Unsecured Dividend	30%
Total Funds Paid to Unsecured	$11,479,682
Total Funds Paid Thru Chapter 13 Plans	$27,146,435
Attorney Fees Paid Thru Chapter 13 Plans	$2,133,315

4. Summit County Standard Language for HUD Deferred Mortgage

For debtors who have a HUD deferred mortgage initiated with Summit County, Summit County is requesting the following language to be inserted into the plan to make clear that although the county is not seeking collection of the mortgage, it would not be discharged through the bankruptcy and will remain a lien on the real property. For most HUD loans, repayment is not necessary as long as the debtor maintains the real property as their personal residence. The requested language listed below is meant to help counsel mitigate the need to file an amended plan as absent this language, Summit County may file an objection to confirmation of the plan.

The County of Summit Mortgage Recorded at #_____on_____ shall remain a lien on the real property located at _____ and the Mortgage remains in full force and effect. Creditor acknowledges that no payments are due under the Mortgage until the real property is sold, deed transferred, it is no longer the mortgagor's principal residence or there is a default under the terms of the Mortgage.

5. Making On-Line Chapter 13 Payments

In the near future, the Chapter 13 office will have available an on-line payment option for debtors who must make their Chapter 13 payment directly. Said on-line payment option will cost the debtors $1.00 per transaction and will be in addition to their monthly Chapter 13 plan payment.

Many debtors have been requesting an on-line payment option. On-line payment options are appropriate for debtors who require direct payment (self employed or retired debtors). The Chapter 13 office will provide further information in the near future regarding on-line payments. While still in the testing stages it is expected that debtors will be able to make on-line payments beginning in February 2014. Further information will be provided in the next newsletter.

6. Relief from Stay for State Domestic Cases

Sometimes in a Chapter 13 case, counsel have to file a motion for relief from stay because the joint debtors in the case have decided to seek a divorce or dissolution of their marriage. Often, the domestic court requires a relief from stay order in order to proceed with the state court proceedings.

Attached to this newsletter is a suggested template to help counsel when their clients need relief from stay to proceed with actions in the state court proceeding.

7. Saving Electronic Copy of Plan and Schedules Helps Avoid Errors When Amending the Plan.

The Chapter 13 office has noticed some errors when counsel file amended plans and/or schedules which cause the need for both further amendments and delayed confirmation.

When a schedule needs amended, for example Schedule B to add an automobile, many counsel simply file an amended Schedule B and list only the automobile. An amended schedule supersedes the previously filed schedule. By filing an amended Schedule B listing only the automobile, all other items on Schedule B which need to be listed are now excluded causing further delay and the need for another amended schedule. As a practice tip, counsel may find it useful to keep electronic copies of their plans and schedules on their database. By keeping electronic schedules, if a schedule needs amended, the additional item can simply be added without removing all the other items which are already there and need to remain on the schedules. This well help cut down on the need to file multiple amended schedules and reduce the time lag in confirmation.

8. Verifying the Debtor's Interest in Automobiles

One of the most frequent reasons a 341 cannot be concluded and the plan cannot be recommended for confirmation is incomplete disclosure on automobiles owned by the debtor.

Counsel may find it useful to verify the cars listed on Schedule B by reconciling with the debtors insurance papers before filing the schedules. Many times the automobiles listed on the debtor's insurance does not reconcile to the automobiles disclosed on the bankruptcy petition either because the debtor may have forgotten to list them because the car is used by a relative but is titled in the debtor's name; and therefore, must be listed on schedule B.

9. Why Modify the Plan if Debtor not Making Payments or Case is not Feasible?

Often times in response to a motion to dismiss filed by the Chapter 13 office, counsel files a modification of the Chapter 13 plan. The problem with these modifications is that the debtor has not been making plan payments; hence, that is why the Trustee filed a motion to dismiss. The modification does not explain how the debtor is going to make plan payments going forward, nor does the amended plan address the missed plan payments which must be made up. It is a futile exercise to modify the plan if the debtor cannot make plan payments and more importantly has not made a plan payment or is unable to make plan payments going forward.

Often, post-petition debt is added to the plan either through one of the taxing authorities or the mortgage company. Many counsel then seek to modify the plan in response to a motion to dismiss but do not address the feasibility issues of the plan given the additional post-petition debt. If post-petition debt is added late into the Chapter 13 plan, it may be in the debtor's best interest to allow the case to be dismissed and have their counsel file a new Chapter 13 plan for them whereby they can have the opportunity to have a full 60 months to catch up on all the post-petition debt which was filed in the previous case.

Unless stated in the motion, the Trustee is not asking for the case to be dismissed with prejudice and the debtor would be eligible to file a new case upon dismissal of their current case.

10. Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure

The committee on rules of practice and procedures of the judicial conference of the United States has published a preliminary draft of proposed amendments to the Federal Rules of Bankruptcy and Civil Procedures. The changes in bankruptcy procedure in forms include a change in the Chapter 13 petition schedules and a new national Chapter 13 form plan which would be mandatory in the United States. Although mandatory, the

form does allow for local and custom use practice. However, said variations have to be fully disclosed in specific parts of the form plan. The committees report is nearly 400 pages long; and therefore, cannot be transmitted as an attachment to this newsletter. Please note that a complete copy of the preliminary draft of proposed amendments to the Federal Rules of Bankruptcy and Civil Procedure is available on the attorney and creditor subpages of the Chapter 13 webpage in Akron located at www.chapter13info.com.

Given that the preliminary draft provides significant change, the Trustee encourages all parties in the bankruptcy community to take a few minutes to review the parts of the plan and forms which affects their respective practices.

The committee is accepting written comments on the proposed changes through February 15, 2014.

11. Request for Discharge

The Chapter 13 office in Akron files a request for discharge at the end of each case where the debtor has completed plan payments. The request gives 30 day notice to interested parties who may or may not object to the discharge. To comply with Rule 3002, the request for discharge also contains a 21 day notice on final cure payments to the mortgage company. As Akron does not require conduit mortgage payments, the motion generally only states that mortgage arrears pay through the plan have been paid.

Creditors have asked that the docket code for the Request for Discharge be more descriptive.

Please note the docket entry now reads:

Trustee's Notice of Final Cure Payment and Completion of payments Under the Plan with 21 day Notice to Mortgage Creditors and Trustee's Request for the Court to Issue a Discharge in Chapter 13 Case.

The Trustee thanks the staff of the US Bankruptcy Court for allowing this new docket code.

12. Case Law

In re Bowers, 2013 Bankr. LEXIS 4939 (B.A.P. 6th Cir. Nov. 22, 2013).

Plymouth Park purchased a tax lien certificate from Summit County that provided Plymouth Park a lien against the debtors' property and the right to pursue the Bowers for unpaid taxes. The certificate stated a negotiated interest rate of 0.25%. After Plymouth Park filed a tax lien foreclosure complaint against the Bowers, they filed a Chapter 13 bankruptcy petition. In their plan, the debtors proposed to pay Plymouth Park the interest rate listed on its certificate which was 0.25%. Plymouth Park filed a claim in which it calculated an interest rate of 18%. Thereafter, Plymouth Park filed an objection to confirmation of the debtors' plan, and the debtors filed an objection to Plymouth Park's claim. Plymouth Park argued that Ohio Rev. Code Ann. § 5721.38(B) entitled it to an 18% interest rate. Section 5721.38(B) provides that a property owner "may redeem the parcel by paying ... interest on the certificate purchase price ... at the rate of 18% per year." The debtors' argued that Section 5721.38(B) was inapplicable because it did not apply to redemption via Chapter 13 plan payments. The bankruptcy court agreed with the debtors and held that 0.25% was the appropriate interest rate for Plymouth Park's claim. The bankruptcy court concluded (i) Section 5721.38(B) "is limited to those instances where 'a party redeems real estate from a certificate sale by paying cash to the county treasurer'" and (ii) Ohio law provides a creditor the interest rate established by the tax certificate auction.

Plymouth Park appealed to the Bankruptcy Appellate Panel of the United States Court of Appeals for the Sixth Circuit, from the United States Bankruptcy Court for the Northern District of Ohio and re-asserted its argument that Section 5721.38(B) guaranteed it 18% interest on its claim.

The decision of the bankruptcy court was affirmed by the Bankruptcy Appellate Panel of the United States Court of Appeals for the Sixth Circuit. Pursuant to Ohio Rev. Code Ann. § 5721.37(A)(3), the certificate rate of interest, not the interest rate provided in Ohio Rev. Code Ann. § 5721.38(B), is the interest rate applicable to a tax lien certificate claim in bankruptcy. Section 5721.37(A)(3) "specifically provides that the tax certificate interest rate continues to accrue during a bankruptcy." Ignoring Section 5721.37(A)(3) in favor of Section 5721.38(B) would violate basic tenets of statutory construction: it would require more general provisions to prevail over specific statutory provisions and it would render specific statutory provisions "mere surplusage."

Flugence v. Axis Surplus Ins. Co. (In re Flugence), 2013 U.S. App. LEXIS 23582 (5th Cir. La. Nov. 22, 2013).

Debtor Flugence filed for Chapter 13 protection in 2004. In March 2007, Debtor was injured in a car accident. An amended plan was confirmed in July 2007 and Debtor did not disclose she had an accident and might prosecute a personal injury claim. The personal injury defendants learned of the non-disclosure and had the case reopened and asked the bankruptcy court to judicially estop the debtor from pursuing the undisclosed claim.

The bankruptcy court held that while Debtor was judicial estopped from pursing undisclosed claim on her own behalf, the trustee was not similarly estopped and could pursue the claim for the benefit of creditors. On appeal, the district court reversed with respect to estopping Debtor and affirmed in all other respects. The district court found that the bankruptcy court abused its discretion and Debtor was not estopped because she did not have a potential cause of action prior to her initial application for bankruptcy.

Upon a further appeal to the Fifth Circuit Court of Appeals, the Fifth Circuit reversed the district court and reinstated the bankruptcy court decision and held that there is a continuing duty for a debtor to disclose a potential cause of action in post-confirmation, Chapter 13 proceedings. The Fifth Circuit also held that the bankruptcy court did not abuse its discretion in declaring Debtor judicial estopped from pursuing the undisclosed claim and based on Reed v. City of Arlington, 650 F.3d 571 (5th Cir. 2011) (en banc) the trustee was not similarly estopped and could pursue the claim for Debtor's creditors without strictly limiting recovery to the amount owed to creditors. In reaching the decision, the Fifth Circuit rejected argument that the trustee's recovery should be limited the amount owed as that would favor tortfeasors over mere innocent creditors.

SAVE THE DATE

White Williams Seminar
Hartville Kitchen

April 11, 2014

Personal Financial Management Class
Monday, April 28, 2014

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Office Of
The Chapter 13 Trustee
Keith L. Rucinski, Trustee

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December 4, 2013

Personal Financial Management Instructional Course

Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, all people filing for bankruptcy after October 17, 2005, must take a Personal Financial Management Instructional Course in order to earn a discharge of their case. A discharge means a successful completion of the plan and creditors paid through the plan may not seek further payment from you. This course is in addition to the Credit Counseling Course that you took to file your Chapter 13 case. If you have already taken both courses you may disregard this notice.

The Chapter 13 Office in Akron, Ohio will be offering the Personal Financial Management Instruction Course on **Monday, April 28th, 2014**, at the Akron-Summit County Public Library, 60 S. High Street, Akron, Ohio 44308. Pickup of course materials and seating for the class begins at 5:30 p.m. The course runs from 6:00 p.m. to 8:00 p.m. A parking deck is located next to the library and parking is free. **You must register for the course and may do so by calling 330-475-7500, or by email to edclass@ch13akron.com. PLEASE MAKE SURE TO LEAVE YOUR NAME AND CASE NUMBER WHEN CALLING TO MAKE YOUR RESERVATION. Space is limited so please make your reservation as soon as possible**. **The deadline to register for the class is April 25th, 2014.** A photo I.D. will be necessary in order to take the course. If you require a Sign Language interpreter send your request to edclass@ch13akron.com. The instructor will be Keith Rucinski. Mr. Rucinski is a CPA and Attorney and serves as Trustee for the Chapter 13 Office. For the past decade he has taught college courses and has been a frequent speaker at local and national seminars.

This course is only being offered to individuals who have filed Chapter 13 with the U.S. Bankruptcy Court in Akron, Ohio. The course is being offered without regard to an individual's ability to pay. There is no cost to individuals for taking the course sponsored by the Chapter 13 Office.

You are not required to take this course through the Chapter 13 Office, but you must take a course which has been certified by the U.S. Department of Justice – U.S. Trustee Program. The other course providers may charge you a fee. The Chapter 13 Office in Akron does not pay or receive fees or other consideration for the referral of debtor students to or by the provider.

Upon completion of the course the Chapter 13 Office in Akron will provide participants a certificate of course completion. This certificate must be filed with the U.S. Bankruptcy Court in Akron, Ohio in order to earn a discharge in your case.

Main Library

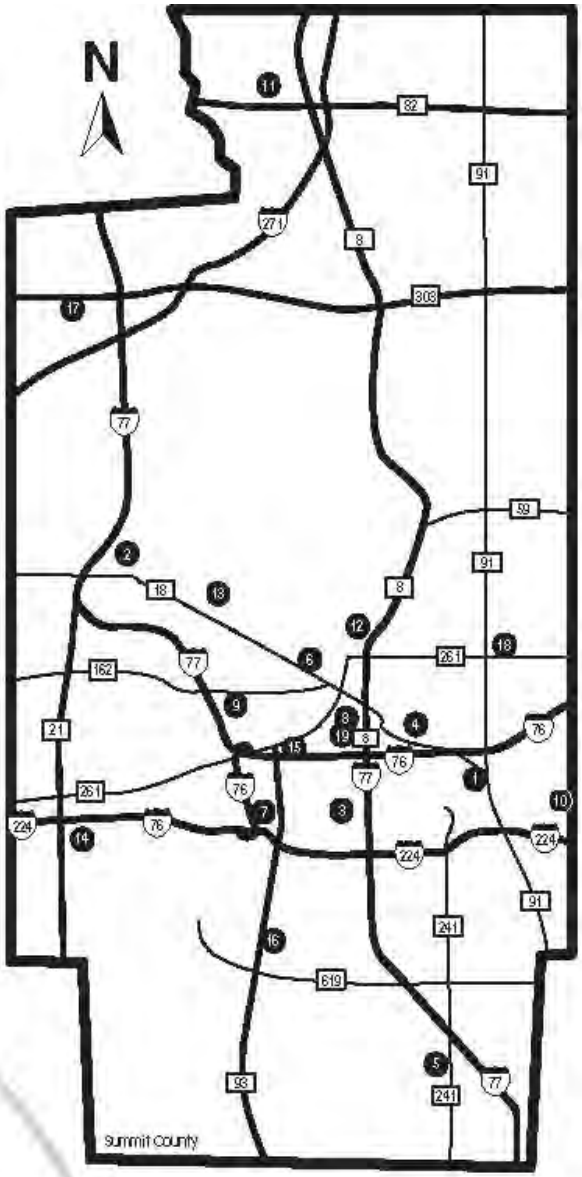
is located at 60 S. High Street
Akron, Ohio 44326
in downtown Akron, OH
330-643-9000.

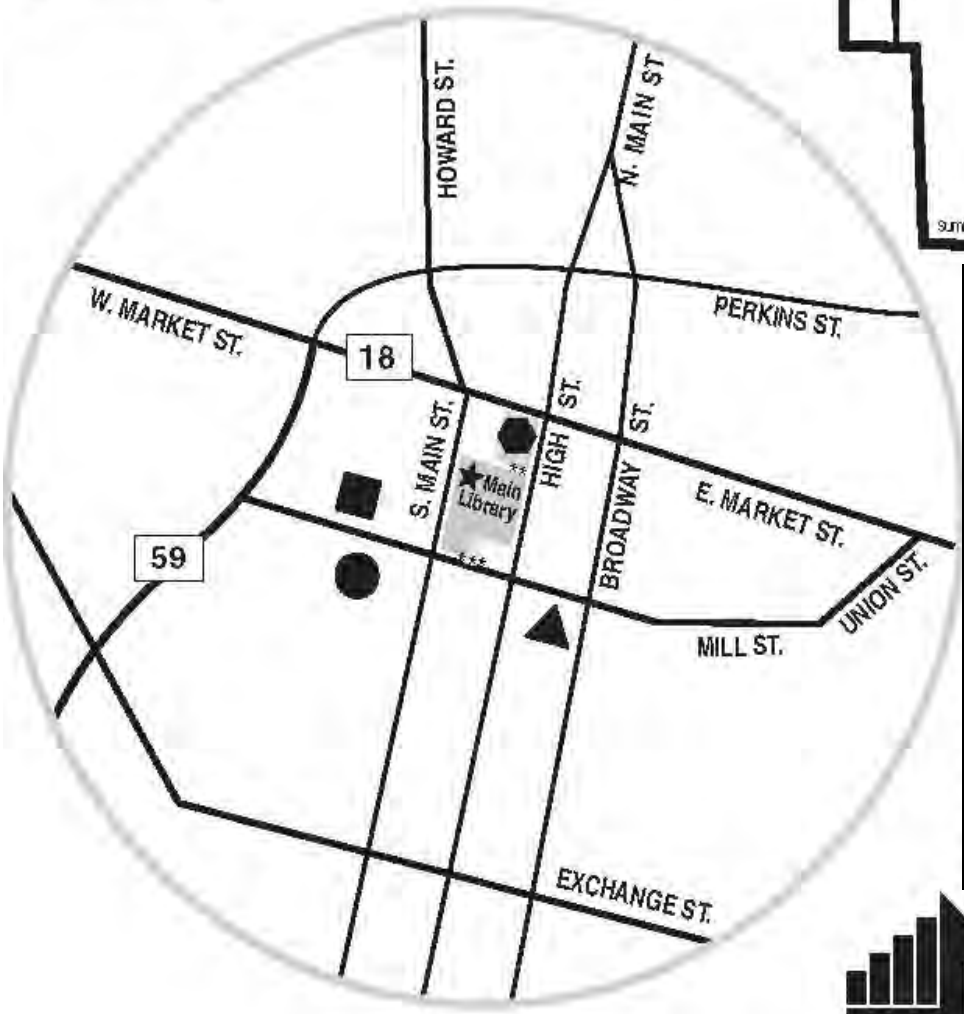
**Drive-through window accessible
from High Street between
Main Library and the High & Market parking deck
***LOADING DOCK entrance is on Mill Street

- **From Cleveland**: From Interstate I-77 South, take exit 21C to merge onto Innerbelt/Martin Luther King Jr Fwy E/OH-59 E toward Downtown Akron. Turn right at N. High St.
- **From Canton**: From I-77 North, take the OH-59 W exit toward Perkins St/M.L. King Jr Blvd & Fwy. Turn left at Perkins St and continue on Martin Luther King Jr Blvd. Turn left at N High St.

Convenient Parking for Main Library includes:

- ⬢ - **High & Market Deck** (across from the Akron Art Museum and connects to the library)
- ■ - Super Block Garage
- ● - Cascade Parking Garage
- ▲ - John S. Knight Center Parking





***** A PHOTO ID IS REQUIRED FOR ADMITTANCE TO THE SEMINAR**

***** IF YOU PARK IN THE LIBRARY PARKING DECK MAKE SURE TO BRING YOUR PARKING TICKET TO THE CLASS WITH YOU. IT CAN BE VALIDATED AT THE LIBRARY SECURITY DESK.**

Akron-Summit County Public Library

Agreed Order for Relief from Stay for State Domestic Cases

THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	)	
	)	CHAPTER 13
	)	CASE NO:
Debtor(s)	)	
	)	MARILYN SHEA-STONUM
	)	BANKRUPTCY JUDGE
	)	
	)	AGREED ORDER BETWEEN DEBTORS AND
	)	CHAPTER 13 TRUSTEE MODIFYING THE
	)	AUTOMATIC STAY ONLY FOR THE LIMITED
	)	PURPOSE OF COMMENCING A DOMESTIC
		RELATIONS CASE

1. The above Chapter 13 case was filed by (DEBTORS), the debtors, on (FILE DATE).
2. The debtors have separated since the commencement of this Chapter 13 case.
3. (DEBTOR NAME) address is: (INSERT CURRENT ADDRESS).
4. (CODEBTOR NAME) address is: (INSERT CURRENT ADDRESS).
5. The debtors desire to end their marriage through a Dissolution of Marriage.
6. (DEBTOR NAME) has retained attorney (NAME OF ATTORNEY) for the limited purpose of representing her in a Dissolution of Marriage in the Domestic Relations Court of Common Pleas in Summit County, Ohio.
7. (DEBTOR NAME) has not retained counsel.
8. Both debtors desire to Modify the Automatic Stay only for the limited purpose of affording them the opportunity to jointly proceed with a Petition

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for Dissolution of Marriage in the Domestic Relations Court of Common Pleas in Summit County, Ohio.

9. The Chapter 13 Trustee in Akron ("the Trustee") takes no position either in favor or opposition to the Dissolution of Marriage. The Trustee's signature on this order only indicates that the Trustee does not oppose the modification of the automatic stay only for the limited purpose of allowing the debtors to file a Dissolution of Marriage.

WHEREFORE, the Court hereby modifies the automatic stay pursuant to 11 USC Section 362 only for the limited purpose of allowing the debtors to proceed with a Dissolution of Marriage in the Domestic Relations Court of Common Pleas in Summit County, Ohio.

IT IS SO ORDERED.

###

Submitted By:

_____

Attorney Name
Ohio Reg No
Address
City, State, ZIP
Phone
Fax
Email

Approved By:

_____

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In re Bowers, 2013 Bankr. LEXIS 4939
(B.A.P. 6th Cir. Nov. 22, 2013)

In re Bowers

United States Bankruptcy Appellate Panel for the Sixth Circuit
August 20, 2013, Argued; November 22, 2013, Decided; November 22, 2013, Filed
No. 13-8014

Reporter: 2013 Bankr. LEXIS 4939

In re: MICHAEL ALLEN BOWERS and MARGARITA VILLE BOWERS, Debtors.

Prior History: **[*1]** Appeal from the United States Bankruptcy Court for the Northern District of Ohio. Case No. 12-51549.

Core Terms

interest rate, certificate, claim, tax certificate, filed, bankruptcy, date, plan, law, bankruptcy court, order, six years, property, parcel, tax, redemption, taxpayer, negotiate, appeal, revise, objection, purchase, certificate holder, county treasurer, tax lien, chapter, version, foreclosure, provision, statutes

Case Summary

Overview

HOLDINGS: [1]-Claim of a tax certificate purchaser was a tax claim under *11 U.S.C.S. § 511(a)*, and state law governed the interest rate payable; [2]-Interest rate on the tax certificate claim was properly set at 0.25 percent while debtors' bankruptcy case remained open pursuant to *Ohio Rev. Code Ann. § 5721.37(a)(3)(b)* and *(c)*, as they filed for bankruptcy within six years from the sale of the tax certificate to the creditor, and tolling of that six year period began with the filing of the bankruptcy and would continue while the bankruptcy case remained open; [3]-Debtors were not required to pay 18 percent rate under *Ohio Rev. Code Ann. § 5721.38(B)(2)* because they sought to redeem their property via their proposed Chapter 13 plan, as *Ohio Rev. Code Ann. § 5721.37(A)(3)(c)* specifically required that the interest rate accrue at 0.25 percent while their bankruptcy case remained open.

Outcome

The bankruptcy appellate panel affirmed the bankruptcy court's order sustaining the debtor's objection to a creditor's claim.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

HN1 A "final" order of a bankruptcy court may be appealed by right under *28 U.S.C.S. § 158(a)(1)*. For purposes of appeal, an order is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

Bankruptcy Law > Claims > Objections to Claims
Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview
Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

HN2 An order sustaining an objection to a creditor's claim is a final order. On the other hand, an order overruling an objection to confirmation without confirming a Chapter 13 plan is not a final order.

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN3 A bankruptcy appellate panel reviews conclusions of law, such as a bankruptcy court's interpretation of state law, de novo. Under a de novo standard of review, the appellate court determines the law at issue independently of, and without deference to, the trial court's determination.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN4 An investor purchasing a tax lien certificate obtains a lien against a taxpayer's property and the right to pursue the taxpayer for the unpaid taxes. *Ohio Rev. Code Ann. §§ 5721.30-5721.43*.

Bankruptcy Law > ... > Administrative Expenses > Priority > Taxes

HN5 See *11 U.S.C.S. § 511(a)*.

Governments > Legislation > Effect & Operation > Prospective Operation
Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN6 The version of the Ohio Revised Code pertaining to tax certificates applicable to a case is the version effective on the date a tax certificate was purchased rather than the version effective at the time of foreclosure.

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures
Governments > Legislation > Statute of Limitations > Tolling
Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN7 The Ohio Revised Code's tax certificate provisions specifically address situations where delinquent taxpayers file for bankruptcy protection. *Ohio Rev. Code Ann. § 5721.37(A)(3)(b)*, as effective in 2010, stated that if, before six years after the date a tax certificate was sold or before the date negotiated by the county treasurer, the owner of the property files a petition in bankruptcy, the county treasurer, upon being notified of the filing of the petition, shall notify the certificate holder by ordinary first-class or certified mail or by binary means of the filing of the petition. It is the obligation of the certificate holder to file a proof of claim with the bankruptcy court to protect the holder's interest in the certificate parcel. The last day on which the certificate holder may file a notice of intent to foreclose is the later of six years after the date the tax certificate was sold or the date negotiated by the county treasurer, or 180 days after the certificate parcel is no longer property of the bankruptcy estate; however, the six-year or negotiated period being measured after the date the certificate was sold is tolled while the property owner's bankruptcy case remains open.

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures
Governments > Legislation > Statute of Limitations > Tolling
Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN8 *Ohio Rev. Code Ann. § 5721.37(A)(3)(b)*, as effective in 2010, placed a six year limit on a certificate holder's ability to file a notice of intent to foreclose. But if a taxpayer filed for bankruptcy at some point within those six years and the certificate holder filed a claim with the bankruptcy court, then the six year period would be tolled while the property owner's (the taxpayer's) bankruptcy case remains open.

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures
Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN9 According to *Ohio Rev. Code Ann. § 5721.37(A)(3)(c)*, as effective in 2010, interest at the certificate rate of interest continues to accrue during any extension of time required by *§ 5721.37(A)(3)(a)* or *(b)* unless otherwise provided under Title 11 of the United States Code. In other words, *Ohio Rev. Code Ann. § 5721.37(A)(3)(c)* specifically provides that the tax certificate interest rate continues to accrue during a bankruptcy unless Title 11 provides otherwise.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN10 The term "certificate rate of interest" is defined by the Ohio Revised Code as the rate of simple interest per year not to exceed 18 per cent per year fixed by the county treasurer with respect to any tax certificate sold or transferred pursuant to a negotiated sale. *Ohio Rev. Code Ann. § 5721.30(G)*.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN12 The 2010 Ohio Revised Code contains no indication that the six year period for certificate holders to initiate the foreclosure process against taxpayers somehow expires early when a notice of intent to foreclose is filed. In fact, it appears that the six year period survives the filing of a notice of intent to foreclose and the initiation of foreclosure proceedings and continues to provide important limitations on the rights of both tax certificate holders and taxpayers. For example, if a tax certificate holder files a notice of intent to foreclose but has its foreclosure action dismissed without prejudice, it can file another notice of intent to foreclose, but must do so before the six year period ends. In an important limitation on taxpayers, the six year period also provides the amount of time in which a taxpayer must complete payments in order to redeem his or her property under the redemption payment plan provided for in the 2010 version of *Ohio Rev. Code Ann. § 5721.38(C)(2)*. *Ohio Rev. Code Ann. § 5721.38(C)(2)*.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN13 See *Ohio Rev. Code Ann. § 5721.38(C)(2)*.

Bankruptcy Law > ... > Administrative Expenses > Priority > Taxes

HN11 *11 U.S.C.S. § 511* provides that the rate of interest on tax claims shall be determined under applicable non-bankruptcy law.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN14 *Ohio Rev. Code Ann. § 5721.38(B)(2)* allows a taxpayer to redeem a parcel after the filing of a notice of intent to foreclose by paying the county treasurer an amount equal to the total of the certificate redemption prices of all tax certificates respecting the parcel, certain fees and costs, and interest on the certificates at the rate of 18 per cent per year for the period beginning on the date on which the payment was submitted by the certificate holder to initiate foreclosure proceedings and ending on the day the parcel is redeemed under this division.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN15 *Ohio Rev. Code Ann. § 5721.30(F)* defines the ″certificate redemption price″ with respect to a sale of tax certificates under *Ohio Rev. Code Ann. § 5721.33* as the amount equal to the sum of the following: (1) the certificate purchase price; (2) interest accrued on the certificate purchase price at the certificate rate of interest from the date on which a tax certificate is delivered through and including the day immediately preceding the day on which the certificate redemption price is paid; (3) the fee, if any, charged by the county treasurer to the purchaser of the certificate under *§ 5721.33(J)*; (4) any other fees charged by any county office in connection with the recording of tax certificates.

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures
Bankruptcy Law > ... > Administrative Expenses > Priority > Taxes
Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN16 The 2010 Ohio Revised Code tax certificate provisions specifically require that the interest rate on a tax certificate accrue at 0.25 percent while a debtor's bankruptcy case remains open.

Governments > Legislation > Interpretation

HN17 A well established tenet of statutory construction mandates that specific statutory provisions prevail over more general provisions.

Governments > Legislation > Interpretation

HN18 Statutes are to be interpreted in a manner that gives effect to each. The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible.

Governments > Legislation > Interpretation

HN19 In interpreting statutes, it is the duty of a court to give effect to the words used, not to delete words used or to insert words not used.

Counsel: ARGUED: Scott W. Paris, KEITH D. WEINER & ASSOCIATES CO., LPA, Cleveland, Ohio, for Appellant.

Robert M. Whittington, Jr., Akron, Ohio, for Appellees.

ON BRIEF: Scott W. Paris, KEITH D. WEINER & ASSOCIATES CO., LPA, Cleveland, Ohio, for Appellant.

Robert M. Whittington, Jr., Akron, Ohio, for Appellees.

Judges: Before: EMERSON, LLOYD, and PRESTON, Bankruptcy Appellate Panel Judges.

Opinion by: JOAN A. LLOYD

Opinion

JOAN A. LLOYD, Bankruptcy Appellate Panel Judge. Plymouth Park Tax Services, LLC (″Plymouth Park″) appeals the order of the United States Bankruptcy Court for the Northern District of Ohio (the ″Bankruptcy Court″) sustaining in part debtors Michael Allen Bowers and Margarita Ville Bowers's (the ″Debtors″) objection to Plymouth Park's claim and overruling in part Plymouth Park's objection to confirmation of the Debtors' chapter 13 plan. The Bankruptcy Court's order held that under Ohio law the appropriate interest rate for Plymouth Park's tax claim against the Debtors was 0.25%. Plymouth Park argues that Ohio's tax lien statutes mandate a higher interest rate of 18%. For the reasons set forth below, the Panel **[*2]** affirms the Bankruptcy Court's decision.

STATEMENT OF ISSUES

The issue presented in this appeal is as follows: whether the Bankruptcy Court erred in determining that Ohio law set the Debtors' chapter 13 plan interest rate on Plymouth Park's tax lien certificate at 0.25%.

JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Appellate Panel of the Sixth Circuit (″BAP″) has jurisdiction to decide Plymouth Park's appeal of the Bankruptcy Court's order sustaining the Debtors' objection to Plymouth Park's claim. The United States District Court for the Northern District of Ohio has authorized appeals to the BAP, and no party has timely elected to have this appeal heard by the district court. *28 U.S.C. § 158(b)(6)*, *(c)(1)*. ***HN1*** A ″final″ order of a bankruptcy court may be appealed by right under *28 U.S.C. § 158(a)(1)*. For purposes of appeal, an order is final if it ″ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.″ *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 797, 109 S.Ct. 1494, 1497, 103 L. Ed. 2d 879 (1989) (internal quotations and citations omitted). ***HN2*** An order sustaining an objection to a creditor's claim is a final order. *Malden Mills Industries, Inc. v. Maroun (In re Malden Mills, Inc.)*, 303 B.R. 688, 696 (B.A.P. 1st Cir. 2004). **[*3]** On the other hand, an order overruling an objection to confirmation without confirming a plan is not a final order. *State Bank of Florence v. Miller (In re Miller)*, 459 B.R. 657, 662 (B.A.P. 6th Cir. 2011). Consequently, this opinion will only review the Bankruptcy Court's order insofar as it sustained the Debtors' objection to Plymouth Park's claim.

HN3 The Panel reviews conclusions of law, such as a

bankruptcy court's interpretation of state law, *de novo*. *Dickson v. Countrywide Home Loans (In re Dickson), 655 F.3d 585, 590 (6th Cir. 2011)*. Under a *de novo* standard of review, the appellate court determines the law at issue ″independently of, and without deference to, the trial court's determination.″ *Palmer v. Washington Mut. Bank (In re Ritchie), 416 B.R. 638, 641 (B.A.P. 6th Cir. 2009)* (citing *Gen. Elec. Credit Equities, Inc. v. Brice Rd. Devs., LLC (In re Brice Rd. Devs., LLC), 392 B.R. 274, 278 (B.A.P. 6th Cir. 2008)*.

FACTS

The Debtors owed delinquent real estate taxes to Summit County, Ohio. Summit County and several other Ohio counties sell outstanding tax obligations to investors in the form of tax lien certificates. By selling these tax lien certificates, Summit County obtains much-needed **[*4]** revenue. ***HN4*** The investor purchasing a tax lien certificate obtains a lien against the taxpayer's property and the right to pursue the taxpayer for the unpaid taxes. *See Ohio Rev. Code Ann. (″O.R.C.″) §§ 5721.30-43*.

On November 5, 2010, Plymouth Park filed a tax lien certificate with the Summit County, Ohio, Fiscal Officer showing its purchase of the Debtors' tax obligation for the price of $4,083.73 with a negotiated interest rate of 0.25%. This certificate states that it was offered, sold, and delivered on November 3, 2010. On October 3, 2011, Plymouth Park filed a second tax lien certificate with the Fiscal Officer showing its purchase of a second certificate for the price of $2,045.44 with a negotiated interest rate of 18.00%. Both of these certificates are titled ″Tax Certificate (Negotiated Sale).″ (Stipulation as to Undisputed Facts (″Stipulation″) Exs. B and C, Bankr. Case No. 12-51549, ECF No. 32). The certificates are signed by the ″Treasurer/Fiscal Officer or Designee,″ Shelly Davis, who states in the first paragraph: ″I do hereby certify that at a negotiated sale pursuant to *O.R.C. § 5721.33* this tax certificate for the parcel listed below was offered and sold . . . .″ (*Id.*).

Both **[*5]** certificates also state that ″[t]his certificate will be canceled six years after the date of delivery pursuant to *Ohio Revised Code 5721.27*, unless the date is extended because of bankruptcy pursuant to *O.R.C. 5721.37(A)(3)(b)*,″ and that ″[t]he purchaser of this Tax Certificate or any transferee is entitled to file a notice of intent to foreclose on this parcel within six years after the purchase of the Tax Certificate, or by the date negotiated with the county treasurer.″ (*Id.*).

On April 17, 2012, the Summit County Fiscal Officer filed a tax lien foreclosure complaint against the Debtors. The Summit County Fiscal Officer filed this complaint ″pursuant to a request for foreclosure form sent to the Fiscal Officer by Plymouth [Park].″ (Stipulation, at ¶6). The foreclosure complaint stated that ″as provided by *Section 5721.38 (B) of the Ohio Revised Code*″ the ″redemption price″ calculated by the Fiscal Officer was $10,585.82. (Stipulation Ex. D, at ¶6).

On May 10, 2012, the Debtors filed their chapter 13 plan and petition. The Debtors' chapter 13 plan proposed to pay interest on Plymouth Park's tax certificates at the interest rates listed on those certificates: 0.25% on the first tax **[*6]** certificate and 18% on the second. On May 23, 2012, Plymouth Park filed a proof of claim based on both certificates in the amount of $10,521.46, an amount that included $2,120.00 in fees and the principal balance of $7,781.19 plus 18% interest from June 1, 2012. The Debtors' plan and Plymouth Park's claim thus put the parties at odds: While the Debtors sought an interest rate of 0.25% on the first tax certificate and 18% on the second, Plymouth Park demanded that the Debtors pay 18% on both.

On May 23, 2012, Plymouth Park filed an objection to confirmation of the Debtors' plan. Plymouth Park claimed that *O.R.C. § 5721.38(B)* entitled it to an 18% interest rate on its claim for the first tax certificate (the ″Tax Certificate″). That same day, the Debtors filed an objection to Plymouth Park's claim, demanding the 0.25% interest rate listed on the Tax Certificate and disputing the propriety of Plymouth Park's $2,120 fee charge.[1] On August 18, 2012, the Bankruptcy Court held an evidentiary hearing at which testimony was taken regarding the procedures and fees involved in Summit County's tax lien foreclosure process. On December 5, 2012, the Bankruptcy Court entered an order directing the **[*7]** parties to file additional briefs ″regarding the applicability and/or inapplicability of *Ohio Revised Code § 5721.38* to the issues before the Court, specifically to what extent, if any, a debtor's chapter 13 plan treatment of the tax certificate holder's claim should be equated with the process of redemption contemplated in *§ 5721.38*.″ (Order Directing Parties to File Briefs, at 1, Bankr. Case No. 12-51549, ECF No. 44).

In its brief on *O.R.C. § 5721.38*, Plymouth Park argued that Ohio law controlled the appropriate interest rate payable on its claim because the claim constituted a ″tax claim″ under *11 U.S.C. § 511*. Plymouth Park then turned to *O.R.C. § 5721.38(B)*, a statute that allows taxpayers to redeem their property by paying a lump sum with an 18% interest rate applicable from the date that foreclosure proceedings commence. *Ohio Rev. Code Ann.§ 5721.38(B)*. According to Plymouth Park, *O.R.C. § 5721.38(B)* **[*8]** guaranteed it an 18% interest rate on its claim.

The Debtors made two arguments against this high rate. First, they argued that Plymouth Park's claim was not

[1] In its Order and Memorandum Opinion entered on March 22, 2013, the Bankruptcy Court upheld Plymouth Park's claim to $2,000 of these fees. (Mem. Op., at 5, Bankr. Case. No. 12-51549, ECF No. 51). The fees are not an issue in this appeal.

a ″tax claim″ under *§ 511 of the Bankruptcy Code* and that therefore the state statute did not govern the interest rate payable on Plymouth Park's claim. According to this argument, the interest rate had to be determined by using the ″prime plus″ formula set forth in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004). Second, the Debtors argued that the lump sum redemption described in *O.R.C. § 5721.38(B)* could not be equated with a redemption via chapter 13 plan payments. The Debtors proposed that *O.R.C. § 5721.38(C)(2)* which provides for a redemption payment plan, not a lump sum payment should guide the selection of an interest rate for Plymouth Park's claim. *Subsection (C)(2)* makes no reference to the 18% interest rate that is required in *subsection (B)* and instead provides for redemption via a payment plan calculated to include a tax certificate's ″certificate rate of interest.″ *Ohio Rev. Code Ann. § 5721.38(C)(2)*.

In an Order and Memorandum Opinion entered on March 22, 2013, the Bankruptcy Court agreed with Plymouth **[*9]** Park that Plymouth Park's claim was a tax claim under *11 U.S.C. § 511* and that state law governed the interest rate issue. But the Bankruptcy Court rejected the proposition that the 18% rate in *O.R.C. § 5721.38(B)* should apply to the Debtors' plan. The Bankruptcy Court stated as follows:

> According to *Ohio Revised Code § 5721.38(B)(2)*, the owner of the property ″may redeem the parcel by paying . . . interest on the certificate purchase price for each tax certificate sold respecting the parcel at the rate of eighteen per cent per year.″ The debtors allege that *Ohio Revised Code § 5721.38(B)* is limited to those instances where ″a party redeems real estate from a certificate sale by paying cash to the county treasurer.″ The debtors further allege that this redemption does not contemplate ″redemption by way of periodic payments as in a chapter 13 plan.″ The Court agrees. Creditor has not established, and the Court finds no support for, the contention that the negotiated interest rate does not apply. Here, the debtors are not redeeming their property as contemplated by *Ohio Revised Code § 5721.38(B)*; therefore the statute does not apply.

(Mem. Op., at 4, Case. No. 12-51549, ECF No. 51 (internal **[*10]** citations removed)). The Bankruptcy Court went on: ″Moreover, 'Ohio law establishes that the Creditor is entitled to the interest rate established by the tax certificate auction on the Debtor's delinquent real estate taxes.'″ (*Id.* at 4 (quoting *In re Cortner*, 400 B.R. 608, 612 (Bankr. S.D. Ohio 2009))). The Court thus held the appropriate interest rate for Plymouth Park's disputed Tax Certificate to be 0.25%. Though the Debtors' brief had pointed the Bankruptcy Court toward the payment plan redemption provided for in *O.R.C. § 5721.38(C)(2)*, the Bankruptcy Court did not mention *O.R.C. § 5721.38(C)(2)* in its opinion.

Plymouth Park now appeals. Plymouth Park argues that *O.R.C. § 5721.38(B)* guarantees it an 18% interest rate on its claim. The Debtors contend that *O.R.C. § 5721.38(B)* only applies to lump sum redemptions, not to payment plan redemptions like those carried out in a chapter 13 plan, and that they therefore need only pay the 0.25% interest rate stated on the Tax Certificate.

DISCUSSION

Neither party to this appeal disputes the Bankruptcy Court's conclusion that Plymouth Park's claim is a tax claim under *11 U.S.C. § 511(a)* and that Ohio law should govern the interest rate payable **[*11]** to Plymouth Park in the Debtor's chapter 13 plan.[2]

This appeal requires that the Panel analyze the provisions of the Ohio Revised Code governing tax certificates. *See generally Ohio Rev. Code Ann. §§ 5721.30-43*. ***HN6*** The version of the O.R.C. applicable to this case is the version effective on November 3, 2010, the date the Tax Certificate was purchased. *See CapitalSource Bank FBO Aeon Fin., L.L.C. v. Donshirs Dev. Corp.*, No. 99032, 2013-Ohio-1563, 2013 WL 1697492, at *5 (Ohio Ct. App.)(stating, in dicta, that the trial court ″erred″ when it applied the version of the O.R.C. effective at the time of foreclosure instead of the version effective at the time tax certificate was purchased). *Cf. Ransier v. Standard Fed. Bank (In re Collins)*, 292 B.R. 842, 847 (Bankr. S.D. Ohio 2003) (″The Court concludes that the date of the **[*12]** signing of the mortgage determines the law of the contract.″); *Suhar v. Land (In re Land)*, 289 B.R. 71, 75 (Bankr. N.D. Ohio 2003) (same); *Eastwood Local School Dist. v. Eastwood Educ. Ass'n*, 172 Ohio App. 3d 423, 2007 Ohio 3563, 875 N.E. 2d 139, 143 (Ohio Ct. App. 2007) (″Except where a contrary intent is evident, the parties to a contract are deemed to have contracted with reference to existing law.″).

HN7 The Ohio Revised Code's tax certificate provisions specifically address situations where delinquent taxpayers file for bankruptcy protection. *O.R.C. § 5721.37(A)(3)(b)*, effective when the tax certificate was purchased on November 3, 2010, stated as follows:

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[2] ***HN5*** 11 U.S.C. § 511(a) reads as follows: ″If any provision of this title requires the payment of interest on a tax claim or on an administrative expense tax, or the payment of interest to enable a creditor to receive the present value of the allowed amount of a tax claim, the rate of interest shall be the rate determined under applicable nonbankruptcy law.″ 11 U.S.C. § 511(a).

> If, before six years after the date a tax certificate was sold or before the date negotiated by the county treasurer, the owner of the property files a petition in bankruptcy, the county treasurer, upon being notified of the filing of the petition, shall notify the certificate holder by ordinary first-class or certified mail or by binary means of the filing of the petition. It is the obligation of the certificate holder to file a proof of claim with the bankruptcy court to protect the holder's interest in the certificate parcel. The last day on which the certificate holder **[*13]** may file a notice of intent to foreclose is the later of six years after the date the tax certificate was sold or the date negotiated by the county treasurer, or one hundred eighty days after the certificate parcel is no longer property of the bankruptcy estate; however, the six-year or negotiated period being measured after the date the certificate was sold is tolled while the property owner's bankruptcy case remains open.

Ohio Rev. Code Ann. § 5721.37(A)(3)(b) (current version at *Ohio Rev. Code Ann. § 5721.37(A)(2)* (2011)). In sum then, ***HN8*** *O.R.C. § 5721.37(A)(3)(b)* placed a six year limit on a certificate holder's ability to file a notice of intent to foreclose. But if a taxpayer filed for bankruptcy at some point within those six years and the certificate holder filed a claim with the bankruptcy court, then the six year period would be tolled "while the property owner's [the taxpayer's] bankruptcy case remains open." *Id.*[3]

The very next division of the 2010 version of *O.R.C § 5721.37*, *O.R.C. § 5721.37(A)(3)(c)*, addressed the treatment of the certificate holder's claim during the tolling period. ***HN9*** According to *O.R.C. § 5721.37(A)(3)(c)*, "interest at the certificate rate of interest continues to accrue during any extension of time required by division *(A)(3)(a)* or *(b)* of this section unless otherwise provided under Title 11 of the United States Code." *Ohio Rev. Code Ann. § 5721.37(A)(3)(c)* (current version at *Ohio Rev. Code Ann. § 5721.37(A)(2)* (2011)). In other words, *O.R.C. § 5721.37(A)(3)(c)* "specifically provides that the tax certificate interest rate continues to accrue during a bankruptcy unless Title 11 provides otherwise." *In re Cortner*, 400 B.R. 608, 614-15 (Bankr. S.D. Ohio 2009).[4]

Applying 2010 *O.R.C. § 5721.37(A)(3)(b)* **[*15]** and *(c)* to this case, the Panel concludes that the interest rate on Plymouth Park's Tax Certificate claim should be set at 0.25% while the Debtor's bankruptcy case remains open. Here, the Debtor filed for bankruptcy within six years from the sale of the Tax Certificate to Plymouth Park.[5] Tolling of that six year period began with the filing of the bankruptcy and will continue "while the [Debtors'] bankruptcy case remains open." *Ohio Rev. Code Ann. § 5721.37(A)(3)(b)*. The 0.25% interest rate on the face of the tax certificate is the "certificate rate of interest"[6] and continues to accrue during this extension of time. *Ohio Rev. Code Ann. § 5721.37(A)(3)(c)*. Title 11 does not provide otherwise: ***HN11*** *Section 511 of the Bankruptcy Code* provides that the rate of interest on Plymouth Park's claim "shall be determined under applicable nonbankruptcy law" here, the Ohio Revised Code. *11 U.S.C. § 511(a)*. Applicable Ohio law thus imposes an interest rate of 0.25% on Plymouth Park's claim while the Debt-

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[3] The face of the Tax Certificate clearly contemplates the potential application of O.R.C. § 5721.37(A)(3)(b)'s tolling period, stating that the certificate "will be canceled six years after the date of delivery . . . unless the date is extended because of bankruptcy **[*14]** pursuant to O.R.C. § 5721.37(A)(3)(b)." (Stipulation Ex. B, Bankr. Case No. 12-51549, ECF No. 32).

[4] ***HN10*** The term "certificate rate of interest" is defined by the O.R.C. as "the rate of simple interest per year not to exceed eighteen per cent per year fixed . . . by the county treasurer with respect to any tax certificate sold or transferred pursuant to a negotiated sale." Ohio Rev. Code Ann. § 5721.30(G).

[5] The Panel notes that ***HN12*** the 2010 O.R.C. contains no indication that the six year period for certificate holders to initiate the foreclosure process against taxpayers **[*16]** somehow expires early when a notice of intent to foreclose is filed. In fact, it appears that the six year period survives the filing of a notice of intent to foreclose and the initiation of foreclosure proceedings and continues to provide important limitations on the rights of both tax certificate holders and taxpayers. For example, if a tax certificate holder files a notice of intent to foreclose but has its foreclosure action dismissed without prejudice, it can file another notice of intent to foreclose, but must do so before the six year period ends. *See Lakeview Holding, L.L.C. v. DeBerry*, No. 99033, 2013-Ohio-1457, 2013 WL 1501640, at *1 (Ohio Ct. App.) ("[T]he certificate has not expired and the six year statute of limitations has not yet expired . . . [the tax certificate holder] may therefore simply refile its notice of intent . . . ."). In an important limitation on taxpayers, the six year period also provides the amount of time in which a taxpayer must complete payments in order to redeem his or her property under the "redemption payment plan" provided for in the 2010 version of O.R.C. § 5721.38(C)(2).***HN13*** Ohio Rev. Code Ann.§ 5721.38(C)(2) (amended 2011) ("The plan shall require **[*17]** the owner or other person to pay the certificate redemption price for the tax certificate, an administrative fee . . . and the actual fees and costs incurred, in installments, with the final installment due no later than six years after the date the tax certificate is sold.").

[6] Ohio Rev. Code § 5721.30(G).

ors' bankruptcy case remains open.[7]

Plymouth Park argues here, just as it did before the Bankruptcy Court, that *O.R.C. § 5721.38(B)* guarantees it an 18% interest rate on its claim. ***HN14*** *O.R.C. § 5721.38(B)(2)* allows a taxpayer to redeem a parcel after the filing of a notice of intent to foreclose by paying the county treasurer an amount equal to the total of the "certificate redemption prices"[8] of all tax certificates respecting the parcel, certain fees and costs, and "interest on the certificates at the rate of eighteen per cent per year for the period beginning on the date on which the payment was submitted by the certificate holder [to initiate foreclosure proceedings] and ending on the day the parcel is redeemed under this division." *Ohio Rev. Code Ann. § 5721.38(B)(2)*. According to Plymouth Park, because the Debtors seek **[*19]** to redeem their property via their proposed chapter 13 plan, they must pay the 18% interest rate required under *O.R.C. § 5721.38(B)(2)*.

Plymouth Park's reliance on *O.R.C. § 5721.38(B)* might make sense outside of the bankruptcy context. Unfortunately for Plymouth Park, ***HN16*** the 2010 O.R.C. provisions discussed above specifically require that the interest rate on the Tax Certificate accrue at 0.25% while the Debtors' bankruptcy **[*20]** case remains open. ***HN17*** A well established tenet of statutory construction mandates that specific statutory provisions prevail over more general provisions. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070, 182 L. Ed. 2d 967 (2012) (citations omitted); *Hartmann v. Duffey*, 95 Ohio St. 3d 456, 461, 2002 Ohio 2486, 768 N.E.2d 1170 (Ohio 2002). Moreover, adoption of Plymouth Park's theory would render *O.R.C. § 5721.37(A)(3)(c)* mere surplusage, in violation of another basic tenet of statutory construction that ***HN18*** statutes are to be interpreted in a manner that gives effect to each. *See Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible . . . ." (Citations and internal quotation marks omitted.)); *Perrysburg Twp. v. Rossford*, 103 Ohio St. 3d 79, 81, 2004 Ohio 4362, 814 N.E.2d 44 (Ohio 2004) (***HN19*** "In interpreting statutes, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." (Citations and internal quotation **[*21]** marks omitted.)). Therefore, the Panel concludes that *O.R.C. § 5721.38(B)* does not provide the interest rate applicable to this case.

CONCLUSION

For the foregoing reasons, the Panel AFFIRMS the Bankruptcy Court's order sustaining the Debtors' objection to Plymouth Park's claim.

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[7] The result would be no different under current law. The Ohio Legislature's 2011 amendments to O.R.C. § 5721.37 replaced O.R.C. § 5721.37(A)(3)(b) and O.R.C. § 5721.37(A)(3)(c) with current O.R.C. § 5721.37(A)(2), a division identical to the divisions it replaced except that the six year period in the 2010 O.R.C. has been replaced by the term "certificate period." Ohio Rev. Code Ann. § 5721.37(A)(2). That term is defined in current O.R.C. § 5721.30(Q) as "the period of time after the sale or delivery of tax certificate within which a certificate holder must initiate an action to foreclose the tax lien represented by the certificate . . . ." Ohio Rev. Code Ann. § 5721.30(Q). Under both the 2010 and current statute a certificate holder has a certain period of time in which to foreclose, that period of time is tolled during a taxpayer's bankruptcy case, and interest accrues during the **[*18]** tolling period at the certificate rate of interest. Were the current version of O.R.C. § 5721.37 to apply to this case, the "certificate period" would be the six year limit provided for on the face of the Tax Certificate. That "certificate period" would be tolled while the Debtors' bankruptcy case remains open, and during that time interest would accrue at the "certificate rate of interest," or 0.25%.

[8] ***HN15*** O.R.C. § 5721.30(F) defines the "certificate redemption price" "with respect to a sale of tax certificates under section 5721.33" as follows:

> [C]ertificate redemption price means the amount equal to the sum of the following:
>
> (1) The certificate purchase price;
>
> (2) Interest accrued on the certificate purchase price at the certificate rate of interest from the date on which a tax certificate is delivered through and including the day immediately preceding the day on which the certificate redemption price is paid;
>
> (3) The fee, if any, charged by the county treasurer to the purchaser of the certificate under division (J) of section 5721.33 of the Revised Code;
>
> (4) Any other fees charged by any county office in connection with the recording of tax certificates
>
> O.R.C. § 5721.30(F)

Flugence v. Axis Surplus Ins. Co.
(In re Flugence), 2013 U.S. App. LEXIS 23582
(5th Cir. La. Nov. 22, 2013)

Flugence v. Axis Surplus Ins. Co. (In re Flugence)

United States Court of Appeals for the Fifth Circuit
November 22, 2013, Filed
No. 13-30073

Reporter: 2013 U.S. App. LEXIS 23582

In the Matter of: CHERYL ANN FLUGENCE, Debtor.CHERYL ANN FLUGENCE; KEITH A. RODRIGUEZ, Appellees, versus AXIS SURPLUS INSURANCE COMPANY; GREAT WEST CASUALTY COMPANY; A & R TRANSPORT, INCORPORATED; KENT SERRET, Appellants.In the Matter of: CHERYL ANN FLUGENCE, Debtor.AXIS SURPLUS INSURANCE COMPANY; GREAT WEST CASUALTY COMPANY; A & R TRANSPORT, INCORPORATED; KENT SERRET, Appellants, versus CHERYL ANN FLUGENCE; KEITH A. RODRIGUEZ, Appellees.

Prior History: **[*1]** Appeal from the United States District Court for the Western District of Louisiana. *Flugence v. Axis Surplus Ins. Co., 2012 U.S. Dist. LEXIS 182338 (W.D. La., Dec. 27, 2012)*

Core Terms

bankruptcy, debtor, bankruptcy court, claim, creditors, personal-injury, disclose, trustee, estop, judicial estoppel, abuse, pursue a claim, equitable, judgment, know, law, inadvertence, position, basis, legal, duty to disclose, district court, doctrine, estate, plan, inconsistent position, confirm, omitted, assets, pursue

Case Summary

Overview

HOLDINGS: [1]-A bankruptcy debtor's personal injury claim was properly barred by judicial estoppel since the debtor did not disclose the claim which was an implied representation that the claim did not exist and which was inconsistent with the debtor's subsequent assertion of the claim; [2]-The debtor knew of the facts underlying the personal injury claim, and whether the debtor knew that disclosure of the claim was required after plan confirmation was irrelevant; [3]-The bankruptcy trustee was not precluded from pursuing the debtor's claim for the benefit of creditors, and the amount of any recovery was not limited to the amount owed to creditors.

Outcome

District court judgment reversed, and bankruptcy court judgment reinstated.

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1 Because judicial estoppel is an equitable doctrine, and the decision whether to invoke it within the court's discretion, an appellate court reviews for abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN2 An abuse of discretion standard does not mean a mistake of law is beyond appellate correction, because a district court by definition abuses its discretion when it makes an error of law. Accordingly, the abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN3 Judicial estoppel has three elements: (1) the party against whom it is sought has asserted a legal position that is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently.

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties
Bankruptcy Law > Individuals With Regular Income > Debtor Duties & Powers

HN4 Chapter 13 bankruptcy debtors have a continuing obligation to disclose post-petition causes of action.

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN5 See *11 U.S.C.S. § 1306(a)(1)*.

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

HN6 See *11 U.S.C.S. § 1327(b)*.

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties
Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN7 To establish inadvertence as that term is understood in the judicial-estoppel jurisprudence, a bankruptcy debtor may prove either that she did not know of the inconsistent position or that she had no motive to conceal it from the bankruptcy court. To prove that she did not know of the inconsistent position, she must show not that she was unaware that she had a duty to disclose her claims but that she was unaware of the facts giving rise to them. In other words, the controlling inquiry, with respect to inadvertence, is the knowing of facts giving rise to inconsistent positions A lack of awareness of a statutory disclosure duty for legal claims is not relevant.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles
Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN8 Where a bankruptcy debtor is individually estopped from pursuing an undisclosed claim, absent unusual circumstances, an innocent trustee can pursue the claim for the benefit of creditors.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

HN9 The Bankruptcy Code addresses limitations on attorneys' fees. Lawyers and other professionals may be employed on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis, and the bankruptcy court must approve such compensation as reasonable. *11 U.S.C.S. §§ 328*, *330*. Because the bankruptcy trustee is a fiduciary of the estate, he has a duty to ensure that the compensation arrangements made with attorneys and others are in the best interests of the creditors.

Bankruptcy Law > Case Administration > Bankruptcy Court Powers
Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN10 Judicial estoppel is an equitable doctrine, and using it to land another blow on the victims of bankruptcy fraud is not an equitable application.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles
Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN11 Where a bankruptcy debtor is judicially estopped from pursuing a claim he failed to disclose to the bankruptcy court, the trustee may pursue the claim without any limitation not otherwise imposed by law.

Counsel: For AXIS SURPLUS INSURANCE COMPANY, Appellant: Kyle Paul Kirsch, Esq., Hilliard Finch Kelly, III, Director, McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch, L.L.C., New Orleans, LA.

For GREAT WEST CASUALTY COMPANY, A & R TRANSPORT, INCORPORATED, KENT SERRET, Appellants: James M. Dill, Esq., Dill Law Firm, Lafayette, LA.

For CHERYL ANN FLUGENCE, Appellee: David Patrick Keating, Keating Firm, A.P.L.C., Lafayette, LA.

For KEITH A. RODRIGUEZ, Appellee: Nicholas A. Blanda, Attorney, Anderson & Dozier, Lafayette, LA.

Judges: Before SMITH, DENNIS, and HIGGINSON, Circuit Judges. JAMES L. DENNIS, Circuit Judge, concurring.

Opinion by: JERRY E. SMITH

Opinion

JERRY E. SMITH, Circuit Judge:

Cheryl Flugence filed for Chapter 13 bankruptcy protection in 2004, and a plan was confirmed. In March 2007, she was injured in a car accident, and she hired an attorney a month later. In July 2007, an amended Chapter 13 plan was confirmed. In March 2008 Flugence sued the appellants for personal injury from the accident. In November 2008, Flugence was discharged of all her remaining debts. She never disclosed to the bankruptcy court, between March 2007 and **[*2]** July 2007 (when the amended plan was confirmed), or between July 2007 and November 2008 (when her debts were discharged), that she had been in an accident and might prosecute a personal-injury claim.

Once the personal-injury defendants discovered this nondisclosure, they had the bankruptcy case reopened and sought to have Flugence judicially estopped from pursuing the undisclosed claim. The bankruptcy court declared that although Flugence was estopped from pursuing the claim on her own behalf, her bankruptcy trustee was not similarly estopped and could pursue the claim for the benefit of Flugence's creditors in accordance with *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011) (en banc).

On appeal, the district court reversed with respect to estopping Flugence and affirmed in all other respects. The district court held that the bankruptcy court had abused its discretion by estopping Flugence because she ″did not have a potential cause of action prior to her initial application for bankruptcy protection in 2005,″ and she relied on her attorney's advice ″as to whether she

must disclose her potential cause of action to the bankruptcy court," and because of the flux in the law at the **[*3]** time regarding a debtor's duty to disclose in post-confirmation, Chapter 13 proceedings.

On appeal of the district court's judgment, the personal-injury defendants contend that, with respect to Flugence, the bankruptcy court did not abuse its discretion in declaring her estopped, so the bankruptcy court's judgment should be reinstated in that regard. With respect to the trustee, the personal-injury defendants maintain that both the bankruptcy and district courts erred in holding that *Reed* allows a trustee to pursue an estopped debtor's claim without limits on the extent of possible recovery. Specifically, they argue that their exposure to liability should be limited to the amount of Flugence's outstanding debt to creditors, about $44,000.

We agree with the personal-injury defendants that there is a continuing duty to disclose in a Chapter 13 proceeding and that Flugence has met all the elements of judicial estoppel. Therefore, the bankruptcy court did not abuse its discretion by finding her estopped. We disagree with the personal-injury defendants' reading of *Reed*, however, because nothing there requires that recovery be limited strictly to the amount owed creditors. We therefore reverse **[*4]** the portion of the district court's judgment that reversed the judgment of the bankruptcy court, and we render judgment reinstating the bankruptcy court's judgment in full.

I.

"Although we are the second court to review the bankruptcy court's judicial estoppel ruling, we review it as if this were an appeal from a trial in the district court. ***HN1*** Because judicial estoppel is an equitable doctrine, and the decision whether to invoke it within the court's discretion, we review for abuse of discretion." *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 204-05 (5th Cir. 1999) (internal quotation marks and citations omitted).

> ***HN2*** An abuse of discretion standard does not mean a mistake of law is beyond appellate correction, because a district court by definition abuses its discretion when it makes an error of law. Accordingly, the abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

Id. at 205 (internal quotation marks and citations omitted).

II.

HN3 Judicial estoppel has three elements: (1) The party against whom it is sought has asserted a legal position that is plainly inconsistent with a prior position; (2) a court **[*5]** accepted the prior position; and (3) the party did not act inadvertently. *Reed*, 650 F.3d at 574. The bankruptcy court found all three elements here, and we cannot say it abused its discretion.

Flugence's main arguments to avoid estoppel are (1) that her cause of action accrued after the initial confirmation; (2) that her non-disclosure was inadvertent because she did not know she had to disclose; and (3) that it was unclear whether she had to disclose because of a conflict in two Bankruptcy Code provisions that have troubled the courts, including the Fifth Circuit. Each of these arguments attacks the third prong of the judicial estoppel test—whether Flugence acted inadvertently because she did not know she had a duty to disclose. Each also challenges the first prong by implication—if she did not have a duty to disclose, then her failure to disclose was not a representation that she had no claim, so she did not assert an inconsistent legal position.

The bankruptcy court, however, rightly found the law on disclosure well settled: ***HN4*** Chapter 13 debtors have a continuing obligation to disclose post-petition causes of action.[1]

It may **[*7]** be uncertain whether a debtor must disclose assets post-*confirmation*. That uncertainty arises from two provisions in the Bankruptcy Code, one suggesting that post-confirmation causes of action are "property of the estate" and the other hinting that such property is "vested" "in the debtor."[2] That possible conflict, however, is irrelevant here. The latter provision vests prop-

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[1] *See, e.g.*, *Browning*, 179 F.3d at 207-08 ("It goes without saying **[*6]** that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims. The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action." (internal quotation marks, emphasis, and citations omitted)). The continuing duty to disclose is a longstanding gloss required by our caselaw. *See id.*; *Superior Crewboats, Inc. v. Primary P&I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 335 (5th Cir. 2004) ("The duty to disclose is continuous."); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005) ("The obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one."); *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 384-85 (5th Cir. 2008) ("Pursuant to the Bankruptcy Code, debtors are under a continuing duty to disclose all pending and potential claims."); *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012) ("'The obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one.'" (quoting *Jethroe*, 412 F.3d at 600)).

[2] Under 11 U.S.C. § 1306(a)(1), ***HN5*** "Property of the estate includes, in addition to the property [that typically becomes property of the estate,] all property of [that] kind . . . that the debtor acquires after the commencement of the case but before the

erty in the debtor *unless otherwise specified by the confirmation plan*—and here, the plan explicitly stated that the estate's assets would not revest in the debtor until discharge.[3]

At oral argument, Flugence's attorney stated that there is still ambiguity, because the order says property of the estate shall revest after discharge, but it is unclear whether the cause of action ever was property of the estate. Even so, our decisions have settled that debtors have a duty to disclose to the bankruptcy court notwithstanding uncertainty. The reason for the rule is obvious: Whether a particular asset should be available to satisfy creditors is often a contested issue, and the debtor's duty to disclose assets—even where he has a colorable theory for why those assets should be shielded from creditors—allows that issue to be decided as part of the orderly bankruptcy process.[4]

Because Flugence had an affirmative duty to disclose her personal-injury claim to the bankruptcy court and did not do so, she impliedly represented that she had no such claim.[5] That is plainly inconsistent with her later assertion of the claim in state court. Moreover, the bankruptcy court accepted the prior position by omitting any reference to the personal-injury claim in the modified plan. Had the court been aware of the claim, it may well have altered the plan. Therefore, the first two elements of judicial estoppel apply.

The remaining question is whether Flugence acted inadvertently. Her representation that she did not know she had to disclose—and that she relied on the advice of her attorney—is unavailing on this prong of the test as well. ***HN7*** To establish inadvertence as that term is understood in the judicial-estoppel jurisprudence, Flugence ″may prove either that she did not know of the inconsistent position or that she had no motive to conceal it from the court.″ *Jethroe*, 412 F.3d at 601. To prove that she ″did not know of the inconsistent position,″ she ″must show not that she was unaware that she had a duty to disclose her claims but that . . . she was unaware of the facts giving rise to them.″ *Id.* In other words, ″the controlling inquiry, with respect to inadvertence, is the knowing of facts giving rise to inconsistent positions . . . . [A] lack of awareness of a statutory disclosure duty for [] legal claims is not relevant.″ *Id.* at 601 n.4 (internal quotation marks and citation omitted).

Flugence knew of the facts underlying her personal-injury claim. The **[*11]** bankruptcy court also found that she had motive to conceal, because her claim, if disclosed, would be available to the creditors. That she did not know that bankruptcy law required disclosure—even if true—is, according to our precedents, irrelevant.

III.

The personal-injury defendants contend that the bankruptcy court erred in interpreting *Reed* to allow the trustee to pursue Flugence's personal-injury claim without limitation. Specifically, the defendants contend that they are entitled to a declaration that, although the trustee may pursue the claim against them, their exposure is limited to the amount of Flugence's debt to her creditors. This is a legal issue this court considers *de novo*. *Traina v. Whitney Nat'l Bank*, 109 F.3d 244, 246 (5th Cir. 1997).

IV.

Reed, 650 F.3d at 573, holds generally that, ***HN8*** where a debtor is individually estopped from pursuing an undisclosed claim, ″absent unusual circumstances, an innocent trustee can pursue [the claim] for the benefit of creditors.″ The remedy affirmed in *Reed* provided that, though the debtor was personally estopped, the trustee ″would be free to [pursue the claim for recovery] for distribution to [the debtor's] creditors,″ and ″[a]ny remaining **[*12]** funds after distribution would be refunded to the [defendants], and not to [the debtor].″ *Id.* That holding was intended both to ″deter dishonest debtors, whose failure to fully and honestly disclose all their assets undermines the integrity of the bankruptcy system,″ and to ″protect[] the rights of creditors to an equitable distribution of the assets of the debtor's estate.″ *Id.* at 574.

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case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.″ Second, under 11 U.S.C. § 1327(b), ***HN6*** ″Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.″ Therefore, although a cause of action acquired post-confirmation and pre-closure, **[*8]** -dismissal, or -conversion would seem, on the one hand, to be ″property of the estate″ under § 1306(a)(1), it would also appear, on the other hand, to have ″vest[ed] . . . in the debtor″ under § 1327(b).

[3] The bankruptcy court's order confirming Flugence's plan provided explicitly that ″[n]o property of the estate will revest in the debtor(s) until such time as the debtor(s) receive a discharge or the case is dismissed.″

[4] *See United States v. Beard*, 913 F.2d 193, 197 (5th Cir. 1990) (explaining that debtors **[*9]** have a ″duty to disclose to the court the existence of assets whose immediate status in the bankruptcy is uncertain, even if that asset is ultimately determined to be outside of the bankruptcy estate″); *see also In re Robinson*, 292 B.R. 599, 607 (Bankr. S.D. Ohio 2003) (″[D]ebtors have the absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or unavailable to the bankruptcy estate. This is because the bankruptcy court, not the debtor, decides what property is exempt from the bankruptcy estate.″ (internal quotation marks and citations omitted)).

[5] *See Superior Crewboats*, 374 F.3d at 335 (″[T]he [debtors'] **[*10]** omission of the personal injury claim from their mandatory bankruptcy filings is tantamount to a representation that no such claim existed.″).

Nothing in *Reed* speaks to liability limitations of the sort the personal-injury defendants seek, and for good reason.

The basic thrust of the defendants' argument is that it would be inconsistent with the goals of bankruptcy to allow the trustee to pursue a claim where, as here, it would disproportionately benefit the attorneys over the creditors. Although the argument may be superficially appealing, if the personal-injury defendants were entitled to the sort of limitation they seek, then such declarations would tend to "thwart one of the core goals of the bankruptcy system—obtaining a maximum and equitable distribution for creditors." *Id.* at 577. Attorneys might not be willing to take on the case with a dim hope for recovery, so the creditors would collect nothing.

HN9 The Bankruptcy Code adequately addresses **[*13]** limitations on attorneys' fees. Lawyers and other professionals may be employed "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis," and the court must approve such compensation as reasonable. *11 U.S.C. §§ 328*, *330*. Because the trustee is a fiduciary of the estate, he has a duty to ensure that the compensation arrangements made with attorneys and others are in the best interests of the creditors.[6] In short, bankruptcy law already imposes limitations on professional compensation.

In *Reed*, we rejected the notion that innocent creditors should be punished for the debtor's failure to comply with disclosure rules. ***HN10*** "Judicial estoppel is an equitable doctrine, and using it to land another blow on the victims of bankruptcy fraud is not an equitable application." *Reed*, 650 F.3d at 576 (emphasis and citation omitted). That wrongful tortfeasors would be favored over innocent creditors by the mere happenstance **[*14]** of the debtor's independent non-disclosure turns equity on its head. Providing the personal-injury defendants the windfall they seek is neither necessary nor desirable.[1]

Accordingly, ***HN11*** where a debtor is judicially estopped from pursuing a claim he failed to disclose to the bankruptcy court, the trustee, consistent with *Reed*, may pursue the claim without any limitation not otherwise imposed by law. The judgment of the district court is REVERSED, and judgment is RENDERED reinstating the judgment of the bankruptcy court.

Concur by: JAMES L. DENNIS

Concur

JAMES L. DENNIS, Circuit Judge, concurring:

I concur in the court's opinion and judgment, but I write separately to briefly state my understanding of one point. That is, that "judicial estoppel is not governed by inflexible prerequisites or an exhaustive formula for determining its applicability, and numerous considerations **[*15]** may inform the doctrine's application in specific factual contexts." *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012) (internal quotation marks omitted); *see also Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc) ("Because the doctrine is equitable in nature, it should be applied flexibly, with an intent to achieve substantial justice." (quoting 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.31, at 73 (3d ed. 2011))). Depending on the specific facts of the case, whether judicial estoppel is invoked and, if so, what is the remedy crafted may differ. *See, e.g., Gilbreath v. Averitt Exp., Inc.*, No. 09-1922, 2010 U.S. Dist. LEXIS 117706, 2010 WL 4554090 (W.D. La. Nov. 3, 2010). The bankruptcy court, which is closest to the facts, operates in a zone of discretion in crafting an appropriate remedy. *Cf. In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) ("[J]udicial estoppel is an equitable doctrine, and the decision whether to invoke it within the court's discretion . . . ."). That we affirmed the bankruptcy court's remedy here — estopping Flugence from pursuing her personal-injury claim while allowing the bankruptcy trustee to do so and requiring that any recovery **[*16]** by the trustee exceeding Flugence's remaining debt be refunded to the tortfeasors — does not imply that the same must be done in *all* cases in which a debtor fails to disclose a claim to the bankruptcy court. As our opinion does not require the same remedy in all cases, I concur.

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[6] *See generally United Pac. Ins. Co. v. McClelland (In re Troy Dodson Constr. Co.)*, 993 F.2d 1211, 1216 (5th Cir. 1993) ("The trustee owes a fiduciary duty to *all* the creditors.").

[1] The defendants' only other argument is that in *Reed* we permitted the attorney to recover costs because he was a creditor of the estate. But the cited passage refers only to fees accrued before the conclusion of the FMLA suit in that case; the court also permitted fees for work performed after the FMLA judgment. *See Reed*, 650 F.3d at 576, 579.