AMERICAN BANKRUPTCY INSTITUTE

Central States Bankruptcy Workshop 2021

Consumer Track

Estopping the Madness: Personal-Injury Claims and Exemptions in Chapter 7 and 13 Cases

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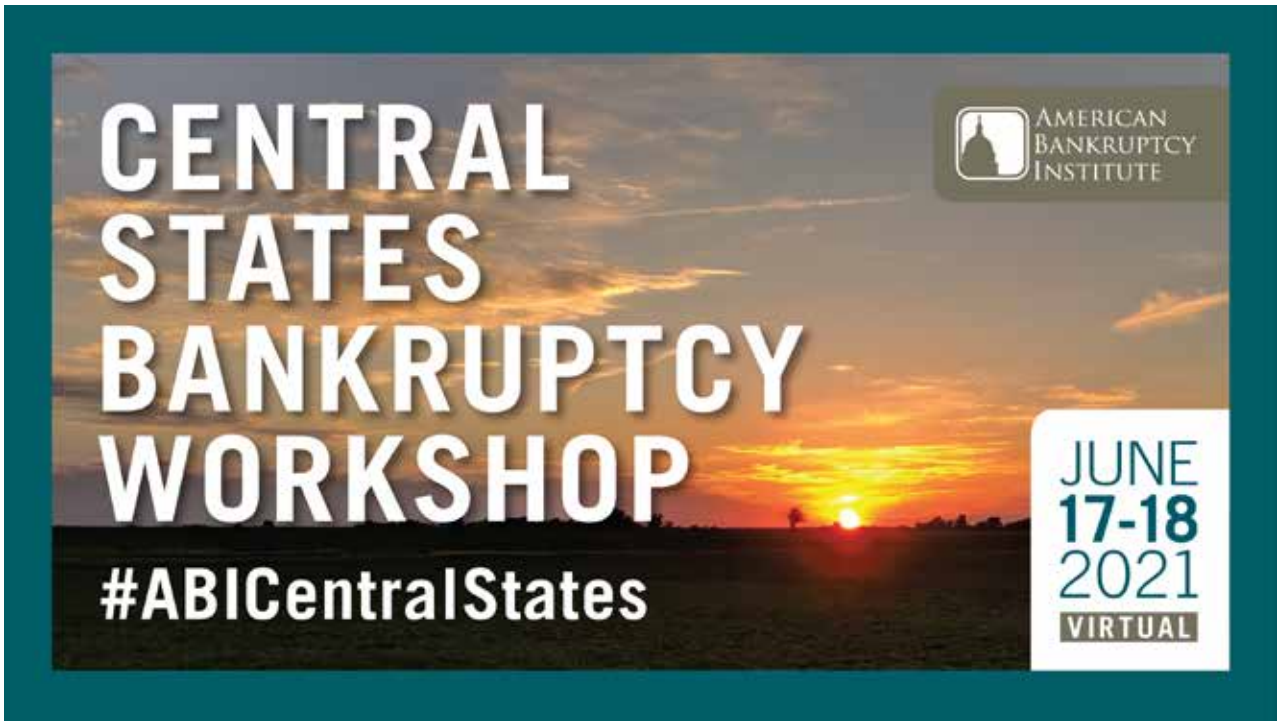
CONCURRENT SESSION

2021



Estopping the Madness: Personal Injury and Exemptions in Chapter 7 and Chapter 13 Cases

Panelists:

E. Phillip Groben, Esq.
Gensburg, Calandriello & Kanter, P.C., Chicago, Illinois
Debtor's Disclosure Considerations and Estoppel

Dean R. Nelson, Jr., Esq.
Taunt Law Firm, Birmingham, Michigan
Personal Injury Claims as Property of the Estate

Virginia E. George, Esq.
Steinhilber Swanson, LLP, Milwaukee, Wisconsin
Personal Injury Exemptions in Bankruptcy

Moderator:

Honorable James W. Boyd
United States Bankruptcy Court, Grand Rapids, Michigan

Disclosure Considerations

A debtor has an obligation to file a schedule of assets as a component of a petition for relief. 11 U.S.C. § 521(a)(1)(B)(i). Failure to comply with such a duty may result in an objection to the debtor's discharge under Section 727(a)(4). In order to prevail on an action brought under Section 727(a)(4), a plaintiff must demonstrate five separate elements: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with the intent to deceive; and (5) the statement related materially to the bankruptcy case.

Fraudulent Intent

The knowledge and intent to deceive requirements are satisfied by showing that "the bankrupt knows what is true and, so knowing, willfully and intentionally swears to what is false. Fraudulent intent must be shown by actual, not constructive fraud, may be inferred by circumstantial evidence, and may be shown by a reckless indifference to the truth.

Estoppel

Debtors who refuse or fail to disclose causes of actions in their bankruptcy schedules, or timely update schedules to disclose causes of action which arise post-petition, may lose the ability to prosecute their claims. State courts have interpreted a failure to disclose assets in bankruptcy schedules as an assertion by the plaintiff that such actions to not exist and attach judicial estoppel to the state court action. Judicial estoppel bars a party from making a representation in a case after he has successfully taken a contrary position in another case and to prevent a party from manipulating courts addressing unrelated matters.

Elements of Judicial Estoppel

The goal of the application of judicial estoppel is to protect the integrity of our system of justice and prevent a party from manipulating and making a mockery of our system of dispensing justice in all its forms. *Id*. at ¶ 12. "At its heart, this doctrine prevents chameleonic litigants from 'shifting positions to suit the exigencies of the moment', engaging in 'cynical gamesmanship' or '[h]oodwinking' a court." *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill.App.3d 836, 850, (1st Dist. 1994).

Judicial estoppel applies if the following five separate elements are present: i) the two positions must be taken by the same party; ii) the positions must be taken in judicial proceedings; iii) the positions must be given under oath; iv) the party must have successfully maintained the first position and received some benefit thereby; and v) the two positions must be totally inconsistent.

Medical Liens

Many states, including the State of Illinois, allow physicians who are attending to injured persons to assert liens upon future recoveries by injured for the value of services rendered but unpaid. For example, the Health Care Services Lien Act, 770 ILCS 23/1, allows a service provider to attach a lien to "any verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person". Medical liens may be avoidable as a preferential transfer under Section 547(b) if the applicable elements can be demonstrated.

Property of the Estate

Every discussion of property of a bankruptcy estate necessarily starts with 11 U.S.C. § 541(a)(1), which creates a vast estate generally comprised of "all legal and equitable interests of the debtor in property…" Inevitably, the discussion turns to a citation to *Butner v. United States*, 440 U.S. 48 (1979) which states that, absent federal considerations, property interests for § 541 purposes are generally determined under substantive state law. Although far reaching, the concept of property of the bankruptcy estate has its limits, including in the context of personal injury claims.

Personal Injury Claims as Property of the Estate

A cause of action which, under applicable non-bankruptcy law, was or theoretically could have been brought by a debtor prepetition is property of the estate. *Tyler v. DH Capital Mgmt.*, 736 F.3d 455, 462 (6th Cir. 2013). The more problematic claims are those which, due to lack of knowledge of any injury or lack of any concrete damages as of the petition date, have both a pre-petition and post-petition component.

- Historically, property of the estate determinations were made after analyzing whether the claim is "sufficiently rooted in the [debtor's] pre-bankruptcy past." *Segal v. Rochelle*, 382 U.S. 375, 380 (1966).
- Some courts look purely to whether a cause of action's elements have been met, while others view *Segal's* "sufficiently rooted" analysis to be the necessary federal consideration to bring assets into the estate that otherwise might not have accrued under state personal injury law.

Legal malpractice Claims

Blasingame is one of the more recent published opinions regarding malpractice claims. It determined, under Tennessee law, that a malpractice claim against a debtor's bankruptcy attorney for filing a bankruptcy petition that resulted in the denial of the debtor's discharge was post-petition property of the debtor, not property of the estate. Other courts have reached opposite conclusions.

Mesh Claims

Like all causes of action, the results depend on the circuit property of the estate standards and substantive state product liability laws. On one end of the spectrum are the cases that hold the mere implantation of some of the devises (which have been determined to be defective and compensable even without physical injury) is sufficient to treat the entire settlement as property of the estate, while others require substantially more.

Personal Injury Exemptions

Federal law: Sec. 522(d)(11): Up to $25,150 on account of personal bodily injury, but not including compensation for pain, suffering or actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent. Sec. 522(d)(5): "Wildcard Exemption" -- $1,325 plus up to $12,575 of any unused Sec. 522(d)(1) exemption.

To the extent that a portion of a personal injury settlement or judgment is compensation for loss of future earnings, it may be separately exemptible under section 522(d)(11)(E), and therefore not subject to the monetary cap under section 522(d)(11)(D).

Medical Payments

Medical payments are not exempt. Though ostensibly belonging to the debtor, medical payments are actually not the property of the debtor but are held in trust for another. Any payment for medical expenses, therefore, is held in trust for the person to whom the medical expenses are owed, since it is not property of the estate and need not be claimed as exempt.

State Exemptions

Michigan: None

Illinois (opt-out state): Wrongful death + $15,000 for personal bodily injury. Right to receive is exempt for up to two years after accrual, and funds traceable to such an aware are exempt for five years after accrual.

Wisconsin: $50,000 resulting from personal bodily injury, including pain and suffering or compensation for actual pecuniary loss of the debtor or an individual of whom the debtor is a dependent and property traceable thereto.

Minnesota: Rights of action for injuries to a debtor or relative, whether or not resulting in death, are exempt.

Some Settlement Considerations

- Is Ch. 13 different from Ch. 7 in terms of who controls the settlement?
- Can a Ch. 7 debtor object to the trustee's proposed settlement?
- If a Debtor doesn't like the Ch. 7 trustee's settlement, can the debtor successfully convert to Ch. 13?
- Does the debtor's settlement of the claim, without court approval, violate Sec. 362?

ABI CENTRAL STATES BANKRUPTCY WORKSHOP

June 18, 2021
1:15 – 2:15 p.m. CDT

Estopping the Madness:
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Panelists:

E. Phillip Groben, Esq.
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Debtor's Disclosure Considerations and Estoppel

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Personal Injury Exemptions in Bankruptcy

Moderator:

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United States Bankruptcy Court, Grand Rapids, Michigan

Debtor's Disclosure Considerations

Section 727(a)(4):

A debtor has an obligation to file a schedule of assets as a component of a petition for relief. 11 U.S.C. § 521(a)(B)(i). Failure to comply with such a duty may result in an objection to the debtor's discharge under Section 727(a)(4). In order to prevail on an action brought under Section 727(a)(4) a plaintiff must demonstrate five separate elements: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with the intent to deceive; and (5) the statement related materially to the bankruptcy case. *Cohen v. Olbur (In re Olbur)*, 314 B.R. 732, 745 (Bankr.N.D.Ill.2004); *Urological Group, Ltd. v. Petersen (In re Petersen)*, 296 B.R. 766, 790 (Bankr.C.D.Ill.2003). Debtors should also be cautioned that while subsequent disclosure of assets prior to an objection to discharge is filed may be some evidence of innocent intent, the disclosure does not cure the original false statement. *In re Bostrom*, 286 B.R. 352, 361 (Bankr. N.D.Ill. 2002); *Weiss v. Winkler*, 2001 WL 423050, at *3 (E.D.N.Y. Mar.30, 2001).

The knowledge and intent to deceive requirements are satisfied by showing that "the bankrupt knows what is true and, so knowing, willfully and intentionally swears to what is false." *In re Kaufhold*, 256 F.2d 181, 185 (3d Cir.1958) (citing *Tancer v. Wales*, 156 F.2d 627, 628 (2d Cir.1946); *Aronofsky v. Bostian*, 133 F.2d 290 (8th Cir.1943); *Morris Plan Indus Bank v. Henderson*, 131 F.2d 975, 977 (2d Cir.1942); *Willoughby v. Jamison*, 103 F.2d 821 (8th Cir.1939)). "Fraudulent intent must be shown by actual, not constructive fraud. The party objecting to the discharge must show that the information was omitted for the specific purpose of perpetrating a fraud and not simply because the debtor was careless or failed to fully understand his attorney's instructions...." *Dubrowsky v. Estate of Perlbinder (In re Dubrowsky)*, 244 B.R. 560, 572 (E.D.N.Y.2000). Fraudulent intent may be inferred from circumstantial evidence or by inference based on a course of conduct. *Clean Cut Tree Serv., Inc. v. Costello (In re Costello)*, 299 B.R. 882, 900 (Bankr.N.D.Ill.2003). The value of misstatements or omissions may not be significant, but when viewed collectively for cumulative effect, may suggest a fraudulent intent on the part of the debtor. *In re Self*, 325 B.R. 224, 248 (Bankr.N.D.Ill.2005).

Fraudulent intent can be shown through a reckless indifference to the truth and debtors which make numerous false oaths that they knew or should have known were inaccurate, and that the cumulative effect of their false statements was material and established a pattern of reckless indifference to the truth. *See*, *Stamat v. Neary*, 635 F.3d 974, 979 (7th Cir. 2011); *Dubrowsky*, 244 B.R. at 576. If a debtor's bankruptcy schedules reflect a "reckless indifference to the truth" then the plaintiff seeking denial of the discharge need not offer any further evidence of fraud. *Costello*, 299 B.R. at 894 (Bankr.N.D.Ill.2003). Reckless disregard has also been described as "not caring whether some representation is true or false...." *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998).

Estoppel:

In addition to the enforcement mechanisms described above, Debtors who refuse or fail to disclose causes of actions in their bankruptcy schedules, or timely update schedules to disclose causes of action which arise post-petition, may lose the ability to prosecute their claims. State courts have interpreted a failure to disclose assets in bankruptcy schedules as an assertion by the plaintiff that such actions to not exist and attach judicial estoppel to the state court action. Judicial estoppel bars a party from making a representation in a case after he has successfully taken a contrary position in another case and to prevent a party from manipulating courts addressing unrelated matters. *See, Berge v. Mader*, 2011 IL App (1st) 103778, ¶ 9. The goal of the application of judicial estoppel is to protect the integrity of our system of justice and prevent a party from manipulating and making a mockery of our system of dispensing justice in all its forms. *Id*. at ¶ 12. "At its heart, this doctrine prevents chameleonic litigants from 'shifting positions to suit the exigencies of the moment', engaging in 'cynical gamesmanship' or '[h]oodwinking' a court." *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill.App.3d 836, 850, (1st Dist. 1994).

Judicial estoppel applies if the following five separate elements are present: i) the two positions must be taken by the same party; ii) the positions must be taken in judicial proceedings; iii) the positions must be given under oath; iv) the party must have successfully maintained the first position, and received some benefit thereby; and v) the two positions must be totally inconsistent. *Berge* at ¶13. In *Berge*, a chapter 13 debtor was injured in an automobile accident, subsequently converted the bankruptcy proceeding to one under chapter 7 and did not amend the schedules to disclose the right to sue. The defendant tortfeasor learned of the bankruptcy proceeding and argued in a motion for summary judgment that the case should be dismissed. The court held that the circumstances satisfied all five elements of judicial estoppel: i) the plaintiff held the position she had no pending lawsuits yet she pursued her personal-injury action; ii) the conflicting positions were made in separate judicial proceedings; iii) the plaintiff took these two separate positions under oath by filing a complaint and various bankruptcy filings in the respective proceedings; iv) the plaintiff received a benefit by having her debts discharged without the creditors knowing of her potential recovery in state court; and v) the plaintiff never disclosed the existence of her lawsuit in bankruptcy court, yet actively pursued it in state court. *Id.* at ¶14. Notably, the court did not require a finding of bad faith to support judicial estoppel. *Id*.

Other States in the region offer similar tests for estoppel in the bankruptcy context:

A. In Michigan, judicial estoppel applies for unscheduled causes of action if "(1) plaintiff assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) the plaintiff's omission did not result from mistake or inadvertence." *Spohn v. Van Dyke Pub. Sch.*, 296 Mich. App. 470, 480-481, 822 N.W.2d 239, 247 (Mich. Ct. App. 2012)(judicial estoppel operated to preclude claim omitted from bankruptcy schedules).

B. In Wisconsin, the elements are "(1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." *Robinson v. Aurora*

St. Lukes Med. Ctr., 2015 WI App 68, 364 Wis. 2d 758, 869 N.W.2d 170 (Wisc. Ct. App. 2015) (judicial estoppel operated to preclude claim omitted from bankruptcy schedules).

C. In Indiana, there is an "inference of bad faith arises when the party asserting judicial estoppel demonstrates that a debtor-plaintiff had knowledge of an unscheduled claim and motive for concealment in the face of a duty to disclose. If the party asserting judicial estoppel establishes knowledge of a claim and motive for concealment, the debtor-plaintiff then has the burden of coming forth with evidence indicating that the nondisclosure was made in good faith." *Price v. Kuchaes*, 950 N.E.2d 1218, 1228 (Ind. Ct. App. 2011)(finding of judicial estoppel by trial court reversed).

D. Although judicial estoppel has not been expressly recognized by the Minnesota Supreme Court, it has been recognized by the Court of Appeals. *Bauer v. Blackduck Ambulance Ass'n, Inc.*, 614 N.W.2d 747, 749-50 (Minn. Ct. App. 2000). Although not recognized by the Minnesota Supreme Court, to the extent judicial estoppel were to apply, "First, the party presenting the allegedly inconsistent theories must have prevailed in its original position (a litigant is not forever bound to a losing position). Second, there must be a clear inconsistency between the original and subsequent position of the party. Finally, there must not be any distinct or different issues of fact in the proceedings." *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005). Finally, informal disclosure of causes of action (i.e. outside of schedules) is sufficient to defeat judicial estoppel – to the extent it could be applied. *Sports Page, Inc. v. First Union Management, Inc.*, 438 N.W.2d 428 (Minn. Ct. App. 1989).

Medical Liens:

Many states, including the State of Illinois, allow physicians who are attending to injured persons to assert liens upon future recoveries by injured for the value of services rendered but unpaid. For example, the Health Care Services Lien Act, 770 ILCS 23/1, allows a service provider to attach a lien to "any verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person."

(a) Every health care professional and health care provider that renders any service in the treatment, care, or maintenance of an injured person, except services rendered under the provisions of the Workers' Compensation Act or the Workers' Occupational Diseases Act, shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges up to the date of payment of damages to the injured person. The total amount of all liens under this Act, however, shall not exceed 40% of the verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person on his or her claim or right of action.

(b) The lien shall include a written notice containing the name and address of the injured person, the date of the injury, the name and address of the health care professional or health care provider, and the name of the party alleged to be liable to make compensation to the injured person for the injuries received. The lien notice shall be served on both the injured person and the party against whom the claim or right of action exists. Notwithstanding any other provision of this Act, payment

in good faith to any person other than the healthcare professional or healthcare provider claiming or asserting such lien prior to the service of such notice of lien shall, to the extent of the payment so made, bar or prevent the creation of an enforceable lien. Service shall be made by registered or certified mail or in person.

770 ILCS 23/10. It is important that chapter 7 trustee and debtors counsel understand the limitations to the rights granted upon the purported lien holders to ensure that the liens of the secured creditors attach to the appropriate portion of the award. Not only can the total value of the lien be limited by statute, as it is in the Health Care Services Lien Act to no more than 40% of the total judgment, but courts may examine the asserted and determine whether said fees are reasonable. *See, Phillips v. DeCarlo*, 301 Ill.App.3d 680 (2d Dist. 1998).

The affixing of medical liens may be avoidable in limited circumstances. Section 522(f) allows a debtor to avoid the fixing of a lien; however, the liens which may be avoided must by a nonpossessory, nonpurchase-money security interest, in household furnishings and goods, tools of the trade and professional books and implements, and professionally prescribed health aids. Medical liens which attach to judicial awards or settlements, such as the lien described in the Health Care Services Lien Act, would not be avoidable under Section 522(f).

Medical liens may be avoidable as a preferential transfer under Section 547(b) if the applicable elements can be demonstrated: i) the transfer was made to or for the benefit of a creditor; ii) the transfer was made for, or on account of, an antecedent debt owed by the debtor before the transfer was made; iii) the transfer was made while the debtor was insolvent; iv) the transfer was made no more than 90 days prior to the filing of the bankruptcy petition; and v) the transfer enables the creditor to receive more than it would receive if the case were one under chapter 7, the transfer had not been made, and such creditor received payment of the debe to the extent provided by the bankruptcy code. However, in addition to the standard commercial defenses to preference liability (ordinary course, contemporaneous exchange, new value, etc.), the holder of an otherwise-avoidable medical lien may rely upon Section 547(c)(6) which references the limitations found in Section 545. Section 545 permits a trustee to a avoid the fixing of a statutory lien on property of the debtor to the extent that such lien:

> (1) first becomes effective against the debtor—
>
> (A) when a case under this title concerning the debtor is commenced;
>
> (B) when an insolvency proceeding other than under this title concerning the debtor is commenced;
>
> (C) when a custodian is appointed or authorized to take or takes possession;
>
> (D) when the debtor becomes insolvent;
>
> (E) when the debtor's financial condition fails to meet a specified standard; or
>
> (F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;
>
> (2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;

(3) is for rent; or
(4) is a lien of distress for rent.

Section 1302 bestows many duties upon a chapter 13 trustee, including those specified in sections 704(a)(2) - be accountable for all property received; 704(a)(3) - ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B); 704(a)(4) - investigate the financial affairs of the debtor; 704(a)(5) – examine and object to proofs of claim, if advisable; 704(a)(6) – oppose the discharge of the debtor, if advisable; 704(a)(7) - furnish information concerning the estate and the estate's administration as is requested by a party in interest; and 704(a)(9) – make a final report and file a final account of the administration of the estate with the court and with the United States trustee. Included within these obligations is standing to pursue chapter 5 avoidance actions, including preference actions, and courts have predominantly held in the chapter 13 proceedings that only chapter 13 trustees have the standing to bring avoidance actions. *See In re Stangel*, 219 F.3d 498 (5th Cir. 2000); *In re Young*, 156 B.R. 282 (Bankr. D. Idaho 1993); *In re Merrifield*, 214 B.R. 362 (B.A.P. 8th Cir. 1997). However, a chapter 13 debtor may acquire standing to pursue avoidance and other actions which benefit the estate through operation of the chapter 13 plan. *See, In re Cohen*, 305 B.R. 886 (B.A.P. 9th Cir. 2004); *In re Nash*. 228 B.R. 669 (Bankr. N.D.Ill. 1999); *Cable v. Ivy Tech State College*, 200 F.3d 467 (7th Cir. 1999). Of course, any such action taken by a chapter 13 debtor would be for the benefit of the bankruptcy estate.

Personal Injury Claims as Property of the Estate

Every discussion of property of a bankruptcy estate necessarily starts with 11 U.S.C. §541(a)(1), which creates a vast estate generally comprised of "all legal and equitable interests of the debtor in property…" Inevitably, the discussion turns to a citation to *Butner v. United States*, 440 U.S. 48 (1979) which states that, absent federal considerations, property interests for §541 purposes are generally determined under substantive state law. Although far reaching, the concept of property of the bankruptcy estate has its limits, including in the context of personal injury claims.

Some personal injury claims are clearly property of the estate. Specifically, a cause of action which, under applicable non-bankruptcy law, was or theoretically could have been brought by a debtor prepetition is property of the estate. *Tyler v. DH Capital Mgmt.*, 736 F.3d 455, 462 (6th Cir. 2013). The more problematic claims are those which, due to lack of knowledge of any injury or lack of any concrete damages as of the petition date, have both a pre-petition and post-petition component.

This dispute is not a new one. Historically, property of the estate determinations were made after analyzing whether the claim is "sufficiently rooted in the [debtor's] pre-bankruptcy past." *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). But after the enactment of the current Bankruptcy Code (replacing the 1898 Bankruptcy Act), this analysis has been rejected by various circuits, but retained by others. *Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 986 F.3d 633, 639-640 (6th Cir. 2021)(noting decisions by the Second, Fourth, Sixth, Ninth, and Tenth Circuits incorporating the test in whole or in part, while the Fifth, Eight, and Eleventh Circuits have rejected it). Although omitted from *Blasingame's* list of conflicting Circuit level cases, the Seventh Circuit has also incorporated the *Segal* analysis in a limited capacity. *In re Meyers*, 616 F.3d 626, 628 (7th Cir. 2010).

Given that *Butner* requires an analysis of state substantive law, except to the extent of federal considerations, two general views have emerged. Some courts look purely to whether a cause of action's elements have been met, while others view *Segal's* "sufficiently rooted" analysis to be the necessary federal consideration to bring assets into the estate that otherwise might not have accrued under state personal injury law. See generally *In re Wagner*, 530 B.R. 695, (Bankr. E.D. Wisc. 2015)(collecting cases on both views).

At least in the Sixth Circuit, a cause of action was property of the estate if, minimally, there was a pre-petition "violation". *Tyler, Supra.,* 736 F.3d at 462. But *Tyler* never addressed whether a violation could occur in the absence of one or more elements of a cause of action. *Id.,* at 463. Recently, the Sixth Circuit ventured into these muddy waters yet again, in *Blasingame*. However, rather than clarifying the law, in this author's opinion, the Sixth Circuit complicated the law. While it paid lip service to its prior opinion in *Tyler* in recognizing that only a "violation" was required, the Sixth Circuit went on to determine that a violation could only occur if the claim "accrued" under state law, and in doing so, cited to statute of limitation accrual cases. But the Court in *Blasingame* ignored its own precedent in that it failed to recognize that "accrual for the purposes of § 541 is different from accrual for statute-of-limitations purposes" *Tyler*, at 463. While the result may be correct in the context of a malpractice suit against a debtor's bankruptcy

attorney in Tennessee, the broader impacts of this analysis are yet to be known, given that the court in *Blasingame* purported to answer the question left unanswered in *Tyler* regarding the extent that a cause of action without all elements being met was still "sufficiently rooted" in the pre-bankruptcy past of the Debtor.

The problem with this type of accrual analysis was conceptualized as follows:

> Consider a case of medical malpractice in which the treating physician has left a dangerous metal instrument inside the body of his patient. At the time the doctor finishes the surgery, the doctor has completed a tort. He has violated a legal duty owed to the patient, and the patient was injured by that violation. If the patient instituted suit at this moment, his suit would be viable. The statute of limitations has not begun to run, however. Under the discovery rule, the statute of limitations is tolled until the patient either discovers or should have discovered that an injury has occurred. This example shows that the dates of accrual and the start of the running of the statute of limitations may vary greatly. Unfortunately, many cases applying the principles of the discovery rule are written in terms of accrual.

Wagner, Supra, 530 B.R. at 703, citing *Matter of Swift*, 129 F.3d 792, 796 (5th Cir. 1997). Compare, however, *In re Vasquez*, 581 B.R. 59 (Bankr. D. Vermont 2018)(distinguishing Swift in the context of a mesh claim).

In short, the law regarding the extent to which causes of action are property of the estate varies considerably depending on the Circuit and underlying state law. Like many disputes, a determination of whether a cause of action is property of the bankruptcy estate must be made on a case by case basis. The following are three common causes of action to be discussed:

A. Legal Malpractice Claims. *Blasingame* is one of the more recent published opinions regarding malpractice claims. It determined, under Tennessee law, that a malpractice claim against a debtor's bankruptcy attorney for filing a bankruptcy petition that resulted in the denial of the debtor's discharge was post-petition property of the debtor, not property of the estate. Other Courts have reached opposite conclusions. See also, *Witko v. Menotte (In re Witko)*, 374 F.3d 1040 11th Cir. 2004) and *Holstein v. Knopfler (In re Holstein)*, 321 B.R. 229 (Bankr. N.D. Ill 2005)

   However, other contrary authority also exists, typically in jurisdictions that still follow *Segal*. See *In re Tomaiolo*, 205 B.R. 10, 14 (Bankr. D. Mass. 1997) (claims are property of the bankruptcy estate despite not having accrued by the time of the bankruptcy filing) and *Winick & Rich, P.C. v. Strada Design Assocs., Inc. (In re Strada Design Assocs., Inc.)*, 326 B.R. 229, 236 (Bankr. S.D.N.Y. 2005).

B. Mesh Settlements. In the US, there is significant multidistrict litigation regarding pelvic mesh devices (sometimes revered to as transvaginal mesh devises) against multiple different manufacturers. These cases generally involve women who received surgical mesh implants to cure incontinence and other medical issues. In many instances, these products were defective and caused severe pain, bleeding, and required additional surgeries

to remedy, remove, and/or replace the devices. Often times, years would elapse between the time the device was inserted, the first incurrence of pain/bleeding, and subsequent remedial actions. Under principles of product liability and other state law claims, these women pursued the manufacturers of the devices in multidistrict litigation cases and have received sizable six figure settlements. Naturally, splits in authority have arisen regarding when these causes of action arise, pitting Chapter 7 Trustees against debtors for control of the settlement funds.

Like all causes of action, the results depend on the circuit property of the estate standards and substantive state product liability laws. On one end of the spectrum are the cases that hold the mere implantation of some of the devises (which have been determined to be defective and compensable even without physical injury) is sufficient to treat the entire settlement as property of the estate, while others require substantially more. Compare *In re Davis*, 589 B.R. 146 (Bankr. E.D. Tenn. 2018)(implanting of device insufficient to render claim property of the estate) with *Davis v. Nasuti (In re Davis)*, 2018 Bankr. LEXIS 1443, 2018 WL 2223076 (Bankr. N.D. Ga. 2018)(implanting of defective device is pertinent event to trigger property of the estate determination, even without pre-petition injury). In those jurisdictions that require something more than mere implantation, the analysis is typically the same as any other cause of action: were all elements of the cause of action present (regardless of knowledge), or where allowed, was the claim sufficiently rooted in the prebankruptcy past. These cases include *In re Carroll*, 586 B.R. 775 (Bankr. E.D. Ca 2018)(all elements of product liability claim met pre-petition based on significant pre-petition injuries despite lack of knowledge that injuries gave rise to cause of action) and *In re Vasquez*, 581 B.R. 59 (Bankr. D. Vermont 2018)(claim not property of the estate where, apart from implanting, no pre-petition injury occurred other than occasional stress incontinence and urinary tract infections).

C. Abuse Claims Retroactively Actionable. There is a growing trend of making litigation more accessible against the perpetrators of sexual abuse of minors, typically in the form of retroactive statute of limitation extensions. As of December of 2019, the number of states enacting such laws numbered 15. Associated Press, *States Expand Child Sex Abuse Laws,* 12/2/2019 https://apnews.com/article/2ba715a1a0ee45bc8ebe97d02b77246c). These laws present an interesting bankruptcy question – namely whether a cause of action that accrued pre-petition but was time barred based on the statute of limitations that existed at the time of bankruptcy filing, but then made actionable by way of a retroactive post-petition extension of the statute of limitations, is property of the estate. Citing cases such as *In re Schmitz*, 270 F.3d 1254 (9th Cir. 2001), *In re Vote*, 276 F.3d 1024 (8th Cir. 2002), and *In re Burgess*, 392 F.3d 782 (5th Cir. 2004), *on reh'g en banc*, 438 F.3d 493 (5th Cir. 2006), some debtors have argued that the cause of action, although accruing pre-petition, is nonetheless not property of the estate, because it was only post-petition legislation that made the claim actionable. However, this argument has been opposed by defendants (typically arguing the debtor was not the correct party in interest) by contrasting cases such as *Schmidt*, *Vote,* and *Burgess*, all of which held various claims are not property of the estate where prepetition damages/losses were made actionable *for the first time* by post-petition legislation where no claim *ever* existed previously. In at least two instances, the Maricopa County (Arizona) Superior Court of Arizona sided with the defendants, holding

that revived sexual abuse claims as a result of post-petition extensions of the statute of limitations are still property of the estate.

Personal Injury Exemptions in Bankruptcy

Federal Exemptions

- Exemptions are governed by § 522
- *Personal Injury Exemption* – Both Chapter 7 and 13 federal bankruptcy laws allow debtors to protect personal injury claims through exemptions. During a bankruptcy proceeding, a debtor can claim up to $25,150 of compensation received for a bodily injury as exempt from the bankruptcy proceedings. Compensation for emotional pain and suffering, however, can't be claimed as exempt.
- *Wildcard Exemption* – Debtors can also use a general exemption, also known as a "wildcard" exemption, to further protect up to $1,325 of a personal injury claim. Additionally, if the debtor did not use all his or her federal homestead exemption, they can protect up to $12,575 more. Using all applicable federal exemptions, a debtor can protect up to $39,050 of their personal injury claim's value.
- **§ 522(d) – Categories of Exempt Property (Federal Exemptions)**
    - **General Exemption; § 522(d)(5)**
        - The debtor is allowed a general exemption of $1,325, sometimes known as the "wild card exemption," plus up to $12,575 of the unused portion of the homestead exemption.
        - Stating that the general exemption under § 522(d)(5) may be applied to any property that is property of the estate, the Seventh Circuit in *In re Smith* reversed the decision of the district court and permitted the debtors to claim as exempt under § 522(d)(5) their causes of action under the federal and state Truth-in-Lending Acts.
    - **Compensation for Losses; § 522(d)(11)**
        - The debtor may exempt the right to receive property that is compensation for certain types of losses. The debtor may also exempt property already owned to the extent that it is traceable to the enumerated types of losses. Subsection (11) of section 522(d) lists the types of compensation that may be exempted:
            - a payment for the wrongful death of a person of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and his or her dependents.
            - a payment for bodily injury of up to $25,150, but *not* including compensation for pain, suffering or actual pecuniary loss of the debtor or an individual of whom the debtor was a dependent.
            - a payment for loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent necessary for the debtor's or a dependent's support.
        - In that the personal injury payment exemption does not cover pain and suffering or compensation for actual pecuniary loss, the exemption is designed to cover only payments compensating actual bodily injury, e.g., the loss of a limb. Thus, medical payments are not exempt. Though ostensibly belonging to the debtor, medical payments are actually not the property of the debtor but are held in trust for another. Any payment for medical expenses, therefore, is held in trust for the person to whom the

medical expenses are owed, since it is not property of the estate and need not be claimed as exempt.

- Typically, debtors' rights to receive payments for personal bodily injury are included either in a settlement with or a judgment against a third party. The judgments and agreements generally are not explicit as regards the character of the payments. Since any amounts attributable to pain and suffering are not exemptible under section 522(d)(11)(D), the court must determine the extent to which the lump sum or annuity payment is covered by the debtor's exemption. In reaching this conclusion, the burden of proof is on the party objecting to the claim of exemption. Similarly, to the extent that a portion of a personal injury settlement or judgment is compensation for loss of future earnings, it may be separately exemptible under section 522(d)(11(E), and therefore not subject to the monetary cap under section 522(d)(11)(D).

Summary of Exemptions in Different States

- MICHIGAN
  - No personal injury exemption or wildcard exemption.
- ILLINOIS
  - Opted out of federal exemptions
  - **Claims for Negligence or Tortious Conduct**
    - Debtor may exempt a payment on account of the wrongful death of an individual of whom the debtor was a dependent and up to $15,000 compensation for a personal bodily injury of the debtor or of a person on whom the debtor was dependent; the right to receive such an award is exempt for up to two years after it accrues; funds traceable to such an award are exempt for five years after accrual.
    - **735 I.L.C.S. 5 § 12-1001. Personal property exempt**
      - The following personal property, owned by the debtor, is exempt from judgment, attachment, or distress for rent:
        - (h) The debtor's right to receive, or property that is traceable to:
          - (2) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor;
          - (4) a payment, not to exceed $15,000 in value, on account of personal bodily injury of the debtor or an individual of whom the debtor was a dependent; and
      - For purposes of this subsection (h), a debtor's right to receive an award or payment shall be exempt for a maximum of 2 years after the debtor's right to receive the award or payment accrues; property traceable to an award or payment shall be exempt for a maximum of 5 years after the award or payment accrues; and an award or payment and property traceable to an award or payment shall be exempt only to the extent of the amount of the award or payment,

without interest or appreciation from the date of the award or payment.

- WISCONSIN **Personal Injury Claims** §815.18(3)(i)(1.c) not to exceed $50,000 resulting from a personal bodily injury, including pain and suffering or compensation for actual pecuniary loss of the debtor or an individual of whom the debtor is a dependent and property traceable thereto.
- MINNESOTA
    - **Claims for Negligence and Tortious Conduct**
        - Debtor may exempt rights of action for injuries to debtor or relative, whether or not resulting in death, and claims or judgments arising from damage to, execution upon, or wrongful taking of exempt personal property. Minn. Stat. § 550.37(9), (16), (22)
        - **Minn. Stat. § 550.37. Property exempt**
            - Subd. 22. Rights of action. Rights of action for injuries to the person of the debtor or of a relative whether or not resulting in death.

Settlement Issues

- Settlement issues – who owns the claim and who can control the settlement (the debtor or the trustee? Is this different in Ch. 7 vs. Ch. 13?)
- ***In re Ashley*, 41 B.R. 67 (Bankr. E.D. Mich. 1984)**
    - RULE: On the date a bankruptcy petition is filed, any outstanding causes of action become property of the estate. Accordingly, the debtor ceases to be the real party in interest and is substituted in that role by the trustee. The personal injury attorney's "client" becomes the trustee, not the debtor. *Id.* at 69.
        - Here, the personal injury attorney never asked the trustee whether the proposed settlement was acceptable to her, and to date, she never indicated her approval or disapproval thereof. *Id.* at 69.
    - HOLDING: The settlement agreement that the personal injury attorney entered into was an executory contract.
        - "In this case, when the petition for relief was filed, the litigation was still pending: trial had not been held and settlement had not been made. The logical consequence of this finding when combined with the earlier finding that the trustee did not expressly assume that contract within the 60 days allowed her for that purpose is that that contract is deemed rejected. That rejection relates back to the moment immediately before the filing of the petition for relief. On that date, November 22, 1983, no settlement had yet been reached. As a result of the trustee's rejection of it, Mr. Bloomquist's contract was no longer in existence at the time he "settled" the litigation. He, therefore, lacked any contractual authority from his client, the trustee, to enter into the settlement. Accordingly, unless the settlement agreement is ratified by the trustee, it is not binding upon her and she may proceed to litigate the case to its conclusion." *Id.* at 70.
- ***Bush v. Nathan (In re Bush)*, 609 B.R. 315 (E.D. Mich. 2019)**
    - FACTS: After Adrienne Bush's bankruptcy trustee discovered her separate, then-pending employment discrimination lawsuit, he agreed to settle it for $20,000.

Unhappy with this settlement, Bush claimed an exemption in the lawsuit and moved to convert her Chapter 7 proceeding to a Chapter 13 proceeding.

- RULE: A bankruptcy trustee "has the authority to seek a settlement of claims available to the debtor, but any proposed settlement is subject to the approval of the bankruptcy court, which enjoys significant discretion."

- ***In re Stinson*, 221 B.R. 726 (Bankr. E.D. Mich. 1998)**
  - OVERVIEW: A debtor scheduled a prepetition personal injury claim in her Chapter 7 filing and claimed it as exempt. At the creditors' meeting, the debtor testified that she had settled the claim. The trustee objected to the exemption. The court sustained the trustee's objection and ordered the debtor and her personal injury attorney to turn over the proceeds to the trustee. The court held that the claim was property of the estate under 11 U.S.C.S. § 541 even though claimed as exempt. The bankruptcy court had jurisdiction of all the debtor's property as of the start of the case under 28 U.S.C.S. § 1334(e). Settling the personal injury case violated the automatic stay of 11 U.S.C.S. § 362(a). The action violated the debtor's duty to cooperate with the trustee under 11 U.S.C.S. § 521(3) and surrender property of the estate to the trustee under 11 U.S.C.S. § 521(4). It interfered with the trustee's opportunity to object to the exemption under Fed. R. Bankr. P. 4003(b), with the trustee's standing to prosecute the personal injury action under Fed. R. Bankr. P. 6009, and with the rights of parties in interest to be heard on the reasonableness of the settlement under Fed. R. Bankr. P. 9019(a).
  - In this case, the Court denied the debtor's exemption in her personal injury claim because she settled it after filing bankruptcy, without involving the trustee, before the trustee had an opportunity to object to her claim of exemption, and without filing a motion for approval of the settlement in bankruptcy court. The Court also ordered the debtor to turn over to the estate the $ 20,000 settlement amount and ordered her personal injury attorney to turn over his fee.
  - HOLDING: Court sustained the trustee's objection to the debtor's exemption in the personal injury claim.

- **Is this different in Chapter 13 cases? Yes, in Chapter 13 the debtor retains control over the property.** *See Bush v. Nathan (In re Bush)*, 609 B.R. 315 (E.D. Mich. 2019).

Summary Table – Personal Injury Exemptions

	Federal Exemptions	State Exemptions
Michigan	***§ 522(d)(5) Wildcard Exemption*** – General exemption of $1,325, plus up to $12,575 of the unused portion of the homestead exemption. ***§ 522(d)(11) Compensation for Losses*** – Exemptions for: • Wrongful death of a person of whom the debtor was a dependent, to the extent reasonably necessary. • Payment for bodily injury of up to $25,150, but *not* including compensation for pain, suffering, or actual pecuniary loss. • Loss of future earnings, to the extent necessary.	N/A
Illinois	N/A (Opt-Out State)	***735 I.L.C.S. 5 § 12-1001(h)***– Exemptions for: • (2) Wrongful death of a person of whom the debtor was a dependent, to the extent reasonably necessary. • (4) Personal bodily injury of the debtor or of a person on whom the debtor was dependent, not to exceed $15,000. The right to receive such an award is exempt for up to two years after it accrues. Funds traceable to such an award are exempt for five years after accrual.

Wisconsin	***§ 522(d)(5) Wildcard Exemption*** – General exemption of $1,325, plus up to $12,575 of the unused portion of the homestead exemption. ***§ 522(d)(11) Compensation for Losses*** – Exemptions for: • Wrongful death of a person of whom the debtor was a dependent, to the extent reasonably necessary. • Payment for bodily injury of up to $25,150, but *not* including compensation for pain, suffering, or actual pecuniary loss. • Loss of future earnings, to the extent necessary.	**Personal Injury Claims** §815.18(3)(i)(1.c) not to exceed $50,000 resulting from a personal bodily injury, including pain and suffering or compensation for actual pecuniary loss of the debtor or an individual of whom the debtor is a dependent and property traceable thereto
Minnesota	***§ 522(d)(5) Wildcard Exemption*** – General exemption of $1,325, plus up to $12,575 of the unused portion of the homestead exemption. ***§ 522(d)(11) Compensation for Losses*** – Exemptions for: • Wrongful death of a person of whom the debtor was a dependent, to the extent reasonably necessary. • Payment for bodily injury of up to $25,150, but *not* including compensation for pain, suffering, or actual pecuniary loss. • Loss of future earnings, to the extent necessary.	***Minn. Stat. § 550.37, Subd. 22*** – Exemption for rights of action for injuries to the person of the debtor or of a relative, whether or not resulting in death.

Faculty

Hon. James W. Boyd is a U.S. Bankruptcy Judge for the Western District of Michigan in Grand Rapids, appointed in May 2014, and presides over bankruptcy matters in Grand Rapids and Traverse City. Prior to his appointment, he was a partner in the law firm of Kuhn, Darling, Boyd and Quandt PLC in Traverse City, Mich., where he practiced in the areas of bankruptcy law and commercial litigation. From 1988-2014, he served as a chapter 7 panel trustee and as a chapter 11 operating and liquidation trustee in many cases. While a trustee, he served on the board of directors of the National Association of Bankruptcy Trustees from 1999-2013 and was its president in 2010. He has also served as an operating and liquidating receiver under Michigan law for numerous entities. Judge Boyd is a contributing author to ICLE's *Handling Consumer and Small Business Bankruptcies* and is a member of the Federal Bar Association and ABI, as well as a frequent speaker. He received his J.D. from the Thomas M. Cooley Law School**.**

Virginia E. George is a partner at Steinhilber Swanson, LLP in Oshkosh, Wis., and has served as a chapter 7 panel trustee in the U.S. Bankruptcy Court of the Eastern District of Wisconsin (Milwaukee Division) since 1999. She has experience in all aspects of chapters 7 and 13, including consumer and business cases and all types of adversary proceedings and enforcement actions. She has also represented creditors, as well as debtors in chapter 11 and 12 cases. For the past 25 years, Ms. George has concentrated over 95 percent of her practice in bankruptcy and insolvency matters, and has served as receiver in state and federal courts, having previously represented a national lender in its Special Assets Division. She is a past two-term board member of the Bankruptcy Insolvency and Creditor's Rights Section of the State Bar of Wisconsin, and she is a regular presenter at conferences on various bankruptcy topics. Ms. George received her J.D. from Marquette University Law School.

E. Philip Groben is an associate with Gensburg Calandriello & Kanter, P.C. in Chicago, where he focuses his practice on bankruptcy and commercial litigation. He represents a variety of clients in bankruptcy proceedings, including debtors, creditors, trustees and equity-holders. Mr. Groben has worked on complex chapter 11 restructurings, chapter 13 reorganizations and chapter 7 liquidations. He also has successfully defended favorable rulings on appeal to the Seventh Circuit Court of Appeals. Mr. Groben also has substantial commercial litigation experience in both state and federal courts. He has prosecuted and defended breach-of-contract and other commercial matters, brought foreclosure proceedings on behalf of secured lenders, negotiated favorable workouts with secured lenders, and enforced the rights of judgment creditors and debtors. He also has sued to set aside illegally obtained trust and will amendments, and has defended interest-holders in civil forfeiture matters. As a co-chair of the Chicago Bar Association Young Lawyers Section Bankruptcy Committee, Mr. Groben organizes the group's annual CLE seminar and monthly committee meetings, and presentations on a variety of topics, including nondischargeability and domestic-support issues. IN addition, he serves as vice chair for the Chicago Bar Association's Asset Protection Committee and is a regular speaker to industry groups, including ABI. Mr. Groben served as a judicial extern to Hon. Bruce W. Black of the U.S. Bankruptcy Court for the Northern District of Illinois and as an extern with the Office of the U.S. Trustee for Region 11. Prior to starting his legal career, he worked with durable goods manufacturers to streamline global supply chains and reduce inventory costs. Mr.

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