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Issue Date: 01 October 2004

Case No. 2004-STA-18

In the Matter of

WILLIAM J. BETTNER

Complainant

v.

CRETE CARRIER CORPORATION

Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

ORDER DENYING RESPONDENT'S MOTION TO DISMISS BASED UPON THE DOCTRINE OF JUDICIAL ESTOPPEL

This case was scheduled to be heard on September 21, 2004 in Bloomington, Illinois but was postponed indefinitely due to the Complainant's filing of a voluntary petition in bankruptcy. Respondent has now filed a Motion to Dismiss based upon the application of the Doctrine of Judicial Estoppel. The Motion represents that the Complainant filed his bankruptcy petition under oath and submitted financial disclosure forms which made no mention of his claim filing in this matter. It is argued in the Motion that the Complainant understood that he was required to list in his bankruptcy application any legal proceedings in which he was involved but that he deliberately omitted this whistleblower action. Respondent contends that his motive in concealing this claim was to exclude any damages obtained from the reach of his creditors. Respondent then concludes that this is a blatant attempt to conceal assets and that the Doctrine of Judicial Estoppel should be applied which necessitates the dismissal of this case.

Paul O. Taylor, counsel for Complainant, filed a responsive statement to the Motion. Included with his responsive material

were sworn statements from the Complainant and also Daniel M. Donahue who is the Trustee for the bankruptcy estate of the Complainant and his wife. Mr. Taylor argues that the Doctrine of Judicial Estoppel is not applicable since the Complainant did not engage in a calculated reversal of positions nor did he deliberately mislead his creditors by failing to list a claim on his bankruptcy schedules. He also suggests that the doctrine is inapplicable when the moving party was neither a creditor nor a defendant in the bankruptcy proceeding. It is further contended that the Complainant did nothing to intentionally undermine the integrity of the Court system and that the mistake of omission which was made by Mr. Bettner was the error of a lay person who was unfamiliar with material required to be included in the bankruptcy application schedules. In addition, Mr. Taylor argues that the omission was subsequently rectified even before the first meeting of creditors which occurred on August 9, 2004. The bankruptcy filing occurred on June 30, 2004.

The Declaration of William J. Bettner which was made under penalty of perjury relates that the schedules filed with the bankruptcy court were based upon information that he had provided to his bankruptcy attorney in December, 2003. He represents that he did not disclose the existence of this claim to his attorney because "I thought this case would settle before my bankruptcy was actually filed." Following the filing of the bankruptcy petition, Mr. Bettner represents that he informed his bankruptcy attorney and that prior to the first meeting of creditors, the attorney informed the Trustee in Bankruptcy of the complaint filing in this matter.

Also included as a part of the responsive statement of Mr. Taylor was the Declaration of Trustee Daniel M. Donahue which was also made under penalty of perjury. Mr. Donahue represents that he is the trustee for the bankruptcy estate of the Complainant and his wife. His declaration indicates that Mr. Bettner was examined by him at a meeting of creditors held on August 9, 2004 and that the Complainant disclosed to Mr. Donahue the basis of this administrative proceeding against the Respondent. Mr. Donahue avers that "He was forthright with me and I do not believe he ever intended to defraud me, the creditors of his bankruptcy estate or the bankruptcy court." He further represents that it is not unusual for lay persons to unintentionally fail to disclose assets and particularly administrative claims since they are not considered by lay people to be assets. He indicates that it is his intention as Trustee for the bankruptcy estate of the Complainant to pursue

his claim in this proceeding and to retain Paul O. Taylor as counsel for the trustee.

On September 24, 2004, Jane M. McFetridge, counsel for Respondent, filed a reply to the Complainant's responsive statement. She argues that non-creditors may indeed invoke the Doctrine of Judicial Estoppel and that the case of *Brassfield v. Jack McEndon Furniture*, 953 F. Supp 1424 (M.D. Ala. 1996) relied upon by the Complainant is "simply wrong," She suggests that in the Seventh Federal Circuit the cases have clarified that privity or detrimental reliance are often present in judicial estoppel cases but that they are not required. Respondent further argues that it is irrelevant as to whether the Respondent was prejudiced by the omission since the Doctrine is applied under circumstances where it is the judicial system itself that is sought to be protected. It is acknowledged that the Respondent did not rely upon Bettner's omission and that Crete is not a party in the bankruptcy proceeding but counsel argues that these facts do not preclude the application of the Doctrine.

The Complainant is a resident of the State of Illinois and thus the legal precedents provided by the Seventh Federal Circuit will apply. The Doctrine of Judicial Estoppel is applicable to administrative proceedings. *Chaveriat, Jr. et al v. Williamspipe Line Company*, 11 F.3d 1420 (7th Cir. 1993). The Doctrine has recently been examined by the Seventh Federal Circuit in the case of *United States of America v. Christian*, 342 F.3d 744 (7th Cir. 2003). In that case the court makes the following statement:

> The doctrine of judicial estoppel is intended to protect the integrity of the judicial process. *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). It is an equitable concept providing that a party who prevails on one ground in a lawsuit may not in another lawsuit repudiate that ground. *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999), *cert. denied*, 529 U.S. 1082, 120 S.Ct. 1707, 146 L.ED.2d 510 (2000). Judicial estoppel may apply when (1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; (3) the party to be estopped convinced the first court to adopt its position; and (4) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if

not estopped. *Maine*, 532 U.S. at 750, 121 S.Ct. 1808; *Hood*, 195 F.3d at 306.

The Doctrine of Judicial Estoppel is intended to protect the court system from being manipulated by litigants who seek to prevail twice on opposite theories. *Levinson v. United States*, 969 F.2d 260 (7th Cir. 1962). The court in *Ladd v. ITT Corp*, 148 F.3d 753 (7th Cir. 1998) indicated that:

> The purpose of the doctrine . . . is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant.

The doctrine is intended to protect the courts rather than the litigants. *Allen v. Zurich Ins. Co.* 667 F.2d 1162 (4th Cir. 1982). The doctrine is to be applied only where a clearly inconsistent position is taken, *Himel v. Continental Ill. Nat'l Bank*, 596 F.2d 205 (7th Cir. 1979), or where the party to be estopped has previously convinced the court to accept its position in its earlier litigation. *Eagle Foundation v. Dole*, 1813 F.2d 798 (7th Cir. 1987).

In applying the standards noted above, I conclude that the Doctrine of Judicial Estoppel is not applicable to this case for a good number of reasons. Initially, the omission of this administrative matter from the bankruptcy schedules, I am convinced, was inadvertent and was subsequently corrected even prior to the initial creditors' meeting. There existed a five-week interval during which the Bankruptcy Petition carried the erroneous information but there is no indication of detrimental reliance upon that Petition by any party including the Respondent here. I find no evidence of fraud nor any facts to support the conclusion that the integrity of the judicial process has been tested. Thus, since the bankruptcy court's record has been corrected to include the proper information, Complainant's current position is not clearly inconsistent with his earlier position. In addition, as is noted, the Complainant did not "convince" the first court to adopt its position. In fact, the Complainant had advised his bankruptcy attorney of the presence of this action and his attorney communicated that fact to the Bankruptcy Trustee. Also, there is no indication that the Complainant here would derive any unfair advantage or impose an unfair detriment on the Respondent if judicial estoppel is not applied. In fact, there exists no adverse impact to the Respondent as a result of this ruling other than it must continue to defend this action.

In sum, the Complainant may have inadvertently filed an erroneous bankruptcy petition but no inconsistent position is being maintained in this matter. Secondly, the Seventh Federal Circuit requirement that the party to be estopped must have convinced a court to accept its position in an earlier litigation is simply not satisfied in this case. Where there is no issue of double recovery, and the court in the second suit is satisfied that the position adopted in the first suit was clearly wrong yet had been advanced in good faith by the party now sought to be estopped to repudiate it, the court is not required to apply the Doctrine of Judicial Estoppel. *In re Cassidy*, 892 F.2d 637, 642 (7th Cir. 1990). *See also Chevariat, Jr. et al, supra.* I am convinced that the omission on the bankruptcy petition was inadvertent and that the petition was advanced in good faith. In view of this finding, I need not address the question as to whether the movant must be a creditor or defendant in the bankruptcy proceeding. In other words, the question of the propriety of the U.S. District Court's holding in *Brassfield, supra*, need not be considered as it might relate to the Seventh Federal Circuit.

In view of the above, IT IS ORDERED that the Respondent's Motion to Dismiss this case based upon the application of the Doctrine of Judicial Estoppel is hereby DENIED.

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RUDOLF L. JANSEN
Administrative Law Judge