IN BRIEF

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Personal Injury Claims and Bankruptcy

An undisclosed personal injury claim can lead to devastating, unintended consequences if the plaintiff is also a debtor in bankruptcy and fails to include the claim on the bankruptcy schedules. Consider the following scenario:

The plaintiff's attorney on a large personal injury claim receives a motion for summary judgment alleging that the plaintiff failed to disclose the personal injury claim in her bankruptcy and that she is not the real party in interest. The motion also argues that the plaintiff should be judicially estopped from pursuing the claim for failing to disclose the claim in the bankruptcy schedules.

Plaintiff's attorney's heart skips a beat. Did he ask his client if she had ever filed a bankruptcy or was contemplating a bankruptcy? What should he do next? He calls his client and finds out the name of her bankruptcy counsel.

Bankruptcy counsel represents the client as a debtor in bankruptcy, which is still open, pending collection and distribution of a tax refund. Bankruptcy counsel receives a call from plaintiff's attorney and the client advising her of the motion for summary judgment and asking for an explanation of the impact of the bankruptcy on the personal injury claim.

Bankruptcy counsel racks her brain. Did she fail to ask this information in the prefiling interview? Did the client disclose the claim to her and she failed to include it on Schedule B (Personal Property Schedule) and exempt a portion of it on Schedule C (Exemption Schedule)? She pulls the client file and looks at the schedules and client questionnaire. She sees that her client did not disclose the personal injury claim during the intake process.

Defense counsel anxiously awaits a response to his motion for summary judgment. Instead, a week later, he is served with an Amended Schedule B adding the claim to the bankruptcy schedules. To his astonishment, he is also served with a motion from plaintiff's attorney requesting he be held in contempt of court for failure to obtain relief from the bankruptcy stay before filing his motion in state court.

His heart sinks. What should he do?

You can avoid the predicaments of these three attorneys by learning about the interplay between bankruptcy and the claims of the debtor against others, including personal injury claims. This article provides an overview of the relationship between these two areas of the law.

The Debtor's Duties in Bankruptcy

The filing of a bankruptcy petition automatically creates a bankruptcy estate, which includes all legal and equitable interest in property of any kind, including a claim for personal injuries. 11 U.S.C. § 541. The bankruptcy debtor has an affirmative duty to file a schedule of assets and liabilities, as well as a schedule of any exemptions that may apply. [Note: The debtor may claim $10,000 in an exemption for a personal injury claim.] This includes claims that exist prior to the filing of the petition, regardless of whether a claim is pending in a court proceeding or has yet to be pursued in any way, and regardless of whether the injured party is even aware of the claim. 11 U.S.C. § 521. The debtor also has an affirmative duty to turn over all physical

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estate property to the trustee. This may include the personal injury lawyer's file, subject to any privilege claim. 11 U.S.C. § 524(e).

The Trustee's Options

If a personal injury or other claim is properly scheduled in a bankruptcy case, the bankruptcy trustee has four options: (1) pursue the claim on behalf of the creditors; (2) close the case, reserving rights to the claim; (3) sell the claim; or (4) abandon the claim. If the trustee elects to pursue the personal injury claim, he or she may want to have the plaintiff's attorney appointed as counsel to the estate. The decision to accept this appointment potentially raises ethical concerns, as there may be conflicts of interest and confidentiality issues. Moreover, the compensation for the estate's attorney is subject to approval by the bankruptcy court. 11 U.S.C. § 330. This will normally require the submission of itemized time records to the court for approval and payment of the personal injury attorney's fee.

In some circumstances, the trustee may wish to reserve the claim so that it remains property of the estate. The trustee can then close the case, pending disposition of the claim, without losing the claim through abandonment. The trustee might exercise this option if it appears that the claim will take years to resolve (such as in a class action suit), and the trustee doesn't want to keep the bankruptcy case open that long.

If the trustee takes no action to pursue the claim and the case is closed, the property is deemed abandoned, thereby becoming a claim that the debtor can legally pursue post-bankruptcy. 11 U.S.C. § 554. Alternatively, the trustee can issue a formal letter abandoning the claim or can sell the claim to another party or the debtor. Plaintiff's attorney should coordinate these alternative measures with bankruptcy counsel, as they require specific filings with the bankruptcy court and notice to creditors.

Consequences of Failure to Disclose a Claim

Failure to disclose a personal injury claim in bankruptcy can result in permanent dismissal of the claim. If a claim arose prior to bankruptcy, and the bankruptcy schedules do not disclose the claim, personal injury defense counsel may have grounds for dismissal of the claim in state court on two theories: (1) the debtor is not the real party in interest (the trustee is); and (2) the debtor should be judicially estopped from asserting the claim. If the statute of limitations has already run, the debtor may not be able to substitute the trustee as the real party in interest, and the claim will be lost.

The case of *Vucak v. City of Portland*, 194 Or App 564 (2004), illustrates the first theory. The plaintiff specifically failed to schedule her personal injury claim as an asset, but she did disclose the pre-petition automobile accident and the resulting insurance recovery for property damage elsewhere in the petition. The trustee was tacitly aware of the claim and presumed that the claim would be considered abandoned to the debtor by operation of law on discharge. Nonetheless, the Oregon Court of Appeals upheld the trial court's ruling that the failure to specifically schedule the claim as an asset prevented abandonment of the claim to the debtor, and it remained property of the estate. As a result, the defendant was entitled to summary judgment, as the plaintiff was not the real party in interest.

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001), citing *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). For an excellent discussion of the application of judicial estoppel in this context, review the case of *Froshiesar v. Babij*, 2004 WL 2360529 (D. Or. Oct. 15, 2004).

Defense counsel might need to obtain relief from the bankruptcy stay before moving to dismiss a state court action on these grounds, or the relief sought in the state court may be absolutely void. *In re Enyedi*, 371 B.R. 327 (Bankr. N.D. Ill. 2007). Additionally, defense counsel would need to obtain relief from stay before bringing a counterclaim against the plaintiff. Any relief would likely permit only pursuit of insurance proceeds or liquidation of a disputed claim in bankruptcy court.

If the claim is a potentially non-dischargeable claim (e.g., for willful or malicious injury to personal property or for an injury caused by the operation of a motor vehicle while intoxicated), there may be strict timelines that must be complied with in seeking non-dischargeability of certain types of debts under the Bankruptcy Code. See Bankruptcy Rule 4007.

If bankruptcy counsel becomes aware of an unscheduled personal injury claim of the debtor, he or she should amend the schedules as soon as possible and notify the trustee of the claim. If the statute of limitations on the injury claim has not already run, bankruptcy counsel can then work with plaintiff's attorney to substitute the trustee as the real party in interest in the state court action, if the substitution would not result in any prejudice to the defendant. Conversely, if plaintiff's attorney becomes aware of a personal injury client's pending bankruptcy, he or she should notify bankruptcy counsel right away.

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If it is later determined that the debtor lied about the existence of the claim to the bankruptcy trustee, the debtor may lose the exemption for the claim.

Tips for Bankruptcy Lawyers

- Carefully question your clients about possible claims before their bankruptcy schedules are filed. Rather than asking generally whether the client has any "claims," consider adding to your intake packet more specific questions that will lead to the discovery of claims. For example: "Have you been in an automobile accident in the last two years?" "Have you ever been terminated from your employment?" "Have you ever suffered an injury at work?" "Have you ever consulted any other lawyer for any other purpose?" "Do you think you could sue anyone for anything?" "Have you ever filed a claim against an insurance company that you think was wrongfully denied?" "Are you involved in a probate matter or expecting to inherit something shortly?"

- Be sure to schedule the claim on Schedule B, "Personal Property of Debtor," and properly exempt the claim on Schedule C, "Exemption Schedule," if one is available. A reference to the claim in other parts of the bankruptcy schedules or the Statement of Financial Affairs may be insufficient.

- Search the Oregon Judicial Information Network (OJIN), at **www.ojd.state.or.us/ojin/index.htm** for any potential pending claims that your client may not have disclosed to you.

- If a claim is later discovered that was not scheduled, promptly notify the trustee in writing and amend the bankruptcy schedules, claiming any exemption available to your client.

- In your closing letter to your clients, add a statement to the following effect: "If you later determine that you have a claim against someone regarding events that happened before your bankruptcy, even if you learn of your claim after your bankruptcy, contact me immediately. The claim may not belong to you, and it may be necessary to reopen your bankruptcy case."

Tips for Personal Injury Lawyers

- Change your intake process to include questions that will elicit bankruptcy information or a contemplated bankruptcy. For example: "Have you ever filed bankruptcy?" "Have you considered filing bankruptcy?" "Do you understand that filing bankruptcy in the future might impact your ability to collect on your claim?" "Will you agree to tell me if you file bankruptcy?"

- Sign up for PACER (Public Access to Court Electronic Records) at **http://pacer.psc.uscourts.gov** so you can check for bankruptcy filings. Contact the U.S. Bankruptcy Court at 503-326-2231 for more information.

- If you are contemplating filing a motion to dismiss a personal injury claim, confirm whether you need to seek relief from the bankruptcy stay before taking action. If the bankruptcy case has not been closed, you may need to obtain relief from the bankruptcy stay, even if the claim has not been scheduled.

If you recognize yourself in the scenario at the beginning of this article, or if you think you might have made a mistake in a similar situation, call the PLF at 503-639-6911 or 1-800-452-1639, and ask to talk to a claims attorney.

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