

The Importance of Disclosing a Bankruptcy Filing on Behalf of a Personal Injury Plaintiff

by Kenneth A. Hoffman

The opening of or existence of a bankruptcy claim by a plaintiff in a personal injury action can have major effects on the outcome of pending lawsuits if improperly handled. Section 541 of the Bankruptcy Code states a Chapter 13 bankruptcy estate encompasses all property, including any legal claims acquired by the debtor after the petition is filed and before the case is closed.¹ This means all personal injury claims are assets of the bankruptcy estate just as car, house, or other personal property and subject to a Chapter 13 bankruptcy claim. Some debtors believe they do not have to disclose an injury or potential claim as long as they do not file suit until after bankruptcy case has closed. This is incorrect. The Third District Appellate Court recently addressed what happens when a plaintiff fails to disclose a potential legal claim to the bankruptcy court.

In the case of *Barnes v. Lolling*, Jerry Barnes (“Barnes”) and her husband filed for a Chapter 13 bankruptcy protection to resolve their personal and business debts on February 8, 2008.² On October 7, 2011, after Barnes had filed her Chapter 13 bankruptcy petition and while the bankruptcy proceeding was pending, Barnes was involved in an automobile accident in which she sustained injuries.³ Barnes never disclosed her potential claim to the bankruptcy trustee, nor did she schedule the potential claim as an asset of the bankruptcy estate.⁴

On April 11, 2013, the bankruptcy court discharged \$92,164.70 in unsecured debt and closed the bankruptcy case.⁵ Barnes then filed

her personal injury claim on October 7, 2013, two years after the accident, approximately five months after the bankruptcy court had discharged Barnes’s debts, and closed the bankruptcy case.⁶ Barnes never sought any modifications to the repayment plan, nor did she inform the bankruptcy court of any new assets, liabilities, or diminished earnings.⁷

The trial court granted summary judgment for the defendants in *Barnes* on the basis of judicial estoppel.⁸ The court did not address defendant’s alternative argument that Barnes lacked standing to bring the personal injury action. However, the third district appellate court held that Barnes lacked standing to bring the instant claim for her own benefit after the bankruptcy proceeding was closed.⁹

The appellate court reasoned that the personal injury claim had accrued before the bankruptcy proceedings were closed and was therefore the property of the bankruptcy estate.¹⁰ A Chapter 13 debtor can only pursue legal claims for the benefit of the estate and its creditors.¹¹ Therefore, Barnes’s personal injury claim was part of the bankruptcy estate and she lacked standing to bring such suit for her own benefit. Barnes also lacked standing to pursue claims on behalf of the estate once the bankruptcy proceeding was closed.

The appellate court reviewed the trial court’s decision in granting summary on the basis of judicial estoppel. The party to be estopped must have “taken two positions that are factually inconsistent in separate judicial or quasi-judicial administrative

proceedings intending for the trier of fact to accept the truth of the facts alleged, and have succeeded in the first proceeding and received some benefit from it.”¹² If all these prerequisites have been established, the trial court must then “determine whether to apply judicial estoppel— an action requiring the exercise of discretion.”¹³ Factors which influence the court’s decision are the significance of the party’s action in the first proceeding and whether there was intent to mislead, as opposed to being a mistake.¹⁴

In *Barnes*, the court found that Barnes took inconsistent positions by failing to inform the bankruptcy court of her new asset of a personal injury cause of action, thereby representing that no claim existed, and then filing the personal injury claim after.¹⁵ She intended the courts in each proceeding to accept the truth of the facts she alleged. She also received a benefit from the bankruptcy proceeding by having the court discharge more than \$92,000 of her unsecured debt. Therefore, all the prerequisites for judicial estoppel had been met.

The appellate court held that the trial court could reasonably find that Barnes’s failure to disclose the claim was deliberate rather than inadvertent.¹⁶ The court held that all the prerequisites for judicial estoppel were met, and the trial court did not abuse its discretion in granting summary judgment for the defendants on the basis of judicial estoppel.¹⁷

The takeaways from the recent court decision include the importance of asking all clients if they have a pending bankruptcy estate and making



sure that if a bankruptcy filing is made that the personal injury action is listed as an asset in the bankruptcy proceeding. The failure to list the claim as an asset may lead to the dismissal of the personal injury lawsuit. Under 735 ILCS 5/12-1001(h)(2),(4) a personal injury plaintiff receives an exemption of up to \$15,000.00 on his claim.¹⁸

It is equally important to communicate with your client's bankruptcy attorney and court appointed trustee to maximize the recovery your client may be allowed. Failing to have the bankruptcy trustee approve or ratify the hiring of you as special counsel with the bankruptcy court could lead to the nullification of your retainer agreement and lead to a loss of attorney's fees and litigation expenses.

Endnotes

- ¹ 11 U.S.C. §§541 (a) (1), 1306 (a)(1).
- ² *Barnes v. Lolling*, 2017 IL App (3d) 150157.
- ³ *Id.*
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ *Id.*
- ¹¹ *Fed. R.Bankr. P.* 6009; *Cable*, 200 F.3d at 472-473.
- ¹² *Seymour v. Collins*, 2015 IL 118432.
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ *Barnes v. Lolling*, 2017 IL App (3d) 150157.
- ¹⁶ *Id.*
- ¹⁷ *Id.*
- ¹⁸ 735 ILCS 5/12-1001(h)(2),(4).

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