BANKRUPTCY AND AUTOMOBILE ACCIDENT AND OTHER PERSONAL INJURY AND WRONGFUL DEATH LITIGATION

BY VICTOR J. FAENZA
ATLANTA, GEORGIA

This paper addresses how the filing of bankruptcy by either party involved in an automobile collision can affect the adverse party's ability to prosecute and/or defend against claims arising from the collision.[1] Generally, if an at-fault driver ("tortfeasor"), files for bankruptcy protection, an injured party is barred from initiating or continuing to prosecute any claims or a lawsuit against the tortfeasor to recover damages for injuries caused in the accident and may very well never recover such damages against the tortfeasor. If an injured party files for bankruptcy after being involved in an automobile accident and fails to list his or her potential claims against the tortfeasor as an asset in the bankruptcy pleadings, such claims may be forever barred by the doctrine of judicial estoppel. This paper discusses these general rules, their exceptions and related matters and how the knowledgeable attorney and insurance adjuster should utilize same to the highest benefit of their clients and insured.

1. WHAT HAPPENS WHEN THE TORTFEASOR FILES FOR BANKRUPTCY PROTECTION?

Mr. Smith and Mr. Jones are involved in a motor vehicle accident on April 17, 2008. The accident occurs when Mr. Jones runs a stop sign and fails to yield to Mr. Smith at an intersection. Mr. Smith's car is totaled and he suffers a broken arm and other injuries as a result of the collision. Mr. Smith wants to bring a claim against Mr. Jones to recover for damage to his car, for injuries caused in the accident and for pain and suffering and lost wages. Unfortunately, Mr. Jones has a hard time keeping a job and has no assets. He files for Chapter 7 Bankruptcy protection on August 17, 2008.

[1] Most of what is discussed in this paper will apply to how bankruptcy proceedings affect most general liability personal injury and wrongful death claims and lawsuits, not just those relating to automobile accidents.

A. AUTOMATIC STAY

First, because Mr. Jones filed for bankruptcy protection under the Federal Bankruptcy laws, all pending claims against him are automatically stayed, and unless the stay is lifted or expires, Mr. Smith cannot pursue any of his claims against Mr. Jones. In this regard, Section 362 (a) of the Bankruptcy Code provides in pertinent part that:

> a petition filed under . . . this title . . . operates as a stay, applicable to all entities, of --
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
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> * * *
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> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1), (2) and (6); Reid v. Harbin Lumber Co. of Royston, Inc., 172 Ga. App. 615, 617 (1984); General Motors Acceptance Corp. v. Yates Motor Co., Inc., 159 Ga. App. 215, 217 (1981).

Upon filing the bankruptcy petition, the automatic stay arises immediately and automatically without any court action.[2] In re Rollins, 200 B.R. 427 (Bankr. N.D. GA. 1996); In re Kirk, 199 B.R.

[2] An automatic stay arises when the debtor files for bankruptcy protection under Chapters 7, 11 or 13 and arises in voluntary, involuntary, and joint petitions. See 11 U.S.C. § 362 (a). The automatic stay does not, however, apply to claims against a joint tortfeasor, and had another driver caused or contributed to Mr. Smith's injuries, Mr. Jones' bankruptcy petition would not cause Mr.

70 (Bankr. N.D. GA. 1996). If Mr. Smith had not filed suit before Mr. Jones filed for bankruptcy protection, Mr. Smith would be immediately stayed from making any further attempts to recover his claims against Mr. Jones and could not in any way commence a lawsuit against Mr. Jones to recover his alleged damages. See 11 U.S.C. § 362 (a)(1) and (6). If Mr. Smith had already filed suit, but had not obtained a judgment at the time Mr. Jones filed for bankruptcy, Mr. Smith would be immediately stayed from continuing the prosecution of the suit. See 11 U.S.C. § 262 (a)(1). Finally, if Mr. Smith had filed suit and obtained a judgment, but had not collected the judgment prior to Mr. Jones filing bankruptcy, Mr. Smith would be immediately stayed from enforcing or collecting the judgment. See 11 U.S.C. § 362 (a)(2).

B. LIFTING THE AUTOMATIC STAY

Can Mr. Smith move the court to lift or modify the automatic stay? Yes, in some situations. One way, and the most likely alternative available in a motor vehicle collision case, is to prove to the bankruptcy court that Mr. Jones had in effect enforceable liability insurance coverage at the time of the accident and the limits of liability coverage available should Mr. Smith obtain a verdict and judgment against Mr. Jones for the damages he seeks.

Section 362 (d) of the Bankruptcy Code provides in pertinent part:

> On request of a party in interest and after notice and hearing, the court shall grant relief from the stay provided under sub-section (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . for cause.

Smith's claims to be stayed against the co-defendant/tortfeasor. See Paul v. Joseph, 212 Ga. App. 122, 123-24 (1994); General Motors Acceptance Corp. v. Yates Motor Co, Inc., supra at 218-19 ("It follows that a stay as to one co-defendant does not necessarily require a stay as to other co-defendants where each defendant may be jointly and severally liable. A stay on behalf of the bankrupt co-defendant merely suspends the proceedings as to him. The plain language of the bankruptcy code itself in § 362 (a)(1) indicates that proceedings against the debtor are stayed. We see no reason to extend the language to include co-defendants of the debtor.").

11 U.S.C. § 362(d)(1). This section has been interpreted by the courts to allow the bankruptcy court to lift or modify the automatic stay to allow an injured party to pursue claims against a debtor tortfeasor to recover damages for personal injuries arising out of an automobile collision to the extent the insurance company would be financially responsible to pay the judgment. See 3 Collier on Bankruptcy, ¶ 362.07 [3][a][i] (15th ed. 1999).

Assuming, at the time of the collision, Mr. Jones was covered by a GEICO policy of insurance with limits of liability for bodily injury of $25,000 per person, Mr. Smith should move the bankruptcy court to have the automatic stay provisions of Section 362 lifted or modified to allow Mr. Smith to pursue his claims against Mr. Jones in or out of court to the extent of the policy limits. Mr. Smith's motion might contain the following specific language concerning the modification of the stay:

> Creditor, Mr. Smith, now seeks to have the automatic stay provisions of Section 362 of the Bankruptcy Code lifted or modified in order to permit him to pursue claims and a possible civil action in the Georgia courts for personal injuries arising out of the automobile accident on April 17, 2008, to the extent that GEICO or any other insurance carrier shall be financially responsible.
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> Creditor, Mr. Smith, submits that relief from the automatic stay should be granted for cause as contemplated by Section 362 (d) of the Bankruptcy Code on account of, without limitation, the following reasons:
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> (a) Debtor will not be prejudiced by an order from this court lifting the automatic stay to the extent of the insurance carried by the debtor at the time of the collision, because if creditor, Mr. Smith, were to obtain a judgment against debtor within the insurance policy limits said monies would be paid by GEICO and not by the debtor. Therefore, such a judgment would not affect the assets of the debtor's estate.
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> (b) Creditor, Mr. Smith, will be prejudiced by a delay in the filing of a state court action because creditor, Mr. Smith, seeks to have a prompt judicial determination of his rights and damages resulting from the automobile collision on April 17, 2008.

After Mr. Smith obtains an order from the Bankruptcy Court lifting the automatic stay to the extent GEICO should be financially responsible for the injuries and damages to Mr. Smith arising out of the automobile accident with Mr. Jones, Mr. Smith can pursue his claims and file or continue a lawsuit against Mr. Jones to recover up to the $25,000 in available insurance proceeds.[3] See 3 Collier on Bankruptcy, ¶ 362.07 [3][a][i] (15th ed. 1999).

If Mr. Jones is not covered by an applicable policy of liability insurance, it is unlikely the bankruptcy court will lift the automatic stay to allow Mr. Smith to continue to prosecute his claims against Mr. Jones. Indeed, if Mr. Jones obtains a discharge from the bankruptcy court, Mr. Smith may be forever barred from bringing his claims and recovering his damages from Mr. Jones. See 11 U.S.C. § 524; Redding v. Walker, 225 Ga. App. 653 (1997); Paul v. Moss, 152 Ga. App. 112 (1979). Section 524 of the Bankruptcy Code sets out the effects of a discharge and specifically provides in pertinent part:

> (a) A discharge in a case under this title --
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> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under . . . this title, whether or not discharge of such debt is waived;
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> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

[3] As a practical matter, when moving the court to have the automatic stay lifted, Mr. Smith should also move the court to prevent or deny Mr. Jones from being discharged to the extent his insurance company will be responsible for damages arising out of the automobile accident. This would allow Mr. Smith to pursue his claims against Mr. Jones even if Mr. Smith has not recovered his damages from Mr. Jones before the bankruptcy court orders all Mr. Jones' debts discharged.

11 U.S.C. § 524 (a)(1) and (2). Accordingly, and unfortunately for Mr. Smith, if Mr. Jones did not have any applicable liability insurance coverage at the time of the accident, Mr. Smith cannot recover from Mr. Jones for any of his injuries and damages.[4]

2. WHAT HAPPENS WHEN THE PLAINTIFF FILES FOR BANKRUPTCY PROTECTION?

Now, let us assume all the facts described in the hypothetical set out above, except, instead of Mr. Jones filing for bankruptcy, assume Mr. Smith filed for bankruptcy protection on August 17, 2008. Assume also Mr. Smith failed to identify in his bankruptcy petition and related schedules and documents that he had potential claims against Mr. Jones arising from the April motor vehicle accident. Under these facts and current Georgia law, Mr. Smith would be barred by the doctrine of judicial estoppel from bringing any claims against Mr. Jones for injuries and damages arising from the accident.

Judicial Estoppel applies in bankruptcy cases in which an obligation is placed upon the debtor to file a list of assets in which he must disclose all personal property owned by the debtor of whatever kind. See Southmark Corp., supra. Along with the bankruptcy petition, a debtor is

> required to file a schedule listing the personal property in which [he] had an interest. The schedule contain[s] a list of various types of personal property and provide[s] a space next to each type of property listed for the debtors to describe any interest they had in such property and give a current market value of the interest.

* * *

[4] It should be noted that Section 523 of the Bankruptcy Code does provide for exceptions to the debtor's discharge, including claims for willful and malicious injury by the debtor to another and for injuries caused by the debtor driving under the influence of alcohol or drugs. 11 U.S.C. § 523 (a)(6) and (9). The fact that a claim or debt is not dischargeable, however, does not affect the immediate application of the automatic stay. In re Cardillo, 172 B.R. 146 (Bankr. N.D. GA. 1994).

> A [Chapter 7] debtor's interest in a cause of action, including an unliquidated tort claim, is personal property included as part of the bankruptcy estate.
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> * * *
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> [I]n view of the stringent disclosure requirements in bankruptcy court, <u>the failure to disclose a claim based on an accrued cause of action is viewed as amounting to a denial that such claim exits</u>. . . . <u>The failure to disclose such a claim in the bankruptcy case preclude[s] subsequent assertion of the claim under the doctrine of judicial estoppel</u>.

<u>Byrd</u>, <u>supra</u>. (punctuation omitted and emphasis added); <u>accord</u> <u>Southmark Corp.</u>, <u>supra</u> at 456. "Compliance with disclosure requirements is essential to maintaining a bankruptcy case." <u>Id.</u>; <u>In Re Roberts</u>, 117 B.R. 677, 678 (Bankr. N.D. Okla. 1990); <u>In Re Hubbard</u>, 96 B.R. 739 (Bankr. W.D. Tex. 1989).

Georgia case law regarding the federal doctrine of judicial estoppel is relatively new and has expanded greatly in the last several years. Judicial estoppel precludes a party from asserting

a position in a judicial proceeding that is inconsistent with a position previously successfully asserted by him in a prior proceeding. <u>Southmark Corp.</u>, 212 Ga. App. at 455. "[T]he 'essential function and justification of judicial estoppel is to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" <u>Id.</u> at 455. "The primary purpose of the doctrine is not to protect the litigants, but to protect the integrity of the judiciary." <u>Id.</u> (citations omitted); <u>accord</u> <u>Byrd v. JRC Towne Lake, Ltd.</u>, 225 Ga. App. 506, 507 (1997). The doctrine of judicial estoppel does not require reliance or prejudice before a party may invoke it. <u>Southmark Corp.</u>, <u>supra</u>.

In <u>Southmark Corp.</u>, <u>supra</u>, the plaintiff brought two legal malpractice actions against a law firm and individual attorneys in the firm. The complaints stated claims for professional negligence, breach of fiduciary duty, and breach of contract based on services rendered by the defendants with

regard to certain business transactions involving the plaintiff prior to its filing of Chapter 11 Bankruptcy on July 14, 1989. Both lawsuits were filed following the Bankruptcy Court's confirmation of the plaintiff's plan of reorganization and the Order of Substantial Consummation. The defendants subsequently moved for summary judgment in both cases based on plaintiff's failure to identify claims against the defendants in the bankruptcy case. In their motions, the defendants maintained the two actions were barred by the doctrine of judicial estoppel and res judicata because the plaintiff failed to raise its claims against the defendants in the bankruptcy proceeding when it had an obligation and opportunity to do so. The plaintiff failed to disclose its claims in any of several original or amended schedules, disclosure statements or plans of reorganization despite the requirement of the bankruptcy laws to do so. The trial court granted the defendants' motion for summary judgment and the Court of Appeals affirmed.

In rendering its decision, the Court of Appeals in Southmark first noted that federal law applied in order to give the proper effect to the judgment of the Bankruptcy Court which ruled upon plaintiff's bankruptcy case. "The goal is to afford the judgment of the Bankruptcy Court the same effect here as it would in the Court where that judgment was rendered." Southmark Corp., 212 Ga. App. at 455 (citations omitted). In opposition to the defendants' motion for summary judgment, the plaintiff asserted it never denied having claims against the defendants as demonstrated by the statements in the plaintiffs' bankruptcy schedules that the value of its contingent and unliquidated claims was unknown, as well as statements in the plan of reorganization that it intended to pursue any claims which it could identify. "Nonetheless, there was no reference to any claim against any defendants and this failure to disclose precludes subsequent assertion of those claims." Id. at 456 (citations omitted and emphasis added).

The Court of Appeals in Byrd v. JRC Towne Lake, Ltd., 225 Ga. App. 506 (1997), more recently applied the Southmark Corp. case and affirmed the trial court's granting of summary judgment on the judicial estoppel issue in a case which appears to be directly on point with our

hypothetical. In Byrd, the plaintiff filed a negligence action to recover damages for alleged injuries caused in an automobile collision. The accident occurred in 1993 and the suit was brought in April 1995. In August 1994, the Plaintiff filed a Chapter 13 Bankruptcy petition in the United States Bankruptcy Court. The trial court granted identical motions for summary judgment brought by the defendants on the basis that the plaintiff was judicially estopped from pursuing the claims asserted in the tort suit because she did not disclose the claims in a Chapter 13 Bankruptcy petition she filed in August 1994.

The Court of Appeals affirmed, finding:

> It is undisputed that, when the Chapter 13 petition was filed, Byrd had an accrued cause of action for the claims she later asserted in the present suit. A Chapter 13 debtor's interest in a cause of action, including an unliquidated tort claim, is personal property included as part of the bankruptcy estate. . . . In seeking information about Byrd's interest in the present cause of action, the schedule of personal property required Byrd to describe any interest she had in any type of personal property described as "contingent and unliquidated claims of any nature, including tax refunds, counter-claims of the debtor, and the rights of set-off claims." Byrd's personal property schedule showed "none" as a description of her interest in this type of personal property. Byrd also signed a verification that the personal property schedule was "true and correct to the best of [her] knowledge, information and belief."

Id. at 506-07 (emphasis added).

The Court went on to hold that based on the schedules included with the Chapter 13 petition, the debtor's plan was confirmed by the Bankruptcy Court and the case was later dismissed on the motion of the trustee. The Court of Appeals affirmed the trial court's granting of summary judgment and specifically held:

> When Byrd filed the Chapter 13 petition, she had a duty to disclose the existence of the cause of action she had arising from the prior automobile accident. She failed to disclose the cause of action on the

> schedule of her personal property filed with the petition, and the bankruptcy court relied on the schedule as a basis for confirming the Chapter 13 plan. Byrd's present suit asserting claims arising from the 1993 automobile accident clearly contradicts her assertion in the bankruptcy case that she had no such claims.

Id. at 507.

In our hypothetical, assuming Mr. Smith did not list his claims against Mr. Jones as an asset of personal property in his bankruptcy pleadings, it appears Georgia law dictates his claims against Mr. Jones are barred by the doctrine of judicial estoppel. See Byrd, supra; Hyre v. Denise, 214 Ga. App. 552 (1994); Southmark Corp., supra. Let us further assume, however, that when Mr. Jones moves for summary judgment based on judicial estoppel, Mr. Smith successfully moved the bankruptcy court to reopen his bankruptcy estate to allow him to amend his petition and schedules to properly identify the claims and the lawsuit as personal assets. Such actions taken by Mr. Smith may very well act to defeat Mr. Jones' summary judgment motion and allow Mr. Smith to continue with the prosecution of his tort claims against Mr. Jones. Indeed, not long after the decision in Southmark, the Georgia Court of Appeals began to chip away at the harsh reality judicial estoppel could have on a plaintiff's tort claim.

In Johnson v. Trust Co. Bank, 223 Ga. App. 650 (1996), the Court of Appeals reversed the granting of a motion for summary judgment based on judicial estoppel under facts similar -- but distinguishable -- to those found in the Byrd case. In Johnson, the Court of Appeals reversed the granting of a motion for summary judgment based on judicial estoppel where there was evidence before the Court that the debtor made a mistake in failing to schedule any tort claims he might have had against the defendants as a potential asset and there was unrefuted evidence in the record the Plaintiff had given information concerning any such claims to his bankruptcy attorney and the bankruptcy trustee. Moreover, although the debtor failed to list the claim as an asset in the appropriate schedule, the Plaintiff specifically referred to the claim in the Statement of Financial Affairs which was also filed with the bankruptcy petition and schedules in the bankruptcy court.

The debtor also successfully moved the bankruptcy court to reopen his bankruptcy estate to add the claims to the schedules as originally required.

Under these specific facts, where (1) it appeared a mistake was made in failing to schedule the tort claims, (2) the debtor had told the bankruptcy trustee about the existence of the claims and specifically referred to the claims in the Statement of Financial Affairs filed with the original petition, and (3) the debtor has petitioned and successfully reopened the bankruptcy estate to include the claims, summary judgment was not appropriate. In his special concurrence, Judge Pope addresses clearly the distinctions between the Johnson and Byrd cases and why the Court of Appeals affirmed summary judgment on judicial estoppel grounds in Byrd, but reversed summary judgment in Johnson:

> In Johnson, Johnson had both informed the bankruptcy trustee about the existence of a potential tort claim and referenced the potential claim in a statement of financial affairs before his bankruptcy case was concluded. . . . Johnson also successfully moved the bankruptcy court . . . to reopen his bankruptcy case to allow him to schedule his tort claim as a potential asset. . . . In the case at bar, however, none of the above circumstances exist, and there is no indication that Plaintiff ever had any desire to have her bankruptcy case reopened to include her tort claim as a potential asset. And while Plaintiff claims that she did not understand what was required to be listed in the bankruptcy schedules, this creates merely a potential issue between Plaintiff and her attorney, who should have thoroughly explained any necessary paperwork to her, and, as set forth by the majority, does not relieve Plaintiff from the duties imposed upon her.

Byrd, supra at 508-09.[5]

[5] In Johnson, the legal lines in the sand between the appeals court judges were beginning to be drawn on the application of judicial estoppel in Georgia. Indeed, in a strong dissent, Judge Andrews disagreed with the majority opinion and specifically wrote: "I respectfully dissent, as the record reveals Johnson *did* successfully manipulate the court system and obtain a complete discharge of his debts without scheduling this personal injury claim, a potentially valuable asset. Not until after trust company moved for summary judgment based on judicial estoppel did

After Johnson, there have been numerous cases reversing summary Judgment to defendants based on judicial estoppels. See Jowers v. Arther, 245 Ga. App. 68 (2000); McBride v. Brown, 246 Ga. App. 149 (2000); Dillard-Winecoff, LLC v.IBF Participating Income Fund, 250 Ga. App. 602 (2001); Weiser v. Wert, 251 Ga. All 566 (2001). While at first it appeared the Court was carving out specific factual exceptions to the application of judicial estoppel, see Johnson v. Trust Co. Bank, supra, and Clark v. Perino, 235 Ga. App. 444 (1998), the general rule that appears to have distilled out of the case law is that summary judgment is not appropriate even where the plaintiff failed to list his or her pre-petition claims in the bankruptcy schedules if (1) the debtor makes an attempt to remedy the omission by, for instance, seeking to reopen the bankruptcy estate and amending the petition and schedules or simply dismissing the bankruptcy case and (2) the proceeds of the claim will inure to the benefit of the plaintiff's creditors and not the plaintiff. See Jowers v. Arther, supra (where plaintiff/debtor dismissed the incomplete bankruptcy petition and then re-filed a corrected bankruptcy petition that properly scheduled the tort claim); McBride v. Brown, supra (where the plaintiff/debtor's Chapter 13 bankruptcy was dismissed on procedural grounds and never re-filed); Dillard-Winecoff, LLC v.IBF Participating Income Fund, supra (where plaintiff/debtor's Chapter 11 petition was dismissed for procedural reasons and never refile); Weiser v. Wert, supra (where plaintiff/debtor voluntarily dismissed the Chapter 13 bankruptcy case). It appears at the present time, the Court is focused on whether the debtor/plaintiff is "successful" in asserting an inconsistent position in a previous judicial proceeding and is not benefited by his or her previous position. See Dillard-Winecoff, LLC v.IBF Participating Income Fund, supra.

Notwithstanding what appears to be clear guidance to plaintiffs on how to defeat a judicial estoppel defense by seeking to reopen bankruptcy estates and amend previously filed petitions or

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Johnson file a motion with the bankruptcy court to reopen the bankruptcy case. . . . Having been 'caught' in his failure to include this asset in the bankruptcy estate, Johnson informed the bankruptcy court of it nine months after the court closed his case. His shifting of positions constitutes exactly the kind of playing fast and loose with the courts' which the judicial estoppel doctrine is designed to prevent." Johnson, 223 Ga. App. at 652-53 (citations omitted).

dismissing the bankruptcy claims completely to the benefit of creditors, there have been a number of recent cases in which the Court of Appeals affirmed the lower courts' granting summary judgment on the judicial estoppel issue. See Zahabiuon v. Automotive Finance Corp., 281Ga. App. 55 (2006); Reagan v. Lynch, 241 Ga. App. 642 (1999) (plaintiff/debtor fail to reopen the estate and amend bankruptcy petitions; telling trustee is not enough); Smalls V. Walker, 243 Ga. App. 453 (2000) (does not matter whether omission is intentional or not; plaintiff/debtor again failed to reopen bankruptcy estate and amend pleadings); Harper v. GMAC Mortgage Corp., 245 Ga. App. 453 (2000) (plaintiff/debtor fail to list or claims, even though equity claims were listed, and 100% payout to the creditors did not protect the debtor); Kittle v. Conagra Poultry Co., 247 Ga. App. 102 (2001) (informing trustee is not enough; must reopen estate and amend bankruptcy petitions); Wolfork v. Tackert, 273 Ga. 328 (2001) (judicial estoppel applies to after acquired claims and Chapter 13 bankruptcy cases[6]); Spoon v. Johnson, 247 Ga. App. 754 (2001); Cochran v. Emory University, 251 Ga. A.. 7373 (2001) (lawyer advice is no defense; plaintiff/debtor must timely move to reopen the bankruptcy estate and amend the petitions).

In our hypothetical, because Mr. Smith successfully petitioned the bankruptcy court to re-open his bankruptcy estate to amend his schedules to properly identify his claims against Mr. Jones as a personal asset, it is likely under current case law he will defeat Mr. Jones' summary judgment motion and be allowed to continue to prosecute his claims in a Georgia court.[7]

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[6] But see In re Carter, 258 B.R. 526 (Bankr. S.D. 2001), and In re Brown, 260 B.R. 311 (Bankr. N.D. Ga. 2001), where the bankruptcy courts hold that tort claims that arise post-petition are not property of the estate if required after confirmation of the chapter 13 plan. The courts therefore refused to open the bankruptcy case because the tort claim would not and could not belong to the bankruptcy estate nor be part of the bankruptcy case and the debtors had no reason or obligation to amend their schedules to disclose them.

[7] But see Scoggins v. Arrow trucking Co., 92 F. Supp. 2d 1372 (S.D. Ga. 2000), where it appears the Southern District of Georgia takes a more critical look at these cases, and in this case, granted defendant's summary judgment even where the plaintiff was attempting to re-open the bankruptcy estate to amend his schedules to properly identify the tort claim as directed by the above discussed Georgia case law.

Finally, assuming Mr. Smith is successful in defeating a motion for summary judgment on the judicial estoppel issue by reopening his bankruptcy estate and appropriately amending the bankruptcy schedules to list his claims against Mr. Jones. Under such circumstances, it appears under current Georgia law the claims become the asset of the bankruptcy estate. See United Technologies Corp. v. Gaines, 225 Ga. App. 191, 192 (1997).

> Under 11 U.S.C. § 541 (a)(1) "all legal or equitable interest of [a] debtor in property as of the commencement of the [bankruptcy] case" becomes property of the bankruptcy estate. This includes causes of action, regardless of whether or not such actions are assignable or transferable by the debtor under state law. . . . Therefore, by preemptive operation of federal law, when Gaines filed for bankruptcy the cause of action at issue became part of the bankruptcy estate even though O.C.G.A. § 44-12-24 normally prohibits the assignment of personal tort causes of action. Once Cielinski was appointed as trustee of the estate, "title" to the cause of action passed to him.

Id. at 192 (citations and footnote omitted).

Accordingly, as the Defendant in the Gaines case did, Mr. Jones may want to move the Court to substitute the bankruptcy trustee as the real party in interest. To do this would make the trustee the Plaintiff for purposes of the litigation. It is arguable therefore, that during the trial Mr. Smith might have to sit outside the courtroom with the rest of the sequestered witnesses, quite possibly, greatly reducing the human element of Mr. Smith's case. Also, because the claims are the assets of the bankruptcy estate, any recovery would be distributed, to the extent necessary, to the creditors of Mr. Smith. This fact will most likely not be embraced by Mr. Smith.