

# The Effect of Bankruptcy on Employment Law

Edward G. Phillips  
Kramer Rayson LLP  
Phone:(865)525-5134  
[ephillips@kramer-rayson.com](mailto:ephillips@kramer-rayson.com)

# Bankruptcy and Employment Law: Oil and Water?

- Multiple interplays exist between these two important statutory schemes.

- This presentation focuses on four major areas of impact:

  - Challenging employee claims based on standing and judicial estoppel

  - Employee protections under 11 U.S.C. 525

  - Employer's bankruptcy and ERISA claims

  - Hurdles to employees suing employers in bankruptcy

# Bankruptcy, Standing and Summary Judgment

- **Chapter 7** petitioners lack standing to bring actions on their own. *Bauer v. Commerce Union Bank*, 859 F.2d 438 (6<sup>th</sup> Cir. 1988).
- Unresolved question: what about **Chapter 13** petitioners?

# Standing and Summary Judgment

- No Sixth Circuit precedent on issue of Chapter 13 debtors' capacity to maintain suit.
- District courts in Tennessee are split.
- Plaintiff has standing:
  - ***Gervis v. Sears, Roebuck & Co.***, (W.D. Tenn June 18, 2004)(Breen, Daniel)
  - ***Johnson v. IBC Corp.***, 2008 U.S. Dist. LEXIS 2670 (W.D. Tenn. Jan. 14, 2008)(Breen, Daniel)
  - ***Paris v. Sansom***, 2007 U.S. Dist. LEXIS 33551 (E.D. Tenn. May 7, 2007)(Collier, Curtis).

# Standing and Summary Judgment

- Two district courts in Tennessee have held a Chapter 13 debtor/plaintiff lacks standing:
  - ***Scott v. Dress Barn***, 2006 U.S. Dist. LEXIS 19404 (W.D. Tenn. Apr. 12, 2006)(Todd, J.)
  - ***Harvey v. Lowe's Home Center, Inc.***, 2006 U.S. Dist. LEXIS 25697 (W.D. Tenn. Apr. 25, 2006) (Todd, J.)

# Standing and Summary Judgment

- Decisions favoring standing note that Chapter 13 debtors are “*debtors in possession*” and retain use of all property of the estate under 11 U.S.C. 1327 (b), except as provided for in the plan.
- Those who deny standing rely on ***Bauer, supra***, a Chapter 7 case, and ***Snyder v. United States***, 63 Fed. Cl. 762, (Fed. Cl. 2006) a Chapter 13 case that did not distinguish between Chapter 13 and 7 cases.

# Judicial Estoppel

- Why of increasing importance?
- One reason: threshold for adverse action in retaliation claims is now set so low that alternate routes to summary judgment finding are more important than ever to employers.
- Second reason: bankruptcies are on the rise.

# “We’re Number One!” And Not in a Good Way

- National Bankruptcy Research data for 2007 places Tennessee at top of the chart for bankruptcy filings per household.
- Chapter 13 filings are especially popular.
- Terminated or laid off employees more likely to file for bankruptcy.

# Disclosure Requirements

- Sworn statement requires disclosing **suits** and **administrative proceedings** under oath.
- Schedule of personal property includes a section for “contingent claims of every nature.”
- Duty is ongoing; debtors have amendment obligations if circumstances change.

# Judicial Estoppel

- “prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument in another phase.”  
***New Hampshire v. Maine***, 532 U.S. 742,749 (2001).
- Use not limited to statements in same case.
- You can’t say “this is all I have,” and then maintain undisclosed charge/lawsuit.

# Considerations for Application

- Supreme Court asks three questions:
  - (1) Was later position **clearly inconsistent**?
  - (2) Did party **persuade court to adopt prior inconsistent position**, creating perception first or second court was misled?
  - (3) Would party derive **unfair advantage** or impose unfair detriment?

# Sixth Circuit Approach

- In ***Browning v. Levy***, 283 F.3d 761, 775-76 (6<sup>th</sup> Cir. 2002), court held judicial estoppel applies where: (1) party asserted contrary position under oath in prior proceeding; and (2) prior court adopted position (either preliminarily or in final disposition).
- Purpose of doctrine: deny cynical gamesmanship or playing fast and loose with courts.

# Exception for Inadvertent Mistakes

- In *Eubanks v. CBSK Fin. Group Inc.*, 385 F.3d 894, 897-98 (6<sup>th</sup> Cir. 2004), plaintiffs in predatory lender case were not estopped because, under *Browning*, 283 F.3d at 776, exception exists where: (1) debtor lacks knowledge of factual basis of undisclosed claims, *or* (2) has “no motive for concealment.”

## *Eubanks' behavior*

Court determined judicial estoppel not appropriate because:

- Although not on schedule, plaintiffs notified trustee in a meeting;
- Provided all documents re claim to trustee;
- Unsuccessfully moved bankruptcy court to allow substitution of trustee for plaintiffs in other action; and
- Filed an amendment to schedule shortly after motion to dismiss filed.

# Three and a Half Years Too Late

- ***Tyler v. Fed Ex***, 420 F. Supp.2d 849 (W.D. Tenn. 2005), *aff'd* 2006 U.S. App. LEXIS 28626 (6<sup>th</sup> Cir. Tenn. Nov. 16, 2006).
- Plaintiff filed bankruptcy petition, not listing her pro se (\$53 million) claim. Plan was confirmed. Two and a half years later, MSJ filed. Tyler claimed “inadvertence,” obtained leave to file amendment, but 5 months later had still taken no action. Only schedule amendment filed 3 days *after* district court entered “show cause order.”

# The Paralegal Made Me Do It

- *Lewis v. Weyerhaeuser Co.*, 141 Fed. Appx. 420 (6<sup>th</sup> Cir. 2005).
- Plaintiff did not include termination dispute in sworn statement or schedule. B'ruptcy court confirmed plan with a 32% repayment. 1 month later, EEOC charge filed. Never amended b'rputcy filings.
- Claimed paralegal told her not to list claim and that she had "told" the trustee's "office" of claim.
- Result: **MSJ** for employer. Plaintiff required to make more than "minimal efforts," and could not blame paralegal.

# Plaintiff who listed two other claims could not excuse omission as mistake

- ***Scott v. Dress Barn***, 2006 U.S. Dist. LEXIS 19404 (W.D. Tenn. Apr. 12, 2006).
- Employee filed failure-to-hire lawsuit, then filed for Chapter 13. Did not include suit in sworn statement, nor correct it after being questioned about it at deposition. Nearly a year after plan confirmed, she attempted to avoid MSJ by amending.
- Result: **MSJ** granted. No showing that her act was *mistake*, especially b/c she listed two other lawsuits on her statement.

# No-go for Chapter 7 petitioner

- ***Pate v. United Parcel Service, Inc.***, 2006 U.S. Dist. LEXIS 50821 (E.D. Tenn. July 24, 2006).
- Plaintiff filed bankruptcy petition while THRC charge was pending. Received right to sue letter before Chapter 7 discharge was granted; filed lawsuit before bankruptcy case closed.
- Result: **MSJ** for employer. No attempt by plaintiff to amend until court entered a “show cause” order. Plaintiff *stood to reap a windfall*, and offered no evidence that he *lacked motive to conceal* claim.

# No affirmative steps to correct

- *Duff v. Lockheed Martin Energy Sys., Inc.*, 2006 U.S. Dist. LEXIS 60747 (E.D. Tenn. Aug. 25, 2006).
- Plaintiff who never revealed EEOC charge or right to sue letter during pendency of Chapter 7 bankruptcy claimed it was “excusable mistake.”
- Result: **MSJ** for employer. Concealment would preserve additional asset for Duff, who took no affirmative steps to inform the bankruptcy court.

## ♪ Ch-Ch-Ch-Changes ♪

- ***Bohanon v. Bridgestone/Firestone N. Am. Tire, LLC***, 2007 U.S. Dist. LEXIS 26615 (M.D. Tenn. Apr. 10, 2007), *aff'd* 2008 U.S. App. LEXIS 2193 (6<sup>th</sup> Cir. Jan. 25, 2008).
- Chapter 13 plan called for 100% pay-back of creditors. Then, 7 months after filing lawsuit against her former employer, plaintiffs sought and were granted *modification* to 30%. As of date of district court's decision, plaintiffs never added claim as asset.
- Result: **MSJ** for employer upheld. Though no motive existed at time of initial b'ruptcy filing, it arose later and plaintiffs showed **no evidence of good faith**.

# My Attorney (who is dead) did it

- *Paris v. Tennessee Valley Authority*, 2007 U.S. Dist. LEXIS 33551 (E.D. Tenn. May 7, 2007).
- Plaintiff hid from bankruptcy payment of back pay, along with continued claims. Claimed “TVA knew about bankruptcy.” Besides, her attorney was dead, so she couldn’t discuss it with him.
- Result: **MSJ** for employer. Judicial estoppel’s main aim is to protect systemic integrity, not TVA. Plaintiff took zero steps to correct omission.

# My Attorney Did It (and is under indictment for fraud)

- ***Aziz v. Dollar Tree Stores***, 2005 U.S. Dist. LEXIS 44902 (E.D. Tenn. Sept. 20, 2005).
- Plaintiff in national origin and age case disclosed fact of EEOC/THRC charge to attorney, who assured him dispute should not be listed. Omission revealed at deposition and Plaintiff hired new attorney to fix schedules.
- Result: **MSJ** for employer **denied**. Court relied on bankruptcy attorney's recent indictment on fraud charges - - declined to hold plaintiff responsible.

# Trustee's Knowledge Deemed Sufficient

- ***Johnson v. Interstate Brands Corp.***, 2008 U.S. Dist. LEXIS 2670 (W.D. Tenn. Jan. 14, 2008).
- Chapter 13 petition filed after filing of lawsuit against employer. She did not schedule claim. Two days after plan confirmed, employer filed motion to dismiss.
- Result: **MSJ denied**. Plaintiff had disclosed claim *at meeting of creditors*, creating sufficient support for argument of that failure was unintentional.

# What about state court claims?

- Judicial estoppel has been used. *See, e.g., Loring v. Nashville Elec. Svc. & Power Bd.*, 1996 Tenn. App. LEXIS 481 (Aug. 16, 1996)(age plaintiff estopped because he claimed 100% disability in workers' comp case).
- Caution: Does not apply where party shows statement was "inadvertent, inconsidered, mistaken, or anything short of a willfully false statement of fact." *D.M. Rose & Co. v. Snyder*, 206 S.W.2d 897, 906 (Tenn. 1947).

# Section 525 Employee Protection

- No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, *solely* because such debtor or bankrupt. . .
- 11 U.S.C. 525(b)(emphasis added).

# When Does Protection Begin?

- General view: only after petition has been filed.
- Minority lower court view: debtors with “intent” to file are protected.
- Predicted Sixth Circuit outcome: protection only applies after petition is filed.

# Strict Adherence to “Solely” Requirement

- *White v. Kentuckiana Livestock Market, Inc.*, 397 F.3d 420, 426 (6<sup>th</sup> Cir. 2005).
- Plaintiff and wife fired on heels of bankruptcy which paperwork referred to as “final incident.”
- Problem? Plaintiff offered to “fiddle” with his bosses’ tax information in exchange for use of a car (after ER eliminated company car).
- Result: Sixth Circuit would not read “solely” to mean “mostly,” and other factors influenced decision.

# Employer Bankruptcy

## Effect on Pension Rights

- Often when ER files for Chapter 11, one goal is to relieve it of further liability for expensive pension plans.
- See e.g. case of **United, Northwest** and **Delta** granted “concessions” allowing termination of pension plans and take over by Pension Benefit Guarantee Corporation.
- PBGC pays benefits after plan termination up to a maximum guaranteed amount.

## **Employer Bankruptcy Effect on Defined Contribution Plans (e.g. 401(k))**

- Defined contribution plans not insured by PBGC.
- Absent fraud/mismanagement benefits are vested and funds available even where plan is discontinued.
- But payout is upon normal retirement.

# Effect of Bankruptcy on New/Pending Employment Lawsuits

- **Automatic stay** prevents new litigation from being filed, stays current litigation. 11 U.S.C. § 362(a)(1).
- Normally bankruptcy discharges debtor from all debts before bankruptcy so employee must act in bankruptcy court.

# How Employee Proceeds in Bankruptcy

- Employee must file **timely proof of claim** to preserve claim and must **respond to objections**.
- Bankruptcy court may adjudicate claim.
- Or employee may move court for relief from stay if:
  - (a) Suit in other forum has multiple parties; or
  - (b) *is ready for trial*.

# Even if Claim is Reduced to Judgment it is Unsecured

- Ultimately EE's (and their counsel) find pursuit of claim not economically feasible.
- Judgment or settlement is unsecured claim.
- Often unsecured creditor receives pennies on a dollar.
- Failing to pursue claim in bankruptcy extinguishes claim.

# Effects of Bankruptcy on EEOC Charges/Actions

- EEOC not precluded by stay from investigating charge/issuing right to sue notice.
- Employee must still file proof of claim.
- Caution if stay is lifted, employee has only 30 days to file suit.
- Note: “Police power” exception to stay for EEOC in limited cases.