

# WASHINGTON CASE UPDATE

## Bankruptcy: Unreported Post-Petition Claims May Be Viable

**From the desk of Kyle Riley: Can a plaintiff's Chapter 13 Bankruptcy Plan bar a future personal injury lawsuit?**

**Claims Pointer: In the following case, The Court of Appeals determined that where a plaintiff fails to disclose a personal injury claim in a pending Chapter 13 bankruptcy, and either the bankruptcy plan has not yet been confirmed or the plan specifically requires disclosure, the future personal injury claim may be barred. However, non-disclosure of a claim in a pending bankruptcy does not automatically lead to the barring of a future suit, particularly where the plaintiff did not intend to conceal the claim.**

case in point...

Arp v. Riley, No. 72613-7-I, Court of Appeals of Washington, Division I (December 28, 2015).

Benjamin C. Arp (Arp) filed a Chapter 13 bankruptcy petition on July 22, 2008. The bankruptcy court confirmed Arp's plan on December 17, 2009. The confirmation order required him to inform the bankruptcy trustee of any change in circumstances and allowed Arp to retain his property. On October 5, 2010, following the confirmation order, a sports utility vehicle (SUV) rear-ended Arp's stopped car. The SUV was driven by James Riley while he was working for the Sierra Construction Company. Arp sustained physical injuries as well as mental and emotional problems, including difficulty with memory. Following the accident, Arp missed several Chapter 13 bankruptcy payments, totaling \$2,875.00. In November 2011, the trustee moved to dismiss Arp's bankruptcy case. The trustee subsequently struck the motion after Arp responded stating he forgot to make the payments due to the accident and his memory loss and also noted that he had paid \$154,336.42 to his creditors under his Chapter 13 plan. In March 2012, Arp was granted a discharge in the bankruptcy case. Arp paid off his remaining debts according to the plan, and his bankruptcy case was closed in April 2012.

Arp later filed suit against Riley as well as Sierra Construction Company. Sierra's amended answer asserted judicial estoppel and lack of standing as affirmative defenses. The trial court dismissed Arp's case on summary judgment, concluding that because the personal injury claim is an asset of the bankruptcy estate, Arp "had a duty to disclose the post-petition asset in his bankruptcy action." It also decided that Arp's response to the trustee's motion to dismiss did not satisfy the disclosure obligation created by the confirmation order. The trial court declined Arp's reconsideration motion.

Arp thereafter appealed, challenging the trial court's decision to utilize judicial estoppel and contending that he had no duty to disclose because he owned the personal injury claim.

The Court of Appeals found error in the trial court's use of judicial estoppel, deciding that Arp's bankruptcy plan and confirmation order vested the Sierra claim. Therefore, Arp owned the claim and had standing to assert the claim. In coming to this decision, the court noted that while a debtor has an ongoing duty to disclose post-petition causes of action, claims first acquired after confirmation of a Chapter 13 plan do not always become estate assets. The court observed that where property acquired post-confirmation is deemed as belonging to the debtor, there is no duty to disclose and, therefore, judicial estoppel to bar claims is not applied. Furthermore, the bankruptcy code vests property of the bankruptcy estate in the debtor when the bankruptcy is confirmed, unless the plan states otherwise.

The Court went on to discuss the three factors considered for judicial estoppel, including whether the litigant asserted inconsistent claims, if the bankruptcy court accepted those claims, and if the litigant benefited from asserting the inconsistent claims. While Arp may have violated the order of the bankruptcy court by not specifically disclosing the claim, the Court of Appeals determined that there was not an inconsistent position taken in the bankruptcy case and the personal injury case. Therefore, judicial estoppel did not bar the personal injury claim.



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