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Medical Malpractice Update

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Going for Broke: The Impact of Bankruptcy in Litigation

Medical malpractice defense attorneys are no strangers to pursuing discovery of a plaintiff's previous personal injury or workers' compensation claims. No doubt, knowledge of a plaintiff's prior injuries or tendencies to sue are valuable tools not only in contesting damages, but may also support dismissal of the pending action. To that end, nearly every standard set of interrogatories to a medical malpractice plaintiff seeks identification of previous tort or workers' compensation actions.

An often overlooked defense strategy is to seek discovery on whether a plaintiff has ever filed for personal bankruptcy, and if so, whether the malpractice claim was disclosed as an asset to the bankruptcy court. Why? A bankruptcy debtor is required to disclose all legal and equitable interests, including causes of action, as assets in bankruptcy. *See Seymour v. Collins*, 2015 IL 118432 (relying on the assumption that the United States Bankruptcy Code requires disclosure). Where a plaintiff fails to do so, malpractice defendants may be entitled to dismissal or summary judgment of the state court action for lack of standing, judicial estoppel, or both.

Standing

In the medical malpractice context, practitioners often fail to question whether the plaintiff has proper standing. A plaintiff does not have standing where his or her malpractice claim existed at the time of filing, or at any time during a bankruptcy proceeding, unless the bankruptcy trustee first abandons or administers the claim. *Barnes v. Lolling*, 2017 IL App (3d) 150157, ¶ 16. The malpractice claim is, without a doubt, the sole property of the bankruptcy estate, and an individual debtor does not have standing to prosecute and/or settle the malpractice action for his or her own benefit. *Barnes*, 2017 IL App (3d) 150157, ¶ 16.

While Illinois law is clear that a plaintiff either has standing or does not–in practice, the issue can be easily remedied by substitution of the proper party. In *Barnes*, the plaintiff failed to disclose a car accident that occurred during the course of her bankruptcy proceedings. *Id.* ¶¶ 4-6. She subsequently received a discharge in bankruptcy and filed a civil action shortly thereafter. *Id.* ¶¶ 6-7. The trial court granted summary judgment for lack of standing, and the Illinois Appellate Court Third District affirmed. *Id.* ¶¶ 10, 18. However, in *dicta*, the Third District noted that the plaintiff could still move to reopen the bankruptcy proceeding, schedule the claim as an asset, and either refile the civil action in her own name, exclusively for the benefit of the creditors, or ask the trustee to pursue the claim on behalf of the estate and the creditors or abandon the claim, which would revert standing back to the plaintiff. *Id.* ¶ 18.

Though a final disposition for lack of standing may be ideal, a realistic goal is to substitute the bankruptcy estate as the plaintiff in interest. Eliminating the debtor as a party will likely remove most, if not all, of the plaintiff's financial interest in the outcome of the litigation. In all likelihood, the circumstances will be such that the debtor received a sizeable monetary discharge in bankruptcy and the trustee will be motivated to recover as much as possible for the creditors.

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Logically, a trustee is unlikely to abandon a medical malpractice lawsuit, as most are accompanied by affidavits at the time of filing stating the plaintiff is seeking damages in excess of $50,000. To the benefit of defendants, unlike the original plaintiff, the bankruptcy estate does not have a personal connection to the litigation. A trustee is more likely to be reasonably counseled on a realistic case value, which could assist in more expedient and successful settlement negotiations. Trustees are also generally more inclined to settle because at minimum, they run the risk of proceeding to trial with a key witness, the former plaintiff, who may be less than willing to cooperate moving forward.

Judicial Estoppel

The doctrine of judicial estoppel prevents a party who makes a representation in one case from taking a contrary position in another case. *Seymour*, 2015 IL 118432, ¶ 36. For the better part of the last decade, Illinois courts have analyzed under what circumstances the application of judicial estoppel is appropriate to preclude recovery to a plaintiff who failed to disclose an underlying tort claim in a previous bankruptcy filing. Essentially, courts are tasked with deciding whether a plaintiff should be able to deny a right to recovery for a tort action in bankruptcy, obtain the benefit of a bankruptcy discharge, and then attempt to realize on his or her personal injury claim in a civil action. *See id.* (setting forth the two-step analysis for applying judicial estoppel). However, courts are reluctant to apply the doctrine of judicial estoppel where a debtor's nondisclosure of a claim was "inadvertent." *See id.* ¶ 47. Nondisclosure may be "inadvertent" where the plaintiff debtor lacked knowledge of the claim or had no motive to conceal it. *See Johnson v. Fuller*, 2017 IL App (1st) 162130, ¶ 36 (citation omitted).

After *Seymour*, plaintiffs essentially had a safe harbor from judicial estoppel and were often able to successfully claim ignorance as a reasonable excuse for nondisclosure. *See Johnson*, 2017 IL App (1st) 162130. However, two recent holdings distinguished *Seymour* and judicially estopped plaintiffs from proceeding with tort actions after nondisclosure in bankruptcy.

In *Barnes*, the Third District held that the circumstances of nondisclosure warranted summary judgment based on judicial estoppel. *Barnes*, 2017 IL App (3d) 150157. Relevant to the estoppel argument, the car accident at issue occurred during the bankruptcy proceedings and within three weeks, the plaintiff retained a personal injury attorney. *Id.* ¶ 24. The plaintiff also had an attorney for the bankruptcy proceedings. *Id.* ¶ 25. She did not inform her bankruptcy attorney of her personal injury claim, and she likewise failed to inform her personal injury attorney of the bankruptcy filing. *Id.*

The bankruptcy case proceeded for 18 months, and the plaintiff ultimately succeeded in having more than $92,000 in unsecured debt discharged in bankruptcy before actually filing her personal injury action. *Id.* ¶¶ 24, 26. She did not contend, at any time, that her attorney or the bankruptcy trustee suggested she was not required to disclose her tort claim. *Id.* ¶ 25. Under these circumstances, the court found "ample evidence" that the plaintiff's nondisclosure had a significant impact on the bankruptcy proceedings, and that the nondisclosure was deliberate, not inadvertent. *Id.* ¶ 26.

Most recently, in *Higginbotham v. Fintel*, 2019 IL App (1st) 181420-U, the Illinois Appellate Court First District issued a Rule 23 order affirming a trial court's grant of summary judgment based upon judicial estoppel in a medical malpractice case where the plaintiff failed to disclose his cause of action during bankruptcy proceedings. The plaintiff's medical malpractice claim accrued after filing for bankruptcy and his civil suit was filed before the bankruptcy case concluded. *Higginbotham*, 2019 IL App (1st) 181420-U, ¶¶ 1-11. The First District held that the prerequisites of judicial estoppel were satisfied and that there were multiple facts to show the plaintiff's nondisclosure was purposeful. *Id.* ¶¶ 30, 37.

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First, when the plaintiff filed for bankruptcy, he signed a document in which he agreed to notify his attorney if he wished to file a lawsuit. *Id*. ¶ 37. Instead, he filed his medical malpractice suit without informing his bankruptcy attorney. *Id*. ¶ 38. During the course of discovery in the malpractice case, the plaintiff admitted that he filed for bankruptcy, but misrepresented the year of filing. *Id*. ¶ 38. The First District held that, together, these facts established a reasonable basis for the trial court to conclude the nondisclosure was intentional. *Id.* While not precedential, the *Higginbotham* opinion can still be used by medical malpractice defendants for its persuasive value and thoughtful analysis distinguishing its facts from *Seymour*.

Practical Considerations

Medical malpractice defendants should investigate a plaintiff's bankruptcy history early and often. Helpful considerations towards the ultimate goal of dismissal, summary judgment, or successful resolution include:

- Conduct an independent search of your jurisdiction's bankruptcy docket, and obtain a copy of any relevant bankruptcy petitions not only at the inception of a case, but routinely through trial;
- Incorporate inquiries as to whether the plaintiff has been involved in any legal proceeding, including bankruptcy, into all standard interrogatories and background questioning at depositions;
- File the appropriate motion, and negotiate to your advantage;
- Consider supplemental discovery related to bankruptcy issues, or verification of prior responses, just before trial; and
- If circumstances warrant, consider seeking sanctions under Illinois Supreme Court Rule 137 for defense fees stemming from the bankruptcy nondisclosure.

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