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2018

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**Bankruptcy Schedules will not be Treated as Judicial Admissions in Court**

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Cite as: *Bankruptcy Schedules will not be Treated as Judicial Admissions in Court*,  
10 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 1 (2018).

**Introduction**

When an individual debtor files for bankruptcy, it must file bankruptcy schedules listing, among other things, the creditors that hold claims against the individual. The information contained on the schedules may have ramifications on the debtor and its creditors. Specifically, often debtors unknowingly fail to list certain claims, which may affect the debtor's right to discharge a creditor's right to a recovery. Part I of this memo discusses bankruptcy schedules and claim dischargeability. Part II illustrates the distinction between judicial and evidentiary admissions. Part III explores cases that have held bankruptcy schedules to be admissions and others that have not, bearing in mind the distinction between the two types of admissions. Part III further discusses the effect listing a claim on a debtor's schedule may have on the dischargeability of the debt.

**I. Bankruptcy Schedules may Determine Whether Debts are Dischargeable or Nondischargeable.**

*A. Filing Bankruptcy Schedules is a Statutory Requirement for Individual Debtors*

Under section 521 of title 11 of the United States Code (the "Bankruptcy Code"), when a debtor files a bankruptcy case, the debtor is required to file bankruptcy schedules that contain information about the debts and financial information of the debtor as of the day the case is

filed.<sup>1</sup> Bankruptcy schedules are amendable and may be withdrawn at any time before the case is closed without permission from the court.<sup>2</sup> To amend, the Federal Rules of Bankruptcy Procedure provide that the debtor need only “give notice of the amendment to the trustee and to any entity affected.”<sup>3</sup>

*B. Dischargeable Debts may be Canceled, While Nondischargeable Debts must be Repaid*

Dischargeable debts are debts that are released or otherwise canceled as a result of the bankruptcy case. Once a debt is discharged, the debtor is no longer obligated to pay it, and the creditors cannot pursue the debtor for payment of such debt. Examples of dischargeable debts in individual bankruptcy include, among other things, medical bills, housing utility bills, and credit card balances.

Pursuant to § 523 of the Bankruptcy Code, there are certain debts that are exempt from dischargeability status; thus, these debts are “nondischargeable.”<sup>4</sup> The statute lists all of these kinds of debts, including taxes, money or property obtained by false pretenses, domestic support obligations, and others.<sup>5</sup> A debtor remains obligated to pay nondischargeable debts notwithstanding the bankruptcy case. For example, a debtor-divorcee would have to pay its alimony claims. Whether a debt is dischargeable or nondischargeable can depend on what kind of admissions have been made about that claim.

**II. Judicial Admissions and Evidentiary Admissions Have Very Different Impacts on Bankruptcy**

A bankruptcy is a bundle of proceedings that often include litigation; therefore, statements, or admissions made by a party or its attorney, may be used against such party in a

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<sup>1</sup> 11 U.S.C. § 521 (2014) (listing a number of materials debtors must file upon a bankruptcy case).

<sup>2</sup> Fed. R. Bankr. P. 1009.

<sup>3</sup> Fed. R. Bankr. P. 1009(a).

<sup>4</sup> 11 U.S.C. § 523 (2014).

<sup>5</sup> *Id.*

litigation. Based on certain statements, the court will have jurisdiction to treat them as judicial admissions, evidentiary admissions, or disregard them all together.

A. *Judicial Admissions Concede Parties to a Specific Fact at Issue*

A judicial admission is “any ‘deliberate, clear and unequivocal’ statement, either written or oral, made in the course of judicial proceedings.”<sup>6</sup> A judicial admission is binding and conclusive, and once a court finds a statement constitutes a judicial admission, the issues regarding that statement cannot be litigated in the current, or in subsequent proceedings under the doctrine of collateral estoppel.<sup>7</sup> Courts have consistently held that statements by a party within a formal pleading constitute judicial admissions.<sup>8</sup> This binding and conclusive nature does not exist with evidentiary admissions.

B. *Evidentiary Admissions do not Concede Facts, but the Fact-Finder may use Them in Determining a Case*

Contrary to judicial admissions, evidentiary admissions are statements that can be offered as evidence and may be used to prove the truth of an assertion.<sup>9</sup> These admissions can be refuted or explained away before a case even reaches the jury. *Id.* Evidentiary admissions are not binding or conclusive on the judge or jury; rather, they are solely admissions for evidentiary purposes.<sup>10</sup> The trier of fact may use evidentiary admissions to decide the case.

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<sup>6</sup> *Ensign v. Pennsylvania*, 227 U.S. 592, 600 (1993).

<sup>7</sup> *See* Charles T. McCormick, *Wigmore On Evidence 3d Edition*, 35 ILL. L. REV. 540, 544 (1940).

<sup>8</sup> *See* *Best Canvas Prods & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) (holding “[a] party is bound by the admissions in his pleadings”).

<sup>9</sup> Fed. R. Evid. 801(d).

<sup>10</sup> *See* *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984); *see also* *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 32 F.2d 195, 198 (2d Cir. 1929) (“When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any other extrajudicial admission made by a party or his agent.”).

### **III. Bankruptcy Schedules Cannot be Judicial Admissions; However, Schedules may be Evidentiary Admissions used to Determine Whether Claims are Dischargeable or Nondischargeable**

#### *A. Bankruptcy Schedules Cannot Be Judicial Admissions*

Bankruptcy schedules cannot be treated as judicial admissions because they are freely amendable and not conclusive. Further, the estate has the right to assert any defense available to the debtor under 11 U.S.C. § 558 (2014). “The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate . . . [and] waiver of any such defense by the debtor after commencement of the case does not bind the estate.”<sup>11</sup>

Consequently, an estate should not be bound to a purported judicial admission made by a debtor that would waive specific issues of fact that could otherwise constitute a defense.

Additionally, courts have held that “an admission made in one proceeding will not be regarded as conclusive and binding in a separate proceeding [because bankruptcy is a] ‘bundle of related controversies’ that must be handled separately to give the estate its full value.”<sup>12</sup> This ruling precludes treating bankruptcy schedules as judicial admissions because judicial admissions concede issues in all present and subsequent proceedings. Schedules filed by a debtor in a bankruptcy case cannot be binding in all subsequent adversary proceedings.<sup>13</sup> If an initial schedule is filed in which a debtor does not dispute a creditor’s claims, a debtor or its estate should not be precluded from later disputing such claims or raising all defenses Congress contemplated when it enacted section 558.

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<sup>11</sup> 11 U.S.C. § 558(b).

<sup>12</sup> *In re Schraiber*, 141 B.R. 1000, 1006 (Bankr. N.D. Ill. 1992) (holding that “[t]reating all the contested matters and adversary proceedings as one controversy and causing the statements made in one matter to be binding in all other matters would be inconsistent” with the interest of maximizing the estate’s value); *see also* *Enquip, Inc. v. Smith-McDonald Corp.*, 655 F.2d 115, 118 (7th Cir. 1981).

<sup>13</sup> *See Schraiber*, 141 B.R. at 1006.

Bankruptcy schedules may be evidentiary admissions that aid the fact-finder in determining whether debts are dischargeable or nondischargeable. When a creditor’s claim is listed in the schedule, but not disputed, the claim does not automatically become nondischargeable based on that listing. This was the issue in the *Chlad* case, where the court ruled in favor of the debtor in order to increase the value of the estate.<sup>14</sup> Currently, there are no equitable remedies for a creditor in this situation. Failure to dispute a debt in a bankruptcy schedule is not listed within the exceptions from dischargeability under § 523, and to hold otherwise would require (1) making bankruptcy schedules binding, or (2) treating them as judicial admissions, both of which the *Chlad* court firmly rejected.<sup>15</sup>

The *Chlad* court left room to treat schedules as evidentiary admissions; however, it’s not clear how much this ruling affects creditors pursuant to § 523. Section 523(a)(2) provides, *inter alia*, that:

money, property, services . . . obtained by [*inter alia*] false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition . . . or . . . consumer debts owed to a single creditor and aggregating more than \$675 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable.<sup>16</sup>

Allowing the use of schedules as evidentiary admissions might assist with proving these, or other circumstances provided within § 523; however, schedules do not list many facts other than the names of creditors and the debts. The statute provides “the term ‘luxury goods or services’ does not include goods or services reasonably necessary for the support or maintenance of the

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<sup>14</sup> *In re Chlad*, Bankr. No. 13–bk–40141, 2017 WL 2861104, \*3 (Bankr. N.D. Ill. 2017).

<sup>15</sup> *See id.*

<sup>16</sup> 11 U.S.C. § 523.

debtor.”<sup>17</sup> Therefore, a creditor might use a schedule as evidence to prove that the listed claims were luxury goods, and thus nondischargeable.

*B. Failure to list Claims in Schedules may Cause the Claim to be Dischargeable or Nondischargeable*

Although § 521 requires the filing of schedules, debtors may fail to list all creditors for innocent reasons such as mistake or inadvertence. Failure to list a claim would not necessarily preclude discharge. Section 523 provides a debt cannot be discharged (is “nondischargeable”) if it is “neither listed nor scheduled . . . with the name, if known to the debtor, of the creditor . . . unless such creditor had notice or actual knowledge of the case in time for such timely filing[.]”<sup>18</sup> Bankruptcy schedules are mandatory; therefore, where a debt is unlisted, that debt becomes nondischargeable unless the creditor is on notice. Thus, whether an unlisted debt is nondischargeable depends on what the creditor knew about the debtor’s bankruptcy status, and when they received adequate notification of the bankruptcy.

Applying Section 523 strictly, if a creditor knew that the debtor filed bankruptcy, but failed to file its claim in a timely manner, the debt would be dischargeable, and the court would not reopen the case for the parties.<sup>19</sup> In *Weitzman*, the Court of Appeals for the First Circuit gave some guidance to what constitutes timeliness: “we think that the statute aims to assure creditor notice before discharge and the idea that ‘timely filing’ remains available *after* the bankruptcy proceeding is surely not what Congress had in mind.”<sup>20</sup> The court further ruled that “[i]f the debtor fails to list a supposed creditor’s claim - meaning that the creditor will not be notified of the opportunity to participate in the proceeding (and the creditor does not otherwise happen to

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<sup>17</sup> See *id.*

<sup>18</sup> 11 U.S.C. § 523(a)(3)(A).

<sup>19</sup> Colonial Surety Co. v. Weizman (*In re Weizman*), 564 F.3d 526 (1st Cir. 2009).

<sup>20</sup> *Id.* at 532.

know of the bankruptcy, the debt is not discharged.”<sup>21</sup> Therefore, whether a creditor’s claim is lost because it was not listed in the schedule turns on whether the creditor was adequately put on notice before the closing of the case.

Section 727(b) of the Bankruptcy Code provides a mechanical approach that discharges debts “without regard to whether a claim was filed”.<sup>22</sup> Reading section § 727(b) and section 523(a) together, unless the debt is rendered nondischargeable under the latter, then the former will automatically discharge an undisclosed debt.<sup>23</sup>

While schedules are freely amendable and are not conclusive or binding, a debtor’s failure to list a claim is subject to judicial scrutiny.<sup>24</sup> In *Stone*, the Fifth Circuit listed three factors that courts must consider before deciding whether failure to list a creditor will render that creditor’s debt nondischargeable, including, (1) the reasons the debtor failed to list the creditor, (2) the amount of disruption which would likely occur, and (3) any prejudice suffered by the listed creditors and the unlisted creditor in question.<sup>25</sup>

If the debtor intentionally fails to list a creditor’s debt constituting fraud, the debt would likely be nondischargeable and the creditor would keep its claim. The same would result if the creditor would suffer prejudice, or if the bankruptcy case would be severely disrupted. These outcomes flow from an equitable analysis that is not applied by all of the circuit courts; therefore, the creditor’s right most firmly turns on notice.<sup>26</sup>

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<sup>21</sup> *Id.* at 530.

<sup>22</sup> 11 U.S.C. § 727(b) (2014).

<sup>23</sup> National Consumer Bankruptcy Rights Center, *Undisclosed Debt Discharged In No-Asset Chapter 7* (Nov. 19, 2015), <http://www.ncbrc.org/blog/2015/11/19/undisclosed-debt-discharged-in-no-asset-chapter-7/> (referencing *Watson v. Parker*, 313 F.3d 1267 (10th Cir. 2002)) (“So long as the debt is not non-dischargeable under section 523(a)(2), (4) or (6), and the creditor had notice of the bankruptcy in time to protect his rights, section 727(b) acts to discharge the undisclosed debt.”).

<sup>24</sup> *Stone v. Caplan (Matter of Stone)*, 10 F.3d 285, 290 (5th Cir. 1994).

<sup>25</sup> *Id.* at 290.

<sup>26</sup> 11 U.S.C. § 523(a)(3)(A).



## **Conclusion**

A creditor's claim that is dischargeable will not become a nondischargeable debt simply because the claim was not identified or disputed in a debtor's schedule. Failure to list a debt might render that debt nondischargeable, but if the creditor has notice of the bankruptcy case, that notice could allow the debt to be discharged. Furthermore, where a debtor listed a debt in a schedule but did not dispute it, the debt will not automatically become nondischargeable, as such listing may only be used as an evidentiary admission.