No. 25-6

IN THE

Supreme Court of the United States

THOMAS KEATHLEY,

Petitioner,

v.

BUDDY AYERS CONSTRUCTION, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER, NATIONAL CONSUMER LAW CENTER, AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF NEITHER PARTY

JAMES J. HALLER
Counsel of Record
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
586 N. First Street #202
San Jose, CA 95112
618-420-1568
jhaller@ncbrc.org

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INTEREST OF AMICI CURIAE[1]

The National Consumer Bankruptcy Rights Center (NCBRC) is a 501(c)(3) organization, dedicated to preserving the bankruptcy rights of consumer debtors and protecting the integrity of the bankruptcy system. NCBRC files amicus briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a non-profit organization of approximately 1,500 consumer bankruptcy attorneys practicing throughout the country. Incorporated in 1992, NACBA is the only nationwide association of attorneys organized specifically to protect the rights of consumer bankruptcy debtors.

NACBA has filed amicus briefs in this Court in several cases involving the rights of consumer debtors. *See, e.g., Bank of America v. Caulkett*, 135 S. Ct. 1995 (2015); *Harris v. Veigelahn*, 135 S. Ct. 1829 (2015); *Clark v. Rameker*, 134 S. Ct. 2242 (2014); *Schwab v. Reilly*, 560 U.S. 770 (2010) (amicus brief cited in dissenting opinion).

The National Consumer Law Center (NCLC) is recognized nationally as an expert in consumer

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1 No counsel for a party authored this brief in whole or in part. No person other than the amici or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

protection issues. For more than 55 years, NCLC has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a twenty-one volume Consumer Credit and Sales Legal Practice Series. Many of these volumes address the judicial estoppel doctrine, including Consumer Bankruptcy Law and Practice (13th ed. 2023). A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices directed against low-income and older consumers, and to promote protections against such practices. NCLC frequently appears as amicus curiae in consumer law cases before trial and appellate courts throughout the country.

Amici's interest in this case arises from their concern that the Court might assume there is no dispute about whether Chapter 13 debtors have a general duty to disclose assets acquired after their bankruptcy petitions are filed when, in fact, that is an open issue that has divided lower courts and has not been developed in the proceedings below. Amici respectfully request that the court not state that such a duty exists, and simply find that there is no need to decide that issue in order to determine the proper standard for applying judicial estoppel, the issue on which certiorari was granted.[2]

[2] Although this brief does not address the issue, amici fully support the position of Petitioner that the Fifth Circuit's rule on judicial estoppel is far too rigid and harmful to innocent consumer bankruptcy debtors.

SUMMARY OF THE ARGUMENT

This case presents a narrow issue: What is the standard for applying the doctrine of judicial estoppel to bar a lawsuit acquired by a Chapter 13 debtor after confirmation of a plan where the debtor failed to comply with precedent in his circuit requiring him to disclose the lawsuit in his schedules?

Both Fifth Circuit and Eighth Circuit precedents impose on Chapter 13 debtors, in those circuits, a duty to disclose a post-confirmation lawsuit in bankruptcy schedules.

Those precedents are not at issue in this case. Thomas Keathley[3] did not challenge them below or in his petition for certiorari and has thereby waived the issue. The Court did not grant certiorari to consider the issue of whether disclosure of postpetition assets in a Chapter 13 case is required. That issue has divided the courts and in turn involves a number of other unresolved Chapter 13 issues. There is no need for the Court to decide whether there is a duty to amend schedules to disclose a postpetition lawsuit in a Chapter 13 case.

[3] This brief refers to "Keathley" to avoid confusion between his status as Petitioner in this court and his filing a petition in bankruptcy court.

ARGUMENT

A. Proceedings Below

On December 27, 2019, Keathley filed for relief under Chapter 13 of the Code in the United States Bankruptcy Court for the Eastern District of Arkansas (the "Arkansas Bankruptcy Court"). Keathley filed schedules of assets and liabilities with his bankruptcy petition. In April 2020, Keathley confirmed a Chapter 13 plan providing for 100% payment of his debts, without interest, over five years.

On August 23, 2021, Keathley was in an accident involving a truck operated by Respondent's employee. Keathley sued Respondent in a complaint filed December 29, 2021 in the United States District Court for the Northern District of Mississippi (the "Mississippi District Court"), superseded by a first amended complaint in December 2022.

Keathley filed a Modified Chapter 13 Plan on March 1, 2022 and two more Modified Chapter 13 Plans through June 27, 2022, resulting in court approval of a Modified Chapter 13 Plan on July 20, 2022.

In 2022, Keathley also sought and obtained the Arkansas Bankruptcy Court's approval of a workers' compensation settlement arising out of the same accident which gave rise to his lawsuit against Respondent.

At no time prior to 2023 did Keathley amend his schedule of assets to include his lawsuit against Respondent.

On March 30, 2023, Respondent filed a summary judgment motion to dismiss Keathley's lawsuit on the ground of judicial estoppel in that he had failed to amend his schedules to list the lawsuit as an asset.

Five days later, on April 4, 2023, Keathley amended his schedule of assets filed in the Arkansas Bankruptcy Court to disclose in his Chapter 13 case, for the first time, his lawsuit against Respondent.

Because Keathley amended his schedule of assets to include the lawsuit against Respondent only after Respondent moved for summary judgment, the Mississippi District Court granted Respondent's motion for summary judgment on the ground of judicial estoppel. *Keathley v. Buddy Ayers Construction Co.*, 686 F. Supp. 3d 495 (N.D. Miss. 2023).

The Mississippi District Court found that Keathley had effectively conceded that he was required to amend his schedules to disclose his lawsuit. *Keathley v. Buddy Ayers Construction Co.*, 686 F. Supp. 3d 495, 497 & n.1 (2023).

Keathley appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the Mississippi District Court's decision.

This Court granted Keathley's petition for certiorari to resolve a split in the circuits on the standard for applying judicial estoppel in cases where bankruptcy debtors have not disclosed assets that should have been included in the schedules they filed with the court.

B. While the Doctrine of Judicial Estoppel Clearly Applies to the Schedules Filed at the Outset of a Bankruptcy Case, Courts have Disagreed About Whether there is a Duty to Disclose Most Assets Acquired During a Chapter 13 Case.

There is no question that a bankruptcy debtor who has not disclosed assets that are required to be disclosed by the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure may be subject to judicial estoppel in a later lawsuit where the existence of the assets should have been disclosed but was not. The standard for applying judicial estoppel in such cases is the issue now before the Court.

Although the Courts of Appeals for the Fifth Circuit (from which this proceeding arose) and Eighth Circuit (where Keathley's bankruptcy case was filed) have both held that a Chapter 13 debtor must amend the bankruptcy schedules to disclose a cause of action accruing postpetition, courts in other circuits have disagreed, noting that neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure require such disclosure.

This Court need not, and should not, decide this issue. Keathley never argued that he had no duty to disclose the lawsuit and he has therefore waived the issue. If a debtor, with the requisite bad intent, hid assets that binding precedent required him to disclose, and did not challenge that precedent, judicial estoppel could apply regardless of whether that precedent was overturned in some later case.

1. Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure Require Disclosure of Postpetition Lawsuits.

A debtor filing a petition under any chapter of the Bankruptcy Code is required to file schedules of assets and liabilities within 14 days of the petition, unless the court orders otherwise. 11 U.S.C. § 521(a)(1)(B)(i); Federal Rule of Bankruptcy Procedure 1007(c).

Rule 1007(h) is the only rule requiring schedules to disclose property received ***after*** the petition date – and that rule applies only to the very limited types of postpetition property that become property of the estate under 11 U.S.C. § 541(a)(5) -- property the debtor receives within 180 days after the petition date through inheritance, divorce or under a life insurance policy.[4]

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[4] The exact language includes property the debtor acquires by bequest, devise or inheritance, under a property settlement agreement with the debtor's spouse or a divorce decree, or under a life insurance policy or death benefit plan. 11 U.S.C. § 541(a)(5).

Federal Rule of Bankruptcy Procedure 1009 shows that there is no general requirement to amend schedules to show property (such as a lawsuit) acquired post-petition.

Rule 1009(a) provides that the debtor ***may*** amend his schedules at any time before his case is closed; he ***must*** amend his schedules if the court so orders, but only on motion by a party in interest on notice to all creditors. The Advisory Committee Note to Rule 1009(a) states that the rule "***continues the permissive approach***" in previous rules, and goes further:

> The rule does not continue the provision permitting the court to order an amendment on its own initiative. ***Absent a request in some form by a party in interest, the court should not be involved in the administration of the estate***.

Finally, Rule 1007(b)(6) requires a Chapter 13 debtor to file a statement of "current monthly income" on Official Form 122C-1, and requires some Chapter 13 debtors to file Official Form 122C-2, Part 3 of which directs the debtor to report any known or virtually certain postpetition changes in income or expenses. Known or virtually certain postpetition income cannot include a future postpetition injury giving rise to a lawsuit.

And the sole reference to disclosure of postpetition events in the Bankruptcy Code, 11 U.S.C. § 521(f), is triggered only if there is a request

by the court, the United States trustee, or any party in interest. Moreover, it is limited to tax returns and statements of income and expenditures.

As the leading treatise observes, the Rules cannot be interpreted to require schedule amendments to reflect postpetition property, as such interpretation would require constant amendment every time the debtor acquired any postpetition property. COLLIER ON BANKRUPTCY ¶ 521.06[3][a] & n.54 (Richard Levin & Henry J. Sommer, eds. 16th ed.).

Notwithstanding the Code's and Rules' failure to require schedule amendments, the Fifth and Eighth Circuits have held that a Chapter 13 debtor must amend his schedules to disclose a post-confirmation lawsuit. *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 732 F.3d 428 (5th Cir. 2013); *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016). *Flugence* relied solely on precedents arising from failure to disclose assets existing on the petition date in the original schedules and the continuing obligation to correct schedules that omitted such assets. It also cited 11 U.S.C. § 1306(a), which makes property acquired after a Chapter 13 petition property of the Chapter 13 estate, but which does not require disclosure of such property. [5] Similarly, *Jones* relied on an earlier case that had involved causes of action that arose before the bankruptcy petition.

[5] Similar provisions apply to individual Chapter 11 cases and to Chapter 12 cases. 11 U.S.C. §§ 1115(a), 1207(a). The relevance of section 1306(a) is discussed below.

However, courts in other circuits have held that Chapter 13 debtors have no general obligation to disclose assets acquired postpetition, for the reasons stated above. *E.g., In re Poe*, 2022 Bankr. LEXIS 2338 (Bankr. N.D. Ohio Aug. 22, 2022); *In re Boyd*, 618 B.R. 133 (Bankr. D.S.C. 2020); *In re Denges*, 2020 Bankr. LEXIS 1155 (Bankr. D.N.J. Apr. 21, 2020).

Keathley did not challenge *Flugence's* holding below, in his petition for certiorari, or in his opening brief. Therefore, the issue is not before the court.

2. 11 U.S.C. § 1306(a)'s Definition of Property of the Estate Does Not Require Disclosure of Property Acquired Postpetition

In addition to relying on cases concerning assets of the debtor on the date of the petition, *Flugence* and some of the cases following it point to 11 U.S.C. § 1306(a), which includes in property of the Chapter 13 estate property that the debtor acquires during the Chapter 13 case. As Collier notes, "The primary purpose of sections 1207 and 1306 is to give the protection of section 362(a) [the automatic bankruptcy stay] to property acquired postpetition in order to ensure the debtor's ability to perform under a plan." COLLIER ON BANKRUPTCY ¶ 1007.08.

Because the property of the estate under section 1306(a) can change literally every day, as the debtor receives income, purchases and uses food and other items, if there were some duty to disclose such property, surely the Bankruptcy Rules or Official

Bankruptcy Forms would give guidance about what types of property are required to be disclosed and how substantial the value of property must be to require disclosure. The rules and forms do not contain even a hint about such questions.[6]

Moreover, any reliance on section 1306(a) ignores the fact that in most cases property of the estate revests in the debtor upon confirmation of a Chapter 13 plan. 11 U.S.C. § 1327(b) and (c) provide:

- **(b)** Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
- **(c)** Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

Courts do not agree on the consequences of vesting of property under these provisions. A recent decision noted that there are no fewer than five different approaches to the issue. *In re Rych*, 2025

[6] In fact, the Advisory Committee on Bankruptcy Rules recently considered an amendment that would simply have authorized local rules on disclosing postpetition property and rejected the idea, in part because "it may be seen as endorsing a requirement not imposed by the Code and that's the subject of conflicting case law. . ." Bankruptcy Rules Advisory Committee Minutes of Meeting of April 3, 2025, p.13.

Bankr. LEXIS 2400 at *18 (Bankr. D. Idaho Sep. 24, 2025). Under the approach adopted by the Court of Appeals for the Ninth Circuit, the *Rych* court held that a cause of action that arose after confirmation of Chapter 13 plan was not property of the Chapter 13 estate because property of the estate had revested in the debtor.[7]

Thus, any court looking to 11 U.S.C. § 1306 to determine whether property acquired postpetition must be disclosed would have to determine whether property of the estate has revested in the debtor upon confirmation, what that revesting means with respect to assets acquired after confirmation, and whether revesting makes a difference in deciding whether such property must be disclosed. The existence of all these issues is all the more reason for this Court to avoid addressing the question of whether Chapter 13 debtors have a general obligation to disclose assets acquired after the bankruptcy petition is filed.

CONCLUSION

Amici therefore respectfully request that the Court rule on only the narrow issue presented in this case: The standard for applying the doctrine of judicial estoppel. The Court should decline to make any statement concerning whether Chapter 13 debtors have a general duty to disclose assets acquired after the filing of the bankruptcy petition,

[7] A Chapter 13 plan may provide that estate property does not vest in the debtor upon plan confirmation. Keathley's plan so provided.

except to acknowledge that it is an open question not decided in this case.

Dated: December 19, 2025

Respectfully submitted,

JAMES J. HALLER
Counsel of Record
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
586 N. First Street #202
San Jose, CA 95112
Phone: 618-420-1568
jhaller@ncbrc.org

Counsel for Amici Curiae
National Consumer Bankruptcy Rights Center, National Consumer Law Center and National Association of Consumer Bankruptcy Attorneys