BANKRUPTCY AND ITS EFFECT ON PROPERTY CLAIM FILES

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I. OVERVIEW OF TOPIC

Whether or not an insurance claimant has filed for bankruptcy protection is an important, and often overlooked, aspect of property claim investigations, particularly claims involving theft and fire losses. The bankruptcy trustee is neither named in a policy of insurance as a loss payee, nor do insureds often volunteer the existence of a bankruptcy filing during the presentation of a claim. However, ignoring the existence of past or pending bankruptcy proceedings can deprive the claim representative or investigator of material information regarding the insured's assets, ownership and value of claimed property, and can possibly result in double exposure on a claim if the bankruptcy trustee is not included on a settlement check as an additional payee.

In addition, examining a plaintiff's bankruptcy background is a useful defense tool for litigation. If a plaintiff files for example a personal injury suit, before or during an open bankruptcy, they may not be the real party in interest to receive any settlements or proceeds awarded from a lawsuit. If they failed to disclose a suit or claim in a bankruptcy, they may be judicially estopped from recovering, and only the trustee would be entitled to the proceeds, applying them to the bankruptcy estate.

This presentation will explore the different types of bankruptcy protection ordinarily sought by insureds, the relevant bankruptcy forms submitted by an insured/debtor which are relevant to a claim investigation, selected portions of the bankruptcy code, the extent of a bankruptcy trustee's interest in an insurance claim, and provide recommendations regarding how the information an insured/debtor submits to the bankruptcy court can be used to assist in a claim investigation and make a determination as to how much, and whom to pay.

II. DIFFERENCE BETWEEN CHAPTER 7 AND CHAPTER 13 BANKRUPTCY FILINGS

Not all bankruptcy filings are the same. The type of bankruptcy filing may have a significant impact on the level of interest the bankruptcy trustee has in the claim. In a bankruptcy brought under Chapter 7 of the Code, the debtor seeks a complete discharge of his or her financial obligations to creditors. In a Chapter 13 bankruptcy, the debtor seeks to establish a payment plan to consolidate debts and discharge them through payments made, usually monthly, over a period of often several years under a Court-approved plan. A Chapter 7 Trustee will often take more interest in pursuing claims of a debtor than a Chapter 13 Trustee.

III. DUTIES OF DEBTOR AND TRUSTEE

In either type of filing, debtors have obligations and restrictions imposed upon them by the bankruptcy court in return for seeking the bankruptcy court's protection. These obligations include the duty to truthfully and accurately report all debts, assets and liabilities, including personal property under penalty of perjury. 11 U.S.C. Section 521. With only a few exceptions, the "property of the estate" which must be disclosed includes "all legal or equitable interests of the debtor and property as of the commencement of the case." 11 U.S.C. Section 541 (a) (1).

In a Chapter 7 proceeding, the trustee has specific duties which include, but are not limited to, collecting and reducing to money the property of the estate and to "close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. Section 704 (a). The trustee also has the power to "investigate the financial affairs of the debtor; if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper; and even oppose the discharge of the debtor." Id.

The debtor must list any suits or claims in the appropriate section of the Bankruptcy Schedules. It is insufficient for a debtor to list an insurance claim or lawsuit under the Statement of Financial Affairs as courts have determined that it is not scheduled properly as defined by § 554(c) under § 521(1). McGlone v. Blaha, 2000 WL 1725423 (Ohio App. 4th Dist.).

The following case demonstrates how a defense can argue a plaintiff is not the real party in interest when they fail to properly list a lawsuit on their bankruptcy schedules:

Troy Doucet filed a complaint against Telhio Credit Union in June of 2004. The trial court dismissed Mr. Doucet's lawsuit in March of 2005, and Mr. Doucet appealed. Meanwhile, Mr. Doucet filed for bankruptcy in October of 2005. Mr. Doucet listed the appeal in his statement of financial affairs but not on his bankruptcy schedules. In December of 2005, the bankruptcy trustee filed a Report of No Distribution indicating there was no property available for distribution to creditors. The defense argued that Mr. Doucet was not the real party in interest as the appeal belonged to the bankruptcy trustee who did not seek to be substituted as a party. Mr. Doucet argued the trustee abandoned the appeal when he filed the Report of No Distribution. The appellate court held the trustee did not abandon the appeal because the appeal was not properly scheduled in the bankruptcy petition as Mr. Doucet only disclosed the appeal in his statement of financial affairs. The Court dismissed Mr. Doucet's appeal deciding "the threshold issue was not whether to apply an estoppel but whether Doucet was the real party in interest." Doucet v. Telhio Credit Union, 2006 WL 2411533 (Ohio App. 10th Dist.). The failure of a debtor to disclose a claim or lawsuit on the proper bankruptcy form can prevent them from bringing suit in their own name even if the trustee has abandoned the suit.

IV. BANKRUPTCY FORMS

In a bankruptcy proceeding, the debtor must submit certain forms which contain valuable information for the claim representative or investigator. The forms submitted by the debtor are a matter of public record and are available at the United States Bankruptcy Court clerk's office or online through Public Access to Court Electronic Records (PACER). At a minimum, the following forms submitted by the debtor should be reviewed:

1. Bankruptcy Petition (Appendix A). The Bankruptcy Petition will indicate the Court, name and address of the debtor, the type of bankruptcy filing (under which Chapter of the Bankruptcy Code), the type of debtor (individual, corporate, partnership or other), as well as pertinent financial information including the estimated numbers of creditors, estimated assets and estimated debts.

2. Bankruptcy Schedules:

Schedule A – Real Property (Appendix B). The debtor must disclose all real property in which the debtor has any legal, equitable, or future interests, including all property owned as a co-tenant, community property or in which the debtor has a life estate. If an entity claims to have a lien or hold a secured interest in any property, the amount of the secured claim must be stated. Unliquidated personal injury actions as well as claims for emotional distress are considered "property" of the bankruptcy estate. This is the proper schedule for listing any insurance claims or lawsuits.

Schedule B – Personal Property (Appendix C). The debtor must also list all personal property of the debtor at the time of the bankruptcy filing "of whatever kind." This property schedule is particularly useful regarding claims for stolen personal property or items claimed lost in a fire, because the schedules contain specific types of property in several categories including: cash on hand, checking, savings or other financial accounts, household goods and furnishings, including audio, video and computer equipment, books, pictures and other art work, wearing apparel, furs and jewelry, firearms, sports/hobby equipment, interest in insurance policies, investment accounts, alimony, automobiles, watercraft, machinery, inventory, animals, even crops and farm supplies. The description and location of the property, the "current value of debtor's interest in property," whether the property is owned by the husband, wife, joint or community property must be included.

3. Declaration Concerning Debtor's Schedules (Appendix D). Each debtor must sign and date a declaration regarding the debtor's schedules indicating "I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of [number of sheets] and they are true and correct to the best of my knowledge, information and belief."

4. Proof of Claim (Appendix E). A timely proof of claim must be filed for creditors who were properly notified of the bankruptcy, or who have actual knowledge of the bankruptcy proceedings, in order for the creditor to protect their interests in the claim. It is important to keep in mind if an insurer believes they have a cause of action for fraud against an insurance claimant or a counterclaim against a debtor, these claims could be lost without the timely filing of a proof of claim and possibly filing of a complaint for non-dischargeability (to declare the debt non-dischargeable). It is also important to remember if any claims against the debtor or cases are pending in State Court, an automatic stay of those proceedings goes into effect when the debtor files for bankruptcy, and the stay will remain in effect unless lifted by the bankruptcy Court. 11 U.S.C. 362.

In 2005, the Bankruptcy Abuse Prevention & Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005) amended schedules A, B, C and D to delete the word "market" from the columns in which the debtor reports the value of various kinds of property. Amendments to § 506 of the Code enacted in 2005 specify that "replacement value" must be used in connection with certain property. The schedules no longer specify "market" value. Deletion of the word "market" from the determinations of value to be made by the debtor on the schedules is intended to remove any inference about choice of valuation standard. This deletion simply indicates that

the form takes no position on which Code provision or valuation standard may be applicable in any instance. (2005 Committee Notes).

V. WHO "OWNS" THE INSURANCE CLAIM OR LAWSUIT WHILE A BANKRUPTCY IS PENDING?

Property of a bankruptcy estate, including insurance claims and suits for personal injury, that are not administered and not abandoned by the trustee remain property of the estate. The discharge of a trustee and closing of a bankruptcy case does not have the effect of revesting in the debtor the right to undiscovered assets that should have been applied to unpaid debts. McGlone v. Blaha, 2000 WL 1725423 (Ohio App. 4th Dist.) A debtor may be the real party in interest and ultimately the sole payee of an insurance claim or settlement only if the property has been abandoned by the trustee. A party seeking to demonstrate abandonment bears the burden of persuading the Court that the Trustee intended to abandon the property. McLynas v. Karr, Franklin App. No. 03AP-1075, 2004-Ohio-3597, at ¶ 14. If the claim or suit has not been abandoned by the trustee, it remains property of the bankruptcy estate.

Abandonment of property in a bankruptcy estate is governed by § 554 of Title XI of the U.S. Code. Under this section, property may be abandoned in three ways: (a) after a notice and hearing, the trustee may abandon a property that is burdensome to the estate or is of inconsequential value and benefit; (b) on a request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or is of inconsequential value and benefit; or (c) unless the court orders otherwise, any property scheduled under § 521(1) of this title not otherwise administered at the time of the closing of the case is abandoned to the debtor and administrated for the purposes of § 350 of this Title. Unless a trustee has abandoned a claim or suit as outlined above, the debtor is not the real party of interest.

The following case illustrates how a trustee may bring suit on behalf of the bankruptcy estate when the plaintiffs themselves are estopped from doing so:

In January of 1999, Vicki Parker filed a complaint against Wendy's, alleging racial discrimination. In February of 2001, the Parker's filed a Chapter 7 Bankruptcy Petition. The Parker's did not list the discrimination suit on their bankruptcy schedules as an asset. The bankruptcy was discharged in May of 2001. The Parker's attorney in the lawsuit notified the trustee that he would need to reopen the bankruptcy in order to properly disclose the suit. The trustee motioned to intervene or substitute as the real party of interest in the case. The district court denied the trustee's motion applying judicial estoppel to dismiss Parker's complaint with prejudice because she had taken an inconsistent position in her bankruptcy proceeding.

The Court of Appeals reversed, holding that the trustee was not judicially estopped because he had not taken an inconsistent position in the bankruptcy and had not abandoned the claim. They ultimately allowed the trustee to bring suit as the real party of interest. Parker is an example of both the argument that a plaintiff is not the real party of interest and the court's

application of judicial estoppel to prevent a plaintiff from recovering proceeds in a suit which he or she failed to disclose in a bankruptcy.

Unlike the insured or a loss payee/mortgagee, the bankruptcy trustee is not a party to the insurance contract in any respect. However, if the insured has a pending property insurance claim and seeks the protection of the bankruptcy court, questions arise. Who is the party with which to correspond regarding the insurance claim? Who should be the proper party to present the claim? Who should be included on any settlement check?

The answer to these questions may depend upon the type of bankruptcy proceeding. The 6th Circuit Federal Court of Appeals, which includes Ohio, Kentucky, Tennessee, and Michigan, has held the bankruptcy trustee has standing to bring a lawsuit on its behalf to pursue the claim in a Chapter 7 proceeding.

In Stevenson v. J.C. Bradford & Co. (In re Canon III), 277 F.3d 838 (6th Cir. 2002), the Court held in a Chapter 7 proceeding the trustee stands in the shoes of the debtor and has standing to bring any action that the bankrupt could have brought had he not filed a Petition for Bankruptcy. The 6th Circuit has not ruled upon whether the trustee in a Chapter 13 bankruptcy has standing to pursue a cause of action. Aziz v. Dollar Tree Stores, Inc., 2005 W.L. 2290593 (E.D.Tenn.). Although the 6th Circuit has not decided that issue, other jurisdictions also recognize the trustee's ability to pursue an action in Chapter 7 and Chapter 13 proceedings.

In the case of In re Sandell, a Florida bankruptcy court allowed the trustee to recover the value of jewelry the debtor owned on the bankruptcy petition date, notwithstanding a finding its insured breached the concealment or fraud provision of the insurance policy thereby voiding her entitlement to coverage. Westfield Insurance Company petitioned the bankruptcy court to reopen an insured's Chapter 7 bankruptcy when it discovered the insured did not disclose several items of jewelry she was now claiming in a theft loss. Ms. Sandell listed a $40 value in jewelry on her bankruptcy schedule and two years later submitted a jewelry claim to her insurer for $39,268. Westfield sought a declaratory judgment from the bankruptcy court as to whether it was obligated to pay the claim and if so, whether the debtor or the trustee was the proper payee. The court concluded Ms. Sandell concealed from Westfield the true owner of the jewelry and breached the concealment or fraud provision of the insurance policy therefore voiding her entitlement to coverage. However, the trustee was entitled to recover from Westfield the value of the jewelry the debtor owned on the bankruptcy petition date. In re Sandell, 2005 WL 1429746 (Bankr.M.D.Fla.).

The Southern District of Ohio has recognized the bankruptcy trustee's power to sue an insured and a lien holder after the insured failed to disclose a vehicle theft claim to her bankruptcy trustee. In Wampler v. Booher (In re Booher), Ms. Booher filed for bankruptcy in 1979 and a week later submitted a vehicle theft claim to Auto-Owners Mutual Insurance Company. Auto Owners paid the claim to Booher and City Loan & Savings, who held a security interest in the vehicle. Booher did not inform her bankruptcy trustee of the insurance transaction. Upon the trustee discovering the claim, the trustee filed an adversary complaint in the Bankruptcy Court against Booher and City Loan & Savings for the insurance proceeds. The Bankruptcy Court for the Southern District of Ohio entered a judgment for the trustee against Booher and denied the trustee's claim against City Loan & Savings. The trustee did not seek

relief against Auto Owners and the court did not address their role in the transaction. Wampler v. Booher (In re Booher), 5 B.R. 254 (Bankr.S.D.Oh. 1980).

The bankruptcy court for the Western District of Kentucky recognized the trustee's power to pursue a claim for total fire loss, after the insured's claim was denied. In Flener v. Pacific Indemnity Insurance Co., the trustee filed an adversary complaint against Pacific Indemnity in the pending bankruptcy action, after Pacific Indemnity denied the Millers' claim for a total fire loss. The claim was denied based on evidence that Mr. Miller or someone on his behalf set the fire and material inaccuracies in the insurance application, including the failure to disclose past claims. After trial in the Bankruptcy Court, the Court found in favor of the trustee in the amount of $607,771.89. The trustee apparently had standing to pursue the claim of its debtor, post-denial. Flener v. Pacific Indemnity Insurance Co. (In re Miller), 267 B.R. 785 (Bankr.W.D.Ky. 2000).

These cases demonstrate a trustee's interest in a property insurance claim should not be ignored, whether the bankruptcy was filed before, during or after the claim was submitted to the insurer.

VI. WHO "PRESENTS" THE CLAIM?

If the bankruptcy trustee has the power to pursue the claim for insurance proceeds, and even a lawsuit upon denial of the claim, who is the proper party to submit the Sworn Statement in Proof of Loss, and submit to an examination under oath pursuant to the terms of the insurance policy? While the insureds have a duty to cooperate with a claim investigation, arguably the trustee must present the claim, while a bankruptcy is pending.

Whether it is the insured bringing suit or a suit is brought against an insured, if the plaintiff does so before filing bankruptcy or while the bankruptcy is pending and the trustee is not listed as a plaintiff, defense can argue the plaintiff is not the real party in interest. The following case demonstrates how a defense won a motion for summary judgment by arguing a personal injury action was not brought by the real party of interest.

In June of 1995, Mrs. McGlone and Ms. Blaha were involved in an automobile accident. The McGlones filed for and received Chapter 7 bankruptcy prior to filing a complaint against Ms. Blaha. The McGlones failed to list their claim against Ms. Blaha on their bankruptcy schedules but did make a statement on their current income schedule regarding the accident. The bankruptcy trustee admitted that although he was aware of the claim, he did not request the McGlones submit an amended schedule because he determined not to pursue the claim. The defense filed a motion to dismiss under Civ. R. 17(A) which requires that a lawsuit be filed by the real party in interest. The McGlones argued the personal injury claim had been abandoned by the trustee and they were legally entitled to pursue the claim. The trial court granted the defendant's motion for summary judgment and motion to dismiss. The McGlone's appealed. The Court of Appeals affirmed finding the McGlones did not properly schedule the personal injury claim in the bankruptcy petition. Because the suit was not properly scheduled, the claim could not be abandoned by the trustee. McGlone v. Blaha, 2000 WL 1725423 (Ohio App. 4 District).

A plaintiff may attempt to amend the complaint to add the trustee as a party to the suit. If a bankruptcy petitioner files a personal injury action within the statute of limitations, and then an amended complaint is filed naming the trustee as a plaintiff after the statute of limitations has expired, the amended complaint relates back to the filing date of the complaint filed by the bankruptcy petitioner, and the action by the trustee has been timely commenced. Young v. IBP, 124 Ohio Misc.2d 31 (2003).

Can the trustee be compelled to submit to an examination under oath and produce documents relative to the financial interests of the debtors/insureds? If a trustee is to claim the benefit of policy proceeds, should not the trustee have a duty to cooperate with the investigation as a condition precedent? At a minimum, the trustee should be notified that the insurance claim is pending and be provided the opportunity to either participate in submitting a claim, or decline in writing its intent to pursue the claim giving the debtors the opportunity to pursue the claim outside of the bankruptcy proceedings.

VII. WHOM DO YOU PAY?

Even if the trustee disclaims any participation in the presentation of the insurance claim, the trustee's name may need to be included on the settlement check as an additional payee. This can become especially important when multiple parties have an interest in the insurance policy proceeds, such as a mortgagee or lien holder, who may be a creditor in the bankruptcy.

For example, in In re Alexander, the debtors filed a motion in the United States Bankruptcy Court for the Southern District of Ohio to collect money paid to a creditor by an insurance company. In 1976, the Alexander's borrowed $2,815.82 from Beneficial Finance Company of Ohio and at the same time executed a security agreement requiring them to maintain insurance on the household goods used as collateral and named Beneficial as the loss payee. In 1979, the household goods were damaged in a flood and the Alexander's submitted a claim to the American Bankers Insurance Company of Florida. In 1980, the Alexander's filed a Chapter 13 petition in bankruptcy. At the meeting of creditors, Beneficial did not assert any security interest in the insurance proceeds accepting a $500 valuation set by the bankruptcy court. The insurance company paid the claim to Beneficial as the loss payee named on the policy. Beneficial then applied a portion of the proceeds to the debt owed them and paid the remainder to the debtors. The bankruptcy court held the Chapter 13 plan made Beneficial subject to the automatic stay provision prohibiting it from holding money owed to it by the Alexander's. In addition, the check from the insurance company was not transferred pursuant to the Plan and was therefore, an unauthorized, post-petition transfer of property of the estate. Beneficial was ordered to pay the debtors the amount of the insurance proceeds they retained to set off the Alexanders' account. In re Alexander, 11 B.R. 313, (Bankr. S.D.Oh. 1981). Accordingly, it is best to, at a minimum, check with the trustee prior to issuing any payment, and get the trustee's position in writing.

Even if the bankruptcy has been discharged, it is possible to petition the bankruptcy court to reopen a debtor's case. After an estate is fully administered and the court has discharged the trustee, the court shall close the case. The case may be reopened in the court in which the case

was closed to administer assets, to afford relief to the debtor or for "other cause," pursuant to 11 U.S.C. Section 350. A decision to reopen a bankruptcy case is within the sound discretion of the bankruptcy judge. Id. at Section 350 (b). Motions to reopen bankruptcy cases are decided on a case by case basis and on the merits of each individual case. Id. The insurer should consider before filing such a petition whether it would be beneficial or necessary to involve the trustee after the trustee's duties have been discharged. Stated differently, will reopening the bankruptcy proceedings "open a whole new can of worms?"

VIII. WHAT DO YOU OWE?

The type and value of personal property items claimed on the bankruptcy schedules may significantly affect the amount which is owed on a theft or fire claim for personal property loss. If a debtor fails to disclose items of personal property on bankruptcy schedules, or discloses property at a different value, the 6th Circuit has held the insured is estopped from presenting claims for non-disclosed or undervalued items to their insurer.

In Smith v. Fireman's Fund Insurance Co., in their 1984 Chapter 7 bankruptcy petition, the Smith's claimed the total value of their personal possessions were $4,010. In 1990, the Smiths presented a claim under an insurance policy for fire loss claiming $21,384.67 in losses to personal possessions purchased prior to 1984 on contents inventory sheets submitted to Fireman's Fund. In addition, the Smith's failed to disclose an alleged briefcase of cash in the petition. The court held the insured was judicially estopped from recovering under the insurance policy any assets they failed to disclose, constituting material omissions, on their bankruptcy schedules. Smith v. Fireman's Fund Insurance Co., No. 92-6540 (6th Cir. 1994).

It is therefore important to review carefully the items and values disclosed on the bankruptcy property schedules and compare them to the contents inventory sheets with particular attention to the dates of purchase and purchase price (if applicable).

The Smith court also upheld the trial court's decision that the insured's commission of fraud in the presentation of the claim voided the policy. While not every discrepancy between a debtor's property schedules and contents inventory sheets would constitute fraud sufficient to void a policy of insurance, the Court may hold the debtor to the items and values of those items which are listed on the property schedule by the debtors under penalty of perjury.
Ohio, Kentucky and Tennessee codes set forth the amount of personal property debtors may claim as exempt. Exempted property does not become part of the bankruptcy estate if the bankruptcy petitioner properly claims the exemption and the trustee does not dispute the exemption.

In Ohio, for example, a debtor may claim exemptions of up to $5,000 in real or personal property used as a residence, up to $1,000 in one motor vehicle, up to $200 for each item of wearing apparel and bedding, up to $300 each in one cooking unit and one refrigerator, up to $400 in cash on hand, up to $400 in one item of jewelry, and up to $200 each for various items such as furnishings, appliances, and firearms. $5,000 collected because of the right to sue for

personal injuries is exempted from the estate of an Ohio bankruptcy petitioner. For a complete list of exemptions, see R.C. § 2329.66 (Appendix F).

In Kentucky, a debtor may claim exemptions for all household furnishings, jewelry, personal clothing and ornaments not to exceed $3,000, tools, equipment and livestock not to exceed $3,000, and one motor vehicle and its accessories not to exceed $2,500. See KRS § 427.010 (Appendix G).

In Tennessee, a debtor may claim exemptions for personal property, including bank funds, not to exceed $4,000. See T.C.A. § 26-2-103 (Appendix H). The exemptions are important in that the insured, rather than the trustee, may be entitled to insurance proceeds for items properly claimed as exempt on the bankruptcy petition.

In re Taylor is an example. The Taylors filed a bankruptcy claiming various items of personal property were exempt. Shortly after the filing, the personal property was destroyed by a fire. The trustee then claimed an interest in the proceeds of the insurance settlement and the debtors argued the destroyed property was exempt and that payment under the insurance policy was a replacement for those items. The bankruptcy court found that each item properly claimed as exempt was protected by the debtors' insurable interest, which is only limited by the maximum dollar amount found in the exemption statute, Ohio Revised Code 2329.66. The court determined the insured was entitled to recover the maximum allowed for each claimed exemption. Where the statute did not address items such as clothes and bedding, the two hundred dollar maximum set forth in the bankruptcy code applied. The exemptions applied to each debtor where items were jointly owned. Because further evidence was required to determine the amount allowed for each item, the court set a hearing to determine the amount the insured was entitled to collect from the insurance company. In re Taylor, 23 B.R. 539, (Bankr. S.D.Oh. 1982).

Other jurisdictions have issued similar rulings. In Security Ins. Co. v. Machevsky, Mr. Machevsky filed for Chapter 7 bankruptcy in 1999 but did not disclose his possession of valuable artwork on the bankruptcy schedules. One year after the bankruptcy was discharged, Machevsky submitted an insurance claim for $587,700 in stolen artwork. The United States Court of Appeals applied judicial estoppel citing the debtor's position in his bankruptcy schedules was inconsistent with his position taken in the insurance claim. Security Insurance Co. of Hartford v. Machevsky, 81 Fed.Appx. 241 (9th Cir. 2003).

When comparing contents inventory forms to the schedules in the bankruptcy proceeding, the dates of purchase of the claimed contents are important. Items allegedly purchased prior to the bankruptcy, but not disclosed on the bankruptcy schedules are arguably precluded from coverage under Smith. But what if the purchase date for the contents is after the filing date of the bankruptcy schedules? The insurer must look to the language of each particular insurance policy to determine whether it is appropriate to request proof of ownership and value of these claimed items. Under many insurance policies, we have successfully requested on behalf of insurers the claimants submit receipts, cancelled checks, invoices, manuals, photographs or other documentation to show ownership and the value of claimed property.

If evidence shows the discrepancy between claimed property and that which can be proven as owned rises above what Ohio courts describe as "mere over-estimation, negligent or inadvertent misstatements as to the extent of loss" this may provide a reasonable basis for denial of a claim pursuant to a concealment or fraud provision in the policy of insurance. Michael v. Security Ins. Co. (1908), 18 Ohio Dec. 530. Such cases are highly fact sensitive and depend significantly upon the terms and conditions of the insurance policy.

IX. CONCLUSION

The existence of a bankruptcy proceeding can provide useful information and unique challenges to the claim representative and investigator of property insurance claims. Bankruptcy schedules submitted under penalty of perjury by the debtor hold valuable information regarding the insured/debtor's ownership and value of real and personal property at the time of the bankruptcy filing. This information provides a "snapshot" of the debtor's financial condition.

Regardless of whether the bankruptcy filing is a Chapter 7 or Chapter 13 proceeding, the trustee's interest in the insurance claim or insurance proceeds must not be ignored. Proper communication, in writing, should be made with the trustee to document its level of interest in the claim, whether it will permit the insured to proceed with the claim individually and to what extent the trustee desires to allocate and receive insurance proceeds are important considerations for the claim representative. This is true for suits brought against an insurer and suits brought against an insured as well. If a plaintiff files suit before or during an open bankruptcy, they may not be the real party in interest to receive any settlements or proceeds awarded from a lawsuit. If they failed to disclose a suit or claim in a bankruptcy, they may be judicially estopped from recovering.

So what are some practical steps to consider when a bankruptcy is revealed?

1. Obtain the bankruptcy petition and schedules.

2. Compare the claim contents sheets to the bankruptcy property schedules, paying close attention not only to the claimed value of items, but the purchase dates of items.

3. Notify the trustee of the claim.

4. Include the bankruptcy trustee as an additional payee on any settlement checks.