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Invoking Judicial Estoppel to Secure Dismissal

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One of the most potent arguments available to a defense litigator is rarely investigated and often overlooked: the doctrine of judicial estoppel. Recognized in Pennsylvania and New Jersey, along with the majority of state and federal jurisdictions throughout the country, judicial estoppel precludes a party from taking a position in a case that is contrary to a position maintained in a prior legal proceeding.

For defense and plaintiffs counsel in personal injury cases, it is crucial to understand the instances in which a defendant can invoke judicial estoppel to seek dismissal of a plaintiff's lawsuit. In particular, a plaintiff's failure to identify a potential cause of action in bankruptcy filings can result in a subsequent lawsuit being dismissed by the court—regardless of the defendant's liability.

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UNDERSTANDING THE DOCTRINE

Attempting to dismiss a case based upon facts otherwise unrelated to the litigation at hand may seem unfair to a plaintiff who believes he or she was wronged. Key to the doctrine, however, is that it is entirely based upon the actions of the plaintiff and has no relation to the culpability of the defendant seeking its relief. Rather, it depends "on the relationship of one party to one or more tribunals," as the court held in *Sunbeam v. Liberty Mutual Insurance*, 566 Pa. 494 (2001).

As explained by the New Jersey Supreme Court in *Ali v. Rutgers*, 166 N.J. 280, 288 (2000), the sole purpose of the doctrine of judicial estoppel is to protect the integrity of the judicial process. This threat is most apparent in the context of litigation following a discharge in bankruptcy. The U.S. Court of Appeals for the Fifth Circuit's holding in *In re Superior Crewboats*, 374 F.3d 330 (5th Cir. 2004), addressed this issue head-on when it found that in these scenarios, the doctrine is invoked to prevent legal maneuvering by debtor-plaintiffs seeking "to have their cake and eat it too, as they retain the enormous benefit of a bankruptcy discharge while standing in line to receive funds from the injury lawsuit after the creditors are paid." The U.S. Supreme Court also acknowledged the importance

of this doctrine in *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001), where it held that judicial estoppel is used to "prevent the perversion of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment."

In the context of civil litigation, bankruptcy filings have proven to be the most common basis for invoking judicial estoppel due to the nature of their proceedings. A debtor will often fail to list their right to pursue litigation as an asset. The Bankruptcy Code requires an individual or corporation seeking bankruptcy protection to disclose any interest in present or future litigation on Schedule B, or claim an exemption on Schedule C. If listed on Schedule B, this interest becomes property of the estate and is handled by the trustee. Any nonexempt proceeds from settlement or verdict go to pay creditors first. For this reason, debtors have a motive to not disclose a right to a claim or lawsuit.

INVOKING JUDICIAL ESTOPPEL

For a defendant to invoke judicial estoppel in a subsequent proceeding, they must meet three criteria under both Third Circuit and Pennsylvania state law. First, the plaintiff "must have taken two positions that are irreconcilably inconsistent," as explained by the Third Circuit in *In re Kane*, 628 F.3d 631, 638 (3d Cir. 2010). Next, the defense must show the plaintiff changed his or her position in bad faith. Finally, the defense arguing for a dismissal under this theory must demonstrate that such a result is tailored to address the harm from these inconsistent positions, with no lesser sanction available to adequately remedy the damage done by the litigant's misconduct. (As discussed below, New Jersey state law follows these same criteria with one notable exception.)

For judicial estoppel purposes, successful maintenance of a position requires only "that the party was allowed by the court to maintain its position," and not that the "party prevailed in the underlying action," as the court held in *Cummings v. Bahr*, 295 N.J. Super. 374, 387 (App. Div. 1996). In other words, the doctrine holds that the inconsistent positions must be assertions of fact—alternative legal theories do not form the basis for dismissal under this doctrine. The Third Circuit in *Ryan Operations GP v. Santiam-Midwest Lumber*, 81 F.3d 355, 361 (3d Cir. 1996), clarifies that "whether the party ... benefited from its earlier position or was motivated to seek such a benefit may be relevant insofar as it evidences an intent to play fast and loose with the courts. It is not, however, an independent requirement for application of the doctrine of judicial estoppel."

Regarding the second element, "a rebuttable inference of bad faith arises when averments in the pleadings demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose," as held by the Third Circuit in *In re Krystal Cadillac-Oldsmobile GMC Truck*, 337 F.3d 314, 321 (3d Cir. 2001). Unlike the Third Circuit and Pennsylvania, however, courts applying New Jersey law do not require a finding of bad faith.

The third and most difficult element that a defendant must prove to dismiss a plaintiff's complaint based upon the doctrine of judicial estoppel is that dismissal is appropriately tailored to the harm caused by the plaintiff's inconsistent positions and that no lesser sanction is appropriate. Unfortunately, state and federal courts in both Pennsylvania and New Jersey have not set forth a bright-line rule for when the doctrine of judicial estoppel should be applied. Instead, one must apply a totality of the circumstances approach to determine whether the plaintiff's actions rose to such a level that allowing a subsequent litigation to proceed despite prior inconsistent representations would damage the integrity of the court.

As it pertains to the third element, a plaintiff facing dismissal of his or her complaint based upon a failure to disclose the interest in litigation in a prior bankruptcy proceeding is likely to argue that a more appropriate remedy than dismissal is to reopen the bankruptcy. While this is certainly a colorable argument under some circumstances, one must remember that the purpose of judicial estoppel is to prevent litigants from playing fast and loose with the courts depending on their changing circumstances. As stated by the Eleventh Circuit in *Burns v. Pemco Aeroplex*, 291 F.3d 1282 (11th Cir. 2002), "allowing a debtor to back up, reopen the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them."

As should be clear from the above, seeking dismissal of a plaintiff's complaint under the doctrine of judicial estoppel is an extremely case-specific endeavor and will depend highly on the handling judge's view of the plaintiff's actions and intentions in making his or her representations. Despite the challenges posed by the lack of a bright-line rule on this doctrine, defense attorneys must be aware and on the lookout for situations that could give rise to this powerful weapon as they proceed through discovery. •