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The Doctrine of Judicial Estoppel

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The doctrine of judicial estoppel is not on some lawyers' radar screens. That's regrettable. Not anticipating application of the rule, a person may make a claim that can hurt him or her in the long run. Or, unaware of the rule, a party may fail to assert a potentially successful defense. Or, having only a very general awareness of the rule, an attorney may miss subtleties or forum variations that are the difference between winning and losing.

This article has three parts. Part I describes the doctrine of judicial estoppel, emphasizing its purposes. Part II explores two recent judicial estoppel decisions of the United States Supreme Court: *Cleveland v. Policy Management Systems Corp.*[1] and *New Hampshire v. Maine.*[2] Finally, Part III surveys the great variations that have existed in formulations of the doctrine.

The Nature and Origin of the Doctrine

Law and equity have developed numerous doctrines of preclusion. Some are familiar and frequently invoked, such as equitable estoppel,[3] collateral estoppel, res judicata, and the concept of judicial admissions (under which a statement by a party or counsel is treated as conclusively establishing a matter, obviating the need for proof).[4] Others are somewhat less well known, for example the doctrine of election,[5] various rules of waiver, the duty of consistency (in tax),[7] and — our subject — judicial estoppel.

Broadly put, the doctrine of judicial estoppel prevents a person from asserting claims, defenses, or positions that are inconsistent with claims, defenses, or positions, which that person asserted in a prior proceeding. The doctrine can be used either offensively or defensively.

It is widely agreed that the doctrine was first applied in 1857 by the Supreme Court of Tennessee in *Hamilton v. Zimmerman.*[8] In that case, Hamilton asserted that he was Zimmerman's partner in a store while Zimmerman claimed that Hamilton was only a clerk in the store. Pleadings were introduced from an earlier court case in which Hamilton stated that allegations describing him as a clerk in the store were "substantially true." The Tennessee Supreme Court held that such statements in the earlier case estopped Hamilton from maintaining in the second case that he was a partner.

The rationales advanced for the various doctrines of preclusion advert sometimes to protection of the judicial process and other times to achieving fairness between the parties. The first of these traditionally has preponderated in justification of judicial estoppel. The *Hamilton v. Zimmerman* court premised the rule of preclusion on the need to protect the sanctity of the oath administered to witnesses and

to safeguard the judicial system from abuse and loss of public esteem.[9] Later decisions have spoken of preservation of judicial integrity and avoiding "unseemliness,"[10] of rejecting an "affront to judicial dignity,"[11] and of avoiding repetitious litigation and protecting "justifiable reliance on opposing parties' positions in litigation."[12]

However, the doctrine has been criticized as well, for instance on grounds that it can produce harsh and unjust outcomes and that it violates the nearly universally accepted practice of allowing inconsistent and alternative pleadings.[13] Thus, some jurisdictions have not recognized the doctrine at all or have imposed elements limiting the doctrine's punch.[14]

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Most directly relevant to Nevada attorneys, both the Ninth Circuit[15] and the Nevada Supreme Court[16] accept the doctrine of judicial estoppel. However, it is fair to say that neither court has yet "carved in stone" the precise contours of the doctrine as they will apply it.[17]

Judicial estoppel has been applied across a wide spectrum of cases and controversies, both federal and state. It has appeared in property, tort, contract, and commercial and business law cases, among others. Although much more frequent in civil cases,[18] judicial estoppel has been invoked in criminal cases too.[19] An area in which the doctrine is being applied with increasing regularity is bankruptcy crossovers. For example, debtors whose schedules omit pending or potential causes of action often find that the omitted causes of action later are dismissed by the non-bankruptcy forum courts on judicial estoppel grounds.[20]

Recent Supreme Court Decisions

Over a hundred years ago (but still nearly 40 years after *Hamilton v. Zimmerman*), the United States Supreme Court in *Davis v. Wakelee* advanced a somewhat different formulation of judicial estoppel than that given by the Tennessee Supreme Court. The *Davis* Court stated: "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."[21]

However, further exploration of judicial estoppel by the High Court was delayed for generations after *Davis*. The drought ended in 1999 and 2001 when the Court handed down, respectively, the *Cleveland* and the *New Hampshire* decisions.

A. *Cleveland v. Policy Management Systems Corp.*

Cleveland involved a frequent judicial estoppel battleground. After suffering a stroke and losing her job, Carolyn Cleveland applied for and obtained Social Security Disability Insurance (SSDI) benefits, claiming that she couldn't work because of her disability. A week before her SSDI award, Cleveland filed suit against her former employer, contending that her firing was because of her disability in violation of the Americans with Disabilities Act (ADA).

The district court granted summary judgment to Cleveland's ex-employer. It reasoned that Cleveland's claim that she was totally disabled for SSDI purposes was inconsistent with her proving a necessary element of her ADA claim: that she could "perform the essential functions" of her job (at least with reasonable accommodation).[22] The Fifth Circuit affirmed, holding that "the application for or the receipt of social security disability benefits creates a rebuttal presumption that the claimant or recipient of such benefits is judicially estoppel from asserting that he is a 'qualified individual with a disability.'"[23]

A unanimous Supreme Court reversed the decision. Closely reading the statutes, the Court found that claims for SSDI benefits and ADA damages "do not inherently conflict to the point where courts should apply a special negative presumption like the one applied by the Court of Appeals."[24] Accordingly, the Court vacated the summary judgment and remanded the case.

While rejecting the presumption, the Court did hold that inconsistency is legally significant. In effect, but not in name, the Court endorsed a version of judicial estoppel. It held: "When faced with a plaintiff's sworn statement asserting 'total disability' or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim."[25] In other words, "an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation."[26]

B. *New Hampshire v. Maine*

Post-*Cleveland* decisions have seen *Cleveland* as establishing

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a new methodology for judicial estoppel in the SSDI-ADA and related contexts, but not as displacing more traditional judicial estoppel analysis in other areas.[27] That reading seems reasonable in light of the Supreme Court's 2001 decision in *New Hampshire v. Maine*.

That case involved a border dispute between two states. In a 1977 dispute between the two states over lobster fishing rights, the two states developed a consent decree as to their lateral marine boundary. The Supreme Court accepted that agreement and entered judgment based on it. Then, in 2000, one of the states (New Hampshire) brought an original action against the other as to their inland river boundary. New Hampshire's position in the 2000 case was inconsistent with the position it accepted in the 1977 consent decree. On that basis, the other state (Maine) filed a motion to dismiss.

A unanimous Supreme Court granted Maine's motion on the ground of judicial estoppel. In contrast to the special estoppel rule it crafted in *Cleveland*, the Court in New Hampshire framed the rule in traditional terms. It identified three factors: (1) whether the party's later position was "clearly inconsistent" with its prior position, (2) whether the party succeeded in persuading a court to accept its earlier position, and (3) whether the party would derive an unfair advantage from the inconsistency if not estopped.[28]

The Court made three other significant points. First, judicial estoppel is an equitable approach which a court invokes at its discretion.[29] Second, in enumerating the above three factors, "we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts."[30] Third, judicial estoppel is less likely to be applied against a governmental party than a private litigant, especially when "estoppel would compromise a governmental interest in enforcing the law."[31]

Variations in Applying the Doctrine

The hallmark of judicial estoppel is fluidity. Different courts disagree on its elements; the same court often invokes differing formulations in different cases. And, in many jurisdictions, guidance as to key parameters is scant. Commentators often have remarked on this with exasperation,[32] but fluidity is perhaps inevitable given the doctrine's underlying equitable purposes.

One major division is whether the doctrine can be applied when the first claim was unsuccessful,[33] but many other points of uncertainty or disagreement exist as well. They include:

(1) whether the two claims must have been made in the same proceeding (or at least in related proceedings),

(2) whether the claims must have been made before the same tribunal,

(3) whether claims before administrative agencies (as well as courts) trigger the doctrine,

(4) whether the parties in the two proceedings must be the same (or at least in privity),

(5) whether the inconsistency must result from an intentional effort to mislead (as opposed to inadvertence or mistake),

(6) whether the doctrine operates only as to assertions of fact or extends to legal conclusions as well, and

(7) which formulation, among the conflicting versions held by different courts, should be applied in diversity or choice-of-law situations.

The Nevada courts have spoken to only some of these matters.[34] Moreover, it would be wrong to think that unanimity, or even strong consensus, prevails in Nevada as to important parameters. A recent Nevada Supreme Court case shows this.[35] By 4 to 3, the Court held that a former spouse was judicially estopped from attacking a divorce decree (on the ground that the trial court had lacked jurisdiction) in light of the fact she had previously agreed that certain "facts" were true, which (had they been true) would have given that court jurisdiction.[36] One Justice disagreed, appearing to say that judicial estoppel can involve only substantive issues within an otherwise proper case, not jurisdictional issues.[37] Two other Justices dissented based on their perception of the equities, emphasizing "inadvertence or mistake" as opposed to knowing misrepresentation.[38]

In short, judicial estoppel is recognized in Nevada and potentially applies across many categories of cases. However, there remains considerable scope for creative advocacy in shaping the contours of the doctrine and its application to particular controversies. N.

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Endnotes

1. 526 U.S. 795 (1999).
2. 532 U.S. 742 (2001).
3. For one summary of the elements of equitable estoppel in Nevada, see United Brotherhood v. Dahnke, 714 P.2d 177, 178-79 (Nev. 1986).

4. For contrast of the doctrines of judicial estoppel and judicial admission, see David S. Coale, *A New Framework for Judicial Estoppel*, Rev. Litig., Winter 1999, at 1.

5. E.g., Crosley Corp. v. United States, 229 F.2d 376, 380 (6th Cir. 1956).

6. E.g., Wheelock v. Commissioner, 77 F.2d 474, 477 (5th Cir. 1935).

7. See Steve R. Johnson, *The Taxpayer's Duty of Consistency*, 46 TAX L. REV. 537 (1991).

8. 37 Tenn. (5 Snead) 39.

9. *Id.* at 48.

10. Young v. United States Dept. of Justice, 882 F.2d 633, 639 (2d Cir. 1989).

11. Scarano v. Cent. R. Co., 203 F.2d 510, 513 (3d Cir. 1953).

12. Ellis v. Arkansas La. Gas Co., 609 F.2d 436, 440 (10th Cir. 1979).

13. See, e.g., Douglas W. Henkin, *Judicial Estoppel — Beating Shields into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 (1991)(urging abrogation of the doctrine for these reasons).

14. Many of the cases falling into the various groups are described in Brian A. Dodd, *Civil Procedure Intent and the Application of Judicial Estoppel: Equitable Shield or Judicial Heartbreak?*, 22 Am. J. Trial Advoc. 481 (1998).

15. E.g., Stevens Technical Serv., Inc. v. SS Brooklyn, 885 F.2d 584, 589 (9th Cir. 1989); Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 716-17 (9th Cir. 1970).

16. E.g., Sterling Builders, Inc. v. Fuhrman, 396 P.2d 850, 853 (Nev. 1964) (doctrine applied to prevent denial of partnership status).

17. For further discussion of judicial preclusion in these jurisdictions, see Michael D. Moberly, *Swapping Horses in Midstream: A Comparison of the Judicial Estoppel Doctrine in Arizona and Nevada*, 32 Ariz. St. L.J. 233 (2000), and Michael D. Moberly, *Playing "Fast and Loose" or Just Fast?: A Look at Judicial Estoppel in the Ninth Circuit*, 33 Gonz. L. Rev. 171 (1997-1998). However, these articles preceded the United States Supreme Court's *Cleveland* and *New Hampshire* decisions discussed in Part II.

18. See, e.g., John S. Nichols, *Safeguarding the Truth in Court: The Doctrine of Judicial Estoppel*, S. Cal. Lawyer, Jan./Feb. 2002, at 32 (summarizing cases in these areas).

19. See Moberly, *supra* note 17, at 187-92 (Ninth Circuit criminal judicial estoppel cases).

20. For discussion, see William Houston Brown, Lundy Carpenter & Donna T. Snow, *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 Am. Bankr. L.J. 197 (2001); Thomas E. Ray, *Judicial Estoppel in Chapters 7 and 13*, AM. Bankr. Inst. J., July/Aug. 2002, at 14.

21. 156 U.S. 680, 689 (1895).

22. 42 U.S.C. § 1211(8).

23. 120 F.3d 513, 518 (1997). The Fifth Circuit's position was part of a significant circuit split, which is what prompted the Supreme Court to take the case. See 526 U.S. at 800-01.

24. 526 U.S. at 802.

25. *Id.* at 807.

26. *Id.* at 806.

27. E.g., Detz v. Greiner Industries, Inc., 346 F.3d 109 (3d Cir. 2003) (inconsistency between SSDI claim and Age Discrimination in Employment Act action).

28. 532 U.S. at 750-51 (citations and internal quotation marks omitted).

29. *Id.* at 750 [quoting Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990)].

30. 532 U.S. at 751.

31. *Id.* at 755.

32. See, e.g., Coale, *supra* note 4, at 3; Dodd, *supra* note 14, at 482 ("judicial estoppel is a doctrine of broad and undefined strokes with a rather uncertain outline").

33. As seen above, the *Hamilton v. Zimmerman* court thought prior success unnecessary while the *New Hampshire* Court (like most courts) thought to the contrary.

34. See, e.g., Breliant v. Preferred Equities Corp., 112 Nev. 663, 668-69, 918 P.2d 314, 317-18 (Nev. 1996)(considering the necessity of prior success).

35. Vaile v. Eighth Jud. Dist. Ct., 44 P.3d 506 (Nev. 2002), *cert. denied sub nom.* Vaile v. Porsboll, 123 S. Ct. 1483 (2003).

36. 44 P.3d at 514 (Agosti, J., writing for the Court).

37. *Id.* at 520 (Maupin, C.J., dissenting).

38. *Id.* at 522-23 (Young, J., joined by Shearing, J., dissenting).