

# The Double-Edged Sword of Judicial Estoppel

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Imagine losing a case because of a pleading filed by another attorney in an unrelated case. Judicial estoppel could be used against you, and your client, to accomplish just that. Judicial estoppel can also create a bar to claims that you are defending, as a rash of recent cases relating to failure to disclose claims in bankruptcy have shown.

Judicial estoppel is an equitable doctrine that may limit or prevent a party from taking inconsistent positions in separate cases. More specifically, it prevents a party from gaining an advantage by asserting claims, defenses or positions that are inconsistent with those asserted in a prior proceeding and upon which a court relied.<sup>1</sup> It may be used as a sword or a shield. It may create a complete bar to a plaintiff's claim, or be used to foreclose a potential defense.

Be alert to applications of the doctrine of judicial estoppel as you investigate a case and consider possible claims or defenses and as you take positions on behalf of a client that may have applications in other forums or proceedings. A series of recent cases suggest that every defense attorney should always be checking for prior bankruptcy filings by plaintiffs for the possibility that the claim should have been disclosed and was not.

## Overview of Judicial Estoppel

The purpose of judicial estoppel is to protect the integrity of the courts from intentional contradictions, usually inconsistent positions taken in separate forums or cases. The doctrine is not intended to be for the specific benefit of or to protect parties to the lawsuit.<sup>2</sup> The party raising judicial estoppel need

not show they have been or will be harmed by the conflicting positions. A court applying judicial estoppel may not be concerned if its application results in a windfall for the party raising the issue, if the elements of the doctrine are present.

As with most equitable doctrines, judicial estoppel is applied at the trial court's discretion. The standard to review its application is generally abuse of discretion.<sup>3</sup>

## The Elements of Judicial Estoppel

Washington Courts have long been willing to apply judicial estoppel utilizing various tests. Most recently there appear to be more decisions invoking the doctrine. The recent decisions have relied on *New Hampshire v. Maine*,<sup>4</sup> and consider three elements necessary for the application of judicial estoppel:

- (1) A party's position in a case or controversy must clearly conflict with a position taken in an earlier matter;
- (2) That party must have persuaded a court (or presumably another tribunal) to have accepted its earlier position such that the acceptance of an inconsistent position in the later proceeding creates the perception that the party must have misled either the first or second court; and
- (3) Whether the party derives an unfair advantage from the change in position or imposes an unfair detriment on the opposing party if not estopped.

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Generally, merely taking a position in prior litigation should not be sufficient to invoke judicial estoppel. The position must be relied upon or adopted by the court as part of its decision. This may limit the application of the doctrine, but not as much as one might expect. The United States Supreme Court found participation in a consent decree resolution of a case to be a sufficient basis to estop the state of New Hampshire from changing its position in subsequent litigation in *New Hampshire v. Maine*.<sup>5</sup> This would suggest that many actions other than a final court ruling can constitute acceptance of a party's position sufficient to support the doctrine, at least when there is complete identity of parties.

### The Recent Evolution of Judicial Estoppel

Washington courts have invoked judicial estoppel for decades. There appears to have been an increase in reported opinions supporting its use in recent years. There has been some evolution of the doctrine in the process.

Washington courts have applied some version of equitable estoppel since at least *In re Guardianship of Miller*.<sup>6</sup> Early cases such as *Miller* and *Markley v. Markley*<sup>7</sup> dealt with challenges to divisions of estates and/or property that had been subject to an estate. More importantly, in these cases equitable estoppel was applied where one party had taken a position in a court action where a subsequent change of that position would have disadvantaged a party to the prior transaction. More recent cases have not required full identity of the parties to apply the doctrine.

Many of the recent cases have involved failure to make disclosures in bankruptcy filings. Subsequent courts have prevented parties from pursuing claims that could have, but were not, listed on bankruptcy filings. In such cases, the courts have not been concerned about the lack of complete identity of the parties. The party to benefit from the estoppel is often someone completely different than whatever creditors may have been harmed by the lack of disclosure.

For example, in *DeAtley v. Barnett*,<sup>8</sup> the trial court granted summary judgment dismissing the plaintiff's right of first refusal over a parcel of property because the plaintiff had failed to list the right of first refusal as an asset in an intervening bankruptcy. This was upheld by Division III on the rationale that all assets, including potential causes of action, were required to have been disclosed in the bankruptcy petition. It was an appropriate application of

judicial estoppel to foreclose the plaintiff from proceeding on an asset even though the defendant in the action who benefited from the judicial estoppel was not specifically a participant or creditor in the prior bankruptcy.

A similar result occurred in a personal injury accident in *Cunningham v. Reliable Concrete Pumping, Inc.*<sup>9</sup> In *Cunningham*, summary judgment dismissing a personal injury action was granted because the plaintiff/debtor had indicated there were no other contingent or unliquidated claims on a bankruptcy schedule. His bankruptcy was closed as a "no asset" case. The plaintiff argued on appeal that it was his prior attorney's duty to amend his bankruptcy schedules to include his personal injury claim. The court rejected this argument indicating "once a party has designated an attorney to represent him in regard to a particular matter, the court and other parties to an action are entitled to rely upon that authority[.]"<sup>10</sup> The court noted, "[b]laming the attorney does nothing to avoid the application of judicial estoppel[.]"<sup>11</sup> Query, however, whether blaming the attorney is simply a predicate to a subsequent legal malpractice action against the bankruptcy counsel who failed to preserve the claim. This is unlikely given that preserving the claim may well give that asset to the bankruptcy trustee, as opposed to the plaintiff.

The filing of a bankruptcy action does not, in and of itself, lay an adequate foundation for judicial estoppel where the claim arises subsequent to the filing of the bankruptcy. In *Johnson v. Si-Cor, Inc.*,<sup>12</sup> the trial court granted summary judgment dismissing a personal injury action because the claim was not listed in a pending bankruptcy action. Division III rejected the application of judicial estoppel and reversed the summary judgment because the claim accrued after the initial bankruptcy filing. Because the plaintiff did not fail to list an asset that belonged to the bankruptcy, there was no evidence that the bankruptcy court "accepted a position" that was inconsistent with plaintiff's subsequent pursuit of his lawsuit, nor any evidence that he benefited by failing to disclose the suit in his bankruptcy action.

### Legal Malpractice Actions

Division I has indicated the equitable estoppel would be available in a legal malpractice action to prevent a client from changing his or her position in the underlying case. For example, in *Faulkner v. Foshaug*,<sup>13</sup> Division I adopted the "innocence" requirement for a criminal defendant suing his prior criminal defense attorney. In so doing, the

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court indicated that equitable estoppel would prevent a criminal malpractice plaintiff from contending he or she was actually “innocent” of the crimes if that plaintiff had voluntarily pled guilty to those crimes. In *Faulkner*, however, the plaintiff had accepted an *Alford* plea which did not concede the underlying guilt, so judicial estoppel did not apply.

Arguments have been made at the trial court level that attorneys are bound by positions they have taken on behalf of clients who are now suing them. This has not been established in any Washington appellate case thus far.

### Practice Implications

The practitioner should think of this doctrine as both a sword and a shield. Obviously, investigation of all prior litigation in which the adverse party has been involved is now more important than ever. In addition to exploring bankruptcy filings, consider representations parties may have made in divorce settlements or even in administrative matters such as Social Security, Labor and Industries or even zoning or building compliance matters.

It is also necessary to consider the impact of judicial estoppel being used against your client, or even you. This applies to positions taken in the past, and to potential ramifications for your client (or you) in the future. Counsel retained by an insurance carrier to defend a client in an action should be particularly wary if they have any reason to suspect or believe that the position they are taking in the case may have a potential impact on other actions in which the insured

may be involved. The insured needs to be informed of tactical decisions regarding presentations or elections made on behalf of the insured which might have potential implications in other cases, especially in light of the language in the *Cunningham* case.

1 See *Garrett v. Morgan*, 127 Wn. App. 375, 112 P.3d 531 (2005).

2 See *Garrett*, 127 Wn. App. at 381.

3 See, e.g., *Garrett*, 127 Wn. App. at 378; *Cunningham v. Reliable Concrete*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005); but see *DeAtley v. Barnett*, 127 Wn. App. 478, 483, 112 P.3d 540 (2005) (in context of review of grant of summary judgment, court applied a de novo standard of review).

4 532 U.S. 742, 750-751, 121 S. Ct. 1808 (2001). This case is often cited for the non-exclusive criteria for the doctrine in the more

recent cases. It is of interest that the United States Supreme Court applied this doctrine sitting as a trial court. There is little or no authority to support an appellate court imposing judicial estoppel when not first adopted by the trial court.

5 532 U.S.742.

6 26 Wn. 2d 202, 173 P.2d 538 (1946).

7 31 Wn. 2d 605, 198 P.2d 483 (1948).

8 127 Wn. App. 478.

9 126 Wn. App. 222.

10 *Cunningham*, 126 Wn. App. at 234 (quoting *Haller v. Wallis*, 89 Wn. 2d 539, 547, 573 P.2d 1302 (1978).

11 *Cunningham*, 126 Wn. App. at 235.

12 107 Wn. App. 902, 28 P.3d 832 (2001).

13 108 Wn. App. 113, 29 P.3d 771 (2001).

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