



**Judicial Estoppel: Essentially Locking in Representations Made During Bankruptcy
Proceeding**

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Cite as: *Judicial Estoppel: Essentially Locking in Representations Made During Bankruptcy
Proceeding*, 7 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 25 (2015).

Introduction

The Bankruptcy Code provides that a debtor is required to file with the bankruptcy, among other things, “a list of [its] creditors,”¹ a “schedule of [its] assets and liabilities,”² and “a statement of [its] financial affairs.”³ With the filing of its schedules, the debtor asserts a position with respect to its assets, liabilities, and financial affairs, which is relied on by the bankruptcy court, the debtor’s creditors, and the other parties in interest. Accordingly, various circuit courts have recognized that “the success of our bankruptcy laws requires a debtor’s full and honest disclosure,” and that there needs to be “necessary incentive [for the debtors] to provide the bankruptcy court with a truthful disclosure of the debtors’ assets.”⁴ Courts employed have refused to allow a debtor “to back-up, re-open the bankruptcy case, and amend his bankruptcy filings”⁵ under the equitable doctrine of judicial estoppel.

¹ 11 U.S.C. § 521(a)(1)(A) (2012).

² *Id.* § 521(a)(1)(B)(i).

³ *Id.* § 521(a)(1)(B)(iii).

⁴ *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002). *See* *Ardese v. DCT, Inc.*, 280 F. App'x 691, 694 (10th Cir. 2008) (quoting *Burnes*, 291 F.3d at 1288); *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1297 (11th Cir. 2003) (same); *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 474 (6th Cir. 2010) (same).

⁵ *Burnes*, 291 F.3d at 1288.

Courts have applied judicial estoppel, in bankruptcy cases, to bar a debtor from pursuing a different position later in the bankruptcy proceeding; similarly, courts apply judicial estoppel to bar a litigation trustee to the same effect. Courts have reasoned that the doctrine of judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, numerous courts have concluded that “[w]hile privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required.”⁶

This Article discusses the application of the equitable doctrine of judicial estoppel to bar a litigation trust from asserting a different position made in prior bankruptcy proceedings and its general implications. Part I analyzes the doctrine of judicial estoppel generally. Part II discusses the doctrine of judicial estoppel in the bankruptcy context and focuses on a recent Second Circuit decision that applies the doctrine to bar a litigation trust’s claim. Finally, Part III concludes by identifying implications for parties involved in bankruptcy proceedings.

I. The Equitable Doctrine of Judicial Estoppel

Judicial estoppel⁷ is “estoppel that prevents a party from contradicting previous declarations made during the same or an earlier proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court.”⁸ The earliest Supreme Court decision that referenced the doctrine of judicial estoppel was *Leonard v. Vicksburg, S. & P. R.*

⁶ *Id.* at 1286 (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996)). *See also* *Patriot Cinemas, Inc. v. General Cinema Corp. et al.*, 834 F.2d 208, 214 (1st Cir.1987); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir.1982).

⁷ Also termed “doctrine of preclusion of inconsistent positions” and “doctrine of the conclusiveness of the judgment.” Black’s Law Dictionary (10th ed. 2014).

⁸ *Id.*

Co.⁹ In *Leonard*, the Supreme Court held that the “application of the doctrine of [judicial] estoppel ... did raise Federal questions.”¹⁰

However, the Supreme Court in *New Hampshire v. Maine*,¹¹ first defined the doctrine of judicial estoppel in detail.¹² In *New Hampshire*, the Supreme Court explained the judicial estoppel as:

[w]here 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, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.¹³

The *New Hampshire* Court further explained that the doctrine “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.”¹⁴

An opposing party can raise judicial estoppel as a defense or the court may invoke judicial estoppel sua sponte. The Supreme Court recognized that courts may invoke the doctrine in order to “protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.”¹⁵ The Supreme Court also recognized that “[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle”¹⁶; however, “several factors typically inform the decision whether to apply the doctrine in a particular case”: (1) whether the party’s later position was clearly inconsistent with its earlier position; (2) whether the party has

⁹ 198 U.S. 416 (1905).

¹⁰ *Id.* at 423.

¹¹ 532 U.S. 742 (2001).

¹² *Id.*

¹³ *Id.* at 749 (citing *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

¹⁴ *New Hampshire*, 532 U.S. at 749 (citing *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8 (2000)).

¹⁵ *New Hampshire*, 532 U.S. at 749–51.

¹⁶ *Id.* at 750.

succeeded in persuading court to accept its earlier position, so that judicial acceptance of inconsistent position in later proceeding would create perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive unfair advantage or impose an unfair detriment on opposing party if not estopped.¹⁷

Notably, the Supreme Court emphasized that “[a]bsent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity.”¹⁸ Therefore, courts only invoke judicial estoppel when “the risk of inconsistent results with its impact on judicial integrity is certain”¹⁹ because the doctrine is primarily concerned with protecting the judicial process by “forbid[ing the] use of intentional self-contradiction as a means of obtaining unfair advantage.”²⁰ Moreover, the Supreme Court opined that “it may be appropriate to resist application of judicial estoppel ‘when a party's prior position was based on inadvertence or mistake.’”²¹

New Hampshire involved a dispute between the states of New Hampshire and Maine regarding the precise boundary between the states.²² Specifically, New Hampshire asserted that the Piscataqua River, an inland river boarded “the easternmost point of New Hampshire” and “the southernmost point of Maine,” and the Portsmouth Harbor, which lied on the Piscataqua River, belonged to New Hampshire.²³ In 1740, by King George II of England’s decree, the border was established to be the “Middle of the River.”²⁴ Then in 1976, the states contested the

¹⁷ *Id.* at 750–51.

¹⁸ *Id.* (internal quotation marks and citations omitted).

¹⁹ *Adelphia Recovery Trust*, 748 F.3d at 116–17 (quoting *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 397 (2d Cir. 2011)).

²⁰ *New Hampshire*, 532 U.S. at 750–51 (citations omitted).

²¹ *Id.* at 153 (citing *John S. Clark Co. v. Faggert & Frieden, P. C.*, 65 F.3d 26, 29 (C.A.4 1995)).

²² *Id.* at 746.

²³ *Id.* at 745–46.

²⁴ *Id.* at 749.

meaning of “Middle of the River” in *New Hampshire v. Maine*,²⁵ where they “expressly agreed that the decree of 1740 fixed the boundary in the Piscataqua Harbor area,”²⁶ and subsequently entered into a consent decree establishing their lateral marine boundary and defining the “Middle of the River” as “the middle of the main channel of navigation of the Piscataqua River.”²⁷ Applying the factors stated above, the Supreme Court invoked the doctrine of judicial estoppel and held that “New Hampshire [was] equitably barred from asserting-contrary to its position in the 1970's litigation-that the inland Piscataqua River boundary runs along the Maine shore.”²⁸ The Supreme Court reasoned that New Hampshire was taking an inconsistent position with respect to its 1976 interpretation of the words “Middle of the River”, that it benefited from its previous interpretation, and that it led the Court to believe in 1976 that the agreement between the states was in each of their best interests.²⁹

II. Applying Judicial Estoppel to Litigation Trustees

In the bankruptcy context, judicial estoppel prevents a debtor from asserting a certain position when scheduling their assets and financial affairs, and then later representing a contradictory position. Judicial estoppel seeks to prevent litigants from “playing fast and loose with the courts” by asserting inconsistent positions before the courts.³⁰ Among other places,³¹ this situation may arise in the bankruptcy context when a debtor that filed for bankruptcy took a

²⁵ 426 U.S. 363 (1976).

²⁶ *New Hampshire*, 532 U.S. at 746 (citations omitted).

²⁷ *Id.* at 747.

²⁸ *Id.* at 749.

²⁹ *Id.* at 752.

³⁰ *In re Cassidy*, 892 F.3d 637, 641 (7th Cir. 1990).

³¹ A situation that commonly arises in the bankruptcy context is when a debtor filing for bankruptcy fails to disclose a claim or cause of action in his or her bankruptcy schedules, and then later pursues that claim or cause of action in a separate litigation. This Article does not discuss this instance; for an excellent discussion on this topic, see *Whether the Doctrine of Judicial Estoppel Applies if the Debtor Fails to List a Lawsuit in His or Her Bankruptcy Schedules*, 6 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 23 (2014).

position, and then a litigation trustee, appointed under the debtor's confirmed chapter 11 plan, asserts the opposite position in a later proceeding. In bankruptcy cases where "the bankruptcy court confirms a plan pursuant to which creditors release their claims against the debtor,"³² the bankruptcy court will apply the doctrine to later claims which are inconsistent with the plan because it is "crucial, both for the sake of finality and the needs of debtors and creditors, that claims to ownership of various assets be determined in the bankruptcy proceedings."³³

For example, in *Adelphia Recovery Trust v. Goldman Sachs & Co.*,³⁴ the Second Circuit held that a fraudulent conveyance claim brought by a litigation trust, created to recover assets for the benefit of unsecured creditors of Adelphia Communications Corp. ("ACC"), was barred by the doctrine of judicial estoppel because the funds at issue were transferred from an account that the plaintiff's predecessor-in-interest scheduled as an asset of one of the predecessor's subsidiaries, not the predecessor itself.³⁵ In *Adelphia Recovery Trust*, the litigation trust commenced a fraudulent conveyance claim against Goldman, Sachs & Co. under sections 548(a)(1)(A) and 550(a) to recover certain payments made to Goldman from a concentration account held in the name of Adelphia Cablevision Corp. ("Adelphia Cablevision"), a subsidiary of ACC.³⁶ Goldman later moved for summary judgment on the grounds that (1) the plaintiff lacked standing to assert the fraudulent conveyance claim because the payments were not transfers of ACC's property; and (2) the plaintiff failed to raise a material issue of fact as to whether the payments were made with an actual intent to hinder, delay or defraud ACC's

³² *In re Cassidy*, 892 F.3d at 641 (quoting *Galín v. United States*, No. 08-cv-2508, 2008 WL 5378387, at *10 (E.D.N.Y. Dec. 23, 2008)).

³³ *Adelphia Recovery Trust*, 748 F.3d at 118.

³⁴ *Adelphia Recovery Trust v. Goldman, Sachs & Co.*, 748 F.3d 110 (2d Cir. 2014).

³⁵ *Id.* at 120.

³⁶ *Id.* at 113-14.

creditors.³⁷ In response, the litigation trust argued that “ACC was the real owner of, and payor from, the Concentration Account”³⁸ because ACC exercised complete control over the collective cash of ACC and its subsidiaries in the concentration account.³⁹ While the district court recognized that the money in the concentration account may have been attributed to ACC prior to the bankruptcy proceedings, the district court ruled that “the easy attribution of money to whatever entity may at the moment be convenient stopped with the bankruptcies.”⁴⁰ Therefore, the district court granted Goldman’s motion for summary judgment, stating that “it [wa]s admitted by [the litigation trust’s] own revised pleading that the margin loan payments were not made by ACC but by Adelphia Cablevision LLC, an ACC subsidiary on whose behalf [the litigation trust] does not have standing to sue.”⁴¹ The Second Circuit affirmed, holding that the litigation trust did not have standing to sue because it was judicially estopped from arguing now that ACC owned the account.⁴²

The *Adelphia Recovery Trust* court applied judicial estoppel to the litigation trust’s fraudulent conveyance claim because ACC’s various schedules and chapter 11 plan, which was substantially consummated, all indicated that Adelphia Cablevision owned the concentration account at issue.⁴³ The Second Circuit emphasized that the finality in determining the allocation of assets to the various parties was central to the process of restating the ACC entities’

³⁷ Brief for Defendant-Appellee Goldman, Sachs & Co. at 12, *Adelphia Recovery Trust v. Goldman, Sachs & Co.*, 748 F.3d 110 (No. 11-1858-cv), 2011 WL 5031309, at *12.

³⁸ *Adelphia Recovery Trust*, 748 F.3d at 114.

³⁹ *Adelphia Recovery Trust v. Bank of Am., N.A.*, No. 05-cv-9050, 2011 WL 1419617 at *2 (S.D.N.Y. Apr. 7, 2011).

⁴⁰ *Id.*

⁴¹ *Adelphia Recovery Trust*, 748 F.3d at 114 (citing *Adelphia Recovery Trust*, 2011 WL 1419617 at *2).

⁴² *Adelphia Recovery Trust*, 748 F.3d at 113.

⁴³ *Id.* at 113.

accounting records, which was needed for a successful reorganization.⁴⁴ Accordingly, the ownership of the concentration account was central to reorganization process because the bankruptcy court needed to resolve intercompany transfers from that account.⁴⁵ Thus, the *Adelphia Recovery Trust* court held that the doctrine of judicial estoppel barred the fraudulent conveyance claim because “revisiting the accuracy of [the asset] schedules to permit the instant action to proceed would [have] clearly threaten[ed] the integrity of bankruptcy proceedings.”⁴⁶

III. Implications and Recommendations

The *Adelphia Recovery Trust*⁴⁷ decision has significant implications for debtors, recovery and litigation trusts, creditors and counterparties to prepetition transactions with debtors. For debtors’ attorneys, this decision demonstrates the importance of accurately determining the ownership of the various assets in cases where there are multiple debtors because the parties will be bound by the asset schedules and the plan of reorganization. In particular, when drafting a plan, attorneys should consider whether each particular debtor has potential avoidance claims and determine how the plan’s allocation of assets amongst the debtors’ various estates affects such claims. Importantly, the attorneys should be cognizant of the fact that the debtors (or trusts created under the plan) may be judicially estopped from later arguing that the plan misallocated the assets in connection with an avoidance action. Further, these attorneys should consider the benefits of creating multiple trusts to pursue avoidance claims on behalf of the various estates

⁴⁴ *Id.* at 118 (“Determination of the ownership of assets [wa]s at the core of the bankruptcy process, and particularly the creation of a bankruptcy reorganization plan, which involves ‘a schedule of all [the debtors’] liquid assets and liabilities,’ and thereafter operates, with full preclusive effect, to ‘bind its debtors and creditors as to all the plan’s provisions, and all related, property or non-property based claims which could have been litigated in the same cause of action.’”).

⁴⁵ *Id.*

⁴⁶ *Id.* at 120.

⁴⁷ *Id.*

because by doing so, each estate will be able to pursue its own avoidance claims. Indeed, nothing in *Adelphia Recovery Trust* would have likely stopped a litigation trust created for the benefit of Adelphia Cablevision's creditors from asserting the exact same fraudulent conveyance claim against Goldman.

Next, for recovery and litigation trusts, *Adelphia Recovery Trust* illustrates that these trusts will be bound by the assertions (or lack of assertions) by their predecessors in their schedules, plans and other filings. This can prove problematic if the various debtors that were focused on confirming a plan misallocate an asset in such a way that forecloses the trusts' ability to avoid certain prepetition transfers at the expense of trusts' constituents (i.e., the trust's predecessor's creditors).

Finally, counterparties to prepetition transactions with a debtor should take solace in the fact that a court will not permit a litigation trust to reargue issues that were previously settled simply because doing so advances the trust's current position. As such, the doctrine of judicial estoppel provides a potentially powerful defense to avoidance actions brought by recovery and litigation trusts against those counterparties. Therefore, when faced with an avoidance action, those counterparties should review the previous filings in the case to determine whether the trust's current position is inconsistent with a position put forth by the trust's predecessor.

Conclusion

When a litigant makes a statement or takes a position in litigation, there are preclusive effects of those statements or positions not only for the case at hand, but potentially for future litigation concerning the same subjects based on the doctrine of judicial estoppel. In bankruptcy cases, in which the accurate disclosure of a debtor's assets and liabilities is critical, the possibility that representations may be used in later lawsuits is heightened. Bankruptcy courts

have the discretion to invoke the judicial estoppel doctrine to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions to benefit themselves.

Bankruptcy courts will judicially estop a party from asserting a position that is at odds with a position taken in the bankruptcy litigation when the risk of inconsistent results certainly impacts judicial integrity. Where the bankruptcy court confirms a plan pursuant to which creditors release their claims against the debtor, and an inconsistent position is taken later, the court will invoke the doctrine for the sake of finality, and the needs of debtors and creditors that claims to ownership of various assets be determined in the bankruptcy proceedings.