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Whether the Doctrine of Judicial Estoppel Applies if the Debtor Fails To List a Lawsuit in His or Her Bankruptcy Schedules

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Introduction

Many different tactics are used by both plaintiffs and defendants to try and gain an upper hand in court proceedings. One particular scheme occurs when parties take an inconsistent position with one they successfully asserted in an earlier proceeding.[1] The idea of the scheme is to be successful initially and then to contradict the position previously taken based on the need of the moment.[2] To combat that particular ploy, the courts developed the doctrine of judicial estoppel.

Judicial estoppel generally refers to "judicially-imposed limitations on litigants who would assert two irreconcilable positions in successive litigations."[3] The purpose of judicial estoppel is to "protect the integrity of the judicial process by prohibiting parties from deliberately changing [their] positions according to the exigencies of the moment."[4] Judicial estoppel differs

[1] *See* Teledyne Industries, Inc. v. NLRB, 911 F.2d 1214, 1217 (6th Cir. 1990) (explaining claim of judicial estoppel).
[2] *Id*. at 1218.
[3] *See* Robert F. Dugas, *Honing a Blunt Instrument: Refining the Use of Judicial Estoppel in Bankruptcy Nondisclosure Cases*, 59 VAND. L. REV. 205, 209 (2006) (discussing background of judicial estoppel).
[4] *See* New Hampshire v. Maine, 532 U.S. 742, 749–50 (2001).

from other types of preclusion in that the doctrine of judicial estoppel focuses on a party's assertions in relation to the courts rather than in relation to the other litigants.[5]

Judicial estoppel is especially important in bankruptcy cases. In the bankruptcy context, if a debtor omits a pending lawsuit from his or her bankruptcy schedules and then obtains a discharge, judicial estoppel may bar the debtor from continuing the pending lawsuit.[6] Although one of the primary goals of bankruptcy law is to allow a debtor to obtain a fresh start,[7] the debtor must comply with his obligations under the Bankruptcy Code. Full disclosure is essential to the functioning of the bankruptcy system.[8] Under section 521(1) of the Bankruptcy Code, a debtor is required to file a "schedule of assets and liabilities . . . and a statement of the debtor's financial affairs."[9] Section 541 of the Bankruptcy Code provides that property of the estate in bankruptcy specifically includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[10] The language of these statutes "impose[s] upon debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims."[11] By filling out the bankruptcy schedule, the debtor is implicitly stating that he or she owns no other assets.

Judicial estoppel is significant for both creditors and debtors. If a court applies judicial estoppel, the debtor will be barred from continuing his or her separate cause of action and,

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[5] *See* Dugas, *supra* note 2, at 209–10 (comparing judicial estoppel to other forms of preclusion such as equitable estoppel, res judicata, and collateral estoppel); *see* Quinn v. Sharon Corp., 343 S.C. 411, 414 (Ct. App. 2000) ("the purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts").

[6] *See* Ah Quin v. Cnty. of Kauai Dep't of Transp., 733 F.3d 267, 271 (9th Cir. 2013) (citing Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir. 1993); Hay v. First Interstate Bank, N.A., 978 F.2d 555, 557 (9th Cir. Mont. 1992).

[7] *See In re* Hart, 5 B.R. 524 (Bankr. N.D. Ga. 1980).

[8] *See In re* Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir. 1999) (discussing importance of disclosure duty cannot be overemphasized).

[9] 11 U.S.C. § 541(2012) (explaining debtor's duties).

[10] 11 U.S.C. § 541 (2012) (discussing property of the estate).

[11] *See* Browning Mfg. v. Mims (*In re* Coastal Plains, Inc.), 179 F.3d 197, 207–08 (5th Cir. 1999); *see also* Dugas, *supra* note 2, at 218–19.

therefore, creditors are deprived of recovering from any potential judgment from that cause of action.[12] In addition, absent the application of judicial estoppel, any surplus after the creditors are reimbursed would belong to the debtor.[13] The debtor, therefore, may also lose out as well if judicial estoppel is applied. In this scenario, the only "winner" is the potentially culpable third party defendant who evades liability because of the actions of the debtor in an unrelated proceeding.[14]

This Article contains four parts. Part I will give a general overview of judicial estoppel. Part II will discuss the doctrine of judicial estoppel in the bankruptcy context. Part III will focus on a recent decision by the Ninth Circuit that articulates a new test for applying judicial estoppel in the bankruptcy context. Finally, part IV will highlight some of the ramifications of the Ninth Circuit's decision.

I. General Overview of Judicial Estoppel

The origin of judicial estoppel can be traced to the mid-1800's in the case *Hamilton v. Zimmerman*.[15] In that case, the plaintiff wanted to testify that he was a full partner of the defendant, even though he had testified in prior litigation that he was a clerk for the defendant in a business matter rather than a partner.[16] The court held that the plaintiff was precluded from asserting a position inconsistent with one he had asserted under oath in a previous judicial proceeding.[17] In reaching its conclusion, the court stressed the importance of protecting the sanctity of the judicial oath.[18]

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[12] *See* Dugas, *supra* note 2, at 208.
[13] *See Ah Quin*, 733 F.3d at 275.
[14] *See* Dugas, *supra* note 2, at 208.
[15] *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, 241-242 (2000) (discussing conflicting views regarding origin of judicial estoppel); *See also* Dugas*, supra* note 2, at 211 (discussing historical development of judicial estoppel).
[16] Hamilton v. Zimmerman 37 Tenn. 39, 40–42 (1857).
[17] [T]he doctrine of estoppel … will not, in some instances, suffer a man to contradict or gainsay what, under particular circumstances, he may have previously said or done. This doctrine is

In 2001, the Supreme Court, in *New Hampshire v. Maine*,[19] fully defined the doctrine of judicial estoppel and endorsed its application for the first time.[20] The case involved a dispute regarding a river that lies on the southeastern end of New Hampshire's boundary with the state of Maine.[21] Specifically, New Hampshire brought a cause of action against Maine, claiming that the entire Piscataqua River which runs along the State of Maine's shore and all of Portsmouth Harbor belongs to the State of New Hampshire.[22] Maine moved to dismiss New Hampshire's lawsuit, claiming that New Hampshire had previously agreed to the status of the river during prior litigation in 1970 and, therefore, was prohibited from asserting a different position.[23]

The Supreme Court agreed and held that, under the doctrine of judicial estoppel, New Hampshire was equitably barred from asserting a contrary position to the position that the state had previously asserted during litigation in the 1970's.[24] The Supreme Court explained that under the doctrine of judicial estoppel, when 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."[25] The Supreme Court elaborated and

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> said to have its foundation in the obligation under which every man is placed to speak and act according to the truth of the case; and in the policy of the law to suppress the mischiefs from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true.

Id. at 48–9 (1857).

[18] *Id.* ("this doctrine applies with peculiar force to admissions or statements made under the sanction of an oath, in the course of judicial proceedings. The chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath.").

[19] 532 U.S. 742 (2001).

[20] 18-134 LAWRENCE B. SOLUM, MOORE'S FEDERAL PRACTICE - AIVIL § 134.30.

[21] New Hampshire v. Maine, 532 U.S. 742, 745 (2001).

[22] *See id.*

[23] *Id.*

[24] *Id.* at 749 ("[W]e conclude that a discrete doctrine, judicial estoppel . . . [u]nder that doctrine . . . New Hampshire is equitably barred from asserting-contrary to its position in the 1970's litigation-that the inland Piscataqua River boundary runs along the Maine shore").

[25] *Id.*

stated that judicial estoppel "is an equitable doctrine invoked by a court at its discretion."[26] The purpose of the judicial estoppel doctrine is to "protect the integrity of the judicial process"[27] by "prohibiting parties from deliberately changing positions according to the exigencies of the moment."[28]

While there is no strict formula for determining the applicability of judicial estoppel, the Supreme Court identified several factors that a court should consider.[29] First, the court should establish whether a party's later position was clearly inconsistent with its earlier position.[30] Second, the court should determine whether the party has succeeded in persuading a court to accept that party's earlier position so that acceptance of an inconsistent position would create the perception that either the first or the second court was misled.[31] Third, the court should inquire "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[32]

The Supreme Court in *New Hampshire v. Maine* expressly stated that it was not establishing inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel.[33] The Court noted that other considerations may inform the court of the doctrine's application based upon the factual contexts.[34] Additionally, the Court stated that it may be appropriate to resist applying the judicial estoppel doctrine "when a party's prior position was based on inadvertence or mistake."[35]

II. **Judicial Estoppel in Bankruptcy**

[26] *Id.* at 750 (citing Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990)).
[27] *Id.* at 749–50 (citing Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)).
[28] *Id.* at 750 (citing United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993)).
[29] *See id.* at 751.
[30] *See id.* at 750.
[31] *See id.*
[32] *See id.* at 751.
[33] *See id.*
[34] *See id.*
[35] *See id.* (citing John S. Clark Co. v. Faggert & Frieden, P. C., 65 F.3d 26, 29 (4th Cir. 1995)).

In the bankruptcy context, the doctrine of judicial estoppel often arises 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.[36] The majority of federal courts have developed a default rule that if a debtor omits a pending lawsuit from the bankruptcy schedules and obtains a discharge, judicial estoppel bars the debtor from pursuing the pending lawsuit.[37] Since the debtor represented in his or her bankruptcy case that no claim existed, the debtor will be estopped from asserting that a claim does exist.[38] The default rule developed by the federal courts is consistent with the factors set forth in *New Hampshire v. Maine*.[39] Specifically, when the debtor fails to list a lawsuit in the bankruptcy schedule and then pursues the lawsuit, "the positions are clearly inconsistent," the debtor succeeded in convincing the first court to accept the first position, and the debtor obtained an unfair advantage.[40]

In certain instances, however, the debtor's failure to list a pending lawsuit in the bankruptcy schedule may be due to inadvertence or mistake. In *New Hampshire v. Maine*,[41] the Supreme Court stated that when a party's prior position was based on inadvertence or mistake, an exception may apply and judicial estoppel may be inappropriate.[42] Therefore, under that exception, if a debtor's failure to list a pending lawsuit in the bankruptcy schedules was due to inadvertence or mistake, judicial estoppel may not apply.

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[36] *See* Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570 (1st Cir. 1993) (discussing Payless' failure to list claims in its schedules); *See also* Deborah B. Langehennig, *The State of Judicial Estoppel in Bankruptcy*, 28-9 AM. BANKR. INST. J. 44, Nov. 2009.

[37] *See* Ah Quin v. Cnty. of Kauai Dep't of Transp., 733 F.3d 267, 271 (9th Cir. 2013) (citing Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir.1993); Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555, 557 (9th Cir.1992)).

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] 532 U.S. 742 (2001).

[42] New Hampshire v. Maine, 532 U.S. 742, 753 (2001) (citing John S. Clark Co. v. Faggert & Frieden, P. C., 65 F.3d 26, 29 (4th Cir. 1995)).

Many Circuit Courts have addressed the effect of an inadvertent or mistaken omission from a bankruptcy schedule.[43] The majority of Circuit Courts have interpreted the exception of "inadvertence or mistake" narrowly.[44] These courts simply inquired whether the plaintiff-debtor was aware of the pending lawsuit at the time of filing his or her schedules and whether the debtor had a motive to conceal the claim.[45] Consequently, these courts will apply judicial estoppel broadly to bar any claim that the plaintiff-debtor had knowledge of prior to his or her bankruptcy case and failed to list because he or she will always have the motive to conceal these claims from the bankruptcy court.[46] For example, in *Eastman v. Union Pac. R.R. Co.*,[47] the Tenth Circuit affirmed the district court's decision to apply judicial estoppel because the plaintiff failed to list his personal injury action when he filed for bankruptcy.[48] In reaching its decision, the court

[43] *See Ah Quin*, 733 F.3d at 272.
[44] *See id.*
[45] *See* Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1157–58 (10th Cir.2007) ("[C]ourts addressing a debtor's failure to satisfy the legal duty of full disclosure to the bankruptcy court have deemed such failure inadvertent or mistaken only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment. Where a debtor has both knowledge of the claims and a motive to conceal them, courts routinely, albeit at time sub silentio, infer deliberate manipulation . . . Given th[is] overwhelming weight of authority, the district court's decision to employ judicial estoppel against [the debtor] . . . is undoubtedly sound."); Barger v. City of Cartersville, 348 F.3d 1289, 1295 (11th Cir.2003) ("The failure to comply with the Bankruptcy Code's disclosure duty is 'inadvertent' only when a party either lacks knowledge of the undisclosed claim or has no motive for their concealment."); Browning v. Levy, 283 F.3d 761, 776 (6th Cir.2002) ("The Fifth Circuit . . . defined two circumstances under which a debtor's failure to disclose a cause of action in a bankruptcy proceeding might be deemed inadvertent. One is where the debtor lacks knowledge of the factual basis of the undisclosed claims, and the other is where the debtor has no motive for concealment . . . . We . . . adopt the[se requirements for inadvertence] in our analysis of the present case."); *In re* Coastal Plains, Inc., 179 F.3d 197, 210 (5th Cir.1999) ("[I]n considering judicial estoppel for bankruptcy cases, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment."); *see also* Guay v. Burack, 677 F.3d 10, 20 & n. 7 (1st Cir.2012) ("Some circuits have held that parties who fail to identify a legal claim in bankruptcy schedules may escape the application of judicial estoppel if they can show that they either lacked knowledge of the undisclosed claims or had no motive for their concealment.... We have never recognized such an exception and have noted that deliberate dishonesty is not a prerequisite to application of judicial estoppel." Cannon–Stokes v. Potter, 453 F.3d 446, 448 (7th Cir.2006) (holding, at least in situations where a trustee has abandoned a legal claim so the debtor stands to benefit personally, that "a debtor in bankruptcy who denies owning [the claim] cannot realize on that concealed claim after the bankruptcy ends").
[46] *Ah Quin*, 733 F.3d at 271 (citing Jethroe v. Omnova Solutions, Inc., 412 F.3d 598, 601 (5th Cir.2005); *In re* Coastal Plains, Inc., 179 F.3d 197, 212–13 (5th Cir.1999)).
[47] 493 F.3d 1151 (10th Cir.2007).
[48] *See id.* at 1153.

stressed that the plaintiff knew of his pending personal injury suit and that he had a motive to conceal the claim.[49]

III. The Ninth Circuit Creates New Test for Applying Judicial Estoppel

Recently, the Ninth Circuit rejected the majority view and articulated a new test for applying the judicial estoppel doctrine.[50] In *Ah Quin v. County of Kauai Dept. of Transp.*,[51] the Ninth Circuit reversed the District Court for the District of Hawaii and held that the district court applied the judicial estoppel doctrine too broadly.[52] Specifically, the Ninth Circuit held that if a plaintiff-debtor (1) claims that her failure to list a pending lawsuit in a bankruptcy schedule was due to a "mistake" or "inadvertence" and (2) seeks to reopen the bankruptcy proceeding, then the court must first examine the plaintiff-debtor's subjective intent regarding how he or she filled out the schedule before deciding that the judicial estoppel applies.[53] The court explained that if a plaintiff-debtor's omission occurred by accident or was made without the intent to conceal the pending lawsuit, judicial estoppel should not bar the plaintiff-debtor's pending lawsuit.[54]

In *Ah Quin*, the debtor filed for bankruptcy under chapter 7 of the Bankruptcy Code after she had initiated an employment-discrimination suit in the district court.[55] The debtor, however, failed to list the lawsuit as an asset in her bankruptcy schedules and denied having the discrimination claim when asked at her section 341 meeting of creditor.[56] At some point, the debtor's attorney in the discrimination suit became aware of the potential effect of the bankruptcy case on the debtor's claim and informed the defendant in the discrimination suit of

[49] *See id.* at 1159 ("[plaintiff] well knew of his pending lawsuit and simply did not disclose it to the bankruptcy court").
[50] *Id.* at 276–277 ("[B]y adopting the ordinary understanding of "mistake" and "inadvertence" in this context, we differ from the test articulated by most of our sister circuits").
[51] 733 F.3d 267 (9th Cir. 2013).
[52] *Id.* at 271.
[53] *See id.* at 276–77.
[54] *See id.*
[55] *See id.* at 269.
[56] *See id.*

the bankruptcy case.[57] Soon thereafter, the debtor was permitted to reopen her bankruptcy case, set aside the discharge, and amend her schedules to list her pending discrimination claim as an asset.[58] About a month after the bankruptcy case was reopened, the defendant moved for summary judgment in the discrimination case on the grounds that judicial estoppel barred the debtor from proceeding with her claim.[59]

The district court presiding over the discrimination case granted the defendant's motion, reasoning that it was bound to apply judicial estoppel because the debtor (1) knew of her claim and (2) had a motive to conceal the claim from the bankruptcy court.[60] The Ninth Circuit reversed, agreeing with the debtor that the district court used the wrong legal standard for applying judicial estoppel.[61]

In reaching its holding, the Ninth Circuit rejected the narrow interpretation for the exception of "inadvertence" or "mistake" enforced by the majority of courts. The Ninth Circuit concluded that the narrow interpretation of the exception for "mistake" and "inadvertence" should not apply because the plaintiff-debtor reopened her bankruptcy proceeding and corrected the initial filing.[62] Moreover, the court opined that judicial estoppel requires an inquiry into a plaintiff-debtor's subjective intent at the time of initiating the bankruptcy proceeding to determine whether the initial incomplete filing was truly inadvertent or mistaken, as those terms are commonly understood.[63] The Ninth Circuit reasoned that, without a specific finding that the

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[57] *See id.*
[58] *See id.*
[59] *See id.*
[60] *See id.* at 271–72.
[61] *See id.* at 272 ("[w]e agree with Plaintiff that the district court erred in applying the narrow interpretation of 'inadvertence' because, in the circumstances, that interpretation is too stringent.").
[62] *See id.* at 277.
[63] *See id.* at 276–77 (9th Cir. 2013) ("judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken … [c]ourts must determine whether the omission occurred by accident or was made without intent to conceal … [t]he relevant inquiry is, more broadly, the plaintiff's subjective intent when filling out and signing the bankruptcy schedules").

plaintiff-debtor intended to omit or conceal the claim, the plaintiff-debtor's omission was not mistaken or inadvertent and judicial estoppel should not apply.[64]

The Ninth Circuit explained that, in these circumstances, where a plaintiff reopens and amends the initial bankruptcy filing, two of the three *New Hampshire v. Maine* factors no longer apply.[65] For instance, although the plaintiff at first took inconsistent positions, the bankruptcy court ultimately did not accept the initial position.[66] Furthermore, once the debtor amends his or her initial filing, he or she does not obtain an unfair advantage.[67]

IV. Implications of the Ninth Circuit's Decision

The decision of the Ninth Circuit, in *Ah Quin*, has many ramifications. In particular, the decision eliminates the presumption of deceit from plaintiff-debtors who claim that their failure to list pending lawsuits in their schedules was due to inadvertence or mistake and seek to reopen their bankruptcy cases and amend their schedules.[68] However, even under *Ah Quin*, the presumption of deceit will still apply in cases where the debtor fails to correct his omission after he receives a discharge.[69] Accordingly, while a plaintiff-debtor should seek to ensure that he accurately completes his schedules, *Ah Quin* demonstrates that if the plaintiff-debtor fails to list a lawsuit in his schedules, it is important that the debtor seek to reopen his case and amend his schedules as soon as possible.

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[64] *See id.*
[65] *See id.* at 274 ("once a plaintiff-debtor has amended his or her bankruptcy schedules and the bankruptcy court has processed or re-processed the bankruptcy with full information, two of the three primary New Hampshire factors are no longer met").
[66] *See id.* at 274.
[67] *See id.* Additionally, the Court refuted other possible justifications. The argument that judicial estoppel should be applied because the creditors were not initially informed of the pending claim was insufficient because the judicial estoppel doctrine is concerned with the integrity of the court system and not its effect on parties. *See id.* at274–75 (9th Cir. 2013). The argument that judicial estoppel is necessary to incentivize future debtors to be honest was insufficient because judicial estoppel functions to protect the integrity of the judicial system with respect to the current litigant, not to discourage future litigants from being dishonest. Moreover, the bankruptcy system has its own protections. *See id.* at 275.
[68] *See id.* at 276.
[69] *See id.* at 272–73.

Under *Ah Quin*, the presumption of deceit will still apply in cases where the plaintiff-debtor fails to correct his omission. Yet, it is important to remember that even under the Ninth Circuit's "subject intent" test, a court may still apply judicial estoppel after the debtor reopens his bankruptcy case if the court finds that the omission was intentional and did not result from mistake or inadvertence.[70]

Ultimately, both creditors and the debtor may benefit if the court permits the lawsuit to proceed because any judgment obtained will be used to satisfy creditors' claims, with any surplus being distributed to the debtor.[71] Under the majority rule, however, the defendant-wrongdoer is the only party that benefits because judicial estoppel will most likely bar the omitted lawsuit.[72]

Conclusion

The doctrine of judicial estoppel is intended to protect the integrity of the judicial system. In the bankruptcy area, where full disclosure is essential, judicial estoppel helps to assure that the judicial system is shielded from dishonest and conniving debtors. Debtors may deliberately omit a pending lawsuit from a bankruptcy schedule in the hope of safeguarding their potential winnings from creditors. In those situations, judicial estoppel will bar the debtor from pursuing any claims in the future. Nevertheless, there are circumstances where the debtor's omission may have been due to mistake or inadvertence. If the debtor amends his schedules and fixes the omission, under the test articulated in *Ah Quin*, the court would have to determine the subjective intent of the debtor at the time he filed the bankruptcy schedule to see if the omission was truly due to mistake or inadvertence. Under that test, as articulated by the Ninth Circuit, negligent debtors will still have the opportunity to pursue their pending claims.

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[70] *See id.* 278–79.
[71] *See id.* at 275.
[72] *See id* at 275–76.