CARLTON FIELDS

Application of the Judicial Estoppel Doctrine in Florida, Georgia, and Federal Courts

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Under the "universal rule," accepted in Florida and "in every other jurisdiction," a party is "estopped" to assert inconsistent positions in litigation. Salcedo v. Asociacion Cubana Inc., 368 So. 2d 1337, 1338 (Fla. 3d DCA 1979). The Third District cited the leading Florida case on the rule, Palm Beach Co. v. Palm Beach Estates, 148 So. 544, 549 (Fla. 1933), abrogated on other grounds in Ed Ricke & Sons Inc. v. Green, 609 So. 2d 504, 506 (Fla. 1992), as follows: The real meaning of the rule concerning estoppels of the kind relied on by appellees is that a party, who in an earlier suit on the same cause of action, or in an earlier proceeding setting up his status or relationship to the subject matter of his suit, successfully assumes a factual position on the record to the prejudice of his adversary, whether by verdict, findings of fact, or admissions in his adversary's pleadings operating as a confession of facts he has alleged, cannot, in a later suit on the same cause of action, change his position to his adversary's injury, whether he was successful in the outcome of his former litigation or not. The rule was applied in Salcedo to reverse the dismissal of a negligence complaint on the ground that the statute of limitations had run. The court concluded that "having successfully claimed that mediation was a required condition precedent to the filing of this action, the defendant may not now be heard to say that the delay specifically caused by the pendency of that very proceeding has resulted in the running of the statute of limitations." Id. at 1339. As it explained: In earlier times, the rule we apply in this case was said to reflect the feeling that a party may not "mend his hold," ... [or] "blow hot and cold at the same time" or "have his cake and eat it too." ... Today, we might say that the courts will not allow the practice of the "Catch-22" or "gotcha!" school of litigation to succeed. Id. (citations omitted). The Salcedo court specifically cited Federated Mutual Implement & Hardware Insurance Co. v. Griffin, 237 So. 2d 38, 42 (Fla. 1st DCA 1970), where the First District explained that "[t]he quintessence ... of this estoppel rule is probably the integrity of our system of justice." The year after the Florida Supreme Court decided Palm Beach Estates, it explained that for judicial estoppel to apply, (1) the position assumed in the prior trial must have been successfully maintained; (2) the positions must be clearly inconsistent; (3) the parties and issues must be the same; and (4) the party claiming estoppel must have been misled and have changed its position. Chase & Co. v. Little, 156 So.

609, 610 (Fla. 1934). More recently, the Florida Supreme Court revisited the judicial estoppel doctrine and broadened the rule in three significant ways. Blumberg v. USAA Casualty Insurance Co., 790 So. 2d 1061 (Fla. 2001). First, the court recognized an exception to the mutuality-of-parties requirement where "special fairness and policy considerations" compel application of the judicial estoppel doctrine. Id. at 1067; Grau v. Provident Life & Accident Insurance Co., 899 So. 2d 396, 399 (Fla. 4th DCA 2005) (discussing Blumberg). Second, as a consequence of the first change, it apparently eliminated the requirement that the party claiming estoppel be misled or change its position in reliance on the first position. Grau, 899 So. 2d at 399–400 (noting the agent in Blumberg who successfully asserted judicial estoppel was not a party to the earlier suit, and the opinion did not indicate he was misled or changed his position). And third, Blumberg recognized that a jury verdict was sufficient to establish the first position was successfully maintained, even though there was no final judgment entered. Blumberg, 790 So. 2d at 1067; Grau, 899 So. 2d at 400. In Blumberg, 790 So. 2d at 1067, the plaintiff litigated one legal theory to a jury verdict but abandoned it for a contradictory theory when the verdict was not as favorable as desired. These circumstances caused the court to conclude that "special fairness and policy considerations" warranted departure from the mutuality-of-parties requirement. Later, the Fourth District declined to apply judicial estoppel where the plaintiff did not use "intentional self-contradiction to obtain an unfair advantage in litigation." Grau, 899 So. 2d at 401–02; see also Osorio v. Dole Food Co., at *16 (S.D. Fla. Jan. 5, 2009) (explaining "the 'special fairness and policy considerations' come into play only if" parties "were using 'intentional self-contradiction to obtain an unfair advantage in litigation'") (quoting Grau). Despite the decision in Blumberg, however, some Florida courts still apply the earlier standard. See Fintak v. Fintak, 120 So. 3d 177, 186–87 (Fla. 2d DCA 2013) (articulating standard that requires the other party both to be misled and to change its position in reliance on the inconsistent position); Tyler-Fleming v. Swisher International Inc., 120 So. 3d 160, 162 (Fla. 1st DCA 2013) (same). As for the requirement that the prior position be successfully maintained, Florida courts explain that "[a] party has successfully maintained a claim or position if, in the prior proceeding, the court 'adopt[ed] the claim or position either as a preliminary matter or as part of a final disposition.'" Tyler-Fleming, 120 So. 3d at 162 (quoting Brown & Brown Inc. v. The School Board of Hamilton County, 97 So. 3d 918, 920 (Fla. 5th DCA 2012)). It is certainly not necessary that the party asserting inconsistent positions obtain a final judgment in the previous case. Hannover Insurance Co. v. Dolly Trans Freight Inc., at *7 (M.D. Fla. Dec. 18, 2006); Blumberg, 790 So. 2d at 1067. Courts have differed on whether a prior claim resolved by settlement can be a basis for judicial estoppel. Compare Brown & Brown, 97 So. 3d at 921 (concluding the prior inconsistent statement was not successfully asserted where the prior claim was resolved by settlement) with Lambert v. Nationwide Mutual Fire Insurance Co., 456 So. 2d 517, 519–20 (Fla. 1st DCA 1984) (holding plaintiff was judicially estopped from taking an inconsistent position in a second action after obtaining settlement in an earlier action). On the other hand, courts have cited Palm Beach Estates, where the court made it clear that the doctrine can apply "whether [the party] was successful in the outcome of his former litigation or not." Grauer v. Occidental Live Insurance Co. of California, 363 So. 2d 583, 585 (Fla. 1st DCA 1978) ("To successfully assume a position to the prejudice of an adversary does not require that the party estopped must prevail in

obtaining a successful result by way of a judgment against his adversary, and whether he wins or loses his case he may just as effectively become estopped from later changing his factual position to the injury of his adversary."); Kaufman v. Lassiter, 616 So. 2d 491, 493 (Fla. 4th DCA 1993) ("The party estopped need not prevail by way of a judgment against his adversary, all that is necessary is that he successfully assume a factual position on the record, whether by verdict, factual findings or admissions."); see also Salcedo, 368 So. 2d at 1338. Furthermore, although the general rule is that judicial estoppel applies where an inconsistent position was asserted successfully in a prior action or proceeding, both the First and Fifth Districts have applied the doctrine in the same proceeding, where there had been a final adjudication of the issue in the case. Rosenberg v. Metrowest Master Association Inc., 116 So. 3d 641 (Fla. 5th DCA 2013); Dubois v. Osborne, 745 So. 2d 479 (Fla. 1st DCA 1999). **Federal Use of Judicial Estoppel** Like Florida, federal courts apply the doctrine of judicial estoppel. Similar to Federated Mutual Hardware, the Eleventh Circuit has explained that judicial estoppel "is designed to prevent parties from making a mockery of justice by inconsistent pleadings," and the doctrine applies "to the calculated assertion of divergent sworn positions." American National Bank of Jacksonville v. Federal Deposit Insurance Corp., 710 F.2d 1528, 1536 (11th Cir. 1983). There is some debate among federal courts, however, about which judicial estoppel standard should apply in diversity cases. In Original Appalachian Artworks Inc. v. S. Diamond Associates Inc., 44 F.3d 925, 930 (11th Cir. 1995), the Eleventh Circuit established that in diversity cases, "the application of the doctrine of judicial estoppel is governed by state law." This position is not adopted by all circuit courts. See, e.g., Jarrard v. CDI Telecommunications Inc., 408 F.3d 905, 914 (7th Cir. 2005) ("Although [plaintiff's] complaint was founded on diversity jurisdiction, we apply federal (not Indiana) case law with respect to judicial estoppel."); Helfand v. Gerson, 105 F.3d 530, 534 (9th Cir. 1997) (same); Allen v. Zurich Insurance Co., 667 F.2d 1162, 1167 n.4 (4th Cir. 1982). Furthermore, even within the Eleventh Circuit, there appears to be an exception. In Burnes v. Pemco Aeroplex Inc., 291 F.3d 1282, 1283 (11th Cir. 2002), the defendant sought to bar plaintiff's employment discrimination claims because of plaintiff's failure to disclose those claims in his concurrent bankruptcy proceedings. The Eleventh Circuit applied federal law, explaining: "In this case, judicial estoppel is raised in the context of a bankruptcy proceeding and a federal employment discrimination case; therefore, federal law governs our analysis." Id. at 1285. Later, in Pavlov v. Ingles Markets Inc., 236 F. App'x 549, 549–50 (11th Cir. 2007), the Eleventh Circuit again applied federal law when it affirmed the application of judicial estoppel to plaintiff's various state law claims based on his failure to disclose those claims as assets in his bankruptcy proceedings. Finally, in Yerk v. PETA, at *3 (M.D. Fla. Sept. 21, 2010), the Middle District pondered whether federal or state law governed a judicial estoppel inquiry in a diversity case involving state law claims where the prior proceeding was in bankruptcy court. It discussed a First Circuit case in which the court opined that federal law would likely apply "where 'both the putatively estopping conduct and the putatively estopped conduct occur in a federal case,' because 'a federal court has a powerful institutional interest in applying federally developed principles to protect itself against cynical manipulations.'" Id. (quoting Alternative System Concepts Inc. v. Synopsys Inc., 374 F.3d 23, 32 (1st Cir. 2004)). Ultimately, however, the court concluded it did not need to decide the issue and applied federal law.

And even when this apparent bankruptcy-related exception does not apply, the Eleventh Circuit's application of state law in diversity cases is not always consistent. See, e.g., Tampa Bay Water v. HDR Engineering Inc., 731 F.3d 1171 (11th Cir. 2013) (applying federal law of judicial estoppel in a diversity action, without comment); Transamerica Leasing Inc. v. Institute of London Underwriters, 430 F.3d 1326 (11th Cir. 2005) (same); see also James River Insurance Co. v. Fortress Systems LLC, 899 F. Supp. 2d 1331 (S.D. Fla. 2012) (same). Clearly, notwithstanding the Eleventh Circuit's pronouncement in Original Appalachian Artworks, the applicability of federal or state law is a still an open question in practice. When federal law does apply to the judicial estoppel inquiry in a particular case, the Eleventh Circuit considers two factors: (1) "it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding;" and (2) "such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." Burnes, 291 F.3d at 1285 (quoting Salomon Smith Barney Inc. v. Harvey, M.D., 260 F.3d 1302, 1308 (11th Cir. 2001) vacated on other grounds by Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002)). The U.S. Supreme Court has also enumerated several factors that inform a decision whether to apply judicial estoppel: (1) whether the present position is "clearly inconsistent" with the earlier position; (2) whether the party succeeded in persuading a tribunal to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding creates the perception that either court was misled; and (3) whether the party advancing the inconsistent position would derive an unfair advantage on the opposing party. Id. (quoting New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001)). Neither set of factors is inflexible or exhaustive; instead, courts must consider all of the circumstances of a particular case when considering the applicability of judicial estoppel. Id. at 1286. Importantly, the doctrine of judicial estoppel is meant to protect the integrity of the judicial system, not the litigants. Id. Consequently, judicial estoppel may apply in the absence of privity, detrimental reliance and individual prejudice. Id. As the Eleventh Circuit noted in Transamerica Leasing, 430 F.3d at 1336 n.8, the circuit courts are split on the question of whether judicial estoppel should apply when, instead of the court adopting the prior position, the prior position resulted in a settlement. Courts that decline to apply judicial estoppel in such instances focus on the requirement that the doctrine apply where a position was successfully maintained in the prior proceeding. They conclude that because settlements neither require nor imply judicial endorsement of a particular argument, the argument was not successful. See In re Bankvest Capital Corp., 375 F.3d 51, 60–61 (1st Cir. 2004) (refusing to apply judicial estoppel where the bankruptcy court approved a settlement but did not accept the legal or factual assertions of the complaint); Blanton v. Inco Alloys International Inc., 108 F.3d 104, 110 (6th Cir. 1997) (declining to apply judicial estoppel, in part, because the parties in the prior proceeding reached a settlement, so there was no "successful" position asserted); Bates v. Long Island R.R. Co., 997 F.2d 1028, 1038 (2d Cir. 1993) ("A settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel.") (internal quotation marks omitted). Other courts have concluded that a party may prevail by obtaining a favorable settlement rather than a judgment. See Commonwealth Insurance Co. v. Titan Tire Corp., 398 F.3d 879, 887 (7th Cir. 2004); Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 604–05 (9th Cir. 1996) (opining, "the fact that plaintiff

prevailed by obtaining a favorable settlement rather than a judgment should have [no relevance] whatever"). The Eleventh Circuit has not decided the issue. Transamerica Leasing, 430 F.3d at 1336 n.8. And courts within the Eleventh Circuit have taken both paths. See Sumner v. Michelin North America Inc., 966 F. Supp. 1567, 1578–80 (M.D. Ala. 1997) (noting that a court's acceptance of a settlement does not generally imply that the court has accepted the settlement's terms, but ultimately concluding that courts should not rigidly require prior success when equity requires protection of the integrity of the courts); Pittman v. Massachusetts Mutual Life Insurance Co., 904 F. Supp. 1384, 1386–87 (S.D. Ga. 1995) (declining to apply judicial estoppel where the prior action resulted in settlement); see also James River, 899 F. Supp. 2d at 1335 (applying judicial estoppel where the first court approved a settlement agreement and issued a final judgment based on the prior position at issue). The Southern District of Florida applied judicial estoppel in the context of a Coblentz agreement in James River Insurance Co. v. Fortress Systems LLC, 899 F. Supp. 2d 1331 (S.D. Fla. 2012). In the first underlying suit, the defendant insured took the position in sworn interrogatories that its failure to load product into the shippers' vehicles was not a cause of the claimant's damages. Moreover, the defendant obtained a final, agreed-to Coblentz judgment that it was not negligent but merely vicariously liable for its subcontractors' negligent shipping. The district court applied the doctrine of judicial estoppel, concluding that it would undermine the foundation of the final judgment to allow the defendant to reverse course and, thereby, obtain coverage for the damages asserted against it. If it was not estopped, it would have a second opportunity to plead into coverage. **Georgia's Use of Judicial Estoppel** Georgia recognizes judicial estoppel as a federal doctrine "which has no exact equivalent under Georgia law." Thaxton v. Norfolk Southern Railway Co., 520 S.E.2d 735, 740 (Ga. App. 1999) (quoting Southmark Corp. v. Trotter Smith & Jacobs, 442 S.E.2d 265, 266 (Ga. App. 1994)). And application of judicial estoppel in Georgia courts is largely limited to cases in which a litigant has taken a previous position in federal bankruptcy court inconsistent with the position it later asserted in a Georgia court. See Wachovia Bank NA v. Moody Bible Institute of Chicago Inc., 642 S.E.2d 118, 121 n.4 (Ga. App. 2007). Nonetheless, Georgia courts have recognized three factors relevant to determining whether judicial estoppel applies: "(1) whether the party's current position is clearly inconsistent with a prior position; (2) whether the party has persuaded a court to accept the prior inconsistent position; and (3) whether the party will be in a position to derive a benefit or an unfair advantage as a result of the inconsistency." Mann v. Hardaway, 691 S.E.2d 612, 614 (Ga. App. 2010). With respect to the second factor, an earlier Georgia Court of Appeals panel held that a party has successfully asserted a previous inconsistent position "when the first court adopts or accepts a party's previous inconsistent position in a manner that provides an unfair advantage or benefit to that party in the first proceeding." Dillard-Winecoff LLC v. IBF Participating Income Fund, 552 S.E.2d 523, 525–26 (Ga. App. 2002). But the qualifier that the unfair advantage or benefit must have been "in the first proceeding" could be explained by the fact that most Georgia cases considering judicial estoppel involve a bankruptcy debtor who has tried to obtain relief from claims it concealed from its creditors. See, e.g., id. (discussing cases in which the plaintiff debtor obtained an unfair advantage with respect to its bankruptcy creditors). Finally, like federal courts, Georgia courts recognize that "the primary purpose of the doctrine is not to protect

the litigants, but to protect the integrity of the judiciary." Southmark, 442 S.E.2d at 267. Consequently, "[t]he doctrine does not require reliance or prejudice before a party may invoke it." Id.; Battle v. Liberty Mutual Fire Insurance Co., 623 S.E.2d 541, 543–44 (Ga. App. 2005). *Originally published by Law360 (January 2014).*

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