LITIGATION ALERT

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## Message From The Co-Chairs

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Welcome to the June 2010 edition of the *Litigation Alert*, which is published by the Litigation Department at Ruskin Moscou Faltischek, P.C. as a service to our fellow members of the Bar. We welcome your feedback on our publication as well as your topic ideas for future issues.

The RMF Litigation Department is the largest commercial litigation practice on Long Island. Ruskin Moscou Faltischek litigators regularly team with area practitioners, out-of-state lawyers and in-house counsel alike, covering all manner of business disputes. For more than 40 years, we have represented clients in federal and state courts throughout New York and the country and before all forums and tribunals, state and federal, international and domestic. Please contact us if we can be of assistance.

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# Judicial Estoppel: A Useful Tool for a Litigator

By Adam L. Browser

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Litigation is becoming increasingly expensive. A long drawn-out litigation can end up in a pyrrhic victory if the costs exceed the benefits. To avoid that outcome and to achieve a positive result in an economical manner, a litigator must consider all the tools at his or her disposal. A useful one, not frequently employed, is the doctrine of judicial estoppel.

The doctrine bars a party from taking a position that is inconsistent with a position that same party took in a prior proceeding. The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, thereby protecting the courts' integrity. However, while the primary purpose is to protect the courts, a litigant will also benefit if judicial estoppel is successfully invoked.

When a defendant asserts judicial estoppel as a shield against a plaintiff's claim, it must demonstrate that the plaintiff advanced a position in another proceeding that is inconsistent with the position the plaintiff is now taking. The defendant must also show that the plaintiff received a benefit in the other proceeding. Conversely, a plaintiff must demonstrate the same things when asserting judicial estoppel as a sword against a defendant's defense.

To illustrate, imagine an automobile accident in which a ticket is issued to the driver, followed by a civil lawsuit between the driver and a pedestrian. In the criminal case, the driver alleges that he was traveling at 15 miles per hour when the accident occurred and as a result, prevails. In a subsequent civil suit involving the same accident, the doctrine of judicial estoppel will likely bar the driver from claiming that he was not moving at the time of the accident.

Judicial estoppel is recognized in both New York State and Federal courts. It is an equitable doctrine and, as such, judges have discretion to apply or reject it. Moreover, courts will not apply the doctrine unless the two positions are truly inconsistent. Where the inconsistency results from an inadvertent mistake, the estoppel will generally not be applied.

Judicial estoppel even applies to governmental entities, although that is a rare occurrence. For example, last fall, the Second Department, relying on judicial estoppel, dismissed a petition brought by a Westchester fire district. In *Matter of Hartsdale Fire District v. Eastland*

*Construction, Inc.*, a dispute arose regarding the parties' obligations under a construction contract. The contractor commenced an action without filing the prerequisite notice of claim. The fire district moved to compel arbitration, which was granted. The arbitration proceeded. On the eve of the hearing, the fire district commenced a separate proceeding pursuant to Article 75 of the CPLR to permanently stay the arbitration, arguing that the contractor's time to serve a notice of claim had expired. The Supreme Court denied the fire district's petition, allowing the arbitration hearing to proceed. The Second Department affirmed. The Appellate Court noted that the position the fire district was now taking – seeking to permanently stay arbitration – was plainly inconsistent with the position it previously took when it successfully moved to compel arbitration.

In *Matter of Hartsdale Fire District*, both the fire district and the construction company were parties in the two proceedings. But that is not always a necessary element for the doctrine to apply. Some New York courts require that the party invoking judicial estoppel must also have been a party in the prior proceeding. However, other courts do not insist upon both parties being involved in the prior proceeding before applying the doctrine. The rationale is that judicial estoppel is intended to protect the court, not the parties involved.

In this interconnected world, information about an adverse party is becoming increasingly and more easily available via the Internet. In some jurisdictions, court records in which a party's prior positions can be uncovered are being made available on-line. That is likely to continue. Access to this information increases the likelihood that a litigator can discover an inconsistent position that the adverse party previously took and use that as an advantage. If judicial estoppel is successfully employed, a litigator may win summary judgment and avoid a long and costly trial or even an expensive discovery process. Litigators are well advised to keep the doctrine of judicial estoppel in mind when devising a strategy to achieve a client's goal.

Please contact **Adam Browser** at 516-663-6559 or abrowser@rmfpc.com with questions on this or any litigation-related topic.

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