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The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions

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THE JUDICIARY SAYS, YOU CAN'T HAVE IT BOTH WAYS: JUDICIAL ESTOPPEL— A DOCTRINE PRECLUDING INCONSISTENT POSITIONS

A party cannot occupy inconsistent positions; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts.

–Melville M. Bigelow, 1872[1]

I. INTRODUCTION

Suppose *X* is injured in an industrial accident and sues *Y* for negligence based on an agency theory that *Y* is *X*'s employer. At trial *X* successfully proves that *Y* is indeed the employer and recovers a judgment against *Y*. Now, suppose that *X* wants to sue *Z*, *Y*'s insurance carrier, but *Z* has a provision that employees may not directly sue the insurance company.[2] Should *X* now be allowed to assert that *X* is *not* an employee of *Y* so *X* may recover against *Z*?

Suppose that in a Chapter 7 bankruptcy proceeding a debtor fails to list a pending personal injury lawsuit against a third party. All debts have been discharged, and the debtor has sworn there are no more assets. Thus, it seems that the debtor has implicitly asserted that there is no pending personal injury lawsuit. Should the debtor now be allowed to proceed with this pending personal injury suit? Is it fair for debtors to use the court system to discharge their debts and then benefit from the lawsuit to the exclusion of their creditors? If the personal injury suit is not allowed to proceed, should the previous tortfeasor be allowed to escape the consequences of the previous tortious acts?

These questions lie at the heart of the doctrine of judicial estoppel, a doctrine that when invoked, precludes a party from

1. MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL 578 (1872).

2. The above hypothetical is almost identical to the facts of Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982).

making inconsistent statements[3] to a court in a subsequent judicial proceeding.[4] Although it is an obscure legal doctrine, judicial estoppel, like other forms of estoppel, has important strategic value at trial and shame on the poor lawyer who has a case dismissed sua sponte by a court on a grounds that the lawyer has never even heard of. Judicial estoppel also serves important and unique social policies within our judicial system. Policy considerations range from "uphold[ing] . . . the sanctity of the oath"[5] to "prevent[ing] parties from making a mockery of justice by inconsistent pleadings."[6] The doctrine also protects the integrity of the courts and the judicial process.[7]

Not only is judicial estoppel a "sleeper" doctrine, rarely used by the courts,[8] it is also somewhat controversial. Courts that apply judicial estoppel have interpreted its policies and elements variously,[9] while other courts have rejected the doctrine outright.[10]

This Comment asserts that the doctrine of judicial estoppel

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3. For the purposes of this Comment, the term "statement" will refer to sworn testimony and positions asserted, although not necessarily under oath, which have been accepted by a court as true.

4. Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244, 1244 (1986); Douglas W. Henkin, Comment, *Judicial Estoppel-Beating Shields into Swords and Back Again*, 139 U. PA. L. REV. 1711, 1711 (1991); Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409, 411 (1987).

5. Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) (quoting Melton v. Anderson, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948).

6. American Nat'l Bank v. F.D.I.C., 710 F.2d 1528, 1536 (11th Cir. 1983).

7. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982).

8. Indeed, judicial estoppel is such a rare doctrine that the U.S. Supreme Court has only mentioned the doctrine once in passing in its entire history. *See* Huffman v. Pursue Ltd., 420 U.S. 592, 606 n.18 (1975):

> We in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues, or that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 U.S.C. § 1983 of federal issues arising in state court proceedings.

9. *Compare Allen*, 667 F.2d at 1166 ("'[J]udicial estoppel' is invoked in these circumstances to prevent the party from 'playing fast and loose' with the courts . . . .") *with Konstantinidis*, 626 F.2d at 937 ("[J]udicial estoppel focuses on the integrity of the judicial process.") *and* Scarano v. Central R.R., 203 F.2d 510, 513 (3d Cir. 1953) ("[I]ntentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.").

10. Chrysler Credit Corp. v. County Chrysler Inc., 928 F.2d 1509, 1520 n.10 (10th Cir. 1991) ("[T]his court does not recognize the doctrine of judicial estoppel."); *See Konstantinidis*, 626 F.2d at 938; Parkinson v. California Co., 233 F.2d 432, 437-38 (10th Cir. 1956) (noting that judicial estoppel "reflects the minority viewpoint which has encountered inhospitable reception outside the State of Tennessee."); *see also* Henkin, *supra* note 4 (suggesting that modern rules of pleading make judicial estoppel useless and recommending that the doctrine be abolished).

should be reinvigorated. Part II of this Comment provides an examination of the history and policy of the doctrine. Part III distinguishes judicial estoppel from other forms of estoppel. Part IV discusses the relationship between judicial estoppel and Rule 8(e)(2) of the Federal Rules of Civil Procedure. The current majority and minority positions of judicial estoppel are examined in Part V. Part VI investigates both California's and the Ninth Circuit's lack of a position on judicial estoppel, and also argues that the Ninth Circuit is not bound by the California state laws on judicial estoppel. Finally, Part VII recommends a new four-part test, which aids in the determination of how and when it is proper to apply judicial estoppel. This proposed test seeks to best fulfill the social policies behind judicial estoppel in a fair yet limited way so as to help avoid the potentially harsh results of judicial estoppel when they are unwarranted.

II. THE HISTORY AND POLICY OF JUDICIAL ESTOPPEL

Judicial estoppel finds its origin in the courts of Tennessee.[11] In 1857 the Tennessee Supreme Court created the doctrine of judicial estoppel in *Hamilton v. Zimmerman*.[12] Through the creation of judicial estoppel, the court intended to uphold "the proper reverence for the sanctity of [the] oath."[13] The *Hamilton* court stated, "This doctrine . . . [has] its foundation in the obligation under which every man is placed to speak and act, according to the truth

11. Boyers, *supra* note 4, at 1245-46; Henkin, *supra* note 4, at 1713.

12. 37 Tenn. (5 Sneed) 39 (1857). In this landmark case, plaintiff and his partner owned a drugstore, which they sold to the defendant. *Id.* at 40. Plaintiff then worked for defendant for four years until the store was sold. *Id.* at 43. After the sale, plaintiff brought suit for a settlement of partnership accounts, claiming he was entitled to half of the profits because he was defendant's partner during the four years. *Id.* at 40-42. Plaintiff claimed that defendant considered him a partner while defendant countered that plaintiff was merely a clerk. *Id.* at 42-43.

Later in the case defendant introduced evidence from a previous action. *Id.* In this previous action, plaintiff's ex-partner claimed that defendant failed to pay him on the note for the sale of the store. *Id.* at 47-48. In his reply defendant stated that plaintiff was his clerk and therefore knew all the debts owed were good. *Id.* at 47. Defendant then filed a cross-bill against plaintiff and his ex-partner for a credit the defendant was owed from the original purchase. *Id.* Plaintiff answered the cross-bill by stating he "read carefully the answer of [defendant], and also his bill, and believes that the allegations in said answer and bill, are substantially true." *Id.* at 47 (emphasis omitted). The court in the later action then held that plaintiff was judicially estopped to assert he was a partner because he had impliedly asserted to a prior court under oath that he was not a partner. *Id.* at 47-48. Plaintiff was therefore bound to the position that he was a clerk. *Id.*

13. *Id.* at 48.

of the case."[14] The court felt that the policy of upholding the sanctity of the oath was compelling enough to disallow inconsistent statements in later judicial proceedings. Thus, Tennessee applied judicial estoppel on an absolute basis; any prior position in a judicial proceeding could be used to prevent a later inconsistent position, except when the original position resulted from fraud, duress, or mistake.[15] The absolute rule upholds the sanctity of the oath and prevents untruths from coming into the court.[16] While many courts apply judicial estoppel in some limited fashion, Tennessee is the only jurisdiction that still applies the strict absolute rule of judicial estoppel.[17]

Although most modern courts accept judicial estoppel, many differ as to the underlying policies and application of the doctrine.[18] Modern courts have identified social policies for the use of judicial estoppel in addition to Tennessee's absolute rule, which is aimed at the sanctity of the oath. Many courts argue that judicial estoppel's primary goal is to afford protection to the judicial process by avoiding inconsistent results.[19] Others cast the doctrine's policy goals in different ways, such as preventing parties from "playing fast and loose with the courts,"[20] or protecting the "integrity of the judicial process."[21] These policy goals are the conduit that has allowed the doctrine of judicial estoppel to become a guardian of the judicial process *itself.* Since its purpose is the protection of the judicial process, the court has the ability to raise a judicial estoppel motion sua sponte.[22]

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14. *Id.*

15. *See, e.g.*, Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980); Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 175 (5th Cir. 1973); *Hamilton*, 37 Tenn (5 Sneed) at 48.

16. For an interesting discussion of how the early Tennessee courts applied judicial estoppel, see T.H. Malone, *The Tennessee Law of Judicial Estoppel*, 1 TENN. L. REV. 1 (1922).

17. Boyers, *supra* note 4, at 1246; Henkin, *supra* note 4, at 1713-14.

18. *See infra* app.

19. *See, e.g,*. Stevens Tech. Servs. v. SS Brooklyn, 885 F.2d 584, 588-89 (9th Cir. 1989); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982); *Konstantinidis*, 626 F.2d at 937; *Johnson*, 485 F.2d at 174.

20. Several courts have used the phrase "fast and loose with the court." *See e.g.* Morris v. California, 966 F.2d 448, 453 (9th Cir. 1991); *Allen*, 667 F.2d at 1166; *Konstantinidis*, 626 F.2d at 937; Scarano v. Central R.R., 203 F.2d 510, 513 (3d Cir. 1953).

21. *Allen*, 667 F.2d at 1166; *Konstantinidis*, 626 F.2d at 937.

22. Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (quoting Religious Tech. Ctr. v. Scott, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting) ("Because [judicial estoppel] is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.").

Courts also consider the question of fairness. It seems patently wrong to allow a person to abuse the judicial process by first swearing to one position, and later, if it becomes beneficial, to assert the opposite. Thus, the courts have invoked judicial estoppel to prevent fraud on the courts[23] and to avoid "unfair advantage" taken against the court by unscrupulous litigants.[24]

As opposed to the absolute rule, modern courts use a more restricted application of the doctrine to better fit the doctrine's policy goals. The most notable of these limitations is the "prior success" rule. Under this rule, a party is judicially estopped in a later litigation only if the "party has successfully asserted an inconsistent position in a prior proceeding."[25] It is important to note that prior success for the purposes of judicial estoppel does not mean that the party won the lawsuit, but rather, that the court in the first lawsuit accepted the questioned statement or assertion as true.[26] Also, judicial estoppel only applies when a party is asserting a matter of fact, not law.[27] Furthermore, settlements have no bearing on judicial estoppel because, in the eyes of the law, no actual assertion of a specific position was ever accepted by a court.[28] And, a future

23. Schulze v. Schulze, 121 Cal. App. 2d 75, 83, 262 P.2d 646, 650-651 (1953).

24. *Scarano*, 203 F.2d at 513.

25. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982).

26. *Id.* at 599 n.5.

27. *See Allen*, 667 F.2d at 1168-69 (Bryan, J., dissenting). The dissent raised the somewhat troubling issue that plaintiff Allen asserted he was an employee in the first suit, but the second suit also concerned the issue of Allen's possible employment. *Id.* at 1168. Therefore, the dissent seems to suggest that had Allen lost the first suit—hence the holding would have been that Allen was not an employee—Allen would be held to his assertion he was an employee in later litigation. This erroneous assumption illustrates the difference between asserting a matter of fact versus a matter of law. At the first trial Allen questioned a matter of law by attempting to prove he was an employee; he made no assertion that the court adopted until the end of the trial when Allen was adjudged to be an employee. At that point, Allen's employment became a matter of fact. Thus, had Allen lost, and then tried to assert he was not an employee in the second suit against Zurich Insurance he would not have been held to his statements about employment because the court never adopted the statement that he was employed. However, once Allen won the first suit, the court must have accepted the proposition that he was an employee, and thus, Allen was judicially estopped from then claiming he was not an employee. *Id.*

28. *Edwards*, 690 F.2d at 599 (citations omitted). The court stated:

> '[A] settlement neither requires nor implies any judicial endorsement of either parties [sic] claims or theories, and thus, a settlement does not provide the prior success necessary for judicial estoppel'). *Id.* The requirement that the position be successfully asserted means that the party must have been successful in getting the first court to accept the position. Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists.

change in fact or position that makes the prior statement no longer valid will of course cause no judicial estoppel effect. Thus, the prior success rule only deals with the area of an actually litigated statement of fact asserted to be true and accepted by a court in the preceding action.

The prior success rule fits well with the policies of protecting judicial integrity and preventing an abuse of the judicial process.[29] If a court never adopted the prior statement, there is no danger of inconsistent results based on that statement.[30] If there is no danger of inconsistent results, then there is no fear of an impairment of the judicial process. It is also less likely that a litigant will abuse the judicial process in a later proceeding if the first court never accepted the original statement. Thus, the policies behind the prior success rule help to uphold the rational purposes behind judicial estoppel without the harsh results and overinclusive effect of the sanctity of the oath policy. If the first court never accepted the statement, the judicial process itself has suffered no harm from inconsistent results.[31]

III. JUDICIAL ESTOPPEL DISTINGUISHED FROM CLAIM PRECLUSION, ISSUE PRECLUSION, AND EQUITABLE ESTOPPEL

While judicial estoppel may at times have the same effect as other forms of estoppel,[32] the elements and policies behind judicial estoppel are quite different. One court stated, "The policies supporting judicial estoppel are different from those that support the more common doctrines of issue preclusion, equitable and collateral estoppel."[33] Thus, in order to more clearly understand judicial estoppel, it must be distinguished from the more common forms of estoppel.

A. Claim Preclusion (Res Judicata)

Among the various estoppel doctrines, claim preclusion is the

29. There is some debate as to whether a court need adopt a statement to give rise to judicial estoppel. *See infra* Part IV.

30. *Edwards*, 690 F.2d at 599.

31. Boyers, *supra* note 4, at 1253.

32. It is important to remember that judicial estoppel prevents a party from asserting a statement, not an entire lawsuit. However, in most instances, the preclusion of the statement will estop a party from carrying out a successful lawsuit. In this way, it is likely that judicial estoppel may very well have similar effects as other forms of estoppel.

33. *Edwards*, 690 F.2d at 598.

least similar to judicial estoppel.[34] Claim preclusion prevents a party from bringing the same litigation after it has already been decided on the merits.[35] This form of estoppel only operates between adverse parties who were involved in a prior action against each other.[36] If claim preclusion applies, a party is barred from asserting a previously adjudicated claim.[37] When a decision on the merits between two parties becomes final, all possible claims arising from that transaction or occurence effectively merge into the judgment if plaintiff prevails; if defendant wins, these future claims are considered barred.[38] Either way, claim preclusion denies parties the ability to litigate claims at a later date because the parties were already afforded the opportunity in the first trial.

Additionally, claim preclusion may never be invoked unless there is some form of privity between the parties.[39] The purpose of this requirement is to ensure that before parties are precluded from pursuing a lawsuit, they must have had at least one chance to prove the claim or defense.[40] The privity requirement makes sense since it would be unfair to preclude parties from pursuing a lawsuit unless they have had at least one opportunity to prove their case.

The policy goals behind claim preclusion include the preservation of judicial resources and the protection of the finality of a court's judgment.[41] Judicial estoppel, on the other hand, has very different policy goals.[42] Judicial estoppel does not have a privity requirement and quite often does not even entail the same claim or occurence.[43] Therefore, although claim preclusion and judicial estoppel may produce the same preclusive effect,[44] the policy goals and elements of these two doctrines are quite different.

B. Issue Preclusion (Collateral Estoppel)

Issue preclusion resembles judicial estoppel more closely than

34. *See* Plumer, *supra* note 4, at 414.
35. *See* 18 C. CHARLES A. WRIGHT, & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 4406 (1995) [hereinafter WRIGHT & MILLER].
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *See supra* notes 5-7, 19-24 and accompanying text.
43. For a discussion of the modern elements of judicial estoppel, see *supra* notes 23-28 and accompanying text.
44. *See supra* note 32 and accompanying text.

claim preclusion.[45] Like claim preclusion, the policy goals behind issue preclusion are judicial economy and ensuring the finality of a judgment.[46] Thus, the policy goals and elements of issue preclusion are clearly different than the policy goals of judicial estoppel.[47]

Issue preclusion can only be invoked when three prerequisite elements are satisfied: first, the issue must have been actually litigated;[48] second, the rendering court must have actually decided the issue;[49] and third, the issue sought to be precluded must have been necessary to the final judgment in the first proceeding.[50] Issue preclusion can be used as a shield by a litigant to prevent another party from attempting to relitigate an issue at a later trial.[51] Issue preclusion can also be used as a sword, in that a plaintiff can use a previous judgment adverse to their opponent against that opponent for plaintiff's benefit, even if the plaintiff was not a party to the prior litigation.[52]

Judicial estoppel's elements are somewhat different than those of issue preclusion.[53] This follows logically because the two doctrines prevent different evils. However, the effect of the two doctrines may be, and often is, the same. A party, if issue precluded, will not be able to assert that issue at trial because it was previously decided. Judicial estoppel can also prevent a party from introducing an issue at trial if the statement is inconsistent with a position the party previously advanced. In either case, a party may be precluded from introducing an issue or statement at trial, and this could ultimately prove fatal to a claim.[54]

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45. *See* Plumer, *supra* note 4, at 415.

46. *See* Edwards v. Aetna Life Ins., 690 F.2d 595, 599 (6th Cir. 1982).

47. For a discussion of the policy goals of judicial estoppel, see *supra* notes 5-7 and accompanying text.

48. WRIGHT & MILLER, *supra* note 35, § 4406.

49. *Id.*

50. *Id.*

51. For example, if *X* and *Y* are in a dispute over ownership of Blackacre, and a court adjudges *X* to be the owner, *X* could block *Y* from asserting ownership of Blackacre in a later litigation through the use of issue preclusion.

52. An example of the use of offensive non-mutual collateral estoppel, i.e. the use of issue preclusion as a sword, would be a case where *B*, a bus passenger, is suing *C*, a bus driver, for negligence. Should *B* prevail in the litigation, all of the other passengers on that ill-fated bus trip would be able to use the negligence judgment against *C*, even though they were not parties to the original action. However, if *C* wins, *C* may not use that judgment against all of the other bus passengers.

53. For a discussion of the elements of judicial estoppel, see *supra* notes 23-28 and accompanying text.

54. *See supra* note 32 and accompanying text.

C. Equitable Estoppel

The doctrine of equitable estoppel is most similar to judicial estoppel.[55] In fact, courts frequently confuse the two.[56] However, the two doctrines have different elements and different goals.

To successfully invoke equitable estoppel, a party must establish that in a prior proceeding (1) the parties were adverse; (2) the party attempting to assert equitable estoppel detrimentally relied on their opponent's prior position; and (3) that party would be prejudiced if the court allowed its opponent to change the prior position.[57] Thus, unlike judicial estoppel, privity and detrimental reliance are necessary elements of equitable estoppel.[58]

Equitable estoppel protects the integrity of the relationship between parties.[59] The *Konstantinidis v. Chen* court argued that the purpose of equitable estoppel is "to ensure fairness in the relationship between parties."[60] Thus, equitable estoppel operates to protect the parties in a litigation from prejudice that may occur from a change in position.[61] Judicial estoppel, on the other hand, aims to prevent a different harm—the harm the judicial process suffers when litigants take inconsistent positions.[62] Although these two doctrines have different purposes and elements, both "prevent a party from contradicting a position taken in a prior judicial proceeding."[63] This similar consequence of these two doctrines may explain why equitable and judicial estoppel are frequently mistaken for each other.

A comparison of judicial estoppel to its cousins, claim preclusion, issue preclusion, and equitable estoppel, demonstrates that judicial estoppel is an independent doctrine with separate policy goals and elements. All the estoppel doctrines, when successfully

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55. Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council, 851 F.2d 1208, 1210 n.3 (9th Cir. 1988).

56. Ellis v. Arkansas La. Gas Co., 609 F.2d 436, 440 (10th Cir. 1979); City of Miami v. Smith, 551 F.2d 1370, 1377 (5th Cir. 1977); Gleason v. United States, 458 F.2d 171, 175 (3d Cir. 1972); Toman v. Underwriters Labs. Inc., 532 F. Supp 1017, 1019 (D. Mass. 1982), *rev'd on other grounds*, 707 F.2d 620 (1st Cir. 1983); Boyers, *supra* note 4, at 1248-49.

57. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982); Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980).

58. For a discussion of the elements of judicial estoppel, see *supra* notes 23-28.

59. *Konstantinidis*, 626 F.2d at 937.

60. *Id.*

61. *Id.*

62. *See supra* notes 5-7, 19-24 and accompanying text.

63. *Edwards*, 690 F.2d at 598.

applied, may ultimately lead to the same result, the demise of a claim or lawsuit. Although preclusion may occur in different fashions, and each form of estoppel aims at preventing a specific evil, the desired end result is the same—the termination of a claim on procedural grounds. It is clear that while judicial estoppel is the rarest of the estoppel doctrines, it still retains an important place in our legal system. When applied properly judicial estoppel protects important policy goals that are inadequately protected by the other estoppel doctrines.

IV. IS THERE TENSION BETWEEN RULE 8(E)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND JUDICIAL ESTOPPEL?

Both courts and scholars have argued that the modern, liberal pleading rules of the Federal Rules of Civil Procedure have made judicial estoppel an ancient and unnecessary doctrine.[64] However, an examination of Rule 8(e)(2)[65] shows that when judicial estoppel is properly applied, Rule 8(e)(2) and the doctrine of judicial estoppel exist independently and harmoniously. The *Parkinson v. California Co.*[66] court concluded that judicial estoppel cannot exist in light of the "spirit of Federal Rules of Civil Procedure, rule 8(e)(2)... [which] would be out of harmony with the great weight of authority independent of that rule, and would discourage the determination of cases on the basis of the true facts as they might be established ultimately."[67] Others also believe that judicial estoppel is preempted by Rule 8(e)(2).[68] Advocates of the preemption argument assert that because the purpose of Rule 8(e)(2) is to ascertain the truth of matters in the litigation, judicial estoppel will "foreclose all further inquiry into the underlying claim . . . [which]

64. Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956); Henkin, *supra* note 4, at 1729-43.

65. Rule 8(e)(2) reads as follows:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insuffciency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

FED. R. CIV. P. 8(e)(2).

66. 233 F.2d 432 (10th Cir. 1956).

67. *Id.* at 438.

68. *See, e.g.*, Henkin, *supra* note 4, at 1729-43.

plainly conflicts with the truth-seeking function of the courts."[69] Subscribers to this theory further argue that judicial estoppel does not adequately respond to subsequent changes in factual situations.[70]

To understand why Rule 8(e)(2) does not preempt judicial estoppel, judicial estoppel in the same proceeding must be distinguished from judicial estoppel in later proceedings. Generally, judicial estoppel should not be applied in the same proceeding, especially if the court subscribes to the adoption theory of judicial estoppel.[71] Thus, other than the old absolute rule—which is presently applied only in Tennessee[72] —the modern adoption theory of judicial estoppel does not prevent litigants from pleading alternative and inconsistent positions within the same lawsuit.[73] If judicial estoppel is only applied to subsequent litigations, then judicial estoppel will never interfere with the truth-seeking policies behind Rule 8(e)(2) and a party's ability to plead alternative and inconsistent positions.[74]

However, the clash between judicial estoppel and Rule 8(e)(2) is quite a different matter in the context of a later litigation. A misapplication of this difference of judicial estoppel forms occurred when the *Parkinson* court faced a situation in which a worker was injured by an undetected gas leak.[75] The worker filed suit in state and federal court.[76] The state court complaint alleged that both the processor and wholesaler of the gas were negligent for failing to add an odorizing agent to the gas.[77] The plaintiff also sued the retailer for failure to inspect the gas and for sending an

69. *Id.* at 1740.

70. *Id.* at 1733-34.

71. Under an adoption theory judicial estoppel cannot be invoked until a litigant in a present lawsuit attempts to advance a statement which is inconsistent from that which they persuaded a prior court to accept as true. Hence, until there is a second lawsuit, there can be no fear of inconsistent results, and thus, judicial estoppel should not be invoked for statements made *within* the same litigation.

72. *Parkinson*, 233 F.2d at 437-38; Boyers, *supra* note 4, at 1246.

73. *See* WRIGHT & MILLER, *supra* note 35, § 4477 at 786 ("[The] [i]nconsistent position doctrine must not be allowed to interfere with the modern pleading rules that expressly permit pursuit of inconsistent positions within a single action.").

74. Since Rule 8(e)(2) only applies within the pleadings of a lawsuit, there is no danger or fear of prior inconsistent statements reaching the court, except those that should be barred by a correct application of judicial estoppel.

75. *Parkinson*, 233 F.2d at 434.

76. *Id.* at 434-35.

77. *Id.*

incompetent employee.[78] Plaintiff's federal court pleadings were the same, except that plaintiff failed to include the retailer as a defendant.[79]

The district court accepted the retailer's argument that the plaintiff should have been judicially estopped in federal court because the complaints were inconsistent.[80] On appeal the Tenth Circuit rejected the judicial estoppel argument and held that the pleadings were not truly inconsistent—one pleading merely omitted certain facts.[81] The Tenth Circuit should have concluded the opinion with its holding on judicial estoppel because the court was correct. There was no occasion to invoke judicial estoppel because there was no formal adoption of a position by either the state or federal district court. Instead of ending the inquiry as it should have, the Tenth Circuit opened a Pandora's box. In dicta the court opined that the judicial estoppel doctrine should be rejected because of Federal Rule of Civil Procedure 8(e)(2).[82]

It was unnecessary for the Tenth Circuit to make this gratuitous comment and, by doing so, may have created substantial confusion. In the *Parkinson* case there was no adoption of any inconsistent position.[83] The district court was merely confused about judicial estoppel. The Tenth Circuit should have refrained from discussing the clash between judicial estoppel and Rule 8(e)(2) without fully investigating the policies and elements of judicial estoppel.

The *Parkinson* court readily conceded that other forms of estoppel, such as claim preclusion and equitable estoppel, can foreclose a party from pleading these claims or issues in a subsequent litigation.[84] In fact, it would likely be a violation of Federal Rule of Civil Procedure Rule 11[85] to plead a claim that is barred by claim preclusion. However, the *Parkinson* court failed to extend this

78. *Id.* at 435-36.
79. *Id.* at 434.
80. *Id.* at 435.
81. *Id.* at 437-38.
82. *Id.* at 438.
83. *Id.* at 434-38.
84. *Id.* at 438 ("[T]here may be an estoppel by judgment, which is a separate and distinct concept. But only under conditions giving rise to the application of an equitable estoppel . . . will prior statements, in and of themselves, foreclose a party from asserting a contrary position.").
85. "[T]he claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law." FED. R. CIV. P. 11(b)(2)

line of reasoning to judicial estoppel. It is logically impossible to plead inconsistent positions in good faith where a court in a prior litigation has adopted a contrary position; Rule 8(e)(2) does not clash with the doctrine of judicial estoppel since Rule 8(e)(2) *only* allows inconsistent pleadings if they are made in good faith.[86]

Thus, judicial estoppel has no "chilling" effect on the inconsistent pleadings provision of Rule 8(e)(2). A litigant cannot in good faith ask a court to accept a position contrary to one asserted by the litigant and accepted by the court in a prior litigation. Therefore, if a prior court is asked to, and actually does adopt an assertion as true, a litigant would be unable to make a good faith assertion that the opposite is now true without a change of circumstances or some other compelling reason.[87]

Recent cases provide support to explain the difference between honest doubt as to the facts of a case and bad faith inconsistency.[88] Unfortunately, the mistaken dicta of one 1956 case[89] has led to much confusion and further erroneous opinions as to Rule 8(e)(2)'s effect on judicial estoppel, at least in a minority of the federal circuits.[90] When examining the adoption theory of judicial estoppel, as compared to the language and polices of Rule 8(e)(2), it is quite clear that both of these rules exist independently and harmoniously.

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86. "All statements shall be made subject to the obligations set forth in Rule 11." FED. R. CIV. P. 8(e)(2)

87. If a court in a prior litigation found that *X* was an employee of *Y*, *X* cannot claim in good faith that *X* is *not Y*'s employee in a later litigation.

88. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982) (quoting Scarano v. Central R.R., 203 F.2d 510, 513 (3d Cir. 1953)). The court stated that the essential function of judicial estoppel is:

> to prevent the use of "intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." This obviously contemplates something other than the permissible practice, now freely allowed, of simultaneously advancing in the same action inconsistent claims or defenses which can then, under appropriate judicial control, be evaluated as such by the same tribunal, thus allowing an internally consistent final decision to be reached.

Id.

89. Parkinson v. California Co., 233 F.2d 432 (10th Cir. 1956).

90. *See* United States v. 49.01 Acres of Land, 802 F.2d 387 (10th Cir. 1986).

V. AN EXAMINATION OF THE CURRENT MAJORITY AND MINORITY POSITIONS OF JUDICIAL ESTOPPEL

A. The Majority Position—The Prior Success Rule

The current majority position, accepted in most federal courts, requires that a party's prior statement was actually accepted as true by a court or administrative agency before a later court can invoke judicial estoppel.[91] This position strives to protect the integrity of the judicial process and to prevent an abuse of the judicial process.[92] As noted earlier, the additional element of adoption marked a substantial step in the formation of the judicial estoppel doctrine.[93] The prior success rule helps ensure that judicial estoppel will only be applied when its application upholds the policies behind the doctrine.[94] However, despite these limitations and policies, some courts do not require an adopted statement,[95] while others still refuse to recognize judicial estoppel at all.[96]

It is evident that judicial estoppel is an independent, useful, and necessary doctrine in our judicial system.[97] Furthermore, of all the existing forms of judicial estoppel—sanctity of the oath,[98] fast and loose,[99] and prior success,[100] the prior success rule comes closest to fulfilling the policy goals of judicial estoppel.[101] However, even the prior success rule has its drawbacks.[102]

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91. For a full listing of all the federal circuits' positions on judicial estoppel see Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540 (7th Cir. 1990); American Nat'l Bank v. F.D.I.C., 710 F.2d 1528 (11th Cir. 1983); Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982); Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982); Konstantinidis v. Chen, 626 F.2d 933 (D.C. Cir. 1980); City of Kingsport v. Steel & Roof Structure, Inc., 500 F.2d 617 (6th Cir. 1974); Scarano v. Central R.R., 203 F.2d 510 (3d Cir. 1953); WRIGHT & MILLER, *supra* note 35, § 4477 at 662; *see infra* app.

92. For a full discussion and explanation of the policies and elements of the prior success rule and the majority position on judicial estoppel, see *supra* notes 18-31 and accompanying text.

93. *See supra* notes 29-31 and accompanying text.

94. *See supra* notes 29-31 and accompanying text.

95. *See infra* Part V.B. for a full discussion of the minority position, which does not require prior success in order to invoke judicial estoppel.

96. United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986) ("The Tenth Circuit, however, has rejected the doctrine of judicial estoppel.").

97. *See* WRIGHT & MILLER, *supra* note 35, § 4477, at 779.

98. *See supra* notes 12-17 and accompanying text.

99. *See infra* Part V.B.

100. *See infra* notes 103-08 and accompanying text.

101. *See* Boyers, *supra* note 4, at 1270.

102. *Id.* at 1256-57.

The first question for the majority position is the following: What constitutes a prior success? Interestingly enough, a party need not have prevailed on the merits to achieve prior success adequate to invoke judicial estoppel.[103] It is sufficient that the prior court "accepted" the position which is now inconsistent with the current theory advanced.[104] This rule is inherently logical in light of the policies behind judicial estoppel. A court's holding on an issue, whether favorable or unfavorable to a litigant, should be the final determination on that issue. If a litigant loses on the merits because a certain issue was decided unfavorably, the litigant should be held to that finding regardless of the holding on the merits.[105]

However, even though it is clear that the prior success rule does not require victory on the merits, the definition of adoption is still unclear.[106] For example, a subsequent court may have difficulty determining which positions or facts were accepted as true by the first court. This task becomes especially arduous if the jury does not return a special verdict or, in a bench trial, if the judge does not prepare written findings of fact. In some cases the verdict makes factual determinations obvious.[107] In other cases it is impossible to determine certain facts based on the verdict alone. There may be ambiguities in a written opinion that a later court must resolve before it can determine if it is an appropriate occasion to invoke judicial estoppel.[108] The test proposed in this Comment helps to alleviate these problematic areas of the adoption theory.[109]

A court in a subsequent proceeding may be unable to determine if the present litigant's position is truly inconsistent with a position adopted in an earlier litigation. There may be insufficient evidence left from the first court to enable a second court to determine if it is appropriate to apply judicial estoppel. The later

103. *Edwards*, 690 F.2d at 599 n.5 ("A party need not finally prevail on the merits in the first proceeding.").

104. *Konstantinidis*, 626 F.2d at 937 n.6.

105. *See Edwards*, 690 F.2d at 599.

106. *See* Boyers, *supra* note 4, at 1256.

107. *See, e.g.*, *Allen*, 667 F.2d at 1163-66 (finding that plaintiff's recovery of worker's compensation from his employer necessarily precluded plaintiff's later claim that he was *not* an employee when the second case was based on the same set of facts).

108. *See* Boyers, *supra* note 4, at 1257.

109. *See infra* Part VII.

court may very well have to decide for itself if the prior court accepted the litigant's original statement as true.[110] If the later court is placed in a situation where it must decide whether to apply judicial estoppel, and the facts are ambiguous, the court should remember that judicial estoppel can have "extreme"[111] and "harsh" results.[112] Thus, because of the judicial policy of seeking truth, and the fact that a party's entire lawsuit may be at stake, judicial estoppel "is . . . to be applied with caution."[113] If a court is faced with an unclear record and the possibility of a judicial estoppel motion exists, the court should be hesitant to apply the doctrine unless it is unmistakably clear that a truly inconsistent position has been taken.

B. The Minority Position—"Playing Fast and Loose" With the Court—The Patriot Cinemas Case

Unlike the majority's prior success rule, which requires the court to adopt a litigant's statement,[114] the minority position requires no such adoption.[115] The key—and apparently only—case for the minority position is *Patriot Cinemas Inc., v. General Cinema Corp.*[116] In fact, *Patriot Cinemas* seems to be the case that created the minority position. The minority position as stated in *Patriot Cinemas* is "the sort of self-serving self-contradiction, or 'playing fast and loose with the courts,' that is barred by the doctrine of judicial estoppel."[117] Thus, according to the *Patriot Cinemas* court, the minority form is different from the "'classic' case of judicial estoppel"[118] in that there need be no form of adoption, merely any form of "playing fast and loose with the court."[119]

In *Patriot Cinemas*, Patriot Cinemas sued General Cinema in

110. *See* Boyers, *supra* note 4, at 1257.

111. USLIFE Corp. v. United States Life Ins. Co., 560 F. Supp. 1302, 1306 (N.D. Tex. 1983).

112. *See* Henkin, *supra* note 4, at 1717.

113. *Allen*, 667 F.2d at 1167.

114. *See supra* notes 94-105 and accompanying text.

115. Morris v. California, 966 F.2d 448, 453 (9th Cir. 1991) ("The minority view, in contrast, holds that the [judicial estoppel] doctrine applies even if the litigant was unsuccessful in asserting the inconsistent position . . .").

116. 834 F.2d 208 (1st Cir. 1987).

117. *Id.* at 213.

118. *Id.* at 214.

119. *Id.* at 212 (citing Judge Hastie's famous description of the fast and loose provision of judicial estoppel in Scarano v. Central R.R., 203 F.2d 510, 513 (3d Cir. 1953)).

Massachusetts Superior Court in February 1986.[120] The complaint alleged four counts, all allegedly based on Massachusetts state law: (1) unfair business practice; (2) violation of a statute regulating bidding practice in the movie theater industry; (3) violation of the state antitrust statute; and (4) common law tortious interference with contractual relations.[121] In April 1986 General Cinema removed the case to federal court, claiming the state antitrust claim was merely a disguised federal antitrust claim.[122] Through a series of complex procedural maneuvers, General Cinemas was able to persuade the federal district court to dismiss the entire case without prejudice.[123]

Patriot Cinemas was unsuccessful in its appeal of the dismissal and was also unable to convince the district court to remand the matter to state court.[124] On January 20, 1987, Patriot filed a fresh action in Massachusetts Superior Court.[125] On March 6, 1987, General Cinemas requested the superior court to stay the new proceeding while the appeal of dismissal by the federal court was pending.[126] General Cinema argued that allowing the state action to proceed on the three counts—excluding the antitrust claim—during the federal court appeal could lead to a duplicate recovery and a waste of judicial resources.[127] Patriot responded by filing a memorandum in superior court arguing against a stay of the state proceeding involving the three state counts.[128] In its opposition to the stay, Patriot represented that it would not pursue a separate claim based on state antitrust law regardless of the outcome of the pending federal appeal.[129] On March 18, 1987, the Massachusetts Superior Court denied defendant's motion for a stay without stating the reason for the denial.[130]

On April 14, 1987, General Cinemas filed a motion to dismiss the pending federal appeal as moot.[131] General Cinemas argued that since Patriot was bound by its claim to the state court that it

120. *Id.* at 209.
121. *Id.* at 210.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 211.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

would not pursue the antitrust claim, the pending federal appeal was moot because the antitrust claim was now itself moot. General Cinemas further argued that the remaining three claims were already being tried in the state court.[132] On April 17, 1987, Patriot filed a memorandum in opposition to defendant's motion for dismissal.[133] In this memorandum Patriot retracted its assertion that it would not pursue the antitrust claim. Although Patriot claimed it "had no real desire" to pursue the antitrust claim, Patriot asserted that they might go forward with the antitrust claim if "developments in the litigation ma[de] it appropriate."[134]

Patriot's strategy did not persuade the court. The court held that "[t]he alleged self-contradiction here is Patriot's prior representation in the Massachusetts state court that it would not prosecute the state antitrust count and its subsequent repudiation of that intention. We conclude that Patriot has engaged in the sort of 'fast and loose' behavior that warrants application of judicial estoppel."[135]

In finding that judicial estoppel applied, the court went on to state:

> Patriot can be said to have made a bargain with the superior court. It traded its chance for success on the antitrust claim for an increased pace in the proceedings on the remaining three counts. . . . Now, however, Patriot wants to have it the other way: it wants to revive its antitrust claim and have it remanded to the state court while enjoying the benefit of the increased pace of its current state action—a benefit obtained by telling the superior court that it would not proceed with its antitrust claim. This is the sort of self-serving self-contradiction, or 'playing fast and loose with the courts' that is barred by the doctrine of judicial estoppel.[136]

The court then held that judicial estoppel bound Patriot to its original assertion in state court and therefore, Patriot could not proceed on its antitrust claim.[137] Thus, Patriot's federal appeal was

132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 212.
136. *Id.* at 213.
137. *Id.* at 214.

dismissed.[138]

The First Circuit correctly held that Patriot's appeal should have been dismissed. While it is obvious that Patriot played fast and loose with the court, either this case fit the classic, prior success rule of judicial estoppel, or if not, then judicial estoppel was *not* the correct basis upon which to dismiss Patriot's appeal.

The facts of *Patriot Cinemas* appear to fit the majority's position on judicial estoppel. However, the First Circuit apparently failed to understand the prior success rule. Patriot made a representation that it would dismiss its antitrust claim if the Massachusetts Superior Court would deny General Cinema's request for a stay.[139] Although the Massachusetts Superior Court did not write an opinion expressing why it rejected the stay, the denial could only have been based on Patriot's representation, since there was no other adequate basis for the denial of General Cinema's motion.[140] If this was the case, then the Massachusetts Superior Court adopted Patriot's position; this is the only conclusion consistent with the rejection of the stay.[141]

Patriot's motion to the First Circuit made an inconsistent statement—that it would consider pursuing its antitrust claim—in direct contrast to Patriot's earlier representation to the Massachusetts Superior Court, which adopted the inconsistent position that Patriot would not pursue its antitrust claim.[142] Therefore, it seems the First Circuit was incorrect when it stated that this case "is different from the 'classic' case of judicial estoppel."[143] In this case the prior court adopted a party's statement as true, and then the party attempted to plead a statement inconsistent from the one the prior court adopted.[144] Thus, the facts of *Patriot Cinemas* clearly fit the classic, majority definition of judicial estoppel.

Furthermore, in this case there was no problem with Federal Rule of Civil Procedure 8(e)(2) because these were two separate

138. *Id.* at 218.
139. *Id.* at 211.
140. *Id.*
141. *Id.*
142. *Id.* at 210-11.
143. *Id.* at 214.
144. The First Circuit itself said, "[W]e hold, therefore, that the doctrine of judicial estoppel bars Patriot from *changing the position it previously took* in the superior court that it does not intend to proceed on the state antitrust claim 'at all.'" *Id.* (emphasis added).

litigations.[145] Although this situation may have appeared to be the same case, it was, in fact, two separate cases with the same factual situation. If Patriot's twin cases had been in one court, there could well have been problems with Rule 8(e)(2), which might not have allowed Patriot to change positions *within* one lawsuit. However, Patriot was dealing with two separate courts, and judicial estoppel precludes a party from convincing one court to adopt a position as true and then attempting to persuade another court to accept the exact opposite.

If, as the First Circuit believed, there was no actual adoption of Patriot's position by the Massachusetts Superior Court, hence preventing the creation of a classic case of judicial estoppel,[146] then judicial estoppel was *not* the correct way to dispose of the case. It appears that the *Patriot Cinemas* court misinterpreted Judge Hastie's explanation of "playing fast and loose with the courts" in the *Scarano v. Central Railroad*[147] case. In *Scarano* Judge Hastie used the phrase "playing fast and loose with the courts" to explain that if a prior court has adopted an inconsistent statement, intentional self-contradiction would "most flagrantly exemplify . . . an evil the courts should not tolerate."[148] Judge Hastie never stated that playing fast and loose was enough to give rise to judicial estoppel in and of itself, but this is exactly how the *Patriot Cinemas* court based its decision.[149] The policies behind judicial estoppel demand that there be an adoption by a prior court.[150] If there was no adoption by a prior court, the purposes behind the judicial estoppel doctrine are unfulfilled.[151] Thus, it seems inappropriate to apply judicial estoppel every time a court decides that a litigant is playing fast and loose with the judicial system.

The other key problem with applying the fast and loose doctrine—if indeed it really exists at all—is the question of determining what behavior fits within the definition of playing fast and loose with the court? *Patriot Cinemas* appears to be the only federal case which finds judicial estoppel based solely on the grounds

145. *Id.*
146. *Id.*
147. 203 F.2d 510, 513 (3d Cir. 1953).
148. *Id.*
149. 834 F.2d at 212-15.
150. For a review of the main policies of judicial estoppel such as preventing inconsistent results and preventing an abuse of the judicial process, see *supra* notes 5-7, 19-24 and accompanying text.
151. *See supra* notes 19-24 and accompanying text.

of fast and loose behavior.[152] Therefore, there was, and still is, no suitable precedent or test for a court to decide what constitutes fast and loose behavior sufficient to warrant the application of judicial estoppel. This ambiguity could lead to much confusion and misapplication of the doctrine in future decisions. Thus, if the *Patriot Cinemas* court truly believed that the elements of classic judicial estoppel had not been met,[153] then the court should have been wary to apply the doctrine at all.

There are other ways the case could have been disposed of. For example, the First Circuit could have held that Patriot waived or released its antitrust claim. The court could also have held that Patriot entered into a contract with the Massachusetts Superior Court, and thus the contract could be enforced by an injunction barring the pursuit of the antitrust claim. Or, most appropriately, the First Circuit could have dismissed the case because it fit the classic, majority position definition of judicial estoppel.

The First Circuit, however, was not incorrect in looking at the fast and loose element of judicial estoppel as explained in the *Scarano* case.[154] Whereas playing fast and loose with the courts should not, by itself, be a sufficient condition to apply judicial estoppel, it remains an important element of the doctrine.[155] A court should look at the policies behind judicial estoppel and realize that, unless a litigant intentionally "used [self-contradiction] as a means of obtaining unfair advantage in a forum provided for suitors seeking justice,"[156] the policies behind the doctrine do not outweigh the harsh result, which is often the effect of the application of judicial estoppel.[157] Although the *Patriot Cinemas* court may have misapplied the adoption theory of judicial estoppel, it was certainly correct in its assertion that "[j]udicial estoppel should be employed when a litigant is 'playing fast and loose with the courts.'"[158] However, the policies behind judicial estoppel make it clear that play-

152. An examination of the other federal judicial estoppel cases shows that while many have acknowledged the *Patriot Cinemas* minority position, none have ever accepted it for their own.

153. *Patriot Cinemas*, 834 F.2d at 214.

154. 203 F.2d at 513.

155. *Id.* Although Judge Hastie does not directly state this proposition, it can be inferred that Judge Hastie felt that a court should be hesitant to apply judicial estoppel unless it is apparent that a litigant is attempting to intentionally self-contradict a prior position adopted by a court.

156. *Id.*

157. *See* Henkin, *supra* note 4, at 1716.

158. *Patriot Cinemas*, 834 F.2d at 212 (citing *Scarano*, 203 F.2d at 513).

ing fast and loose with the court should not, in and of itself, be enough to permit a court to invoke judicial estoppel. Instead, playing fast and loose should be an important element in deciding whether or not to invoke judicial estoppel. An analysis of this element should be included in all judicial estoppel decisions because the policy goals behind judicial estoppel[159] will best be fulfilled, and the harsh results of the doctrine will best be avoided, if the doctrine is only applied when a litigant engages in intentional self-contradiction.

VI. CALIFORNIA AND THE NINTH CIRCUIT: THE ROAD NOT YET TAKEN

As of the writing of this Comment, both the California state courts and the Ninth Circuit have repeatedly claimed that they accept the doctrine of judicial estoppel, however both have yet to decide which position—majority or minority—they will adopt. Perhaps a primary reason for this indecision is that a case has not yet arisen in which the judiciary was forced to take one position or the other. Thus, California and Ninth Circuit courts have been afforded the opportunity to adopt judicial estoppel without actually having to announce a specific position. It is likely that the doctrine of judicial estoppel has not been explained by these courts because the doctrine is not well known, and the courts have had few opportunities in which to examine it. However, this Comment has stressed that judicial estoppel is an important doctrine, which encompasses key social policies. If judges and attorneys become more familiar with the doctrine and its applications, judicial estoppel will prove a valuable tool in both the California and Ninth Circuit courts.

A. California and Judicial Estoppel

There are precious few judicial estoppel cases in the immense body of California case law. Moreover, these few cases have failed to create a usable precedent for judicial estoppel. California judges have given short shrift to the matter. In fact, no reported case in the last fifty years has even been decided on judicial estoppel grounds.[160] Even *Witkin's*[161] has not addressed the doctrine.

159. *See supra* notes 19-24 and accompanying text.

160. It is quite possible that some cases may have arisen in which a court *could* have decided that judicial estoppel was appropriate, however, it is likely that the

The California appellate courts have said, "[t]he proper application of this doctrine is at best uncertain."[162] The precise elements of judicial estoppel have not been propounded in California because there just has not been case law where a precise definition was necessary. The vicious circle further perpetuates itself because if there is a case where judicial estoppel would be appropriate, then it would be almost impossible for a California attorney or judge to find information—let alone even know about the doctrine. Thus, ignorance and lack of case precedent begets even more ignorance and lack of case precedent regarding the state of judicial estoppel in California courts.

Judicial estoppel has been described by the California courts as, "play[ing] fast and loose with the court. . . . One to whom two inconsistent courses of action are open and who elects to pursue one of them is afterward precluded from pursuing the other."[163] California courts have also said, "[t]he [judicial] estoppel [doctrine] cannot be invoked where the first position was not clearly inconsistent so that holding one position necessarily excludes the other. Nor can it be asserted where the first position was based upon ignorance of facts."[164] Recently, the California Court of Appeals stated, "[j]udicial estoppel is an equitable doctrine aimed at preventing fraud on the courts. . . . The purpose of judicial estoppel is to prevent injury to an *innocent* litigant."[165]

These few quotes are difficult to synthesize, and yet they constitute most of what has been stated in California judicial estoppel decisions. The California courts seem unclear as to whether they take the majority adoption theory or the minority fast and loose position. No California court has ever discussed whether a prior inconsistent position needs to be adopted by a court before judicial

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doctrine was not argued because it was unknown to either the courts or litigants at the time.

161. Bernard E. Witkin's series of treatises summarizes California law and provides a comprehensive summary of California law, evidence, and procedure. They are an important resource for many California attorneys and are considered solid and persuasive authority.

162. Ng v. Hudson, 75 Cal. App. 3d 250, 258, 142 Cal. Rptr. 69, 76 (1977).

163. Schulze v. Schulze, 121 Cal. App. 2d 75, 83, 262 P.2d 646, 650 (1953).

164. *Ng*, 75 Cal. App. 3d at 258, 142 Cal. Rptr. at 77.

165. *In re* Marriage of Dekker, 17 Cal. App. 4th 842, 850, 21 Cal. Rptr. 2d 642, 646 (1993). Two recent California cases in the bankruptcy context have affirmed the viability of the doctrine where a debtor has failed to list a pending lawsuit, although the doctrine is not mentioned in great detail. Billmeyer v. Plaza Bank of Commerce, 42 Cal. App. 4th 1086, 52 Cal. Rptr. 2d 119 (1995); Conrad v. Bank of America, 44 Cal. App. 4th 317, 52 Cal. Rptr. 2d 142 (1996).

estoppel can be invoked by the later court. Again, this is most likely the result of the fact that there has been no case in which it became necessary for the California courts to develop a precise definition of the doctrine. However, from these few opinions one thing is clear: California accepts judicial estoppel in some form. This acceptance clearly indicates that the judiciary of California recognizes that there are important and unique policy concerns inherent in the doctrine of judicial estoppel. Thus, should a case arise in which the California courts can apply the doctrine of judicial estoppel, the judiciary will have an excellent opportunity to define the elements and conditions for the application of judicial estoppel in California.

B. The Ninth Circuit: Many Opportunities, but No Decision

Unlike the California courts, the Ninth Circuit has had several opportunities in recent years to decide which form of judicial estoppel to adopt. Despite several opportunities, the Ninth Circuit has repeatedly said that, although it accepts the doctrine of judicial estoppel, it has yet to decide the specific elements.[166] However, the Ninth Circuit has discussed the doctrine of judicial estoppel in great detail.[167] Moreover, it is clear that the Ninth Circuit has accepted the doctrine, and should a case arise where the court needs to decide the elements of judicial estoppel, it most likely will do so. However, like the California courts, the Ninth Circuit has not had a case requiring it to designate the elements of judicial estoppel and decide which position to take.

The Ninth Circuit has "acknowledged that the doctrine of judicial estoppel acts to bar inconsistent positions but has not stated the requirements for the application of the doctrine."[168] Thus, like

166. *See* Morris v. California, 966 F.2d 448 (9th Cir. 1991); Milgard Tempering, Inc., 902 F.2d 703 (9th Cir. 1990); Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990); Stevens Technical Servs. v. S.S. Brooklyn, 885 F.2d 584 (9th Cir. 1989); Religious Tech. Ctr. v. Scott, 869 F.2d 1306 (9th Cir. 1989) (Hall, J., dissenting); Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council, 851 F.2d 1208 (9th Cir. 1988); Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984); Garcia v. Andrus, 692 F.2d 89 (9th Cir. 1982).

167. *See Morris*, 966 F.2d at 448; *Russell*, 893 F.2d at 1033; *Stevens Tech. Servs.*, 885 F.2d at 584; *Garcia*, 692 F.2d at 89.

168. *Stevens*, 885 F.2d at 589. In this case, the court held that under either the majority or minority position there was no judicial estoppel. *Id.* The Ninth Circuit has also had several other opportunities to decide the law of judicial estoppel, but has declined to accept a position, using the same logic. *See, e.g.*, *Milgard*, 902 F.2d at 716 (holding that judicial estoppel did not apply under either majority or minority

California, the Ninth Circuit accepts the doctrine, and thereby implicitly recognizes the value of judicial estoppel and its policies. However, unless the Ninth Circuit decides on the proper form and application of the doctrine, district court judges will be unclear on when to apply judicial estoppel and much of the value of the doctrine will be lost. Thus, the logical course of action is for the Ninth Circuit to take charge. When the appropriate case arises, the Ninth Circuit should be the first court to set forth clear elements for judicial estoppel and give judges and lawyers an idea as to how and when to use the doctrine.

1. The *Rolfs* and *Morris* cases—a new element: The balancing of judicial estoppel's policies versus the right at stake in the case

The Ninth Circuit has recently decided two landmark judicial estoppel cases—both in the criminal law area—that add a new dimension and element to the doctrine of judicial estoppel: the importance of the right at issue in the case.

In *Russell v. Rolfs*[169] the Washington Court of Appeals affirmed the rape and attempted murder convictions of defendant Russell.[170] Russell then sought habeas corpus, but was denied by the U.S. District Court for the Western District of Washington[171] because the court accepted Washington's argument that "federal review was not proper because Russell had 'an adequate and available state court remedy through a Personal Restraint Petition.'"[172]

Russell then filed a Personal Restraint Petition in December 1986 in the Washington Supreme Court.[173] In state court the State of Washington successfully argued that Russell's petition was procedurally barred because "Russell had raised the same issues on direct appeal [to the federal court]."[174] Russell then appealed to the Ninth Circuit Court of Appeals.[175]

The Ninth Circuit said, "[t]his language [the state's argument

position); *Rockwell*, 851 F.2d at 1211 (holding that judicial estoppel is not appropriate to bar claim, appeal reversed on other grounds); *Shamrock Foods*, 729 F.2d at 1215 (holding that there was no intentional self contradiction to warrant application of judicial estoppel).

169. 893 F.2d 1033 (9th Cir. 1990).
170. *Id.* at 1035.
171. *Id.*
172. *Id.* at 1037.
173. *Id.*
174. *Id.*
175. *Id.* at 1034.

to the Washington Supreme Court that Russell was not now able to raise a personal restraint petition] is flatly inconsistent with the state's previous representation of June 5, 1986 in federal court that Russell's remedy in the state courts through the personal restraint petition procedure was presently 'adequate and available.'"[176] Essentially, Washington argued two inconsistent positions—first that an adequate and available remedy existed in state court, and "[t]he use of these two adjectives in tandem [adequate and available] was tantamount to advising the federal district court that Russell would be given a hearing in state court on the merits of his claims."[177] Then, in the Washington Supreme Court, the State took the inconsistent position that "appellant's petition for relief [should be denied] on the theory he was actually procedurally barred in state court."[178] Thus, in holding that judicial estoppel applied against the State, the court said "[t]he state prevailed by telling the state court the opposite of what it told the federal court. The proposition that the state can be estopped from relying on the advantage it gained by doing so seems unremarkable."[179]

Judicial estoppel therefore was invoked to estop the State from "arguing in federal court that Russell's claims are procedurally barred."[180] The use of judicial estoppel in this case shows its importance in the judicial system. First, it is important to note that the Ninth Circuit recognized judicial estoppel, and in deciding the *Russell* case on judicial estoppel grounds, proved it was willing to use this doctrine when appropriate. Moreover, when looking at the particular facts of this case, it appears that no other form of estoppel would have stopped the State of Washington from engaging in this type of intentional self-contradiction. Had judicial estoppel not been invoked in this case, Russell would have lost very important constitutional rights because of Washington's contradictory and crafty position switching.

Furthermore, without directly saying so outright, the Ninth Circuit implicitly examined the importance of the rights that would have been lost had judicial estoppel not been applied. In the *Russell* case, the Ninth Circuit said, "[t]hus, in the state's view, there was *no* remedy available to the defendant. The state should have

176. *Id.* at 1037.
177. *Id.* at 1038.
178. *Id.*
179. *Id.*
180. *Id.* at 1039.

told the district court that such was the state's view . . . . [T]his strikes us not only as appropriate, but also easy and obvious."[181]

The *Russell* court did not say outright that because the important constitutional right of habeas corpus would have been lost, it gave higher scrutiny to Washington's inconsistent positions and applied judicial estoppel. However, this line of thinking may have led the Ninth Circuit to add an important new element—the importance of the right asserted—to the doctrine of judicial estoppel, when a year later it decided *Morris v. California.*[182]

The *Morris* case marks an important addition to the judicial estoppel doctrine. Here, defendant Karen Morris was found guilty of drug offenses in a California court.[183] On appeal Morris attempted to argue that she received ineffective assistance of counsel because although she admitted to her lawyer that she had ingested methamphetamines legally, her lawyer informed her not to mention it at trial.[184] So, when placed on the stand, Morris testified "she had taken only three prescription drugs-Tylenol with codeine, Fiorinal, and penicillin."[185]

Morris wanted to argue to the federal district court that she had perjured herself on the advice of her lawyer.[186] However, the district court held that judicial estoppel barred Morris from asserting this position because it was inconsistent from the position she took at an earlier trial.[187]

When faced with this yet unseen situation on appeal, the Ninth Circuit decided it was time to add an important element to judicial estoppel. The court held, "the doctrine of judicial estoppel may not be invoked where its use would serve to keep a conviction in effect regardless of the innocence or guilt of the defendant."[188] The court's rationale for this holding was that:

> No circuit has ever applied the doctrine of judicial estoppel to bar a criminal defendant from asserting a claim based on innocence either on direct appeal or on habeas corpus, and we will not do so now. . . . [T]he doctrine of judicial estoppel serves the function of preserving the in-

181. *Id.* at 1038.
182. 966 F.2d 448 (9th Cir. 1991).
183. *Id.* at 450.
184. *Id.* at 452.
185. *Id.* (footnote omitted).
186. *Id.*
187. *Id.*
188. *Id.* at 453.

> tegrity of the judicial process. Where a defendant who claims to be innocent allegedly made untruthful statements solely because her attorney was ignorant of the law and told her incorrectly that telling the truth would constitute the admission of a crime, the integrity of the judicial process is best preserved by permitting the judiciary to consider her claim. Justice would not be served by holding defendant to her prior false statements, because to do so would assign a higher value to the 'sanctity of the oath' than to the guilt or innocence of the accused. Because the conviction of an innocent person as a result of her lawyer's incompetence constitutes one of the most serious infringements of the integrity of the judicial process, our concerns over compromising the 'sanctity of the oath' must yield. The judicial process can more easily survive a rule that precludes the use of judicial estoppel to keep intact convictions of innocent persons than it can a rule that purports to preserve judicial sancrosanctity by leaving wrongful convictions in place as a sanction for lying.[189]

The Ninth Circuit in *Morris* thus added an important new balancing test to judicial estoppel. Essentially, the reasoning in *Morris* allowed the court to hold that some rights are more important than procedural devices. If the fundamental purpose of judicial estoppel is to protect the integrity of the courts, how just would the judicial system be if an innocent person could be incarcerated solely because of a procedural device? The *Morris* case is a monumental decision and marks an important step—if not a giant leap—in the formation of the judicial estoppel doctrine. The case stands for the principle that a fair and just judicial system must place some personal rights and individual liberties above procedural devices designed for expediency and integrity.[190] The Ninth Circuit reached the correct decision in declining to apply judicial estoppel—even though this case met all of the elements—because the court properly balanced the policies of judicial estoppel versus the important rights at stake and subordinated the less important policy.

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189. *Id.*
190. *Id.*

C. The Erie Question

Another question confronting a federal court that desires to apply judicial estoppel is whether judicial estoppel is an independent federal doctrine or whether the federal court must apply state law. In the *Russell* case the Ninth Circuit was required to determine whether the federal or state version of judicial estoppel applied to the case.[191] The Ninth Circuit stated that, "[e]ach court, state and federal, is entitled to have whatever rules of judicial estoppel it considers necessary to protect its dignity and it [sic] system of justice. That Washington may have a more limited or different view of judicial estoppel does not preclude us from determining what rule is appropriate for our purposes."[192] There is a split among the federal circuits as to whether state or federal law applies to the question of judicial estoppel in diversity cases.[193]

In order to determine whether federal or state judicial estoppel law should be applied in diversity cases, federal courts have looked to the case of *Erie Railroad Co. v. Tompkins*.[194] Under the *Erie* interpretation of the Rules of Decision Act,[195] federal courts must apply substantive state laws in all diversity actions.[196] Thus, if judicial estoppel is found to be substantive rather than procedural, the federal court will be compelled to apply state judicial estoppel law.

However, it is a difficult task to define which laws create sub-

191. Russell v. Rolfs, 893 F.2d 1033, 1038 (9th Cir. 1990).

192. *Id.*

193. Some courts have held that judicial estoppel is an independent federal doctrine. *See* Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 n.4 (6th Cir. 1982) (holding that because judicial estoppel primarily concerns federal interests, "federal courts must be free to develop principles that most adequately serve their institutional interests"); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 n.4 (4th Cir. 1982) (holding that "federal law controls the application of judicial estoppel, since it relates to protection of the integrity of the federal judicial process"). *But see In re* Southwestern Bell Tel. Co., 535 F.2d 859, 861 n.4 (5th Cir. 1976) (stating that, "'[i]n diversity litigation in the federal courts where nonfederal issues are at stake, probably the *Erie* . . . [decision] compel[ls] the application of the relevant state formulation of the [judicial estoppel] principle, if any'"); Konstantinidis v. Chen, 626 F.2d 933, 937-38 (D.C. Cir. 1980) (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)) (discussing Court's obligation to apply the District of Columbia's law on judicial estoppel); Sholly v. Annan, 450 F.2d 74, 76 n.4 (9th Cir. 1971) (noting that the federal court was obliged to apply the Arizona law of judicial estoppel or a diversity court's best estimate of what the Arizona court would hold regarding judicial estoppel).

194. 304 U.S. 64 (1938).

195. Rules of Decision Act, 28 U.S.C. § 1652 (1995).

196. *Erie*, 304 U.S. at 71-78.

stantive rights and which are merely procedural. Fortunately, some later cases have given the courts some guidelines for defining substance versus procedure. *Guaranty Trust Co. v. York*[197] clarified the definition of substantive rights by focusing on whether a state rule defined legal rights and whether a federal court's disregard for that state law would "significantly affect the result of a litigation."[198] The *Guaranty Trust* Court defined procedural rules as those "[which] concern[] merely the manner and means by which a right . . . is enforced."[199]

The Supreme Court further qualified the *Erie* doctrine in *Byrd v. Blue Ridge Electrical Cooperative.*[200] The Court held that even if a rule may change the outcome of a case, federal courts need not apply state law if such an application would offend an important federal judicial policy.[201] Thus, a countervailing federal policy made it possible for the federal court to try that case with a jury—as mandated by federal law—as opposed to a judge—as mandated by state law.[202]

Even with the guidelines of *Guaranty Trust* and *Byrd* in mind, it remains difficult to determine whether judicial estoppel is substantive or procedural, as evidenced by the split in the federal circuits.[203] While the federal circuits have debated whether this doctrine is substantive or procedural, the arguments of the courts finding judicial estoppel to be procedural—and thus an independent federal doctrine, such as the *Edwards* and *Allen* courts[204]—are more persuasive and logical. In light of the policies behind judicial estoppel, especially the fact that the doctrine is designed to protect the integrity of the court itself,[205] judicial estoppel appears to be a procedural device. Since this doctrine protects the courts and not the individual litigants, it is clear that judicial estoppel creates no substantive rights.[206] Also, since judicial estoppel is for the court's own protection from inconsistent results, each sovereign court

197. 326 U.S. 99 (1945).
198. *Id.* at 109.
199. *Id.*
200. 356 U.S. 525 (1958).
201. *Id.* at 536-39.
202. *Id.* at 538.
203. *See* cases cited *supra* note 193. Since there is a split in the federal circuits as to the nature and elements of judicial estoppel, it seems that this would be a question for the Supreme Court to resolve, were a ripe case to arise. *See infra* app.
204. *See* cases cited *supra* note 193.
205. *See supra* notes 19-24 and accompanying text.
206. *See supra* notes 19-24 and accompanying text.

should be allowed to decide how far judicial estoppel's shield of protection will extend in their own courtroom. Furthermore, it is possible that under *Byrd*, preventing abuse of the judicial process may be held a countervailing federal policy, in which case federal judicial estoppel would automatically be applied.[207] Either way, judicial estoppel appears to be more of a procedural device, a rule that structures and regulates the judicial process. Thus, until the Supreme Court makes a final decision, federal courts should hold that judicial estoppel is an independent federal doctrine and that federal courts should apply their own definition of the doctrine.

VII. RECOMMENDATION: JUDICIAL ESTOPPEL NEEDS CLEARLY DEFINED ELEMENTS IN ORDER TO MAKE IT A VIABLE AND USEFUL DOCTRINE FOR BOTH JUDGES AND LAWYERS

This Comment has attempted to enlighten the legal community as to the important strategic uses and policy considerations of the judicial estoppel doctrine. A recurring theme throughout this Comment has been that even though judicial estoppel is a rare and somewhat unknown doctrine, it still contains very important and unique policies, which have a necessary place in our current legal system.

Throughout its history, judicial estoppel has been a confusing and unknown doctrine, most likely because "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle. . . ."[208] Therefore, judicial estoppel requires clearly defined elements, just like its cousins: claim preclusion, issue preclusion, and equitable estoppel. A clearly defined set of elements in accordance with the policy goals of judicial estoppel would remedy the confusion surrounding this doctrine and provide guidance to courts as to when judicial estoppel should be applied. Thus, based on the opinions of several courts and the policy goals of judicial estoppel, this Comment proposes a four-part test, which would help courts decide when an application of judicial estoppel is warranted and appropriate.

207. *Byrd*, 356 U.S. at 537-38.
208. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982).

A. The Test

1. Actually litigated

The first prong of the judicial estoppel test is that the claimed statement or position was actually litigated and adopted in a prior court or administrative proceeding. Settlements have no judicial estoppel effect because there is no position that was adopted by any court.[209] Settlements have no danger of any damage of inconsistent results in the court because there was never any court proceeding. Thus, there must be some form of litigation before there can be any fear of inconsistent results, which makes the protection of judicial estoppel necessary.

2. Assertion clearly adopted as true by earlier court

The second prong is similar to the majority's adoption theory. The majority position appears to best fulfill the policy goals of judicial estoppel by requiring the first court to adopt a statement as true.[210] However, to avoid confusion as to what was adopted, the court should be "unequivocally clear" that it actually adopted the purported factual position as true. Should a court be faced with a situation where it is unclear whether the prior court adopted a statement in question, the second court should decline to apply the potentially harsh results of judicial estoppel, unless it is clear that the litigant is attempting to advance a position that is truly inconsistent with the prior adopted position. However, once a court has clearly adopted a litigant's position, the classic case of judicial estoppel arises. This is the type of case where all of the policies of judicial estoppel come into play and judicial estoppel should be applied.

3. Inconsistency must reach the level of playing fast and loose with the court before applying judicial estoppel

Even if a court has adopted a prior inconsistent statement, it seems unfair to apply the harsh and damaging remedy of judicial estoppel unless the litigant has intentionally taken an inconsistent position.[211] Thus, before a court either raises judicial estoppel on

209. *See* Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982).

210. *See supra* notes 91-105 and accompanying text.

211. *See* American Nat'l Bank v. Federal Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983) ("Judicial estoppel is applied to the calculated assertion of divergent sworn positions."); Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 175

its own motion or accepts a litigant's motion for dismissal on judicial estoppel grounds, the court must ensure that the party is truly attempting to persuade the court to accept two inconsistent positions. This prong of the test would prevent innocent litigants from suffering the Draconian results of judicial estoppel, yet would still protect the integrity of the courts from unscrupulous litigants who attempt to abuse the judicial process through intentional self- contradiction.

4. The balancing test

Even if a case meets the first three prongs of the judicial estoppel test—actually litigated, existence of an unequivocally clear adoption of the prior position, and if the litigant's self-contradiction has reached the level of playing fast and loose with the court—the judge must then balance the policies behind judicial estoppel against the harsh results suffered if judicial estoppel is invoked.[212] Therefore, judges must use discretion in applying a balancing test to decide if an important right or superseding policy would be trumped if judicial estoppel were applied. Like the *Morris* court, judges should be able to decide that some rights or interests are more important than the procedural device of judicial estoppel—despite the very important policy considerations behind the doctrine.

Factors that judges should consider when balancing the policies behind judicial estoppel versus the results that would occur when it is invoked include: the importance of the right that would be lost if judicial estoppel were invoked; the significance of the position in the prior litigation, reliance, fairness, bad faith; actual damages suffered by the court, the litigant, and the opposing party; the fear of double recovery or unjust enrichment; and overall considerations of justice.

These factors aid judges in the determination that even though the elements of the classic case of judicial estoppel are met, the doctrine should be superseded for reasons of greater policy importance.

(5th Cir. 1973) ("the rule looks toward cold manipulation and not an unthinking or confused blunder"); Scarano v. Central R.R., 203 F.2d 510, 513 (3d Cir. 1953) ("[T]his is more than affront to judicial dignity. . . . intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.").

212. *See supra* notes 182-90 and accompanying text.

B. Exceptions

Judicial estoppel must have a fraud, duress, or mistake exception in order to ensure that the doctrine will only be invoked where its policies will be furthered. The reason for these exceptions is that "[b]ecause the rule [judicial estoppel] looks toward cold manipulation and not an unthinking or confused blunder, it has never been applied where plaintiff's assertions were based on fraud, inadvertence, or mistake."[213] It would be inequitable and unfair to hold a person to a position based upon fraud, duress, or mistake. Furthermore, there would be no possibility of inconsistent results or unscrupulous litigants taking advantage of the court if the previous position became incorrect based upon an erroneous assumption. Thus, the core policies behind judicial estoppel would not be met if the doctrine were applied in the situation where one of the exceptions should apply. A later change in circumstances would also be acceptable to avoid judicial estoppel because the position would no longer be inconsistent.

C. The Sua Sponte Ambush Factor

If a court is going to make a judicial estoppel motion sua sponte, the court should give litigants "reasonable time" to file a reply brief to the spontaneous application of judicial estoppel. The reason for this extra time is that few people know about the doctrine and its elements, as well as possible exceptions such as an overriding policy as set forth in *Morris*.[214] Until the doctrine and its permutations are better known, it is unfair to saddle a litigant with such a motion sua sponte, unless reasonable time is given to research and reply to the motion or show cause why the court should not apply the doctrine.

In summation, the recommended test for judicial estoppel consists of these elements:

1. The area was actually litigated.
2. There was a full and fair opportunity for the litigant to assert a factual position, and it is unequivocally clear that this position was adopted by the first court.
3. The later inconsistent position must reach the level of playing fast and loose with the court so as to be an intentional self-contradiction.

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213. *Johnson*, 485 F.2d at 175.
214. *See supra* notes 188-90 and accompanying text.

4. The policy interests of judicial estoppel must be balanced against the impact from the application of judicial estoppel, keeping in mind the importance of the right or claim at issue.

a. There is a fraud, duress, mistake, or change of circumstances exception.

b. If raised sua sponte, litigants should be given a reasonable time to reply.

Eric A. Schreiber[*]

* I would like to dedicate this Comment to my family for their encouragement of my academic career. I would especially like to thank my father, Edwin C. Schreiber who has been both the support and inspiration for my legal study and my life. I would also like to thank all of the staff and editors of the *Loyola of Los Angeles Law Review* for all of their hard work and dedication—especially Mary Carlson and R.J. Comer for going well above and beyond the call of duty.

Appendix

Presently there is a four way split in the federal circuits on the question of judicial estoppel—majority position, minority position, acceptance without clearly defined elements, and outright rejection. Thus, if a case in which judicial estoppel is at issue should reach the United States Supreme Court, it would be the Court's constitutional duty to decide whether the federal courts should accept judicial estoppel, how the *Erie* doctrine affects judicial estoppel, and what the elements of judicial estoppel should be. Should the Supreme Court ever be placed in the position to decide, serious consideration should be given to the recommended test proposed in this Comment. The following chart describes the positions of the United States Supreme Court and the federal circuits' accepted definitions of the judicial estoppel doctrine.

FEDERAL COURTS AND JUDICIAL ESTOPPEL

Court	**Accept JE**	**Form**
U.S. Supreme	Undecided	Undecided
D.C. Circuit[215]	No	——
1st Circuit[216]	Yes	Minority
2nd Circuit[217]	Yes	Majority
3rd Circuit[218]	No	——
4th Circuit[219]	Yes	Majority
5th Circuit[220]	Yes	Majority
6th Circuit[221]	Yes	Majority
7th Circuit[222]	Yes	Majority

215. Konstantinidis v. Chen, 626 F.2d 933 (D.C. Cir. 1980).
216. Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987).
217. Bates v. Long Island R.R., 997 F.2d 1028 (2d Cir. 1993).
218. Scarano v. Central R.R., 203 F.2d 510 (3d Cir. 1953).
219. Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982).
220. City of Miami Beach v. Smith, 551 F.2d 1370 (5th Cir. 1977).
221. Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982).
222. DeGuiseppe v. Village of Bellwood, 68 F.3d 187 (7th Cir. 1995).

Court	Accept JE	Form
8th Circuit[223]	Yes	Majority
9th Circuit[224]	Yes	Undecided
10th Circuit[225]	No	———
11th Circuit[226]	Yes	Majority

223. Wyldes v. Hundley, 69 F.3d 247 (8th Cir. 1995).
224. Morris v. California, 966 F.2d 448 (9th Cir. 1991).
225. Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509 (10th Cir. 1991).
226. McKinnon v. Blue Cross & Blue Shield, 935 F.2d 1187 (11th Cir. 1991).